

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES DEPARTMENT OF ENERGY,
ET AL., Petitioners V. OHIO, ET AL.

and

OHIO, ET AL., Petitioners, V. UNITED STATES
DEPARTMENT OF ENERGY, ET AL.

CASE NO: 90-1341 & 90-1517

PLACE: Washington, D.C.

DATE: December 3, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES DEPARTMENT OF :

4 ENERGY, et al., :

5 Petitioners :

6 v. : No. 90-1341

7 OHIO, et al. :

8 and :

9 OHIO, et al., :

10 Petitioners :

11 v. : No. 90-1517

12 UNITED STATES DEPARTMENT OF :

13 ENERGY, et al. :

14 - - - - -X

15 Washington, D.C.

16 Tuesday, December 3, 1991

17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United States at
19 1:00 p.m.

20 APPEARANCES:

21 JAMES A. FELDMAN, ESQ., Assistant Solicitor General,
22 Department of Justice, Washington, D.C.; on behalf of
23 the Petitioners/Cross-Respondents.

24 JACK A. VAN KLEY, ESQ., Assistant Attorney General of
25 Ohio, Columbus, Ohio; on behalf of the

1 Respondents/Cross-Petitioners.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-1341, United States Department of Energy v.
5 Ohio, and 90-1517, Ohio v. United States Department of
6 Energy.

7 Mr. Feldman.

8 ORAL ARGUMENT OF JAMES A. FELDMAN

9 ON BEHALF OF THE PETITIONERS/CROSS-RESPONDENTS

10 MR. FELDMAN: Thank you, Mr. Chief Justice, and
11 may it please the Court:

12 This, a case -- this case arises from a suit by
13 the State of Ohio against the United States Department of
14 Energy, concerning the operation of DOE's Fernald, Ohio
15 uranium processing plant.

16 Now, all aspects of the case have been settled,
17 other than the State's claim for State and Federal civil
18 penalties. Thus, as the case comes to this Court, the
19 issue before the Court is solely whether civil penalties
20 are available against the Federal Government under four
21 specific provisions of the Clean Water Act and the
22 Resource Conservation and Recovery Act, RCRA.

23 Now it's our position that the provisions are
24 most reasonably interpreted not to waive sovereign
25 immunity as to civil penalties. But the issue in the case

1 is not whether we can show that those provisions mean what
2 they say they do. The issue is, because this involves a
3 waiver of sovereign immunity, whether the State can show
4 that Congress clearly and unambiguously, in the language
5 of these statutes, waived sovereign immunity from civil
6 penalties.

7 Now that, that is based on the well-settled rule
8 that it is up to the State to prove -- to show that a
9 waiver exists, that any doubts concerning whether there's
10 a waiver should be resolved against finding a waiver of
11 sovereign immunity, and that a waiver of sovereign
12 immunity must be clear and unambiguous.

13 Congress was well aware of those principles at
14 the time when the provisions at issue here were enacted.
15 Indeed, the key provisions, which are the Federal
16 facilities provisions of the Clean Water Act and of RCRA,
17 were enacted within a year or so after this Court's
18 decisions in Hancock against Train and EPA against
19 California, which specifically rested on the clear
20 statement principle.

21 Indeed, Congress must have been aware of that
22 principle. And I think if we -- if you look at the
23 language of the statutes at issue, it's impossible to find
24 a clear and unambiguous waiver under those standards.

25 Now, if there were still any doubt, there are

1 two features of the case that suggest that that clear
2 statement rule has to be applied with particular rigor.
3 First, there's the long-settled understanding that where
4 an asserted waiver of sovereign immunity would upset the
5 delicate Federal-State balance, and in particular, where
6 it subjects the Federal Government to regulation by
7 States, it's particularly appropriate to apply the clear
8 statement rule. And that is -- that would be the case
9 here.

10 Secondly, where an asserted waiver of sovereign
11 immunity would have an effect on the Federal -- and
12 perhaps more important where an asserted waiver of
13 sovereign immunity is penal in nature, the Court has also
14 applied the clear statement rule with particular rigor.
15 Perhaps the case that's most closely on point is Missouri
16 Pacific Railroad --

17 QUESTION: May I interrupt you, Mr. Feldman,
18 because there is one sentence in the statute that does
19 seem rather clear. It says -- just the second half of it
20 on page 58 of your opinion -- the United States shall be
21 liable only for those civil penalties arising under
22 Federal law. Now, in any case, it must arise under
23 Federal law. But can you not -- can that any way possibly
24 be interpreted to say there's no case in the world in
25 which the United States shall be liable for a civil

1 penalty?

2 MR. FELDMAN: Yes. That --

3 QUESTION: Your position that there is simply no
4 case to which that language applies?

5 MR. FELDMAN: That language would apply to civil
6 penalties or -- it would apply to monetary sanctions which
7 could be called civil penalties that are imposed as a
8 result of the Federal Government's failure to comply with
9 an injunction that was issued under the statute. But that
10 language itself is not the language of waiver. It's a
11 language of limitation. So we would submit that that
12 language itself doesn't waive sovereign immunity.

13 And if you look at the earlier language, earlier
14 in the same provision -- I might refer you to page 1(a) of
15 the appendix of our brief where it's reprinted -- there
16 are three categories of items as to which sovereign
17 immunity is waived.

18 If you look on page 1(a), and about eight lines
19 down, it's look -- that's requirements --

20 QUESTION: 1(a) of what, Mr. Feldman?

21 MR. FELDMAN: Of the appendix to our brief.

22 This is the Federal facilities provision of the
23 Clean Water Act. And there are three -- there are three
24 categories of items waived: requirements,
25 administrative --

1 QUESTION: That's the same section from which I
2 just read.

3 MR. FELDMAN: Yes, earlier in the same section.
4 And it would -- it's our understanding of the provision
5 that the waiver is in the earlier part of that statute.
6 And that waiver limits financial penalties to those
7 sanctions that are imposed as a result of failure to
8 pay -- to comply with court process, or injunctive relief.

9 QUESTION: Well, why do you say the last
10 sentence could not be construed as a waiver, at least as
11 to civil penalties arising under Federal law?

12 QUESTION: The last sentence of what, Justice
13 O'Connor?

14 QUESTION: Of the same section that we're
15 looking at, let me see -- it's the section 313 of the
16 Clean Water Act, right?

17 MR. FELDMAN: Yes -- that -- the sentence to
18 which you're referring is on 2(a) if you're looking at the
19 appendix to our brief.

20 Having -- it would be our -- it's our
21 understanding --

22 QUESTION: Where does the last sentence that is
23 being referred to begin? Is it towards the bottom of
24 2(a)?

25 MR. FELDMAN: It's not actually the last

1 provision -- the last sentence --

2 QUESTION: No, it's not.

3 MR. FELDMAN: -- of the statute. It's about
4 the sixth -- maybe the -- one, two, three, four -- about
5 the ninth line down.

6 QUESTION: On page 2(a)?

7 MR. FELDMAN: On page 2(a). It says the United
8 States shall be liable only for those civil penalties
9 arising under Federal law or imposed by a State or local
10 court to enforce an order of the process of such court.

11 Having already limited the kinds of financial
12 penalties that could be paid to those that are -- that
13 arise from -- having already limited the waiver of
14 immunity to process and sanctions --

15 QUESTION: Well, I'm not sure that it does.
16 This might extend the waiver to Federal penalties. What
17 are the Federal penalties that are available? Is section
18 1319 the only section providing for Federal penalties?

19 MR. FELDMAN: Yes, and indeed one of the
20 problems with reading this as itself being a waiver is
21 that the only Federal penalties available are under
22 section 1319. Under section 1319 civil penalties are
23 available only against a person. And the term person, as
24 defined in the statute, to exclude a whole variety of
25 different entities, does not include the Federal

1 Government. And therefore --

2 QUESTION: Well, then what does Federal penalty
3 refer to in this sentence we were just examining?

4 MR. FELDMAN: Civil -- in this sentence, civil
5 penalties refers back to those penalties that might be
6 imposed on the Federal Government for failure to obey an
7 injunction. When a State finds that the Federal
8 Government has not complied with a provision of the Clean
9 Water Act, it is permitted to go into a court, and to
10 obtain an injunction --

11 QUESTION: But that's already covered in
12 the -- later in the sentence.

13 MR. FELDMAN: Later in the sentence it refers to
14 State or local court to enforce -- in other words, there
15 is two categories: there could be those actions brought
16 in a Federal court, in which case the penalties that would
17 be assessed arise under Federal law, because they would be
18 assessed for failure to obey a Federal court injunction,
19 or imposed --

20 QUESTION: That isn't what it says.

21 MR. FELDMAN: It says liable only for those
22 civil penalties arising under --

23 QUESTION: Imposed by a State. It doesn't say
24 imposed by a State court -- State or local court.

25 MR. FELDMAN: It -- I'm not -- if you're reading

1 from the same --

2 QUESTION: State or local court?

3 MR. FELDMAN: By State or local court, right.

4 QUESTION: But it does seem odd that if they
5 meant simply pay civil contempt penalties imposed by a
6 Federal, State, or local court, they would word the
7 sentence this way.

8 They talk about penalties arising under Federal
9 law. And you're saying that should be read as if it meant
10 penalties imposed by Federal courts for failing to obey an
11 injunction.

12 MR. FELDMAN: That is the only -- those are the
13 only kind of penalties that would otherwise be provided by
14 the Act -- or the only kind of penalties that could be
15 assessed against the Federal Government, and that could be
16 applied.

17 QUESTION: Well, unless you say that -- unless
18 you say that this -- that because the State has a role in
19 enforcing a Federal statute that -- if the State has
20 authority to regulate a Federal agency, which, I take it,
21 it does?

22 MR. FELDMAN: Yes.

23 QUESTION: Under the Clean Water Act?

24 MR. FELDMAN: Yes.

25 QUESTION: Are they -- is the State enforcing a

1 Federal law there?

2 MR. FELDMAN: No -- well, no. The State is
3 enforcing its own law. Under the Clean Water Act, the
4 structure of the statute --

5 QUESTION: I know, but it's -- but it arises
6 under the Clean Water Act, doesn't it? Except for the
7 Clean Water Act, the State wouldn't be doing what it's
8 doing.

9 And it certainly wouldn't have the authority
10 to -- to regulate an agency.

11 MR. FELDMAN: I'm not sure that that's right,
12 although that issue isn't presented by this case. The
13 Clean Water Act -- the waiver -- this provision of 1323
14 waives Federal immunity from -- if you look at the prior
15 page, from State and local administrative authority from
16 requirements which we would understand to be
17 the prelitigation requirements, those things that the
18 Federal Government must do to comply with the Act and so
19 on.

20 And the fact -- the State statutes, for
21 instance, the State civil penalty statute at issue in this
22 case, was effective upon enactment by the State
23 legislature, and it was effective against the Federal
24 Government regardless of whether it received EPA approval
25 or not.

1 The effect of having received EPA approval is
2 simply that this Federal program, regulatory program is
3 supplanted. And an entity who's in the State of Ohio
4 doesn't have to go both to EPA to obtain a permit, and to
5 the State administrative agency to obtain a permit.

6 QUESTION: Well, maybe -- maybe when Congress
7 wrote this, the first half of the sentence they just
8 didn't -- didn't advert to whether there were any civil
9 penalties arising under Federal law. Or they thought they
10 might enact some in the future.

11 MR. FELDMAN: Yes.

12 QUESTION: And they were willing to have the
13 Federal Government liable for any penalties arising under
14 Federal law, but that doesn't mean that they were willing
15 to have the Federal Government liable for any penalties
16 arising under State law.

17 MR. FELDMAN: Yes.

18 QUESTION: And these are State statutes here
19 that we're talking about, right?

20 MR. FELDMAN: Yes.

21 QUESTION: State penalties.

22 MR. FELDMAN: Yes.

23 QUESTION: And there's nothing in this sentence
24 that says that they shall be liable for penalties under
25 State law.

1 MR. FELDMAN: That's right -- that's right.
2 And -- I mean, exactly. When I say that that arising
3 under Federal law provision applies only to -- as things
4 stand right now, it applies only to -- the only kind of
5 Federal penalties that would be available would be for
6 failing to obey a Federal court injunction. That doesn't
7 mean that there couldn't be other Federal penalties at
8 some point in the future, that Congress thought that there
9 were other Federal penalties, or considered it.

10 QUESTION: Or that the Congress might have
11 thought there -- there were some others, and didn't want to
12 search the statute books to make sure there were, and said
13 if there are any -- if there are any, we're perfectly
14 willing to make the Federal Government liable for it. But
15 that doesn't mean we're willing to make the Federal
16 Government liable to whatever the States want to do.

17 MR. FELDMAN: Yes.

18 QUESTION: But Mr. Feldman, there are some
19 penalties that arise under Federal law. Are there not?

20 MR. FELDMAN: There are --

21 QUESTION: 1319(d) describes a set of penalties
22 that arise under Federal law.

23 MR. FELDMAN: Right, but those penalties are
24 applicable only against a person.

25 QUESTION: Well --

1 MR. FELDMAN: And the term person is a defined
2 term in the statute that excludes the United States.

3 QUESTION: Well, it's also defined to include
4 the United States in another provision.

5 MR. FELDMAN: Right -- well, if --

6 QUESTION: In the citizens suit provision, it
7 expressly includes the United States.

8 MR. FELDMAN: I don't think it's --

9 QUESTION: So the United States is a person.

10 MR. FELDMAN: I wouldn't say it's defined. The
11 term persons is otherwise defined in the citizens suit
12 provision. If you -- that provision is reprinted at 3(a),
13 if you want to --

14 QUESTION: Yes, it says may bring a suit against
15 any person, paren, including (1) the United States, and
16 (2) any other Government agent. That surely includes the
17 United States within the concept of person in that
18 section.

19 MR. FELDMAN: Right, and for purposes of
20 citizens suits, the United States is --

21 QUESTION: And this is a citizens suit.

22 MR. FELDMAN: Right, and the United States is
23 subject to a citizens suit, generally.

24 QUESTION: All right.

25 MR. FELDMAN: If you follow that --

1 QUESTION: And there is another provision of the
2 statute that describes penalties that may be awarded,
3 arise under Federal law. Why isn't that an appropriate
4 remedy under this case -- I don't understand. I mean
5 maybe I'm just dumb.

6 MR. FELDMAN: Okay, because the citizens suit
7 provision generally makes citizens -- makes the United
8 States amenable to suits by citizens, like other entities
9 under the Clean Water Act.

10 QUESTION: Right.

11 MR. FELDMAN: It doesn't generally change,
12 though, the types of relief that are available otherwise
13 under the Act, or have any other effect on the United
14 States' obligations under the Act -- other than that they
15 can be enforced at the behest of a citizen.

16 QUESTION: And they can be subject to
17 appropriate penalties.

18 MR. FELDMAN: Right, to appropriate penalties.

19 QUESTION: And an appropriate penalty is one
20 arising under Federal law, according to this earlier
21 section. And we've got a Federal statute describing
22 penalties arising under Federal law. I don't know
23 what -- which piece is missing?

24 MR. FELDMAN: The piece that's missing is
25 that -- I guess I would submit, is that the appropriate

1 civil penalties -- civil penalties are never
2 appropriate -- if you look at the --

3 QUESTION: Against the United States unless they
4 arise under Federal law.

5 MR. FELDMAN: They say to apply appropriate
6 civil penalties under section 1319(d) of this title. I
7 read that to refer back to 1319(d) to find out what civil
8 penalties are appropriate. Now, that -- one thing that
9 should be remembered is that phrase applies to any
10 citizens suit against any entity under the Clean Water
11 Act, not just the United States. It would be an odd way
12 to waive sovereign immunity to waive it in a sentence that
13 applies to any kind of citizens suit.

14 And indeed, if you look at that whole paragraph,
15 what it really refers to is that any kind of relief that's
16 ordinarily available under the Clean Water Act is
17 available against the -- whatever is available otherwise,
18 is available in a citizens suit.

19 QUESTION: No, not -- the State of Ohio couldn't
20 pass a statute saying the penalties should be \$1 million a
21 day. That would not be permissible.

22 MR. FELDMAN: Against the United States are
23 you --

24 QUESTION: Correct.

25 MR. FELDMAN: That's right.

1 QUESTION: Because that would not arise under
2 Federal law. But this limits -- in other words, this
3 clearly limits it to those that are described in 1319(d).

4 MR. FELDMAN: That's right.

5 QUESTION: But I don't know how you can say
6 those in 1319(d) don't arise under Federal law.

7 MR. FELDMAN: It's not a question of whether
8 they -- I guess there would -- there's really two parts to
9 my answer to that.

10 This -- the provision which says that United
11 States shall be liable only for those civil penalties that
12 arise under Federal law, that is limiting the waiver.
13 It's not extending the waiver. It's not saying the United
14 States shall be liable for penalties that arise under
15 Federal law. It says the United States --

16 QUESTION: Well, it says in so many words, shall
17 be liable. It also has the word only in that. But it
18 says, shall be liable for those penalties.

19 MR. FELDMAN: Right, and I would read -- because
20 it has the word only I would read that as a language of
21 limitation, rather than extension. And then if --

22 QUESTION: Where is 1319(d)? It isn't in your
23 appendix.

24 MR. FELDMAN: It's not in the appendix,
25 actually --

1 QUESTION: Is it somewhere around here?

2 MR. FELDMAN: It is --

3 QUESTION: I think maybe I've got it here. Wait
4 a minute.

5 QUESTION: Well, never mind -- I thought it was
6 handy.

7 MR. FELDMAN: In any event, 1319(d) is a
8 relatively -- it's a one-paragraph provision that just
9 says any person who violates a provision of this statute
10 shall be --

11 QUESTION: And where is person defined to
12 exclude the United States, as you say?

13 MR. FELDMAN: That is -- I can tell you, is on
14 page -- if you look at our brief on page 6, it's the
15 continuation of note 4. It actually goes from 5 to 6.
16 That's in 1362(5). It says the term person means an
17 individual, corporation, partnership, association -- lists
18 a number of entities. And does not include the United
19 States.

20 QUESTION: Well, yes, but 1365 says it does.
21 Any person, including the United States.

22 MR. FELDMAN: Right, and we would read that to
23 include the United States as a person for purposes of
24 citizens suits, so that citizens suits generally may be
25 brought against the United States, but not to alter the

1 general definition of person for other provisions of the
2 statute. And if you read 1365, the intent of the language
3 appears to -- appears to us to be that they didn't want to
4 alter the ordinary remedial scheme of the statute here.
5 That ordinary remedial scheme --

6 QUESTION: Well, the last -- the last -- the
7 last couple of lines of 1365 --

8 QUESTION: Where are you reading from?

9 QUESTION: In 3(a).

10 QUESTION: 3(a), 1365, the last sentence or
11 two -- the last line or two says that -- says that a
12 district court could apply any appropriate civil penalties
13 under 1319(d).

14 MR. FELDMAN: That's right, and that --

15 QUESTION: And that would be against the United
16 States.

17 MR. FELDMAN: Well, that would -- that
18 would -- I read that language to mean that when you have a
19 citizens suit --

20 QUESTION: Appropriate is the key word.

21 MR. FELDMAN: Right.

22 QUESTION: Right?

23 MR. FELDMAN: Right, whatever penalties are
24 appropriate in a citizens suit, may be applied by the
25 court. Injunctive relief is appropriate against the

1 United States under the waiver in 1323, and therefore --

2 QUESTION: But because -- because person doesn't
3 include the United States under the general definition of
4 a person, it wouldn't be appropriate to -- is that it?

5 MR. FELDMAN: That's right, just as it wouldn't
6 be appropriate to apply a civil penalty against a -- well,
7 for situations that are not otherwise covered by the civil
8 penalty provision.

9 QUESTION: But Mr. Feldman, let me just point
10 this out. This talks about relief against the
11 administrator, as defined in 1319(d). By hypothesis, the
12 administrator could not be a defendant in 1319(d) because
13 that's the penalties that he may obtain in litigation. In
14 1319 they are enforcement actions by the administrator.

15 MR. FELDMAN: That's right. .

16 QUESTION: So if you refer to that for the
17 general citizens suit provision, you can't just -- can't
18 say they can do it in suits against the administrator, and
19 then say it's got to be an appropriate penalty in a suit
20 brought by the administrator, is what you're arguing.

21 MR. FELDMAN: I'm --

22 QUESTION: Because 1319 deals with litigation
23 initiated by the administrator. So by hypothesis, the
24 administrator could not be a defendant in a 1319(d) suit.

25 MR. FELDMAN: That's right.

1 QUESTION: Now, how can you then say that when
2 they refer to the administrator in this provision, they're
3 excluding -- they're excluding cases in which -- the
4 United States? Because by hypothesis here, he's a
5 defendant in this case.

6 MR. FELDMAN: I think possibly the answer to
7 that is if you look at 1365(a)(2), right above that
8 provision, one of the kinds of citizens suits that you can
9 bring is against the administrator --

10 QUESTION: Right.

11 MR. FELDMAN: -- where the administrator is --

12 QUESTION: Right, and the appropriate remedy for
13 that suit is found in 1319(d), according to the very suit.

14 MR. FELDMAN: For instance, no one's argued that
15 you could obtain a civil penalty against the administrator
16 by virtue of that reference to 1319(d).

17 In other words, where the suit is brought
18 against the administrator, all that this provision is
19 doing in the citizens suit provision is preserving
20 whatever remedies are otherwise applicable in citizens
21 suits.

22 So for instance, where the action is brought
23 against the administrator, the court may order the
24 administrator to perform such act or duty as the case may
25 be. Where the suit is brought against a private party,

1 the court may enforce an effluent standard, or apply
2 appropriate civil penalties.

3 Similarly, where the action is against the
4 United States, the court may also enforce an effluent
5 standard or apply any appropriate civil penalties. But in
6 the case of the United States, there are no appropriate
7 civil penalties, because civil penalties are not
8 appropriate.

9 In each case, they didn't want to alter the
10 remedial scheme of the statute otherwise, by this last
11 paragraph of the citizens suit provision. They just
12 wanted to refer all questions to be resolved in accordance
13 with that -- with that provision.

14 And it would be our submission that under that
15 provision, the term person is defined in accordance with
16 the general definition, and it excludes the United States.

17 Um -- I think the case -- the case that's most
18 close to, that's closest to this, and both with respect to
19 the specific --

20 QUESTION: There's no case close to this.

21 (Laughter.)

22 MR. FELDMAN: Perhaps in the complexity of the
23 statutes this may -- this may go, do one better to some of
24 the others.

25 But in the Ault case, for instance, the

1 operative language of waiver was that the United
2 States --

3 QUESTION: The what case?

4 MR. FELDMAN: In Missouri Pacific against
5 Ault --

6 QUESTION: Ault?

7 MR. FELDMAN: Yes, it was a case that arose
8 during the Federalization of the railroads during World
9 War I. And Congress had passed a statute providing that
10 the Federalized rail carriers are subject to -- I think
11 the quote is all laws and liabilities as common carriers,
12 which is a very broad waiver provision, I think arguably
13 broader than any of the waiver provisions that you find
14 here -- that you find here in the earlier part of 1323 at
15 least.

16 The Court held that although that provision
17 subjecting the United States to all laws and liabilities
18 did subject the United States to compensatory remedies, it
19 did not extend to penal measures. It -- a particularly
20 clear statement is required before a waiver of sovereign
21 immunities should extend to penal measures.

22 In 1323, I think you don't find such a clear
23 waiver in any of the positive -- in any of the positive
24 terms of the statute that purport to be a waiver, neither
25 the term requirements, nor administrative authority, nor

1 process and sanctions. For the reasons I said before, I
2 think process and sanctions is coupled as a single term,
3 grammatically in the statute, and also structurally where
4 it's listed under --

5 QUESTION: But isn't it true that the word
6 sanction quite frequently is used to refer to the kind of
7 penalties that are inscribed in 1319(d)?

8 MR. FELDMAN: Yes -- I think sanctions could be
9 referred to -- sanctions could be used to refer to
10 penalties. However, in this particular provision, I think
11 because it's coupled with process, they did -- it was not
12 a list of four items: requirements, administrative
13 authority, process, comma, and sanctions, but rather
14 requirements, administrative authority, comma, and process
15 and sanctions. And that's reinforced by the following
16 provision which lists each of those three things, A, B, C.
17 What Congress had in mind was sanctions that are necessary
18 to enforce compliance with the court's process.

19 And that would include injunctive relief,
20 sanctions to enforce injunctive relief, but would not
21 include civil penalties. At the very least, that creates
22 enough of an ambiguity or it couldn't be said that that
23 term, process and sanctions, unambiguously waived
24 sovereign immunity.

25 And that's what the State would have to show

1 here.

2 QUESTION: It's wonderful to know that Congress
3 can draft with such subtlety. That is really a very,
4 subtle point. It's not sanctions used alone, but it's
5 sanctions with process and sanctions.

6 QUESTION: Especially when Congress -- I thought
7 Congress got a little upset about some decisions and
8 wanted to make sure the United States got hooked to obey
9 the law.

10 MR. FELDMAN: These statutes were
11 rewritten -- were amended to some extent.

12 QUESTION: Yes, to do that, to do that. And yet
13 they were so subtle about it, that they've -- that the
14 United States isn't liable at all.

15 MR. FELDMAN: With due respect, I think that
16 they did exactly what they intended to do, which is they
17 subjected the United States to the full range of
18 administrative authority of States, of the State's
19 substantive requirements, of permanent requirements, of
20 reporting requirements. And those were the things that
21 Congress had on its mind as a result of the Court's
22 decisions in Hancock against Train and EPA against
23 California.

24 But I think what Congress didn't do, was go
25 farther and give any positive consideration to, or decide

1 that they wanted to subject the Federal Government to
2 civil penalties. That's -- I don't see that in the
3 language of the statute, or in what they did. And
4 certainly they didn't unambiguously do that. And, indeed,
5 they knew -- they should have known as a result of Hancock
6 and EPA against California that an unambiguous waiver is
7 what was required.

8 QUESTION: Mr. Feldman, before you leave
9 1365 -- if it's possible to leave it -- my understanding
10 is that these fines are paid to the United States
11 Government under this section.

12 MR. FELDMAN: That's right.

13 QUESTION: Is that -- does that present a case
14 or controversy, for Federal courts to sit and allocate
15 money from one Federal account to another?

16 MR. FELDMAN: I think that there would certainly
17 be a case or controversy as between the State of Ohio, for
18 instance, and the Federal Government here. Because
19 they're asserting that --

20 QUESTION: As to the enforcement, perhaps.

21 MR. FELDMAN: As to the enforcement --

22 QUESTION: But just as to the penalty part --

23 MR. FELDMAN: Even as to the penalties, to some
24 extent. It might be questioned whether there is, and
25 indeed, I think the strangeness of having that kind of

1 procedure, where money is coming from one pocket of the
2 Federal Treasury, and going into another, indeed, it may
3 be coming from the same pocket and going right back into
4 that same pocket.

5 The strangeness of that proceeding is one reason
6 why Congress may not have provided for civil penalties
7 here, or at least would have wanted to think twice before
8 doing so, and I think a clear indication that they wanted
9 to should be found before they --

10 QUESTION: I'm not sure if there are cases where
11 there's a case or controversy as to part of the relief,
12 but not as to the other part of the relief. But it seems
13 to me that it's quite questionable here that there is a
14 case or controversy as to the fine that's being paid from
15 one part of the Federal Treasury to the other.

16 MR. FELDMAN: I agree that it would be -- I
17 agree that it would be questionable. And again, I think
18 that's another reason not to assume that Congress would
19 have intended something that both is questionable, perhaps
20 from a standing point of view, and it would apparently be
21 a rather futile gesture.

22 QUESTION: I'm -- don't we have cases captioned
23 the United States v. Interstate Commerce Commission? I
24 mean, we've had the Federal Government suing itself up
25 here before.

1 MR. FELDMAN: I believe -- I believe we do. I
2 certainly think that whenever the executive --

3 QUESTION: It may not be right, but we've done
4 it.

5 MR. FELDMAN: Right, there are such cases.
6 Whenever one branch -- one part of the executive
7 branch -- whenever the executive branch is on both sides
8 of the case, it certainly raises a question about the
9 case, about case or controversy.

10 I'd like -- if there are no further questions
11 right now, I'd like to reserve the balance of my time.

12 QUESTION: Very well, Mr. Feldman.

13 Mr. Van Kley, we'll hear from you.

14 ORAL ARGUMENT OF JACK A. VAN KLEY

15 ON BEHALF OF THE RESPONDENTS/CROSS-PETITIONERS

16 MR. VAN KLEY: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 We believe this case turns on three words
19 scattered over the course of four statutory sections. And
20 we would like to very briefly spend a little bit of time
21 beginning with the citizens suit provisions which, of
22 course, turns on the word person.

23 QUESTION: Please, if you're going to read
24 anything from the statute, please tell us where you -- or
25 where you are going to read from.

1 MR. VAN KLEY: All right, Your Honor.

2 The particular statutory term that I'm referring
3 to is found in the citizens suit provision, which is the
4 same provision that we have been discussing with Mr.
5 Feldman.

6 QUESTION: 1365 --

7 MR. VAN KLEY: Yes, Your Honor.

8 QUESTION: On 3(a) of the brief of the
9 petitioner.

10 MR. VAN KLEY: That's correct, Your Honor.

11 The same operative language also appears in
12 RCRA's citizens suit provision, which is 42 USC 6961. And
13 that would also be in the appendix to the
14 petition -- well, actually, actually I think that we're
15 better off looking at the Department of Energy
16 cross-petition on that one, because I think there was an
17 error in the printing on that particular one, so we
18 believe the cross-petition or -- no, it's --

19 QUESTION: It's 6972 -- what number did you
20 give --

21 MR. VAN KLEY: Right, it -- I'm sorry, I
22 misstated, Your Honor. It's 42 USC 6972.

23 QUESTION: Right -- that's on 5(a) of the
24 Government's brief.

25 MR. VAN KLEY: Okay, it's on their brief.

1 QUESTION: Yeah.

2 MR. VAN KLEY: It's correct in their brief, yes.

3 So those are the two provisions that I'd like to
4 dwell on just briefly here.

5 I think we have to go back to the discussion
6 that Mr. Feldman and Justice Stevens had at the beginning
7 of that dialogue concerning the phrase arising under
8 Federal law, and how that relates to the definition of
9 person in the citizens suit provision.

10 Under the Department's interpretation, not only
11 can citizens not file a suit for civil penalties against
12 the Federal Government, but even EPA could not file a
13 lawsuit for civil penalties against the Federal
14 Government. Which means that no one can file a civil
15 penalty action against the Federal Government under
16 Federal law, under the Department's interpretation.

17 And that negates the operation, according to the
18 Department -- of the phrase, civil penalties arising under
19 Federal law. Now, civil penalties --

20 QUESTION: Well, do you -- do you agree that the
21 only penalties provided in Federal law right now are those
22 in 1319?

23 MR. VAN KLEY: Yes, Your Honor -- yes, Your
24 Honor. It would be 1319, incorporated by reference into
25 the citizens suit provision. That's correct.

1 QUESTION: But 1319 contemplates that those are,
2 are penalties that can be sought by a suit brought by EPA,
3 by the administrator.

4 MR. VAN KLEY: Yes, Your Honor, and also by a
5 citizen. In fact, if an ordinary citizen other than a
6 State were to file under the citizens suit provision, that
7 citizen would also be applying the standards in 1319. And
8 it's incorporated into reference -- by reference into the
9 citizens suit provision. And that's where all citizens
10 suits draw their penalty provisions from.

11 So by the operation of that citizens suit
12 provision, the civil penalties against the United States
13 are not limited to 1319 as enforced by the administrator.
14 We would also note that --

15 QUESTION: Excuse me, your contention is that
16 this provision waives that immunity on the part of the
17 Federal Government, although it does not on the part of
18 the State governments?

19 MR. VAN KLEY: No, Your Honor.

20 QUESTION: I mean, it doesn't eliminate the
21 State government's Eleventh Amendment immunity. I mean
22 that's what it says. It says, to the exte -- any other
23 governmental instrumentality or agency to the extent
24 permitted by the Eleventh Amendment to the Constitution.
25 So I gather that means that you can't -- you can't get any

1 penalty out of the State treasury.

2 MR. VAN KLEY: No, Your Honor, I would not agree
3 with that.

4 QUESTION: That doesn't --

5 MR. VAN KLEY: No, I would not agree with that.
6 The States can be sued, even despite the --

7 QUESTION: Well, I don't understand what that
8 exception means, then, any other Government
9 instrumentality or agency to to the extent permitted -- to
10 the extent permitted by the Eleventh Amendment to the
11 Constitution. I thought that means to leave in there
12 State sovereign immunity.

13 MR. VAN KLEY: No, and in fact, Your Honor, the
14 Court recently decided another case in the Superfund area
15 where it interpreted exactly that type of phrase, and
16 decided that the Eleventh immunity was waived. That was
17 the Union Gas case, Your Honor. So it does waive
18 sovereign immunity for States as well as the Federal
19 Government.

20 QUESTION: Well, then, what is the reason for
21 putting in the reference to the Eleventh Amendment there?

22 MR. VAN KLEY: Um --

23 QUESTION: Well, it still had to be decided.

24 QUESTION: Let him answer the question.

25 MR. VAN KLEY: I'm not really sure, Your Honor,

1 to tell you the truth. So --

2 QUESTION: Does this really strike you as a
3 model of clarity?

4 (Laughter.)

5 MR. VAN KLEY: Well --

6 QUESTION: The whole thing -- I mean, the rule
7 is that to waive the sovereign immunity of the United
8 States, you must have a clear statement, and it must be
9 unambiguous. And here we are, just wrestling with very
10 vague and often self-contradictory terms.

11 MR. VAN KLEY: Well, Your Honor, we do not
12 believe that this is ambiguous. And we do not believe
13 they're self-contradictory, either. We think that anyone
14 can think of arguments to propose a secondary definition
15 of any statutory term, if a person creates enough
16 ambiguity by exercising ingenuity. And there are many
17 cases in the courts where people have tried to stretch the
18 meaning of words.

19 But if we look at the normal meaning of these
20 words, it is not ambiguous.

21 QUESTION: Well, could you sum up, perhaps in
22 two or three sentences, exactly how you reason your way
23 through to the conclusion that this is --

24 MR. VAN KLEY: Yes, Your Honor.

25 QUESTION: This is perfectly clear?

1 MR. VAN KLEY: Yes, Your Honor.

2 The sovereign immunity of the United States is
3 waived with respect to all sanctions. Sanctions would
4 include civil penalties under the normal meaning of that
5 word. In fact, even this Court, in some of the cases
6 we've cited in our brief, has used the word sanctions to
7 refer to civil penalties, and criminal penalties, and
8 other types of penalties.

9 There's a limitation sentence below that which
10 is the arising-under clause, which limits those sanctions
11 to those civil penalties arising under Federal law. And
12 that is simply the way the statute works, Your Honor.

13 Now, civil penalties ordinarily is not a term
14 used to describe contempt sanctions. In fact, Congress has
15 been using the phrase sanctions to enforce injunctive
16 relief in these waivers to express their desire to waive
17 immunity for contempt sanctions.

18 QUESTION: Well, you're relying on the
19 provisions of 1323, the Federal facilities pollution
20 control statute for the waiver of sovereign immunity.

21 MR. VAN KLEY: Your Honor, that is true with
22 respect to the civil penalties assessed pursuant to the
23 State program. We rely solely on 1323. With regard to
24 the citizens suit penalties, we rely both on 1323 and the
25 citizens suit provision. And --

1 QUESTION: And -- but under the citizens suit
2 provision, do you -- do you rely on that to give authority
3 for waiver of Federal sovereign immunity for civil
4 sanctions imposed by State law?

5 MR. VAN KLEY: We believe that the specific
6 waiver in the citizens suit provision is enough. However,
7 there is also another provision of waiver in 1323 which
8 works just as well, with respect to the Clean Water Act.

9 QUESTION: Well, if we thought 1323 did not
10 waive Federal sovereign immunity for State law sanctions,
11 where would that leave us?

12 MR. VAN KLEY: That would leave us with the
13 citizens suit provisions under Federal law. If the Court
14 decided that particular -- in that particular fashion, the
15 State of Ohio would not be able to enforce its civil
16 penalties under its implementation of the Federal program.

17 QUESTION: But the suit, nevertheless, covers
18 Federal sanctions as well?

19 MR. VAN KLEY: Yes, Your Honor.

20 QUESTION: But the Sixth Circuit didn't deal
21 with that?

22 MR. VAN KLEY: It did with respect to the RCRA
23 citizens suit provision, but not --

24 QUESTION: But not 1365.

25 MR. VAN KLEY: -- the Clean Water Act, correct,

1 Your Honor.

2 QUESTION: Did it under that -- it did not deal
3 with that section at all?

4 MR. VAN KLEY: That's correct. It did not need
5 to reach that section because the stipulation of penalty
6 provides that the penalty payments will be made under
7 State law, if the court finds a State law waiver, and goes
8 to the Federal citizens suit penalties only if the court
9 fails to find a waiver under State law.

10 So as a result, the Sixth Circuit did not need
11 to reach the citizens suit issue with respect to the Clean
12 Water Act. Now --

13 QUESTION: Do you agree, Mr. Van Kley, that
14 penalties under -- is it under 1365, the citizens suit,
15 are paid to the United States?

16 MR. VAN KLEY: Yes, Your Honor, we do agree.

17 QUESTION: Then doesn't it seem odd that the
18 United States would be sued and its penalty would be paid
19 to the United States?

20 MR. VAN KLEY: No, Your Honor. The main purpose
21 of a civil penalty is its deterrent effect. The deterrent
22 effect from such a penalty comes from twofold -- first of
23 all, under some types of actions, the money would be taken
24 out of the DOE accounts, out of the DOE funds, and paid to
25 another account that DOE cannot draw on. In other words,

1 DOE loses the use of the money it has strived so carefully
2 to get from Congress.

3 Secondly, perhaps the most important deterrent
4 from a civil penalty is the public stigma, if you will,
5 that is attached to paying a penalty for violating the
6 law. And, in fact, with respect to Federal agencies, that
7 is the most effective deterrent. A Federal agency does
8 not want to draw the attention of Congress and the public
9 to it, and basically --

10 QUESTION: Is there any indication that Congress
11 realized that it was imposing sanctions on the United
12 States which would be paid to the United States?

13 MR. VAN KLEY: No, there is no indication either
14 in the statute or the legislative history in which
15 Congress discussed where the money is going to go.

16 QUESTION: Mr. Van Kley, you know, if the main
17 point is the embarrassment of the Federal agency, I'm
18 really not sure that most of the administrators I know are
19 terribly embarrassable people. But if that is the big
20 problem, that can be done without paying any money. I
21 mean, just the entry -- the Government concedes that
22 they're suable, and that an order can be entered saying
23 you have broken the law. Stop breaking the law.

24 Now, that demonstrates the agency's been
25 breaking the law. Why isn't that embarrassment enough?

1 MR. VAN KLEY: Well, Justice Scalia --

2 QUESTION: You think it adds to that to say
3 moreover, you're going to have to switch money from one
4 account to another just to embarrass you? I don't think
5 that's going to make any difference at all.

6 MR. VAN KLEY: Oh, it does, Your Honor. It
7 makes a dramatic difference.

8 QUESTION: From the standpoint of embarrassment?

9 MR. VAN KLEY: From the standpoint of the stigma
10 of being penalized. It does, indeed, make a very big
11 difference. Because the fact that they've paid this
12 penalty calls Congress' attention, including in the
13 appropriation process, where they might have to re-fund
14 the money drawn by that penalty, or re-fund the money
15 drawn from the judgment fund, that very definitely calls
16 attention to the public agency -- to the Federal agency by
17 the public and by Congress.

18 In fact, Your Honor, we have had cases where
19 Federal agencies have been willing to pay us money simply
20 if they don't call it a civil penalty, because of the
21 embarrassment factor.

22 And, in fact, Your Honor, we also have to go
23 back to can Congress's statements about civil penalties in
24 the 1972 Clean Water Act, where Congress acknowledged that
25 although injunctive relief was available, the Act was not

1 working in part because there were no penalties for
2 noncompliance.

3 And in light of that overriding purpose from
4 Congress, even Congress realized that injunctive relief
5 alone was not adequate to do the job. And that is true
6 with Federal agencies as well.

7 QUESTION: Mr. Van Kley, I understood you to say
8 a moment ago that the term civil penalties is not normally
9 used to include contempt sanctions and so on. Isn't that,
10 however, exactly the sense in which it's used in 1323,
11 because the phrase that we're concerned with here, the
12 United States shall be liable only for those civil
13 penalties arising under Federal law or imposed by a State
14 or Federal court to enforce an order of the process of
15 such court, clearly, when they speak of civil penalty,
16 they are including a contempt sanction within that term,
17 as used here. Isn't that correct?

18 MR. VAN KLEY: They're including only contempt
19 sanctions for State and local courts in that particular
20 section. There are other contempt sanctions --

21 QUESTION: Well, that's the section I understood
22 you to be relying on a moment ago.

23 MR. VAN KLEY: Not with respect to contempt
24 sanctions under Federal law, Your Honor. The contempt
25 sanctions under Federal law --

1 QUESTION: No, but I -- maybe I misunderstood
2 your argument. I thought your argument was, in effect,
3 that civil penalties for which the United States would be
4 liable would -- is a term that simply would not normally
5 be used to refer to a contempt sanction, and hence, it was
6 more probable that it referred to something other than a
7 contempt sanction.

8 And my only point is here, as the term is used
9 here, it clearly does include a contempt sanction if it's
10 imposed by a State court. And therefore, we have to say
11 that the term as used here does include contempt
12 sanctions, which therefore weakens your argument that it
13 must refer to something else when it's referring to a
14 civil penalty paid by the U.S. Isn't that a fair response
15 to what you said?

16 MR. VAN KLEY: No, Your Honor.

17 The sanctions that are in the latter half of the
18 sentence which you've been referring to --

19 QUESTION: Well, your entire -- I apologize for
20 interrupting you. You're entirely right about half the
21 sentence. But the term is used in both the earlier
22 reference and the later reference.

23 And my only point is the term has to include, as
24 it is used there, a contempt sanction. And that is
25 correct, isn't it?

1 MR. VAN KLEY: No, Your Honor, it is not
2 correct. The words used there do not include Federal
3 contempt sanctions.

4 QUESTION: Well, you --

5 MR. VAN KLEY: Those are covered by the earlier
6 part of the section, however.

7 QUESTION: Then are, are you -- are you, in
8 effect saying that the term civil penalties is not also
9 modified -- is not modified not only by -- start that
10 again.

11 Are you saying that the term civil penalties is
12 modified by, arising under Federal law, but is not
13 modified by, imposed by a State or local court to enforce
14 an order?

15 MR. VAN KLEY: That's correct.

16 QUESTION: It's a very strange reading.

17 That's a very strange reading of that sentence.
18 Well, what is the alternative meaning?

19 MR. VAN KLEY: Well, the way the sentence is
20 structured, Your Honor, there is no alternative meaning.

21 QUESTION: There is no alternative meaning?

22 MR. VAN KLEY: No, the --

23 QUESTION: Well, could you then have simply
24 excised from the sentence the phrase, arising under
25 Federal law, and simply say the United States shall be

1 liable only for those -- strike that.

2 The United States shall be liable only for,
3 imposed by a State or local court? That's the implication
4 of what you're saying. And that would make no sense at
5 all.

6 MR. VAN KLEY: No, Your Honor, perhaps I --

7 QUESTION: It's got to be -- it's got to refer
8 to, to both of those -- both of those modifiers have got
9 to refer to penalties.

10 MR. VAN KLEY: No, Your Honor, the way the
11 sentence is structured, it states first that the Federal
12 Government is subject to all civil penalties rising under
13 Federal law. And then it also says --

14 QUESTION: Well, it doesn't say that. Now,
15 you're -- it says the United States shall be liable only
16 for those penalties arising under Federal law.

17 MR. VAN KLEY: Correct, Your Honor.

18 QUESTION: Well, that is not what you said.

19 MR. VAN KLEY: Okay, I misstated, Your Honor.

20 QUESTION: Continue with your answer to Justice
21 Souter.

22 MR. VAN KLEY: Yes, thank you, Your Honor.

23 The second part of the sentence, paraphrased,
24 means the Federal Government shall be liable for sanctions
25 imposed by State and local courts.

1 QUESTION: And those sanctions are described,
2 are denominated civil penalties.

3 MR. VAN KLEY: No, Your Honor, they are not.
4 Because it -- they are donated sanctions, sanctions.

5 QUESTION: We'll have to agree to disagree. I
6 seem to insist on finding the need for a noun somewhere,
7 and you don't.

8 (Laughter.)

9 MR. VAN KLEY: The noun, Your Honor, is the
10 word --

11 QUESTION: Well, Mr. Van Kley -- that just
12 doesn't make any sense.

13 MR. VAN KLEY: The -- the sentence that we've
14 been describing, I think, can be, can be explained as to
15 its intent by looking at the -- how the State programs,
16 the State civil penalty programs work.

17 We've developed in our brief that State law
18 programs operate in lieu of and on behalf of the Federal
19 Government with respect to the civil penalties that are
20 assessed under those programs.

21 Notably, the United States EPA refers to
22 enforcement mechanisms such as civil penalties as the
23 requirements of State programs. But it does not refer to
24 State contempt sanctions as part of that program.

25 So that is why it was necessary in the second

1 part of that sentence to separately refer to the State and
2 local court contempt sanctions.

3 One thing that has to be emphasized with respect
4 to the State law programs is that EPA has basically been
5 told to keep its hands off of enforcement, as long as the
6 State is implementing its approved program. Now, in fact,
7 USEPA has to give 30 days notice before the State, and
8 allow the State to enforce -- take advantage of the
9 situation and try to enforce first, before the Federal
10 Government can even act.

11 And the Congress has made it very clear that
12 USEPA's enforcement actions to get civil penalties and
13 other enforcement are to be the unusual exception; that
14 the States are primarily entrusted with the function of
15 enforcing this statute.

16 Therefore, it doesn't make much sense to try to
17 limit the statement made in this section to only those
18 civil penalties that have been assessed pursuant to the
19 citizens suit provision. There will be very little
20 enforcement at all if that occurs.

21 And, in fact, if the State does not enforce,
22 that is grounds for USEPA to revoke its program. So the
23 option is not even left open for the State to allow EPA to
24 take all the enforcement against the many Federal
25 facilities that exist in this country.

1 The way the Congress has set this statute up
2 precludes that interpretation.

3 QUESTION: Well, are you -- are you saying then,
4 that the -- that the sanctions assessed under State law
5 really should be treated as arising under Federal law?

6 MR. VAN KLEY: If they are part of the Federally
7 approved program that acts in lieu of USEPA's program,
8 that is the case, Your Honor.

9 QUESTION: So you wouldn't just be looking to
10 one of these sections that we've just been looking at.
11 You would look at State law?

12 MR. VAN KLEY: It is State law that implements
13 the Federal program. That is the case, Your Honor.

14 QUESTION: And a sanction imposed by a State law
15 that's implementing the Federal act or implementing the
16 program that's been approved, that would arise under
17 Federal law?

18 MR. VAN KLEY: That's correct, Your Honor.

19 Yes, the phrase, arising under, taking its
20 normal textual meaning, refers to originate or spring out
21 of, result from. And even though these -- even though
22 these penalties have been enacted in the State law, that
23 State law is passed directly as a response to the Federal
24 Clean Water Act to implement that program in response to
25 that Federal Clean Water Act.

1 QUESTION: And then all of those suits to
2 recover those State penalties can be brought in Federal
3 court, because they arise under the laws of the United
4 States.

5 MR. VAN KLEY: That depends on how far this
6 Court goes with respect to its decision, Your Honor.

7 QUESTION: You mean that's thinkable?

8 MR. VAN KLEY: That is thinkable only if the
9 Court draws on 1331 case law for its decision. As we
10 stated in our brief, even this Court, in the Verlinden
11 case, for example, has acknowledged that the phrase
12 arising under means different things in different
13 statutes, depending on the purpose and intent of that
14 statute.

15 For example, the arising under clause in
16 article III of the Constitution has been interpreted
17 differently than the 1331 arising under clause.

18 QUESTION: Yes, but neither of those refers to
19 penalties arising under. This is a cause of action
20 arising under.

21 MR. VAN KLEY: Exactly right, Your Honor.
22 Thus --

23 QUESTION: As I understand, your -- what you're
24 saying is the penalties, even though described in an Ohio
25 statute, arise under Federal law because the statute was

1 enacted pursuant to the Federal program and has been
2 approved by the administrator.

3 MR. VAN KLEY: Right, Your Honor.

4 QUESTION: That's -- and if that's true, I don't
5 know how you answered Justice Scalia. Because then it
6 seems to me any suit under the State program arises under
7 Federal law.

8 MR. VAN KLEY: No, Your Honor. The Court has to
9 look at the different purpose of the arising under clause
10 in the Clean Water Act. That doesn't necessarily mean
11 that it has to be interpreted in the same fashion.

12 QUESTION: Well, the purpose here, as your
13 opponent has rather forcefully argued, is to limit the
14 liability of the United States as liable only for those
15 civil penalties.

16 MR. VAN KLEY: Yes, Your Honor.

17 QUESTION: And so it's rather strange to say you
18 will limit these. But if we prove it under -- well,
19 anyway, under a State program, it still arises under
20 Federal law. That's certainly not a natural reading of
21 that word.

22 MR. VAN KLEY: Your Honor, the Department of
23 Energy tries to use case law from 1331 by analogy to
24 interpret the arising under clause --

25 QUESTION: I'm not even looking at any cases.

1 I'm just -- like my colleagues on the right here, I just
2 agree -- and we just looked at this language. It seems to
3 me that when you talk about arising under Federal law,
4 that's a rather odd way to say arising under State laws
5 that have been enacted pursuant to a Federal program, or
6 approved by a Federal agency, which is what you're reading
7 as.

8 But you're -- you rely entirely on this
9 argument, and you don't rely on the citizens suit
10 provisions. Is that right?

11 MR. VAN KLEY: No, we rely on the citizens suit
12 provision for Federal law, for Federal penalties.

13 QUESTION: You -- just to get a different scale
14 of penalties, is that the reason for the difference?

15 MR. VAN KLEY: No, the difference is simply
16 alternative forms of relief.

17 QUESTION: Do you -- you think you're entitled
18 to collect this money on several different independent
19 grounds, like --

20 MR. VAN KLEY: That's correct, Your Honor,
21 several independent grounds, in the alternative.

22 In fact, we -- the stipulation of settlement did
23 not assess penalties under Federal law unless we could not
24 get them under State law. So we did not try to collect
25 twice.

1 QUESTION: But may I just put one -- there are
2 two rather separate theories under the Clean Water Act.
3 One is the one you've argued almost entirely now. The
4 second is the citizens suit theory that I debated with
5 your opponent. Is there a difference in the outcome of
6 the litigation, depending on which theory one might buy?

7 MR. VAN KLEY: Yes, there -- the only
8 difference, Your Honor, is where the money goes, whether
9 the money goes to the State treasury or the Federal
10 Government.

11 QUESTION: I see, so that's why you're not
12 arguing the citizens suit provision very vigorously.

13 MR. VAN KLEY: There's two reasons. That's one
14 reason, because we think the deterrence is more effective
15 if the money goes to State law, State court.

16 QUESTION: And you don't get the money. I
17 understand that.

18 (Laughter.)

19 MR. VAN KLEY: Well, Your Honor, actually, ah,
20 there's a lot easier ways to earn \$250,000 than to file a
21 suit like this. We definitely do not bring these suits as
22 fundraising mechanisms.

23 (Laughter.)

24 QUESTION: No, but I understand now why you've
25 concentrated your argument on this, rather than the other.

1 MR. VAN KLEY: Yeah, and the second reason --

2 QUESTION: It seems to me if one looks at plain

3 language you've got a much stronger argument on the other.

4 I don't know whether you're right or not, but surely the

5 waiver is much more clear in the citizens suit --

6 QUESTION: Well, I thought maybe you wanted to

7 enforce this law and sue under the citizens suit provision

8 and recover those Federal penalties because then you're

9 going to punish the agency by taking their money away and

10 giving it to somebody else in the Federal Government.

11 MR. VAN KLEY: Either way, Your Honor, it is

12 punishment. We think the punishment's greater under State

13 law, frankly. But we believe there is punishment both

14 ways. And certainly -- certainly we believe that's a

15 laudable purpose and that deterrent is the only way to

16 enforce these statutes. It's the only way these statutes

17 are going to work.

18 QUESTION: The State penalties are higher, too,

19 aren't they, as I recollect it?

20 MR. VAN KLEY: No, they're lower, Your Honor.

21 QUESTION: Pardon?

22 MR. VAN KLEY: They're lower.

23 QUESTION: They're lower.

24 MR. VAN KLEY: Yes.

25 QUESTION: They could be higher, I suppose.

1 MR. VAN KLEY: They could be higher as long as
2 they are consistent with Federal law. Because USEPA
3 approves those penalties.

4 QUESTION: I see.

5 MR. VAN KLEY: And, in fact, that's one more
6 reason why we believe that they do arise under Federal
7 law, is because they are part of a program which USEPA has
8 labelled requirements of the State enforcement programs.
9 And they are approved as part of the program. And they
10 operate in lieu of Federal law.

11 And as I mentioned before, given the fact that
12 USEPA is not supposed to be enforcing the statute unless
13 the State falls down, it is much more likely that the
14 Federal Government wanted the State to take the lead
15 against the Federal agencies.

16 I would like to just briefly and quickly
17 distinguish the 1331 case law, although as I mentioned
18 before, we do not rely on this case law. We believe that
19 1331 arising under case law should not be used to
20 interpret arising under in the Clean Water Act because of
21 the different purposes of those statutes.

22 However, under the Machinists case, the
23 Department of Energy has made the argument that it is
24 State law that -- in our case it is State law that is
25 providing the penalties, and therefore, even under 1331 it

1 can't arise under Federal law.

2 Well, Machinists tells us differently. Because
3 in that case, it was a private contract, implementing the
4 purposes of Federal law that was deemed to be arising
5 under Federal law.

6 So the fact that the penalty actually is passed
7 as a State law, does not -- even under Federal question
8 jurisdiction -- detract from the fact that it arises under
9 Federal law.

10 Just one quick point about the administrator
11 being sued under the Clean Water Act citizens suit
12 provisions that I'd like to respond to. The administrator
13 can be sued under that section if, for example, an EPA
14 building would pollute the environment. And it does make
15 sense in the light of the fact that EPA, indeed, can be a
16 Federal agency violating the law just like any other
17 agency. EPA has to obey the law as well.

18 With respect to the Ault case, we believe that
19 the case is dramatically different than the one here.
20 Although the waiver in the statutory text was extremely
21 broad in that case, the statutory text allowed the
22 President to pass an order -- enact an order which limited
23 the scope of that general waiver. And that's exactly what
24 happened in that case.

25 Thank you, Mr. Chief Justice.

1 QUESTION: Thank you, Mr. Van Kley.

2 Mr. Feldman, you have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF JAMES A. FELDMAN

4 ON BEHALF OF THE PETITIONERS/CROSS-RESPONDENTS

5 MR. FELDMAN: Thank you, Mr. Chief Justice.

6 I'd just like to make two points, one specific,
7 and one more general. The specific point is, as to the
8 arising under Federal law clause that I discussed earlier,
9 I think it should be kept in mind that that provision was
10 added by a conference committee. It wasn't in either the
11 Senate or House versions of the bill when it was first
12 enacted. The legislative history you can find in our
13 brief.

14 There's no legislative history or no commentary
15 on what that provision might have meant, or what the
16 conferees thought it meant. And I think that that adds
17 perhaps some plausibility to the view that they wanted to
18 make sure that whatever else had already been done, or had
19 already been waived in the statute, they wanted to be sure
20 that in any event, they wanted to cancel it if it didn't
21 arise under Federal law, or it would pose a State or
22 a -- order a process of a State or local court. I think
23 the history kind of supports that inference.

24 The more general point I wanted to make was that
25 the case really is about whether there is a clear and

1 unambiguous waiver of sovereign immunity in the statutes
2 at issue here. And --

3 QUESTION: For -- of money liability?

4 MR. FELDMAN: Yes, of liability for civil
5 penalties of the sort that the State seeks here. I
6 don't -- I think in light of going running through these
7 statutes, and seeing the difficulties of interpreting
8 them, the best you could say is that it's ambiguous. Now,
9 Congress, at this very -- well, not this very moment,
10 they're in recess -- but they've recently enacted
11 amendments to the RCRA provision that's also at issue in
12 this suit that would clearly and unambiguously waive
13 sovereign immunity from civil penalties.

14 QUESTION: They make it clear.

15 MR. FELDMAN: I beg your pardon.

16 QUESTION: Those are clear.

17 MR. FELDMAN: Yes, and as I've -- at least the
18 provisions, as I have seen the most recent versions, they
19 were passed in different versions by the House and the
20 Senate.

21 QUESTION: Have they been through a conference
22 committee yet?

23 MR. FELDMAN: Not yet.

24 (Laughter.)

25 QUESTION: So you're not promising that you

1 won't be back.

2 (Laughter.)

3 QUESTION: We don't know what some other
4 Solicitor General will say about that.

5 MR. FELDMAN: No, we don't, if that becomes law.

6 But the point I'd like to make is one function
7 of the rule requiring waivers to be clear and unambiguous,
8 especially when there's penal measures of this sort at
9 issue, is to require Congress to go and look at the
10 specific problems, and the specific issues that arise
11 concerning Federal -- concerning civil penalties against
12 Federal facilities. And that's one of the functions of
13 the rule, and that's one of the real reasons the rule
14 makes a great deal of sense applying in a case like this.

15 Thank you very much.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Feldman. The case is submitted.

18 (Whereupon, at 1:58 p.m., the case in the
19 above-entitled matter was submitted.)

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CERTIFICATION

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

NO. 90-1341 - UNITED STATES DEPARTMENT OF ENERGY, ET AL.,

Petitioners V. OHIO, ET AL., and

NO. 90-1517 - OHIO, ET AL., Petitioners, V. UNITED STATES

DEPARTMENT OF ENERGY, ET AL.

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