OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: EASTERN ENTERPRISES, Petitioner v. KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL.

CASE NO: No. 97-42 C.3

PLACE: Washington, D.C.

DATE: Wednesday, March 4, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

- X

EASTERN ENTERPRISES, :

Petitioner :

v. : No. 97-42

KENNETH S. APFEL, :

COMMISSIONER OF SOCIAL SECURITY, :

ET AL. :

- X

Washington, D.C.

Wednesday, March 4, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:18 a.m.

APPEARANCES:

JOHN T. MONTGOMERY, ESQ., Boston, Massachusetts; on behalf of the Petitioner.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C., supporting the Federal Respondents.

PETER BUSCEMI, ESQ., Washington, D.C., on behalf of the Respondents UMWA.

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P R O C E E D I N G S

(10:18 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in number 97-42, Eastern Enterprises vs. Kenneth S. Apfel. Mr. Montgomery.

ORAL ARGUMENT OF JOHN T. MONTGOMERY

ON BEHALF OF THE PETITIONER

MR. MONTGOMERY: Mr. Chief Justice and may it please the Court. This case presents the question left open in prior cases concerning the extent to which the Fifth Amendment places any restriction on the power of Congress to impose retroactive liability on private parties to fund social programs.

The Coal Act of 1992 is an unprecedented statute as applied to Eastern Enterprises and it is contrary to the constitutional traditions embodied in the Fifth Amendment for two distinct reasons. First, the Coal Act violates the Due Process Clause because it changes the legal consequences of past employment relationships that concluded long ago at a time when Eastern could not have anticipated any future obligation to former employees.

QUESTION: Are you arguing substantive due process or procedural due process?

MR. MONTGOMERY: Your Honor, we have attempted to the best we can not to put a label, but if a label is

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necessary.

QUESTION: I suggest you are going to have to if you are going to persuade us.

MR. MONTGOMERY: Your Honor, if a label must be placed it would have to be substantive due process but as we have pointed out in our briefs, the values that we seek to protect here are largely procedural values. The interest in notice, in understanding the consequences of one's actions. It is procedural in that sense, I suppose in the way that the void for vagueness doctrine is procedural.

QUESTION: You went -- it went through the legislative process. That's probably all a procedural due process you are entitled to. You fall back on a substantive claim.

MR. MONTGOMERY: Certainly the Court has restricted procedural due process to the legislative process in the past and we don't mean to suggest that in order to prevail in this case the Court needs to create a new doctrine.

QUESTION: And substantive due process as you know is not in good odor with regard to economic rights for some reason, although we still apply it with respect to noneconomic rights.

MR. MONTGOMERY: It certainly has not been in

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good favor for some decades, Justice Scalia. The Court, however, has been very careful in its decisions not to suggest that there were not limits to the power of Congress to enact retroactive legislation, and we are here to say that this is the case which crosses that border.

QUESTION: Well, if your client is not, maybe as sympathetic a client as some of the ones talked about in some of the amicus briefs filed in this case. I guess Eastern sold the coal mining operation to a wholly owned subsidiary in effect.

MR. MONTGOMERY: We transferred --

QUESTION: And then there was cross management. I mean, some of the same managers of Eastern were also managers of the subsidiary corporation, so Eastern doesn't come here in the same shoes as some of the amici.

MR. MONTGOMERY: We are certainly not in the same shoes of those amici who have been driven into bankruptcy, but in terms of the analytical application of the statute to Eastern, liability has been imposed on Eastern solely because it was an employer of miner's before 1946.

QUESTION: Let me ask you one more question and then I'll subside here. You have a right of reimbursement. Is that right? From Eastern for any liability incurred here?

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MR. MONTGOMERY: Section 9706(f), Justice O'Connor, preserves to Eastern any right that it may have had to seek recovery from its subsidiary or the party to whom it sold the subsidiary, Peabody Coal. The statute does not create any new right of action.

QUESTION: Did Eastern preserve a right of recovery against its subsidiary?

MR. MONTGOMERY: In the action, in the third party action that we filed below, we alleged that we do have a right. I will tell the Court that if to the extent that we have a right is a right in implied indemnity. There were no documents that passed between Eastern and its subsidiary or between Eastern and Peabody Holding Company which specifically spoke to the possibility of future statutory liability, and in the event that we are unsuccessful here, we will be left with that third party action in the District of Massachusetts in which we will attempt to advance our right to obtain recovery on an indemnification or contribution ground.

QUESTION: Does the record tell us the amount and the extent of the liability and the number of the employees? Is that -- is that known at this time?

MR. MONTGOMERY: Justice Kennedy, the record tells us that as of the time that we filed this lawsuit that 1,400 employees, former employees or their spouses

had been assigned to Eastern. Since the lawsuit was filed, we have had additional assignments, but those are not part of the record.

With respect to the amount of the liability, it is an annual premium that's established by the combined fund. The record is undisputed that at the time that the lawsuit was filed, and Mr. Harper's affidavit is in the record to this effect, that the actuarial calculation of the liability was in the vicinity of $100 million.

QUESTION: But that's disputed to the extent, at least, that you would have a deduction for that expense, so that would bring that down a considerable amount without any other factor.

MR. MONTGOMERY: Certainly, Justice Ginsburg, and we are not attaching any special significance to the amount of money.

QUESTION: May I ask you, your position is that Eastern, which severed its relationship with these employees many decades ago, should not be responsible. On your theory, if any private party in this picture, Eastern's successors, can anybody compatibly with substantive due process or the Takings Clause be responsible or is this the kind of obligation that can be thrust only on the public as a whole through the revenue system?

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MR. MONTGOMERY: The test that we have suggested here, and that we think is reflected in the Court's precedence such as Concrete Pipe and Turner Elkhorn is whether a party upon whom Congress seeks to impose a retroactive liability has some reasonable basis to anticipate.

QUESTION: Is there anybody -- let's take this case specifically. Are either of the successors -- suppose the tax -- scratch that.

Suppose this liability had been imposed on Peabody. Under your theory, would that be compatible with due process?

MR. MONTGOMERY: There is a class of companies that are included within the Coal Act that we believe properly bear that responsibility.

QUESTION: Would be Peabody who -- currently in the business.

MR. MONTGOMERY: We are not seeking at this point to shift our liability to any particular company.

QUESTION: But which -- these are -- these are miners who stopped working in the mines in the 1960s.

MR. MONTGOMERY: That's right.

QUESTION: Who in this picture would be responsible for them?

MR. MONTGOMERY: If we are successful here the

miners and their spouses assigned to Eastern will then be reassigned under the priority scheme set forth in the statute to other companies for whom those miners worked or in the absence of such a company will be assigned to what's called the orphan pool.

QUESTION: Would that be compatible with due process, just concentrating on the people who never worked for any existing company?

MR. MONTGOMERY: Certainly.

QUESTION: These employees, these very employees, would it be compatible with due process to distribute them among employers who never had any employment relationship with them?

MR. MONTGOMERY: Absolutely, Justice Ginsburg.

QUESTION: What was the notice? What was the expectation that these present companies had that this would occur? I'm not sure -- how you can be so categorical as to say that Justice Ginsburg's hypothetical presents no due process problem. MR. MONTGOMERY: I don't wish to be categorical as to every single company. There are certainly other companies that may have as applied complaints to present with respect to the application to them. But as to whether obligations can be opposed retroactively on those who participated in a multiemployer plan, at least beginning in 1978, which

undertook to provide defined benefits --

QUESTION: But for employees who were never beneficiaries of that plan. I mean, it seems to me that they are as remote from responsibility as you are.

MR. MONTGOMERY: Some of them may be, Your Honor, but those --

QUESTION: Which ones wouldn't be?

MR. MONTGOMERY: Well, certainly --

QUESTION: Which ones who never employed these people or their decedents would be any closer to responsibility.

QUESTION: Justice Scalia, it's critical to understand that those who signed collective bargaining agreements from period to period, when they executed those agreements, they undertook an obligation to the very employees who have been assigned to Eastern, the very individuals who were beneficiaries of each of those plans.

QUESTION: But they didn't undertake this obligation.

MR. MONTGOMERY: They undertook -- they undertook an obligation that was at least as extensive as this obligation.

QUESTION: No, but the fact that I agree to do something for a certain amount -- I don't quite understand your distinction.

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MR. MONTGOMERY: I agree with that. There are various classes that are included in the statute. And I don't want to confuse the Court. Certainly with respect to the class of so-called 1988 signatories, those who signed the last collective bargaining agreement at a time when deficits began to develop in this plan because they lowered the rate of contribution to fund the benefits, including the benefits to these employees, and when that plan started to develop those deficits, we do submit that it would have been perfectly within Congress' authority to say that all of those companies should have understood that when they made changes in the plans that took the plans into a deficit position, they should have understood once the initial legislative interest was expressed in this subject in 1989 by Senator Rockefeller shortly after the execution of that agreement, that there was some reasonable possibility that Congress may step in and rescue the plans.

QUESTION: Well, shouldn't, shouldn't you by a similar line of reasoning or shouldn't Eastern have understood that whatever its obligations may be, and I realize those are in question, but whatever its obligations may be, may be affected by the actions of the independent trustees so that it at any time in the future this kind of shortfall, let's say, from imprudent trustee

action. Imprudent action in determining the amount of assessments what makes them might very well result in an added liability to you or to Eastern many, many years hence.

So I don't see a distinction in kind between what you have just described as the, as the latter imprudent consequences, consequence of imprudence in the anticipation that you should have made or Eastern should have made in imprudent consequences?

MR. MONTGOMERY: I would suggest that there is a difference of more than a degree, Justice Souter, in anticipating congressional action within a year or two after a particular development in the history of the plan, another over a generation.

QUESTION: With respect, perhaps congressional action might be difficult to anticipate, but the need for some action even if it be a lawsuit, judicial action, possibly, to enforce a liability thought to have been incurred, that certainly is not difficult to anticipate.

QUESTION: Well, I suppose it's your position that the liability only extended for the life of the contract?

MR. MONTGOMERY: That's certainly the case, and our liability --

QUESTION: I mean, that much was clear. It

wasn't like one of these long-term continuously extended benefit plans. They had a limited term. Is that right?

MR. MONTGOMERY: That's exactly right and prior to 1965 as to the contracts that we signed, those were defined benefit -- excuse me, defined contribution contracts.

QUESTION: Limited to the contribution?

MR. MONTGOMERY: Limited to the contribution without any agreement as to defined benefits.

QUESTION: But the other side says that, that Congress found that you had created an expectation of lifetime benefits, even though you are only making defined contributions, you had created an expectation. What is your response to that?

MR. MONTGOMERY: Justice Scalia, the Congress only made one finding, and that finding is in the preamble to the statute, and that finding simply says that those, that the Congress seeks to attach liabilities to those most responsible for planned liabilities, period.

QUESTION: And the rest is from the commission report which the Congress did not itself adopt.

MR. MONTGOMERY: Did not itself adopt. That's exactly correct. The expectations, argument certainly is prominent in the judicial decisions that have upheld the Coal Act.

QUESTION: If in fact in respect to expectations you had never formed a separate subsidiary, imagine you had never formed it and you stayed in business until 1987, then would you think it was constitutional for Congress to impose upon you the obligation that you are talking about today?

MR. MONTGOMERY: Not at all because it would not have been reasonable on the expectations argument, Justice Breyer, for miners or their spouses to develop any expectation at all as a result of Eastern's conduct.

QUESTION: So in your view if you had been in business until 1987 and all the companies that were in business up until 1992 or '93 or before this very act was passed, it's constitutional in your view for Congress to sell these companies in the mining industry that you have to take care of the miners who were there previous to 1992?

MR. MONTGOMERY: Perhaps I misunderstood your question. If your question is, is it unconstitutional to the extent that Congress noted that we were in the business until 1987 --

QUESTION: No. I'm trying to pretend that you never formed a separate subsidiary and therefore you continued to do business, everything else is the same, but you just did business without your separate subsidiary.

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You were the subsidiary so you left in '87 instead of leaving in '65. I'm saying then in your opinion is it unconstitutional for Congress to impose this very obligation upon you?

MR. MONTGOMERY: Our position here would be far weaker if we had never --

QUESTION: Yes, but I want to know if you think it is or isn't unconstitutional?

MR. MONTGOMERY: I think it is not unless this Court is willing.

QUESTION: Then your position is that in fact they can't impose these obligations on anybody, however long they stayed in as long as they left prior to this very law being passed; is that right?

MR. MONTGOMERY: Justice Breyer I want -- meaning to be clear, I think this Court would have to extend Concrete Pipe in order for liability to attach to companies that were in business up until 1987 or 1988 --

QUESTION: But is --

MR. MONTGOMERY: -- this Court could do that, and I think it is only a modest extension, but I do not believe that it is constitutional absent that, that determination by this Court.

QUESTION: All right. So you think you have a stronger case because you left in '65?

MR. MONTGOMERY: Absolutely.

QUESTION: All right. Now is your case stronger in any respect at all but for you have some expectation that Congress won't pierce corporate veils?

MR. MONTGOMERY: Congress considered the extent to which it ought to pierce the corporate veil, and it did not.

QUESTION: Yes. All right.

MR. MONTGOMERY: Our expectation clearly was reasonable, we believe --

QUESTION: Well --

MR. MONTGOMERY: -- because we had a well capitalized subsidiary that made all of the contributions that were asked of it and remained in business.

QUESTION: That's very helpful because what I get from your answer is that's right. I think you are saying the only additional expectation you have is that Congress won't engage in veil piercing and then you went on to answer just what was the next thing in my mind, is is that a reasonable expectation given that Congress has passed quite a few statutes that pierce veils, CERCLA, states pierce veils, veil piercing is not an unknown thing and therefore how reasonable is that expectation. Now, you began to answer that and I'd like you to continue.

MR. MONTGOMERY: In this particular statute,

Congress also pierced the veil and set up a category of responsible parties called related persons. Eastern, under that veil piercing mechanism, is not a related person, and we think in that regard, Congress got it right as to Eastern.

QUESTION: Mr. Montgomery, I think you are saying that it doesn't matter what your expectation was, that even if your expectation was that there would be no veil piercing, that expectation has not been frustrated.

MR. MONTGOMERY: It has not been frustrated, that's absolutely correct, Justice Scalia.

QUESTION: That the basis for your liability here is not veil piercing.

MR. MONTGOMERY: It is not. Liability is exclusively based on the fact that we were directly an employer between 1946 and 1965.

QUESTION: Are you putting all your eggs in the due process basket, I take it, today?

MR. MONTGOMERY: Not at all, Your Honor. We have --

QUESTION: Well, I thought he had a takings claim?

MR. MONTGOMERY: I do indeed. We do have a takings claim, and I would like to address it. Our takings claim rests on two premises, that the takings

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clause is designed to avoid the injustice of forcing someone to bear public burdens that ought to be borne by the public themselves or by someone else.

QUESTION: What are the cases in which there is a taking but the government has not been enriched? Here the government doesn't take property and use it for a firehouse or a park or a school. As the government projects the argument to us, this is simply an adjustment of liability between two private parties. What, what case do you have where that occurred and we found there was a taking?

MR. MONTGOMERY: Hodel v. Irving with respect to the escheat of title rights on Indian lands. United States v. Security Industrial Bank and going back further, though it's not cited in our brief, a case and an opinion by Justice Brandeis, Thompson v. Consolidated Gas. In each of those cases, the government effected a transfer of property from one private person to another private person. That's exactly what the government has done here. But in doing so, the statute undermines values which are held dear in the course of this Court's takings jurisprudence, and that is value that says that we ought not to have individuals singled out to bear public burdens, to bear more than their fair share.

QUESTION: Well, the argument is made, I think

in respect to this singling out and it's made with respect to the rationality under the due process argument that you are not being improperly singled out because as I think you mentioned earlier, because of the finding in the committee report that you in effect had created the expectation that the benefits were going to be lifetime benefits. If we, if we find that report something that we ought to consider significant, and if we also bear in mind what is in one of the red briefs, and that was a statement by an industry representative, I think it may have been, maybe it was the first independent trustee, Mr. Owen, I think, exactly that effect, the fact about 1950, what argument do you have that we should in effect overlook that finding which does establish a connection? Can we make fact finding of our own? Does the record indicate that that conclusion is so far unsupported as to be irrational? I think that's your burden.

MR. MONTGOMERY: It is our burden, and I'm going to have to slide back over to the due process side to some extent to answer that question.

QUESTION: But doesn't it also affect your takings argument?

MR. MONTGOMERY: It does. The expectations finding, if it was made by the commission, first of all, is not one that was --

QUESTION: It was not a committee report that made the finding, was it?

MR. MONTGOMERY: No. It was the coal commission.

QUESTION: Appointed by the Department of Labor?

MR. MONTGOMERY: Appointed by the Department of Labor though as a technical matter its report was never adopted so far as where we are -- by the Secretary of Labor after it was submitted, but that report does not speak specifically to the class of companies of which we are a part, the so-called super reach back companies who were in the business directly only up until 1978. But even to the extent that there is a finding that was made with, that we created expectations, the expectations argument is if I might be charitable and a little loose with my language, is a fig leaf. It's a fig leaf for essentially unlimited liability that might be opposed retroactively on companies that have been in business.

QUESTION: If we accept the finding as significant in the decision in this case in judging the nexus, the rationality, however you want to put it under the different headings of your argument, then in fact it is not a fig leaf simply for a finding of unlimited liability. It is in fact a basis for identifying a class with respect to whom liability is at least arguably quite

reasonable, and so I think it has greater significance than you are willing to accord it.

MR. MONTGOMERY: I would suggest, Justice Souter, that the Court is entitled to and ought to look at the facts that underlies that so-called expectation finding. And those facts are simply that a party entered into a limited contract. A contract which at the time in an exchange with the union was sought, thought to be a social advance, and then by virtue of that participation to the limits of that agreement, it is now suggested that an expectation was created --

QUESTION: That's the government's argument in its footnote at page 30 of the brief. And it focuses on the 1974 agreement and it says the fact that at that time the companies by the contract agreed to pay these benefits for previous workers showed that there existed then an expectation. Could you address that?

MR. MONTGOMERY: The government says so but there certainly is no finding to that effect and that doesn't make it so, and I would suggest that the Court ought to consider how private contracting, i.e., the employment area or any other area, is going to work, if on the one hand we are entitled as a matter of freedom of contract to participate in bargains and to participate to a limited extent, but at the same time, the government may

come along a year later or a generation later or more and say by virtue of your mere participation, you have set up an expectation, and that expectation provides us with a basis, an unlimited basis.

QUESTION: Well, the government would have us say that this was a consensus in the industry, that this is the duty of the employer because of the fact that wages have been low and benefits have been high. That's what I understand their argument to be.

MR. MONTGOMERY: Well, there is no finding with respect to such a consensus. If there was a consensus, it was a consensus to participate under the terms of the Taft-Hartley Act in a multi-employer plan. One of the premises --

QUESTION: Why did the trustee, I'm sorry, why did the trustee make as I understand it essentially the same statement in what was it 1950? Way, way back.

MR. MONTGOMERY: That statement needs to be looked at in context. What the trustee was doing is complaining about the management by the trustees of the assets that had been tendered to them under the terms of the agreement.

QUESTION: Yes, but, but the terms of his complaint were that basically there had been a promise of lifetime benefits.

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MR. MONTGOMERY: A promise of lifetime benefits which he suggests in his statement that the industry couldn't possibly fulfill. That was his point.

QUESTION: Was the trustee authorized to speak for the companies on that point?

MR. MONTGOMERY: Absolutely not. In this Court's decision, in Amex Coal, I think you made it clear that under the Taft-Hartley Act independent trustees are not representatives of the company and are not entitled.

QUESTION: Well, I would agree with you there but the whole line of questioning I think starts with the assumption that we are going to consider the commission report and your burden, I think if we are going to consider it, your burden is to say that simply is not -- that is not a reasonable statement of findings that can be taken into consideration, and I suppose one item of evidence on that would be the fact that somebody, a trustee, who was theoretically neither for you nor for them was saying something very similar to that in 1950. And I think that affects your burden is my only point.

MR. MONTGOMERY: And my response is largely the same, and that is if the statement is looked at in context, I think you will see that it was not made on behalf of the companies and it does not support the weight that the government has attempted to put on it.

QUESTION: If the government can come back years later and, say, hold you responsible for having had a small participation in putting out some kind of tailings or toxic waste that people didn't even at the time know was toxic and so forth, why can't they come back years later and say we are going to hold you partly responsible for putting out their millions of miners who spent their working lives in the industry and feel in their old age that somebody has given them an expectation they will be taken care of medically. What's the difference between those two situations?

MR. MONTGOMERY: The difference is causation. The difference is that the premise of the environmental statute that you have mentioned is that the liable party caused that injury to the environment.

QUESTION: Had a very small part in it. Couldn't you have had a very small part in a very large --

MR. MONTGOMERY: Could have had a very small part of it but causation as a principled matter is fundamental to the operation of that --

QUESTION: So if you caused in part this expectation on behalf of the miners, then would you say it was the same thing?

MR. MONTGOMERY: No. Because I would say that

an expectation is not a sufficiently, sufficient basis to justify retroactive legislation. Because expect --

QUESTION: You are causing in part their being out there old without medical care.

MR. MONTGOMERY: Well, the Court in Turner Elkhorn distinguished between specific medical needs and generalized medical needs. We did not cause the needs of these miners or their spouses for medical care.

QUESTION: Would you explain to me once more why a company that's a recent entrant like let's take in this case Ohio Valley Coal, why it's compatible with due process, and I think you said it was, to stick such a company that's a current player, it's a signatory to the most recent contract with liability for people who worked for Eastern from the '40s to the '60s?

You seem to say this is not something that has to be loaded on the public at large, you can put it on the industry, but only certain players, so I'm trying to understand why it's fair to do it for some and not the others.

MR. MONTGOMERY: Congress has broad latitude to impose obligations on existing members of an industry to bear liability for workers who are currently in the business or formerly in the business. It's in the nature of the an excise. Congress I think has virtually

unlimited power to do so, Justice Ginsburg. If there are no further questions, I'd like to reserve the balance of my time.

QUESTION: Your time just expired, Mr. Montgomery.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF FEDERAL RESPONDENT

MR. KNEEDLER: Mr. Chief Justice and may it please the Court, the Coal Industry Retirement, Retiree Benefits Act of 1992 rests on two basic determinations made by Congress in that year. Excuse me. First, Congress determined that the cost of furnishing health benefits to retirees and their families which benefits were at risk in 1992 should be borne by participants in the industry rather than by the public at large. And the second critical determination was that within that industry, the costs should be borne to the extent possible by those companies that had actually employed the miners.

QUESTION: Did Congress say why it decided that these people shouldn't simply shift for themselves the way most other people do if they don't have a contractual right?

MR. KNEEDLER: Well, the determination by Congress at the time, there were two reasons. One is the

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Congress -- the Act rests on a determination or judgment that the miners had legitimate expectations that these funds would pay lifetime benefits and they had paid lifetime benefits to retirees since 1950.

QUESTION: But they were not something that could be enforced in a court?

MR. KNEEDLER: No, but the Due Process Clause is not limited -- Congress' ability under the Due Process Clause is not limited to enforcing existing contractual relationships and as this court's decisions in Concrete Pipe and Connolly have shown.

QUESTION: Mr. Kneedler, what was the first time at which miners were actually guaranteed lifetime benefits?

MR. KNEEDLER: There is no legal guarantee, but the expectation -- there was, there were guarantees during the period of the respective contracts but each of the, each of the contracts was a contract for term, for a term, and it's important to recognize --

QUESTION: Any, in which of those contracts were specific guarantees of lifetime health benefits given?

MR. KNEEDLER: 1974 was the first time that the agreement itself contained those -- contained those limitations but with respect -- excuse me, that guarantee but with respect to the retirees --

QUESTION: For the duration of the contract?

MR. KNEEDLER: That's all it could be. They said lifetime, lifetime benefits, but --

QUESTION: Just for the duration of the contract.

MR. KNEEDLER: The contract had a term.

QUESTION: And what about for the spouses and dependents? When was the first time that was provided?

MR. KNEEDLER: Spouses and dependents of retirees, those benefits were afforded from the beginning. For widows' benefits, there were widows benefits from 1950 to '54 for life and then that dropped down to a year, two years.

QUESTION: Was it ever part of the contract?

MR. KNEEDLER: In 1974 the widows' benefits were again made part of the contract.

QUESTION: That's what I'm trying to find out. When was there specific provision for it in a contract?

MR. KNEEDLER: In 1974 again was the first time but --

QUESTION: You said earlier that despite the date you just gave that lifetime benefits had been paid since the 1950s, would you expand on that?

MR. KNEEDLER: That's correct. And this is something that a number of the courts have pointed to.

Since 1950 lifetime benefits were paid, health benefits were paid to retirees and their families and under, under a series of collective bargaining --

QUESTION: Beyond the terms of the original contract?

MR. KNEEDLER: Well, the contracts, the contracts were renewed.

QUESTION: Basically got rolled over?

MR. KNEEDLER: They got renewed.

QUESTION: You are talking about lifetime benefits to people who were lucky enough to die before the company went out of business, right?

MR. KNEEDLER: Not at all. These were benefits under, under an industry-wide multiemployer plan and that's one of the things that Petitioner overlooks. The benefits under this plan, the miners all along continued to keep those benefits even if the company they worked for went out of business because this was a collective undertaking by all employers in the industry to furnish benefits for all employees when they retired and their spouses and their widows. This furnished, this furnished --

QUESTION: Widows? Widows not while this company was --

MR. KNEEDLER: No. There were widows' benefits the duration of the benefits. There were lifetime widows'

benefits from 1950 to 1954 and that dropped back then to one year in 1954 but there were provisions even then for widows' benefits of some provision.

QUESTION: For what year?

MR. KNEEDLER: For some duration.

QUESTION: So the one thing that the term of the contract limited was the term in which contributions are to be made.

MR. KNEEDLER: That's correct.

QUESTION: On expiration, no more contributions unless the contract is renewed but under the plan so long as the plan was funded to the extent it was funded they would continue to draw benefits --

MR. KNEEDLER: That is correct. And in fact the plans were funded and a collective bargaining agreement, especially a multiemployer collective bargaining agreement that is industrywide is more than just a contract. It is, it is the document that establishes the relationship long term. There is a collective bargaining relationship that extends from contract period to contract period. And employees come to expect and particularly in this industry came to expect as evidenced by the strikes that occurred every time there was some threat to the continuation of those benefits, they came to expect that those benefits would continue over time.

QUESTION: But were notices regularly sent saying that these aren't guaranteed and they can be terminated? It depends on whether we have the money? Weren't those regularly provided?

MR. KNEEDLER: They were, they were, they were in the forms but again Justice O'Connor, the question, this is not a contract enforcement question. The question is whether it is rational for Congress to look to the relationship that grew up under a series of collective bargaining agreements.

QUESTION: Let's talk about the collective bargaining agreements. Those agreements were negotiated with one of the most powerful unions in the country and I'm sure the negotiations could have taken into account whether the funding of this thing was to be a guaranteed funding of whatever amount is necessary to provide lifetime benefits. That was not in the contract. They just agreed to put in a certain amount every year.

MR. KNEEDLER: But, but --

QUESTION: I mean, this was a sophisticated labor union who adopted that agreement on behalf of their employees. It's hard for me to understand how that could have created any reasonable expectation that the companies would kick in whatever it takes to provide lifetime benefits. It's very clearly said we will kick in so much

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each year.

MR. KNEEDLER: Quite the contrary, Justice Scalia. I think the course of conduct in this industry from, from the seizure of the coal mines in 1946 to the current time was that the coal companies would take care of these miners.

QUESTION: Well, why did the collective bargaining agreements say that? If you say that the course of conduct made, where would you expect to find the employers' intentions more better placed or better examined than in the agreements they signed?

MR. KNEEDLER: Well, but the expectations involved are not just what comes from the employers' intentions but what expectations were reasonably accrued by virtue of the collective bargaining relationship that the employers entered into.

QUESTION: I thought --

QUESTION: You had to renew the contract every three years --

MR. KNEEDLER: And over the course of the relationship in fact they were renewed. Under the plan, for example, another very tangible symbol of the permanence of these benefits was the plan constructed hospitals in critical communities in Appalachia to furnish health benefits. These were financed by 20-year loans

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from the fund in the '50s to establish a permanent system of health --

QUESTION: Mr. Kneedler, with reference to investment-backed expectations, I usually thought it was the expectation of the person who is paying the liability. You are saying it was -- this was an expectation on the part of the miners.

MR. KNEEDLER: Two answers to that, if I may. The first is if we are looking, if we are looking at expectations, I think it's proper to look both at the expectations, look at the expectations of both parties to the contractual relationship and an important part of that expectation here is that this was -- this -- the employer didn't just hire somebody during the term of the contract. The employee during that term of the contract accrued service credits that enabled the person upon retirement to get the very benefits we are talking about here. For example, and this is highly instructive, Sam East, who is the miner whose assignment to Eastern triggered this lawsuit worked for Eastern from 1934 to 1960. 26 years of his working life were with Eastern. The only reason that he and then now his widow is eligible for benefits under this plan is because he worked for Eastern. He accrued the 20 years of eligibility of service credits during his time with Eastern. Eastern was present at the creation of

this collective bargaining relationship as a member of BCOA in 1950 and the problems that we see today are the product of the way in which that collective bargaining relationship was structured in 1950. With respect to --

QUESTION: May I interrupt you with one question just to be sure I get it in my mind. If the facts are that these were all defined contribution plans, were they not?

MR. KNEEDLER: Yes.

QUESTION: That the employee -- employers consistently said this is going to be the limit of our liability and our exposure and so forth, but the union representatives consistently told the employees we are going to take care of you, we are going to use enough muscle to be sure that they contribute enough money. The employer said well, we don't -- we don't accept that. Would that still be a sufficient expectation?

MR. KNEEDLER: I think it would be a sufficient basis on which Congress may act.

QUESTION: In other words, the unions taking the position they could do it would be enough the employees can rely on that despite the fact, assuming that to be the case, the employers regularly and consistently said this is as much as we are going to do?

MR. KNEEDLER: Well, they entered into contracts

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for a term but what Congress did --

QUESTION: And for defined contributions as opposed to benefits.

MR. KNEEDLER: What Congress could look at legitimately was the course of conduct over the history of this industry in which health benefits and retiree health benefits were a critical factor. And Congress could also look at the fact that every time there was an effort to take these back, most recently in 1989 in the Pittston strike, there were severe disruptions to the national economy.

QUESTION: So what you are saying is the reasonable expectations that others have of what claims they have on your property that's controlling?

MR. KNEEDLER: No. I'm not saying it's controlling but there is a combination of expectations and if I may --

QUESTION: You are saying, aren't you, that the acts, the unilateral, in answer to Justice Stevens' question, that the unilateral acts of one party to the agreement can create a reasonable expectation when the other party says no. How can that be a reasonable expect -- source of reasonable expectation when on Justice Stevens' hypothesis it is disputed from the beginning?

MR. KNEEDLER: Well, if I may, the other party

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did not say no. The other party -- the employers never said five years and then we are not funding a benefits plan.

QUESTION: Okay. Well, that's not this case. Did they say anything?

MR. KNEEDLER: What they did is, what's significant is that every time there was a contract renewal, the contract was renewed, the contributions paying into the -- as you pointed out, the plan is ongoing. The contributions were paid into the plan at every contract renewal. That course of conduct, and Congress can legitimately look at the course of conduct in this unique industry over a course of time to see what sort of expectations had legitimately grown up. But --

QUESTION: Mr. Kneedler, may I ask you if you can differentiate the following case from what's going on here. Congress passed the Equal Pay Act in 1963, but since World War II, when there was an executive order that says industry, you should pay minimum in the same for the same work, there had been an expectancy built up that people would be paid equally without regard to sex. Suppose Congress had said in '63 and not only prospectively must the pay be equal but we are going to reach back to the date of that executive order and every employer that was in violation of the equal pay principle

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in that period will have to cough up the difference.

MR. KNEEDLER: I think this is very different because this Act only addresses health benefits prospectively from the date of the Act. This Act does not reach back and require people like Petitioner to pay for health benefits in the preceding years. The $300 million deficit that was projected in these funds by 1993 was made up entirely by the companies that were parties to the 1988 collective bargaining agreement. This was another agreement that was due to expire in 1993. When Congress looked at this arrangement if there had been no new collective bargaining agreement, all of the retirees in this fund would have been out of luck.

QUESTION: Change Justice Ginsburg's hypothetical a little bit then -- so you don't have to pay off all people against whom you --, you were in violation of equal pay but only those people who are now impecunious as a result of your failure to have done that in the past so it has the same future application as this statute. Would that be okay?

MR. KNEEDLER: Um --

QUESTION: Those people who would otherwise be on welfare today whom you did not give equal pay 30 years ago.

MR. KNEEDLER: I think under the hypothetical

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there was no -- maybe I misunderstood.

QUESTION: I'm changing it. I'm changing it.

MR. KNEEDLER: Yes. But there was no legal requirement to pay it.

QUESTION: Yes. 30 years ago. But we are adopting the legal requirement today and if anyone is on welfare today because of your failure to pay, give equal pay 30 years ago, you have to take care of their welfare needs.

Mr. Kneedler: Again, it would depend on the rationality of it. But that seems to me to be vastly different from this situation. There was an existing collective bargaining relationship that provided accumulated service credits. The employers obtained the benefits of mobility and portability of miners under this during time they were there. They obtained the benefits of mechanization. They obtained the benefits of tradeoffs with, of wages against mechanization and pension benefits. There was an ongoing collective bargaining relationship under which there were lifetime benefits guaranteed, so during the course of the relationship that was present.

But if I could go back to the address, Justice Souter has mentioned trustee Owen's statements but another significant point in the record to note is the address by, by Mr. Moody who was the president of the Southern Coal

Operator's Association, a member of BCOA in 1953 and this is discussed at page 48 of the fund's brief. Mr. Moody was making an address in which he identified the problems in the fund that were present at the creation, the promise of benefits and yet pay-as-you-go funding which created an internal problem with the fund from the beginning. And he said at that time it may well be, it was foreseeable that Congress at some point might have to intervene to assure either regulation of the benefits or to assure the payment of the funds and that's at page 2,000 of the appendix in the Court of Appeals. The people in this industry, the employers, knew from experience that the government, that this was --

QUESTION: Well, I think, I think clearly it's an area where one might expect Congress to step in as it did with ERISA and provide some multiemployer plans that are specific and provide for funding. But what we are talking about is whether it's reasonable to think they are going to look back 30-some years to impose the liability. I mean, that's the shocker.

MR. KNEEDLER: Well, but, but two things about that. In Turner Elkhorn, an employer's liability for paying black lung benefits to employees could have applied to employment relationships that ended decades earlier.

QUESTION: You have a different situation

probably if the employer and the employment was itself the cause of the miner's disease, than when you were talking about general benefits, for instance, spouses and dependents and general health care needs of people unrelated to their service in the mining industry, isn't that a difference?

MR. KNEEDLER: No. But there is a causation element here as well. Again, what we are seeing today, what Congress saw in the early 1990s was the, the consequences of a, of a pattern of conduct and collective bargaining that began in the 1950s with a guarantee of benefits and insufficient funding and the industry made up for that each time, each time it was asked to contribute to that.

QUESTION: It wasn't a guarantee of benefits.

MR. KNEEDLER: In the terms that they were --

QUESTION: It was a guarantee of a certain amount of funding.

MR. KNEEDLER: That's true. Again, the question is not, this is not a contract enforcement action. The question is whether Congress can look to the collective bargaining relationship to define the category of people --

QUESTION: What findings do we have by Congress here that there was a guarantee of benefits? Do we have

any finding by Congress?

MR. KNEEDLER: Beginning in 1974 it was expressed in the contract. There is no indication that that was a departure and in fact --

QUESTION: I think Justice Scalia asked did Congress make that finding.

MR. KNEEDLER: The Act itself doesn't contain the findings but in a due process challenge, the question is whether the facts on which Congress apparently based its action could reasonably be believed to be true.

QUESTION: About a Takings challenge and even if there had been in a Takings case a congressional finding that this property belongs to the United States anyway and we are taking it for that reason. Would we be bound by that fund?

MR. KNEEDLER: Under this Court's Takings jurisprudence there is a vast difference between adjusting the benefits and burdens of economic conduct and --

QUESTION: That's a different issue. I'm not asking about that issue. I'm asking in our takings jurisprudence do we accept findings made by the Congress as to whether the taking is justified or not?

MR.KNEEDLER: There is some degree of review, but, but, but I think it seems to me hardly irrational for Congress to conclude that over a 50-year course of conduct

in an industry of lifetime benefits have in fact been paid that the retirees who worked their entire lives in the mines under such a system in which their fathers and brothers --

QUESTION: Congress may have concluded that and it would not be unreasonable for Congress to have concluded that if Congress concluded that. We don't know for sure that Congress concluded that.

MR. KNEEDLER: The debates leading up to the passage of this Act show careful attention by Congress as to who within the coal industry should bear the burden and Congress concluded that the burden should not be borne by current coal companies --

QUESTION: Why should it just be the coal company? Let's suppose, and I think this could be the case, I'm not sure, that the real problem here is the decline in the price in the market for coal, and what happened was the natural gas companies were taking all the business. Why shouldn't the natural gas companies pay this? Could, could the Congress say to the national gas companies, because they are, let's assume that they are the ones that are taking all of the profits, they are the ones that should pay the cost for keeping everybody warm until the natural gas industry could develop.

MR. KNEEDLER: In terms of a current assessment,

Congress could certainly do that. A portion of the cost of this is paid --

QUESTION: So you think, you think this case would come out just the same way if the natural gas companies had to pay the liability that we are talking about here?

MR. KNEEDLER: I was responding to the, to current natural gas companies. Congress can impose a tax on a current industry and in fact a major portion of the liability here is paid, was paid for by transfers from the 1950 pension fund and from the abandoned mine fund which were paid for by fees on current mining companies. They pay for the miners who can't be assigned to an employer.

But where an employee can be identified with an employer who actually got the fruits of that person's labor who gave him service credits during the employment relationship, who because of that employment relationship was part of a collective bargaining relationship, Congress can look to that relationship to define the category of people among whom the costs should be spread and it's carefully tailored here for pre-1978 --

QUESTION: I'm carefully tailoring. Is there any exception for companies like the Mary Helen Coal Corporation, one of the briefs spoke about the plight of that company.

MR. KNEEDLER: There is not, but it is not uncommon to have for generally applicable statute to take the company as it finds it with respect to its economic viability.

QUESTION: Thank you, Mr. Kneedler.

Mr. Buscemi.

ORAL ARGUMENT OF PETER BUSCEMI

ON BEHALF OF RESPONDENTS UMWA

MR. BUSCEMI: Thank you, Mr. Chief Justice. May it please the Court. I'm here on behalf of the trustees of the Combined Benefit Fund and the beneficiaries for whom they are fiduciaries. I think it's easy in the midst of the argument here to lose sight of the human dimension of this problem. That's the dimension that Congress focused on when it acted in 1992. Congress faced an imminent crisis. The collective bargaining agreement that was in force at the time Congress acted had less than four months to run and at the end of that collective bargaining agreement the employers who had signed that collective bargaining agreement like Eastern, like the other employers that have submitted briefs to the Court could have made the very same argument. They could have said that our obligation to contribute was for the term of this agreement.

Now, let me make sure that we are clear on what

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the historical record was. The historical record was that in 1946 President Truman seized the mines. The secretary of the interior and the union negotiated collective bargaining agreement. From that time forward, there were health care benefits provided for miners, spouses, dependents in the coal industry funded by contributions by the employers. That continued year after year after year for almost 50 years by the time Congress acted.

In 1974, for the first time, the collective bargaining agreement made a specific reference to beneficiaries retaining a health services card until death or for life. In 1978, there were further changes in the collective bargaining agreement and now, although the collective bargaining agreement prescribed specific contribution amounts per time or per hour, the employers were given the right to increase those contribution amounts as needed to guarantee the benefits that were specified in the contract.

So by the time Congress acted in 1992, we had been under a regime for the last 14 years in which there had been a specific set of guaranteed benefits. Now, Mr. Montgomery's client, Eastern, through its wholly-owned subsidiary, Eastern Associated, signed not one, not two, but three collective bargaining agreements that guaranteed these benefits --

QUESTION: But excuse me. The liability here was not imposed on the basis of the fact that this was the parent company of a company that had signed the later agreement. That's not the basis for the imposition of a liability at all.

MR. BUSCEMI: Your Honor, all I'm saying is --

QUESTION: That's an irrelevant fact as far as this statute is concerned.

MR. BUSCEMI: Well, I would not agree with that, Your Honor, with all respect. I would think that when the Court looks at the reasonableness of what Congress has done under this deferential standard of review that looking at the situation with respect to the particular Petitioner before the Court is what the Court has traditionally done and it is --

QUESTION: We look at those aspects of the situation that Congress took into account and made the basis of liability. The fact that this was the parent of a subsidiary that is liable for some other things was not the basis of liability.

MR. BUSCEMI: Well, with respect, Your Honor, I think that this Court has said repeatedly, this Court in reviewing the Constitutionality of legislation may take into account not only what the legislative record may reveal about what Congress actually thought or what some

members of Congress actually thought but also what they reasonably could have thought. In fact, the Court has said repeatedly that there is no obligation for Congress to build a legislative record.

QUESTION: What holding, what holding, what holding do you want us to make if the case comes before us where there is no subsidiary relationship?

MR. BUSCEMI: Well, Your Honor, we think --

QUESTION: The Mary Hill mine, I think, was mentioned. Maybe I have the name wrong.

MR. BUSCEMI: Yes, Mary Helen is a case that's pending right now in the Fourth Circuit and the statute has been sustained with respect to Mary Helen by the district court in that case and we think it should be sustained with respect to Mary Helen but that's not the case before this Court. Mary Helen is a company that was in business for some 45 years. They have a small number of retirees who are still in this plan and they are the ones who employed those retirees for long, for the longest and none of those retirees ever worked for any company that signed the '78 or later agreement.

One of the things that has been missed here, I think, is that Congress has set forth a very detailed scheme in which they have placed the lion's share of the burden on those companies that were the signatories to the

'88 agreement, the collective bargaining agreement that was in force at the time that the statute was passed.

QUESTION: What is the factual circumstance? That is, I take in your argument that basically in respect to this company, even though it isn't a veil-piercing statute, the only extent to which it's unfair to them involves the subsidiary. It's a question of fairness. Now, suppose you take that out of it? How many -- are there a lot of companies? Is there a lot of liability going on here as a practical matter involving companies just like them that where there is no subsidiary relation so that we would have to face this case, the same question later?

MR. BUSCEMI: Your Honor, the most recent statistics as of the beginning of the current fiscal year are as follows. There are currently 76,933 beneficiaries in the Combined Benefit Fund. Of those 76,933, 20 percent, 15,469 are unassigned.

QUESTION: How many?

MR. BUSCEMI: 15,469, 20.1 percent. 6,628 or 8.6 percent are assigned to companies that did not sign the 1978 or later NBCWA. And I might say that --

QUESTION: Congress could probably afford to take care of them out of general funds, wouldn't you think?

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MR. BUSCEMI: Well, Your Honor, the possibility of alternative funding is not, -- I mean, sure, the health care costs for 6,628 people could be paid for, I suspect, out of the Treasury. But there are competing demands, as Your Honor is aware, for that money. And Congress -- one of the things that --

QUESTION: 6,628 are assigned to companies like Eastern but that have no subsidiary that was in the business after '78?

MR. BUSCEMI: That's right. And that includes, I should say that includes the 1,332 because that includes the 1,332 that Eastern has because --

QUESTION: But Eastern had a subsidiary.

MR. BUSCEMI: Eastern had a subsidiary but when the funds list Eastern because of the point that Justice Scalia made, we list Eastern in the pre-'78 group.

QUESTION: What I'm trying to think of is the practical effect because if you were to win the case on the alternate ground involving the subsidiary whether in fact that would leave a lot of the miners, let's say, out in the cold.

MR. BUSCEMI: It would be about 5,000 beneficiaries out of the 76,000 that would still be left that have been assigned to pre-'78 signatories.

QUESTION: Who are not subsidiaries, or who

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don't have subsidiaries?

MR. BUSCEMI: Yes, Your Honor. One of the things that we sort of have overlooked here is what situation Congress considered. Congress didn't just think about this alternative. Congress thought about weaving it to collective bargaining. That they recognized wasn't going to work because the people weren't around. We have less than half of the beneficiaries who are assigned to people who were signatories to the current agreement. Congress thought about just imposing the liability on the '78 or later signatories.

QUESTION: Well, Congress actually passed a bill that didn't have this reach-back provision in it but it was vetoed, wasn't it?

MR. BUSCEMI: Yes.

QUESTION: So then they put in the reach-back thing that we are talking about now.

MR. BUSCEMI: The bill was a little different, Justice O'Connor, the bill had two features. With respect to those beneficiaries who could be assigned to former employers that had signed the '78 or later agreement, those former employers had to pay. With respect to the beneficiaries who could not be assigned either because they had no former employer in business or because it was all pre-1978, there was a fee imposed across the board on

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the industry as a whole whether or not there was any relationship to the collective bargain multiemployer system, and that bill was part of a larger bill, an omnibus tax bill, that was vetoed, and of course we don't know precisely why it was vetoed. We do know that there was nothing in the veto message that specified any objection to that particular bill. Congress made the decision to impose this liability on all NBCWA signatories and as I understand the argument here, Petitioner says that any of these decisions that Congress might have made would have been fine except for the one that they did make. They could have imposed it on the taxpayers, they could have imposed it on the coal industry. They could have imposed it only on the '78 or later signatories. They could have imposed it on the '88 signatories. All of that would have been fine. Just this particular choice is not fine, and with all respect, I think that ignores the nature of this multiemployer system. As the Second Circuit said in upholding the statute in the LTV case, this system contained this latent problem or what the Court of Appeals called the latent loophole from the beginning because as employers like Eastern accorded their beneficiaries service credits and built up that 20 years that you needed to get the health care, those, and beneficiaries were accumulating and they were staying

around but some of the employers were leaving and that was the problem that was inherent in the system. Thank you, Your Honor.

MR. CHIEF JUSTICE: Thank you, Mr. Buscemi. The case is submitted.

(Whereupon, at 11:18 a.m., the case in the above-entitled matter was submitted.)

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