

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RUHRGAS AG, Petitioner v. MARATHON OIL
COMPANY, ET AL.

CASE NO: 98-470 02

PLACE: Washington, D.C.

DATE: Monday, March 22, 1999

PAGES: 1-47

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RUHRGAS AG, :

4 Petitioner :

5 v. : No. 98-470

6 MARATHON OIL COMPANY, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Monday, March 22, 1999

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:00 a.m.

13 APPEARANCES:

14 CHARLES ALAN WRIGHT, ESQ., Austin, Texas; on behalf of
15 the Petitioner.

16 CLIFTON T. HUTCHINSON, ESQ., Dallas, Texas; on behalf of
17 the Respondents.

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

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-470, Ruhrgas v. Marathon Oil Company.

5 Mr. Wright.

6 ORAL ARGUMENT OF CHARLES ALAN WRIGHT

7 ON BEHALF OF THE PETITIONER

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

10 This case presents a single technical
11 jurisdictional procedural issue. It is a case clearly of
12 first impression here, it would not be here if you had
13 ruled on it before, but despite all those negatives, I
14 submit that the case raises important issues both about
15 the efficient functioning of the district courts and about
16 the proper relation between courts of the States and
17 courts of the United States.

18 Although I view it as a case of first
19 impression, I believe that a line of cases from this Court
20 has established a rule of law, and that from that rule of
21 law we can find the answer to this particular issue, and
22 the rule of law that I believe your cases support is that
23 a Federal court may make a wide variety of decisions prior
24 to determining whether or not it has subject matter
25 jurisdiction of the case, but that it may not decide any

1 issue that relates to the merits of the case.

2 We believe that that is the line that was
3 clearly drawn in Steel Co. and a line that has been drawn
4 in many of the other cases.

5 Your cases say that the -- that a court can pass
6 on the issue of class certification without deciding
7 whether or not it has subject matter jurisdiction, that
8 was Amchem, of course, that a court can hold that a lower
9 court properly exercised its discretion in declining to
10 use pendent jurisdiction without deciding whether pendent
11 jurisdiction existed under the circumstances of the case;
12 that a court can order Younger abstention, though it
13 hasn't decided whether it has subject matter jurisdiction,
14 that was Ellis v. Dyson; that a court can rule on a tag
15 bar to habeas corpus without deciding whether there was a
16 prisoner in custody, whether there is a final -- an
17 independent adequate judgment reason that would bar review
18 by any Federal court.

19 We believe that there is a line of cases that
20 provide the rule by which this case is to be measured.
21 Then, immediately I ask myself, should there be an
22 exception to that rule of law where, as here, the issue
23 that the Federal court decided, without deciding whether
24 it had subject matter jurisdiction, is one that would have
25 preclusive effect so that it would bar a State court from

1 making an independent judgment on that? I submit that
2 there should not be an exception to the usual rule on
3 those grounds.

4 QUESTION: Mr. Wright, the majority in the court
5 of appeals in this case reversed the district court, did
6 it not?

7 MR. WRIGHT: Yes, sir.

8 QUESTION: And the dissenters said that they
9 would uphold -- that they would affirm the district court.

10 MR. WRIGHT: Yes, Your Honor.

11 QUESTION: So it would have come out differently
12 in the district court if the dissenters' views had
13 prevailed.

14 MR. WRIGHT: That is correct, Justice -- Mr.
15 Chief Justice.

16 QUESTION: Mr. Wright, you're not arguing that
17 the Constitution requires one approach or another, are
18 you?

19 MR. WRIGHT: I -- Justice O'Connor, I'm not
20 arguing that at all. My submission is that district
21 courts ought to have discretion on these matters and
22 decide what is the most efficient and expeditious way to
23 dispose of the case so long only as they do not get into
24 the merits of the case without having first decided that
25 they have subject matter jurisdiction to determine the

1 merits.

2 QUESTION: When we write the opinion, should we
3 say that that discretion should be exercised in a way so
4 that personal jurisdiction is usually decided after
5 subject matter jurisdiction, all other things being equal?

6 MR. WRIGHT: It seems to me you could well write
7 the opinion that way.

8 QUESTION: Well, should we?

9 MR. WRIGHT: If I were writing it I would not
10 write it that way. I would write it simply as a general
11 grant of discretion to the district courts to decide which
12 issue they are going to resolve first. I would not impose
13 on them any rigid ordering, but as long as the ordering is
14 simply a presumptive priority for subject matter
15 jurisdiction I think that could be perfectly --

16 QUESTION: Well, is there not a value to
17 Federalism in deciding subject matter jurisdiction first
18 in an instance like this, so that in the event it does not
19 exist, the State can address its own long-arm statute?

20 MR. WRIGHT: I wonder if I could answer that by
21 putting to you a hypothetical.

22 QUESTION: So long as you answer the
23 hypothetical for me.

24 (Laughter.)

25 MR. WRIGHT: I'm surely going to answer the

1 hypothetical. In fact, I think it's self-answering. I
2 hope so.

3 Let us suppose that in this case our only
4 argument for Federal jurisdiction was fraudulent joinder
5 and therefore diversity, an argument that Norge should not
6 have been a party and then there would have been complete
7 diversity, and that the basis of the argument for
8 fraudulent joinder is that even if there was personal
9 jurisdiction with regard to the claims of Marathon there
10 was not personal jurisdiction with regard to the claims of
11 Norge. And let us suppose that the Federal court says no,
12 you were wrong, there is personal jurisdiction over
13 Norge's claim, therefore Norge is properly a party,
14 therefore there is no diversity, and remands the case to
15 the State court.

16 In my submission we could not then come in and
17 seek to relitigate the issue in State court of whether
18 there was personal jurisdiction of the claims of Norge
19 against us. That would have been an issue determined by a
20 Federal court and, under Baldwin v. Iowa Traveling Men, we
21 would be barred from ever raising that again. That would
22 mean that the State court would never have had an
23 opportunity to pass on that issue of personal
24 jurisdiction.

25 QUESTION: Well, my question is directed to

1 this. It seems that you give no weight at all to subject
2 matter jurisdiction as having some sort of a priority over
3 personal jurisdiction, assuming both are of equivalent
4 difficulty. And isn't there a Federal interest in
5 allowing the State in an instance somewhat like this to
6 have the first opportunity to address its own long-arm
7 statute -- assuming there's subject matter jurisdiction,
8 personal jurisdiction -- in the district court or
9 questions of equal difficulty?

10 MR. WRIGHT: Of course, there's always a
11 Federalism.

12 QUESTION: Because you indicate there is some
13 discretion, and I want to know what are the determinants
14 in guiding that discretion?

15 MR. WRIGHT: Well, I think that an important
16 determinant in guiding the discretion would be the extent
17 to which this would require the Federal court to pass on
18 difficult issues of State law, the extent to which the
19 questions of personal jurisdiction are intertwined with
20 the question of subject matter jurisdiction, as, indeed,
21 we think they are here, that all those would be relevant
22 considerations in deciding which issue you would address
23 first.

24 QUESTION: You go further, I take it, than the
25 dissenters in the court of appeals. As I understand their

1 position, it was the presumptively you decide the subject
2 matter jurisdiction first, but it's not an iron-clad rule.
3 The majority said it's an iron-clad rule. You would say
4 basically just leave the whole thing up to the district
5 court.

6 MR. WRIGHT: As the lawyer for Ruhrgas, I would
7 say we are very happy with the rule announced by Judge
8 Higginbotham and the dissenters in the Fifth Circuit. If
9 I were sitting in my office writing an article, I would
10 say that there ought to be a general discretion.

11 QUESTION: And yet there are many authors who
12 have distinguished subject matter jurisdiction as being
13 the most basic from personal jurisdiction, which those
14 authors have ranked along with, say, venue, as a merely
15 dilatory defense, suggesting that there is a hierarchy
16 here, and that subject matter jurisdiction is the more
17 basic.

18 MR. WRIGHT: Justice Ginsburg, I would say that
19 I would not agree with them, that I would agree on the
20 great importance of subject matter jurisdiction.

21 My friends do me the honor of quoting from one
22 of my books in which I in turn quoted ex-Justice Curtis,
23 the questions of jurisdiction are questions of power as
24 between the Central Government and the States.

25 I believe that deeply, but I do not think that

1 personal jurisdiction is some sort of second-class issue.
2 It is an issue that stems from the Constitution, from the
3 Due Process Clause, and I do not think that you can say
4 that Article III takes priority over the Fifth Amendment.

5 QUESTION: I was quoting your text when I used
6 the word dilatory.

7 MR. WRIGHT: I imagined that I recognized the
8 words.

9 (Laughter.)

10 QUESTION: I take it the point of your
11 hypothetical was that sometimes in deciding the subject
12 matter case, whether removal was proper, a district judge
13 would decide a host of State law questions, personal
14 jurisdiction questions, all kinds of other questions.

15 MR. WRIGHT: Yes, Your Honor.

16 QUESTION: All right. So who's to say? In
17 other words, if your interest is in protecting the State,
18 who's to say? It depends on the case. Is that the --

19 MR. WRIGHT: That is exactly my submission.

20 I could give another example. Suppose a suit in
21 State court asking \$50,000 in damages for breach of
22 contract and \$1 million in punitive damages.

23 The case goes to the Federal court, diversity
24 being present. The Federal judge says, in this State, the
25 State law does not allow punitive damages in a breach of

1 contract action, therefore the amount in controversy is
2 not satisfied, therefore I am remanding.

3 I think that the plaintiff in that case would
4 not be allowed to claim in State court that it could get
5 punitive damages. Obviously, that would not be a binding
6 declaration as to what the law of that State was to be for
7 the future, but as between the parties to that litigation,
8 that it would have issue-preclusive effect.

9 QUESTION: Mr. Wright, as to the preclusive
10 effect, imagine that this case had been dismissed for want
11 of personal jurisdiction. Plaintiffs begin all over again
12 in State court, and they say, State court, the first thing
13 we want you to do is to give us a declaration that there
14 is personal jurisdiction, and the reason that you're not
15 bound by that Federal court is, they lacked subject matter
16 jurisdiction, and that is open to collateral attack, so
17 that your premise about the preclusive effect is wrong.
18 The Federal court would be accomplishing nothing, because
19 it wouldn't bind the State court.

20 MR. WRIGHT: Justice Ginsburg, I don't believe
21 that the party would be allowed in State court to
22 challenge the preclusive effect of the judgment by saying
23 that the Federal court lacked jurisdiction to issue that
24 judgment. I think of Chico County as a case that you
25 can't challenge in a second proceeding whether there was

1 jurisdiction in the first proceeding.

2 QUESTION: But how about Trinese v. Sunshine
3 Mining. Didn't that say you could challenge basis of
4 jurisdiction?

5 MR. WRIGHT: It did, yes.

6 QUESTION: That you could relitigate the issue
7 of jurisdiction if the first court had not had
8 jurisdiction.

9 MR. WRIGHT: I'm sorry, Justice Rehnquist, I'm
10 not prepared on that case.

11 QUESTION: Well, I'm not sure that's right,
12 either.

13 QUESTION: The --

14 QUESTION: But all of those cases, in any event,
15 involved a court that reached the merits, which assumes
16 that it has jurisdiction.

17 Here you have a court which never even assumed
18 that it has jurisdiction. Even if your ordinary rule is
19 that it can't be attacked collaterally where it has
20 proceeded with an affirmance of its jurisdiction, it's
21 proceeded to the merits.

22 Here you have a case that doesn't fall into that
23 pattern. You have a case where even the court issuing it
24 says, you know, I don't really know if we have
25 jurisdiction. Why should any subject -- why should any

1 later court -- it decided the case on a different
2 jurisdictional issue, and therefore never spoke to its own
3 subject matter jurisdiction.

4 MR. WRIGHT: Well, I go back, Justice Scalia, to
5 I think it's 1803, McCormick v. Sullivan, that after a
6 judgment in a Federal court you cannot resist enforcement
7 on the grounds that in fact there was no diversity.
8 Diversity was -- existence of diversity was not challenged
9 in the first proceeding, but your Court held that a final
10 judgment is not to be attacked for lack of subject matter
11 jurisdiction.

12 QUESTION: But here, it is attacked in the first
13 proceeding, and the court says, well, I can pick and
14 choose. I'm not going to deal with subject matter
15 jurisdiction, just personal jurisdiction. The State then
16 says, fine, it's never been litigated, so we will litigate
17 it and we will decide for the first time that there was no
18 subject matter jurisdiction and therefore nothing else
19 that was done in that action counts.

20 MR. WRIGHT: It was --

21 QUESTION: So you would have a delightful, quite
22 parallel situation. The Federal court will have decided
23 the personal jurisdiction question for the State courts,
24 and the State courts will have decided the subject matter
25 jurisdiction question for the Federal courts. I like it.

1 (Laughter.)

2 MR. WRIGHT: Well, I don't think I do.

3 (Laughter.)

4 MR. WRIGHT: I like judgments of Federal courts
5 to stand and not be challenged on lack, ground of lack of
6 subject matter jurisdiction.

7 QUESTION: But why isn't that exactly the
8 respondents' point? They say this does show the intrusive
9 effect on the State court system, which is why you have to
10 reach subject matter jurisdiction, they say always first.
11 Other people might say most of the time first. You seem
12 to think that it doesn't make much difference.

13 MR. WRIGHT: Well, I'd, as I suggested a moment
14 ago, be perfectly content with saying that mostly you
15 consider it first, but look at a case such as
16 Caterpillar --

17 QUESTION: But why? Why is that?

18 MR. WRIGHT: Why is --

19 QUESTION: Why should we usually consider
20 subject matter jurisdiction first?

21 MR. WRIGHT: It is a threshold issue, but
22 threshold issues not always have to be considered first.
23 That is what specifically was said in *Lambrix v.*
24 *Singletary*.

25 QUESTION: What is the source -- are you

1 finished answering him?

2 MR. WRIGHT: Yes.

3 QUESTION: What is the source, which I've often
4 wondered, of rules of law that say you always have to
5 decide some question of a certain kind first, for example,
6 jurisdiction before merits?

7 I mean, I've never seen anything in the
8 Constitution that says that. I don't think Madison wrote
9 about it. I haven't seen a statute that says it. Is it
10 from the brooding omnipresence in the sky?

11 (Laughter.)

12 QUESTION: I mean, where does it come from?

13 MR. WRIGHT: I think it comes, Justice Breyer,
14 from Article III, that the judicial power of the United
15 States extends only to certain kinds of cases, and that
16 therefore you have to find out whether this is a case that
17 is within your jurisdiction, but you have to do that
18 before you decide the merits.

19 You don't have to do that before you decide
20 whether to refuse class certification, and you don't have
21 to have subject matter jurisdiction from the beginning.

22 This is Caterpillar v. Lewis, in which not only
23 was there no subject matter jurisdiction at the time the
24 case was commenced, but when the nondiverse defendant Lane
25 was dismissed, it would have been too late to remove the

1 case to Federal court if the --

2 QUESTION: Did we get that one right, in your
3 view?

4 MR. WRIGHT: You did, exactly right, all nine of
5 you.

6 (Laughter.)

7 QUESTION: Well, I wasn't sure.

8 (Laughter.)

9 QUESTION: There was some compelling practical
10 consideration in that case, though, was there not? There
11 had been an entire trial, and after the trial there was
12 perfect diversity. It would have been I think strange to
13 send that thing back to start from square 1.

14 MR. WRIGHT: I agree completely. I'd be a tenth
15 vote for that proposition, Justice Ginsburg. That was a
16 very compelling case, but I think that the considerations
17 of efficiency and economy on which you expressly relied in
18 your opinion in that case are always considerations that
19 courts have to take into account. They will be most
20 compelling, as in your case, where there had been a
21 finished trial, but that doesn't mean that they do not
22 exist at an earlier stage in the litigation.

23 My friends undertake to dismiss Caterpillar in a
24 footnote on page 13 of their brief by saying it really
25 didn't amount to anything; it's not at all like this case,

1 where there is a continuing lack of jurisdiction.

2 I submit that's not an accurate description of
3 this case. There is no lack of jurisdiction in this case.
4 The issue simply has not been decided.

5 The en banc court expressly vacated so much of
6 the panel decision as it passed on subject matter
7 jurisdiction and remanded the case for the district court
8 to decide whether it had subject matter jurisdiction.
9 That decision has not yet been made, so it can't be looked
10 at as a case with continuing lack of subject matter
11 jurisdiction but as a case in which the issue of subject
12 matter jurisdiction has not yet been determined.

13 QUESTION: But in your view it need never be
14 determined, because if the district court is right that
15 she could dismiss for personal jurisdiction and that binds
16 the State court, then subject matter jurisdiction is never
17 determined, and properly so.

18 MR. WRIGHT: I agree entirely with that, and I
19 think the same thing is true in Amchem, that subject
20 matter jurisdiction never has to be decided because you
21 hold that the class should not have been certified, and so
22 you don't pass on the both constitutional and statutory
23 objections to subject matter jurisdiction that were
24 present in that case.

25 If there are no further questions, I will

1 reserve my time.

2 QUESTION: Thank you, Mr. Wright.

3 Mr. Hutchinson, we'll hear from you.

4 ORAL ARGUMENT OF CLIFTON T. HUTCHINSON

5 ON BEHALF OF THE RESPONDENTS

6 MR. HUTCHINSON: Thank you, Mr. Chief Justice.

7 May it please the Court:

8 What petitioner proposes here is to ignore a
9 first principle. The carefully defined and limited power
10 of Federal courts. Efficiency jurisdiction is wrong for
11 three reasons. First, it violates fundamental
12 constitutional principles allocating judicial power
13 between the States and the Federal Government; second, it
14 negates congressional policy favoring remand; and third,
15 and ironically, it's inefficient.

16 Federal courts can't act without power.

17 That's --

18 QUESTION: Well, he -- Mr. Wright gave several
19 examples of situations where courts, apparently properly
20 and with our approval in some instances, have decided
21 certain things other than subject matter jurisdiction
22 before reaching the merits, and that have disposed of the
23 case insofar as the Federal court is concerned. For
24 instance, class certification --

25 MR. HUTCHINSON: In Amchem.

1 QUESTION: -- as we've just heard. Now, what
2 about those cases? And he recited several others, pendent
3 jurisdiction, Younger abstention and so on.

4 MR. HUTCHINSON: The abstention cases, Justice
5 O'Connor, involve situations where the Federalism issues
6 aren't raised. There, the Court is declining jurisdiction
7 when it has jurisdiction. In the Lambrix case --

8 QUESTION: Well, without deciding, in some
9 instances, like class certification, without even deciding
10 whether there's subject matter jurisdiction.

11 MR. HUTCHINSON: Class certification is a
12 different issue, Justice O'Connor. In the Amchem case,
13 what the court said is that the certification issue was a
14 logical antecedent to a determination of subject matter
15 jurisdiction.

16 Before justiciability could be analyzed in the
17 Amchem case, which was the issue that was being raised by
18 one segment of the class, the court had to determine
19 exactly what is this class so that it can then address
20 subject matter jurisdiction. And in fact I think Amchem
21 is a very good illustration of efficiency jurisdiction.

22 As Judge Becker pointed out, that was a
23 wonderfully efficient case. Judge Becker called it a
24 humongous class of asbestos cases, but, he said, the court
25 can't go beyond its power, and that's what it did when it

1 certified these cases. He said --

2 QUESTION: What if the subject matter
3 jurisdiction issue turned on some fact-finding that would
4 take place at trial? What's the court going to do then,
5 and yet here's a personal jurisdiction issue just sitting
6 there, right there, that the court could decide. What's
7 it going to do?

8 MR. HUTCHINSON: The court doesn't have the
9 power, Justice O'Connor, to decide that issue until it
10 determines that it has the capacity to decide the case,
11 and that comes from the fundamental difference between
12 subject matter jurisdiction --

13 QUESTION: So you say it would have to go to
14 trial and determine these factual questions despite the
15 lack of personal jurisdiction.

16 MR. HUTCHINSON: Justice O'Connor, you can -- I
17 think there are hypotheticals that you can come up with
18 that make it difficult for a court to determine subject
19 matter jurisdiction. I think that is rare. I think
20 Professor Wright himself has indicated those are rare
21 situations.

22 QUESTION: Well, what if we have the rare case?

23 MR. HUTCHINSON: In the rare case the court has
24 to undertake whatever procedures it has to to resolve
25 whatever antecedent issues it has to in order to get to

1 that nub issue of subject matter jurisdiction, and I --

2 QUESTION: In other words, you want to support a
3 per se rule no matter what. You have no exceptions, in
4 your view.

5 MR. HUTCHINSON: The exceptions, Justice
6 O'Connor, are those which have been established in the
7 cases, for example, the inherent power cases, which deal
8 with the court's authority to manage its docket and to
9 manage proceedings before it. But when a court goes
10 beyond that, beyond that inherent power to maintain the
11 status quo, then it is exceeding its power under Article
12 III, and if --

13 QUESTION: Do you subscribe to that even when it
14 is not a removal case, even when the alternative is not
15 the same case proceeding in State court, or is it just in
16 these removal situations?

17 MR. HUTCHINSON: Justice Scalia, I think it
18 applies -- from a constitutional standpoint it would apply
19 across the board.

20 QUESTION: So in all cases, even if it's not a
21 removal case, where there is a personal jurisdiction issue
22 and a subject matter jurisdictional issue, you would say
23 that the Federal court has to decide the subject matter
24 jurisdiction first, or else it has no authority to
25 pronounce on personal jurisdiction?

1 MR. HUTCHINSON: Yes, Justice Scalia, I would.

2 Now, in the removal cases there are some factors
3 that are particularly aggravating. There is more
4 potential for abuse.

5 There is the situation, kind of an anomalous
6 situation that a defendant has removed to Federal court
7 claiming subject matter jurisdiction and then, as in this
8 case, tells the district judge, I have removed it to you
9 asserting subject matter jurisdiction, but you don't even
10 have to address it. You can circumvent it.

11 QUESTION: Mr. Hutchinson --

12 QUESTION: May I ask you this question about,
13 there are two possible bases for challenging subject
14 matter jurisdiction. One would be that the plaintiff does
15 not have standing, and the other would be that the
16 question is so frivolous that it doesn't merit review at
17 all. Which must be decided first, as between those two?

18 MR. HUTCHINSON: Insubstantiality and statutory
19 standing, or constitutional standing.

20 QUESTION: Constitutional standing and
21 insubstantiality.

22 MR. HUTCHINSON: Justice Stevens, I think that
23 was part of the questions that were discussed at some
24 length in the Steel Co. case, which is whether you can --

25 QUESTION: No -- well, okay.

1 MR. HUTCHINSON: The issue of what type --

2 QUESTION: There the court would have a choice,
3 you'd say.

4 MR. HUTCHINSON: Constitutional versus statutory
5 standing. And I would submit to the Court in one sense
6 that's two sides of the same subject matter jurisdictional
7 coin, and that's very different from the situation we have
8 here, subject matter jurisdiction and the power of the
9 court and the --

10 QUESTION: No, the --

11 MR. HUTCHINSON: -- and the defense of the
12 party.

13 QUESTION: But Justice Stevens is correct that
14 we do use what you might call an efficiency model whenever
15 we allow a dismissal on jurisdictional grounds because the
16 Federal claim is frivolous.

17 I mean, you're -- without looking into whether
18 there is subject matter jurisdiction for -- you know, for
19 other reasons, we just say the Federal claim is frivolous,
20 and as Steel Co. makes clear, that is regarded as a
21 jurisdictional dismissal. What is there to be said for
22 that except efficiency?

23 MR. HUTCHINSON: What is to be said to that,
24 Justice Scalia, to distinguish it, is that the court is
25 looking at subject matter jurisdiction. It may be

1 applying an efficiency factor.

2 QUESTION: Yes, but it's not looking to Article
3 III jurisdiction, is it? It's looking to the statute,
4 isn't it?

5 MR. HUTCHINSON: It may be. It may be.

6 QUESTION: Well, and if it does that, and if
7 that is proper, then in effect we've already decided the
8 issue as to whether the Article III point always and under
9 all circumstances must take precedence.

10 MR. HUTCHINSON: I don't quite follow that,
11 Justice Souter. The -- it seems to me the -- when you're
12 saying it's insubstantial you're saying it's not a case or
13 controversy under Article III, otherwise you --

14 QUESTION: Well, we are saying in the first
15 instance that it's a frivolous claim in relation to the
16 statute under which it is brought. That may be a basis
17 for that kind of an efficiency dismissal.

18 QUESTION: You're not saying -- excuse me.
19 You're not saying it's not a case or controversy. You're
20 saying the Federal basis for the controversy is so
21 frivolous there was merit to it.

22 The example, of course, is the census case we just
23 decided. There's clearly a controversy there, but avoiding
24 the standing issue the Court said, well, there's no merit
25 to the Federal claim, so it dismissed for want of

1 jurisdiction without reaching a jurisdictional standing
2 question.

3 MR. HUTCHINSON: But what the Court did there
4 was address its capacity to act, its power to act over the
5 case, and that's very different from the individual
6 right --

7 QUESTION: But it clearly had power to act over
8 the case. It could have decided that case ahead of the
9 other one. It surely had power before it decided the
10 first case to decide the second case. You wouldn't deny
11 that.

12 MR. HUTCHINSON: The Court has to have power
13 before it can act. I would not.

14 QUESTION: Well, how about Rule 12(b), the way
15 it lists the various defenses. And number 1, of course,
16 is lack of jurisdiction over the subject matter; number 2,
17 lack of jurisdiction over the person, and it goes on, and
18 that has not been treated necessarily as a hierarchical
19 thing. It seems to me that gives the courts considerable
20 discretion as to which of those defenses to take up first.

21 MR. HUTCHINSON: But it has been treated
22 hierarchically.

23 QUESTION: Has it?

24 MR. HUTCHINSON: In the rule itself.

25 QUESTION: Well --

1 MR. HUTCHINSON: Some of the defenses are
2 waivable, some are not. Some must be decided first.

3 QUESTION: Is there authority in case law to
4 that effect?

5 MR. HUTCHINSON: Justice Scalia, I was actually
6 referring to Professor Wright's treatise, that is correct.

7 (Laughter.)

8 QUESTION: Is that res judicata here, too?

9 (Laughter.)

10 MR. HUTCHINSON: It is not. It is not, Justice
11 Scalia, but I thought the -- some of the language --

12 QUESTION: Mr. Hutchinson, subject matter
13 jurisdiction is preserved and it can be raised later and
14 later, so it's the most holy one in that respect. But
15 there is no -- in Rule 12(b) it says, the only economy
16 thing in the rule is, if you've got one, try to bring them
17 all at the same time, except if you leave out subject
18 matter jurisdiction and one or two others, that you could
19 bring those up later, but that's all that Rule 12(b) says.

20 It says, here are these pre-answer defenses.
21 You can bring these up by motion pre-answer, and you
22 should if you bring one, bring all the others that you
23 have at the same time, except there are certain ones that
24 you don't -- that are saved out even if you don't bring
25 them.

1 That's all that Rule 12 says. It doesn't say
2 that you must bring subject matter jurisdiction, and if
3 you bring -- you can't bring personal jurisdiction. It
4 doesn't have any of that kind of ranking.

5 MR. HUTCHINSON: Well, what I was referring to,
6 Justice Ginsburg, was Rule 12(h), which indicates that a
7 defense of lack of jurisdiction over the person, improper
8 venue, insufficiency of process, all those things can be
9 waived, but -- but jurisdiction, subject matter
10 jurisdiction --

11 QUESTION: Yes, because there's always
12 jurisdiction over the person by consent, so there's that
13 difference, but how does it relate to the issue that's
14 before us, and you have been talking largely in the
15 abstract.

16 One response that I give to your floodgates, oh,
17 this is going to be deceptive, you're predicating rather
18 dumb district judges. I mean, if subject matter
19 jurisdiction is phony, the district judge is going to say,
20 get rid of it. Send it back.

21 I mean, diversity, is there diversity, is there
22 a Federal question on the face of the complaint? Every --
23 I thought everybody agreed that in most cases the lack of
24 subject matter jurisdiction is clear, so you don't get
25 this floodgate.

1 On the other hand, there is what Justice
2 O'Connor referred to as a rare case, which I looked at
3 this case and said, well, maybe this is it, in that this
4 party, Norge, that's alleged to be fraudulently joined as
5 a plaintiff, that's all bound up with the merits of this
6 case, so you may not be able to sort out whether there was
7 a sham party there inserted simply to block diversity
8 until you get to the merits and to see whether this Norge
9 has any real substance.

10 MR. HUTCHINSON: That suggests, though, Justice
11 Ginsburg, that -- that a court has -- may re -- pre-try a
12 case in determining remand, and that would be against
13 congressional policy, that if all doubts are to be
14 resolved --

15 QUESTION: Well, let's not talk about policy,
16 about specifics. The district judge said, gee, you can't
17 create an absence of diversity in a phony way any more
18 than you can create with -- so I have to see whether there
19 is really diversity, and there is really diversity if
20 Norge doesn't belong in this litigation, but I can't tell
21 that in this complicated picture till we get some kind of
22 evidentiary hearing.

23 MR. HUTCHINSON: But in this case the only
24 evidence in the case was that Norge owned the license, and
25 that that license was damaged by the acts of Ruhrgas.

1 That was the only evidence before the court. It was,
2 indeed, a simple question. The -- and that's the irony of
3 this case, is that the subject matter jurisdiction
4 questions were easy.

5 QUESTION: Well, why was it so easy when the
6 Fifth Circuit itself, the majority said, gee, we're a
7 little uncertain about that panel that held there was no
8 subject matter jurisdiction, so we think it better go back
9 to the district court to decide?

10 If it was all that easy, then the majority of
11 the court of appeals surely would have said, yeah, the
12 panel got it right, there's no subject matter
13 jurisdiction. But they took the extraordinary step of
14 saying, we're not going to go back to that panel decision.
15 We want the district judge to explore all these questions,
16 so if you were right about it was easy, then why didn't
17 the panel decision stand?

18 MR. HUTCHINSON: I can't speak to the
19 dissenters, or why they didn't allow the panel --

20 QUESTION: I'm talking about the court, the
21 majority, not the dissenters. The court could have said,
22 subject matter jurisdiction has to be handled first, and
23 the panel had it right, there was no subject matter
24 jurisdiction. Isn't that what the three-judge panel
25 decided, that there was no --

1 MR. HUTCHINSON: Yes, Justice Ginsburg, the
2 majority could have done that, but they decided to return
3 it to the district court, and I don't know why.

4 QUESTION: May I ask, just to understand the
5 purity of your position, if the attack on personal
6 jurisdiction had been insufficient service of process that
7 challenged the way in which the process -- would you still
8 say that could not be decided before the subject matter
9 jurisdiction issue?

10 In other words, take this example. Supposing
11 you have attack on the line item veto case, and you want
12 to challenge the standing of the plaintiff, and the motion
13 to dismiss has two grounds, one he doesn't have standing,
14 all sorts of -- secondly, they didn't leave the summons at
15 the right person at the -- wherever it should have been
16 left.

17 Must the judge decide the standing issue before
18 deciding whether service was proper, in your view?

19 MR. HUTCHINSON: In my view, yes, Justice
20 Stevens, that the court first must satisfy itself it has
21 Article III power over the case before it can address
22 subject matter jurisdiction.

23 QUESTION: Why, just -- I've always wondered
24 this, and I'm not saying there's no answer to it, but if
25 all these cases, indeed, where it's Article III power

1 versus the merits, they all are cases in which it's
2 arguable both ways whether there is or there isn't the
3 Article III power. We're only talking about cases in
4 which a district judge could be reasonably uncertain. So
5 if this is so holy that you have to decide the question of
6 power first, why don't you have to have an immediate
7 appeal?

8 I mean, suppose the district judge were to get
9 it wrong? Suppose, horror of horrors, he were to think
10 there is Article III power to hear this case, and he's
11 wrong, there isn't; why is he permitted to go ahead with
12 the merits before all that's finally resolved on appeal,
13 perhaps by certiorari?

14 MR. HUTCHINSON: Courts can get it wrong,
15 Justice Breyer, but the fact is they have to get it; they
16 have to determine --

17 QUESTION: Why?

18 MR. HUTCHINSON: They have to make that
19 determination --

20 QUESTION: Why? In other words, why is it that
21 it's absolutely incumbent upon the district judge to
22 decide every difficult, no matter how difficult question
23 of Article III power first, including yours here, before
24 going on to another easy question, that it isn't incumbent
25 upon the system to decide that question definitely first?

1 MR. HUTCHINSON: Because of Article III and the
2 limited power of the Federal courts. If you allow the
3 court to exercise power before it determines that it has
4 power, then it has exceeded --

5 QUESTION: Exactly. So why don't we have to
6 have appeals and certiorari, and really get it solved
7 before we can go ahead to the merits? It's a
8 constitutional matter, after all. Why don't you have to
9 have a full range of appeals first?

10 MR. HUTCHINSON: Because Congress has spoken to
11 that in a removal case, and they've said if -- in remand,
12 it cannot be appealed, and I think that --

13 QUESTION: Of course, you're not giving me the
14 answer correctly that I'm looking for, which is it would
15 be totally impractical. Now, is that relevant?

16 MR. HUTCHINSON: No, Justice Breyer. Efficiency
17 can never trump constitutional principles.

18 QUESTION: But there's a constitutional
19 principle that the defendant's asserting with reference to
20 personal jurisdiction as well.

21 Suppose you have somebody who's sued in Texas,
22 who says I've never been in Texas, and they say, oh, you
23 negotiated a deal there. No, I did that in San Francisco,
24 just a factual determination. Was he ever in the State of
25 Texas, was it in San Francisco or Houston where he had the

1 one deal that he negotiated in the United States. He's
2 from overseas. He says, you have no constitutional power
3 over me.

4 But you would say, well, we want you to go to
5 Houston and spend hundreds of thousands of dollars on
6 attorneys litigating subject matter jurisdiction first.
7 That, it seems to me, is a serious abridgement of his
8 personal right not to be subject to the jurisdiction of
9 the court, and you just sweep that under the rug.

10 MR. HUTCHINSON: It is an individual right, and
11 that's what distinguishes it from the institutional
12 integrity of subject matter jurisdiction. But there's a
13 practical side to this as well, because in this context it
14 is the defendant who makes that selection.

15 Here, defendant has said, I have an easy
16 question --

17 QUESTION: Well, but of course, you apply your
18 rule across the board, even to nonremoval cases, so in my
19 hypothetical you were sued in the district court
20 originally and you still say he has to submit himself to
21 the subject matter jurisdiction argument by hiring
22 attorneys and making special appearances and so forth.

23 That's not the rationale of the statutes that --
24 of the constitutional provision that gives you protection
25 against a court asserting jurisdiction over you if it has

1 no personal jurisdiction under the Fourteenth Amendment.

2 MR. HUTCHINSON: Every defendant is going to be
3 inconvenienced, but the sanctity of the Federalism system
4 must take priority over that determination, and we're not,
5 in our situation, saying that personal jurisdiction is not
6 important, it shouldn't be decided. It will be. But in
7 the --

8 QUESTION: What authority do you have for the
9 standpoint that Federalism takes precedence over personal
10 freedom?

11 MR. HUTCHINSON: Over the right of the
12 individual?

13 QUESTION: What case do I cite when I write the
14 opinion that has that --

15 MR. HUTCHINSON: I would --

16 QUESTION: -- statement in it?

17 MR. HUTCHINSON: I would cite those cases that
18 define what is a jurisdictional prerequisite for the case
19 -- for the court to act.

20 The Zipes case, which said it is a
21 jurisdictional prerequisite if it can't be waived, if it
22 can't be established by estoppel. I would cite Republic
23 National Bank and Landgraf for the principle that a
24 jurisdictional prerequisite speaks to the power of the
25 court, not to the rights of the parties. I would cite the

1 Caspari case for the principle that a jurisdictional
2 prerequisite must be raised by the court sua sponte. None
3 of those apply to personal jurisdiction.

4 Some of the points, Justice O'Connor, you raise
5 in some of the cases that you mention, the Lambrix case,
6 for example, the Lambrix case dealt with the Teague rule.
7 In the Caspari case, that very issue was raised by this
8 Court, is the Teague rule a threshold jurisdictional
9 issue, and the Court said no. It's waivable, and
10 therefore it doesn't rise to the level of a prerequisite
11 that has to be considered by the Court.

12 In the Amchem case, the class certification was
13 logically antecedent to a finding of subject matter
14 jurisdiction.

15 In the inherent power cases, such as -- or Willy
16 actually wasn't an inherent power case. It was a
17 sanctions case. That was the court's power to manage that
18 was being invoked, and there are limits to that power, as
19 this Court found in the Catholic Conference case.

20 In the Catholic Conference case the district
21 court had ordered discovery, and it was a contempt motion
22 in connection with that discovery, and the Catholic
23 Conference case said the discovery sought in that case was
24 not for the purpose of determining subject matter
25 jurisdiction. Therefore, it exceeded the court's power.

1 QUESTION: May I ask you to comment on another
2 consideration that occurs to me as I think about the
3 problem. Sometimes the jurisdictional issue, like the
4 standing question, will raise a serious constitutional
5 question, whereas the personal jurisdiction may merely be
6 a matter of fact, or interpreting the provision of State
7 law.

8 What about commenting on our policy of trying to
9 avoid constitutional, difficult constitutional questions
10 when there's another principal basis for decision
11 available?

12 MR. HUTCHINSON: I'm familiar with that line of
13 cases, Justice Stevens, but again I don't think that rule
14 can be taken this far, and to say that you -- the Court
15 goes into a balancing --

16 QUESTION: You'd say that even though there's no
17 personal jurisdiction we have an obligation to address the
18 difficult constitutional question.

19 MR. HUTCHINSON: You have -- my -- yes, Justice
20 Stevens.

21 QUESTION: You must decide it before you --

22 MR. HUTCHINSON: You must decide it first. And
23 what is proposed here --

24 QUESTION: Then you're withdrawing from one
25 thing you said in your brief, which I -- you said, if the

1 subject matter jurisdiction question is real tough -- this
2 is on page 18, 19 of your brief, if it's real tough,
3 there's a simple solution. Remand. Don't decide it.

4 So you said I think twice in your brief that
5 subject matter jurisdiction doesn't have to be decided by
6 the Federal court. If they find it a tough question, they
7 should just send the whole thing back to the State court.
8 I think you're -- are you modifying that, because here you
9 seem to say they must decide it?

10 MR. HUTCHINSON: Justice Ginsburg, in a removed
11 case, the courts are uniform in saying that doubts should
12 be resolved in favor of remand in order to follow the
13 dictates of Congress in the removal statutes, and as this
14 Court recognized in the International Primate, these are
15 mandatory statutes, and that's what we meant in our brief,
16 that when there are doubts, those doubts should be
17 resolved in favor of remand.

18 QUESTION: Well, what does that mean --

19 QUESTION: I don't understand what you just
20 said.

21 QUESTION: -- specifically? Does it mean that,
22 as you seem to imply here, the court says, subject matter
23 jurisdiction case, messy here, we maybe have it, maybe we
24 don't, but resolve that doubts in favor of remand, remand.
25 We decide nothing. Would that be a proper way for a

1 Federal court to behave?

2 MR. HUTCHINSON: No, Justice Ginsburg, but there
3 are different types of cases in which this could be
4 resolved.

5 For example, the case cited, the American
6 National Red Cross case, where there is a question of the
7 interpretation of a 1900 Federal charter that was a purely
8 legal issue that had been resolved differently by
9 different circuits. There it may be a difficult question,
10 but it's not a question of resolving factual doubts or
11 State law doubts, it's a question of looking at the
12 language of a charter and interpreting it.

13 In this case, there were questions of State law
14 intertwined with the factual situation, intertwined with
15 questions of the constitutional due process, so the court
16 had to address factual issues, and those factual issues
17 should be resolved in favor of remand.

18 QUESTION: Well, I don't understand what you're
19 answering me, because I thought from your brief you say
20 that when the question is tough, accordingly where the
21 subject matter jurisdiction question is difficult, the
22 Federal judiciary already has devised a simple but
23 effective means of resolving the issue, remand.

24 Now, that's not what the Fifth Circuit did. It
25 sent it back to the district judge and they said, you

1 figure out the subject matter jurisdiction question. But
2 according to what you've just said, if the principle is
3 resolve doubts in favor of remand, then the Fifth Circuit
4 en banc was wrong to burden the district judge with
5 deciding the issue.

6 MR. HUTCHINSON: The Fifth Circuit deferred to
7 the district judge to make that decision in the first
8 instance.

9 QUESTION: Instructed her to make it. It didn't
10 defer to it. She said, I don't want to make it. I want
11 to decide personal jurisdiction.

12 MR. HUTCHINSON: But they could have decided at
13 the Fifth Circuit. They sent it back down. I don't think
14 that goes against what we're arguing here today.

15 QUESTION: Well, what you just argued is that
16 the district judge should have resolved the doubts in
17 favor of no jurisdiction and just remanded without any
18 decision, saying it's a tough question, a tough question,
19 we're going to remand.

20 MR. HUTCHINSON: Doubt should be resolved in
21 favor of remand.

22 QUESTION: Is that what that means? Does doubt,
23 resolving doubts mean it's a tough question, we don't have
24 to decide it, we resolve the doubt in favor of remand, and
25 never decide subject matter jurisdiction?

1 MR. HUTCHINSON: That's not what it means. It
2 depends on the question.

3 QUESTION: Well, let's take this question.
4 Let's take the three bases on which Federal jurisdiction
5 was asserted in this case. What should the district judge
6 have done?

7 MR. HUTCHINSON: She should have remanded.

8 QUESTION: After deciding what?

9 MR. HUTCHINSON: After deciding subject matter
10 jurisdiction, because --

11 QUESTION: Grappling with each one of those
12 three complicated --

13 MR. HUTCHINSON: Complicated issues, and
14 arbitration where there was no arbitration agreement, and
15 the very first filing by Ruhrgas was that there was no
16 such agreement.

17 QUESTION: Well, you're saying it's all that
18 easy, but certainly the Fifth Circuit didn't treat it that
19 way.

20 MR. HUTCHINSON: The Fifth Circuit dissenters
21 didn't treat it that way. The panel did.

22 QUESTION: But no -- the Fifth Circuit en banc
23 wiped out the panel decision, which held there was no --
24 if it had been all that easy, they should have let the
25 panel decision stand, but they didn't. The majority

1 didn't let a panel decision stand that said there is no
2 subject matter jurisdiction. They said, this issue needs
3 a thorough airing, and sent it back to the district court.

4 MR. HUTCHINSON: They sent it back to the
5 district court for resolution. And I don't know their
6 rationale for doing that rather than deciding it
7 immediately, but it is, I think, an easy issue.

8 QUESTION: Mr. Hutchinson, to me, at least, your
9 position is a little stronger when you confine it to the
10 removal situation.

11 I want to be clear on one thing. Do you base
12 your Federalism argument simply on the dignitary interest
13 of the State in being able to take, in effect, first crack
14 at subject matter jurisdiction if that's possible, or does
15 your argument rest on a further suggestion that there is
16 likely to be a different -- difference in result depending
17 on where the State courts or Federal courts decide the
18 personal jurisdiction?

19 Do you suggest that the State courts are more
20 likely to find the personal jurisdictional prerequisites
21 present?

22 MR. HUTCHINSON: No, not precisely that point,
23 Justice Souter. What I'm saying is that they may decide
24 it differently, and --

25 QUESTION: You're just saying in a close case in

1 which courts could reasonably go either way, it's better
2 to let the State court have the first chance if that's
3 possible.

4 MR. HUTCHINSON: Yes. Yes.

5 QUESTION: So that's essentially a dignitary
6 kind of argument.

7 MR. HUTCHINSON: It is in part, but --

8 QUESTION: Is there any sense among the
9 practicing bar in Texas that the State courts are more
10 likely to find personal jurisdiction than the Federal
11 courts are?

12 MR. HUTCHINSON: No, but the burden of proof is
13 different.

14 QUESTION: What is the difference?

15 MR. HUTCHINSON: The burden of proof is, under
16 the Kawasaki case in the Texas supreme court, the burden
17 of proof is on the defendant to disprove every ground of
18 personal jurisdiction, whereas the burden of proof applied
19 in Federal court is, the burden of proof is on the
20 plaintiff, so that's one difference.

21 QUESTION: Well, that seems odd for some reason.

22 QUESTION: Mr. Hutchinson, isn't that a Federal,
23 the whole thing a Federal question? Here, the assertion
24 is there is no power over me compatible with due process,
25 and since the Texas statute goes the length of due

1 process, we don't have to worry about it, we stop short of
2 that.

3 It's a question of due process, and yet you're
4 suggesting that the State court could have a burden of
5 proof that makes it easier for a plaintiff to assert
6 jurisdiction over a defendant than in the Federal court.

7 I would think that that, since it's a Federal
8 constitutional question, would have to come out the same
9 way with the same burdens in both courts, and if the Texas
10 courts have said something different, the defendant has to
11 negate jurisdiction, that's --

12 MR. HUTCHINSON: Justice Ginsburg, what I think
13 the point here in this particular case is that the issues
14 of due process are intertwined with State law and with the
15 factual situation, because one of the issues in the due
16 process argument was, under the Texas long-arm statute
17 was, was there a tort in Texas?

18 I think the court got this wrong, but the issue
19 that the court addressed was, was there a completed
20 tortious act within the State which involved an analysis
21 of tort law as well as the facts, so that --

22 QUESTION: I think you've answered the question,
23 Mr. Hutchinson. Thank you.

24 MR. HUTCHINSON: Thank you, Mr. Chief Justice.

25 QUESTION: Mr. Wright, you have 10 minutes

1 remaining.

2 REBUTTAL ARGUMENT OF CHARLES ALAN WRIGHT

3 ON BEHALF OF THE PETITIONER

4 MR. WRIGHT: Thank you, Mr. Chief Justice.

5 Let me first speak to the issue that was just
6 discussed about burden of proof. We did not discuss that
7 in our briefs. We didn't think it important enough.

8 The Fifth Circuit in fact has held that the
9 Texas burden rule is, quote, exactly the sort of State
10 procedural accessory that Federal courts are not bound to
11 don whenever they enter the diversity courtroom. That's
12 Product Promotions 495 F.2d 483.

13 The Texas supreme court has held that if a
14 plaintiff does not allege that defendant has performed a
15 specific act in Texas, then the mere finding or allegation
16 that defendant is a nonresident is enough to carry his
17 burden of proof, so I really think the burden of proof
18 issue here is not significant.

19 I go back to Justice Kennedy's question to my
20 friend: Suppose that pleading, the summons and complaint
21 are served on Norge -- as I pronounce it, and others have
22 different pronunciations -- in Germany, and they say,
23 well, we've not been in Texas, we're not subject to the
24 jurisdiction of the courts in Texas.

25 Let us suppose that the case had been brought in

1 Federal court. If the position for which Marathon has
2 been arguing here is right, it would be necessary for
3 Norge to come in, litigate complicated and novel matters
4 of Federal subject matter jurisdiction, when it says we
5 have an easy personal jurisdiction objection, an objection
6 that is constitutionally raised.

7 And what I think highlights the illogicality of
8 that is that, as we know, if you are served and you
9 believe that you are not subject to personal jurisdiction
10 to the court of the State, you can simply refuse to go
11 there, do nothing, and collaterally attack the judgment.

12 If you go there as in Baldwin and litigate the
13 personal jurisdiction issue, you cannot then raise it in
14 an enforcement action, but if you simply ignore the first
15 action, you can then challenge any judgment. I don't
16 think that's what we want to encourage people to do. We
17 don't want them deciding for themselves what the law is
18 and gambling that they will later be held to be right. We
19 want them to go into court and present their objection in
20 an orderly way.

21 But if my defendant comes in and says, I'm not
22 subject to your personal jurisdiction, Madam Federal
23 Judge, it seems to me that it is wrong to say that that
24 defendant must litigate issues of Federal subject matter
25 jurisdiction rather than having the case dismissed because

1 there is no in personam jurisdiction.

2 That, of course, I'm there positing, because my
3 friend Mr. Hutchinson says his rule applies across the
4 board to all cases, original and removed, and in an
5 original jurisdiction case I think that would simply be an
6 intolerable rule, and I don't think that it has much more
7 logic to commend it when it is in a case that is in the
8 Federal court by virtue of removal.

9 QUESTION: Do you acknowledge, Mr. Wright, that
10 there's a stronger case for what Mr. Hutchinson proposes
11 in the removal situation, or does it really come down to
12 the same thing anyway, just a Federal court acting beyond
13 its -- allegedly acting beyond its subject matter
14 jurisdiction?

15 MR. WRIGHT: Well -- excuse me. Justice Scalia,
16 I think that the Federalism component becomes more
17 significant when it is a removed case, that here is an
18 issue that -- here is a case that if it had not been
19 wrongly taken to Federal court, as we presuppose a Federal
20 lack of subject matter jurisdiction, that the State court
21 would get to decide the matter, that there would be a
22 dignitary interest in the State court there. So I think
23 yes, that is an element that has to be taken into the
24 scales.

25 But I quoted, at page 23 of my opening brief, a

1 sentence from Justice Black's opinion in *Younger v. Harris*
2 that has for years been my mantra with regard to
3 Federalism, that it means neither strict obeisance to
4 State's rights, nor regarding the Federal Government as in
5 control of everything.

6 It regards -- it requires a sensitive
7 recognition of the interests of each of the systems. And
8 I think that in the removal cases such as this one, that
9 the efficiency considerations for the Federal court
10 outweigh the dignitary interest of the State court in
11 retaining the power to decide the issue.

12 If there are no further questions, I thank the
13 Court.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright.
15 The case is submitted.

16 (Whereupon, at 11:55 a.m., the case in the
17 above-entitled matter was submitted.)

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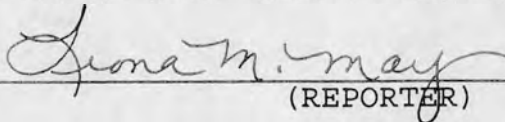
The United States in the Matter of:

RUHRGAS AG, Petitioner v. MARATHON OIL COMPANY, ET AL.

CASE NO: 98-470

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