# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

**THE SUPREME COURT OF THE UNITED STATES**

**DKT/CASE NO.** 83-196

**TITLE** WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Appellant v. MONSANTO COMPANY

**PLACE** **Washington, D. C.**

**DATE** February 27, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, :

Appellant :

v. : No. 83-196

MONSANTO COMPANY :

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Washington, D.C.

Monday, February 27, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:44 p.m.

APPEARANCES:

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A. RAYMOND RANDOLPH, JR., ESQ., Washington, D.C.; on behalf of Appellee.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Wallace, you may proceed when you're ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF APPELLANT

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

This is an appeal from a district court judgment declaring unconstitutional and enjoining the enforcement of key provisions of FIFRA, the Federal Insecticide, Fungicide and Rodenticide Act, the Act under which EPA regulates the marketing and use of what are now known collectively as pesticides, although at one time in the federal statutes they were referred to as economic poisons.

Under FIFRA an EPA registration, which is essentially a license, is required in order to market a pesticide, and in determining whether to issue the registration EPA determines whether there will be unreasonable adverse effects on the environment, and makes that determination partially by consideration of health and safety test data which is either submitted by the applicant or cited by the applicant.

The provisions struck down by the district court are those that permit EPA to consider the health

and safety data submitted by one applicant and cited by a subsequent applicant in support of the application for registration by the subsequent applicant, while requiring that subsequent applicant, if the registration is granted, to compensate the first applicant for a portion of the cost of conducting the tests, and provisions requiring EPA to disclose this health and safety data to qualifying members of the public.

The court also declared unconstitutional the provisions providing for a scheme of compulsory arbitration if the two applicants are unable to agree on the terms of compensation, but the parties are in agreement that that provision was not ripe for review by the district court for reasons stated in the briefs, and I won't refer further to that aspect of the case.

In many ways this decision is reminiscent of the constitutional litigation of the 1920's and the 1930's and again three terms ago in the Surface Mining Act cases. In striking down this major Congressional regulatory effort, the district court articulated its holding to be that Congress had exceeded its powers under the commerce clause.

Now, interstate commerce obviously is substantially affected by this industry --

QUESTION: Mr. Wallace, don't you think the

district court meant that Congress had exceeded its powers unless it wanted to pay compensation?

MR. WALLACE: Well, that is probably what it meant, and I don't intend to belabor anything else. But I just do want to say that to the extent that this reflected what is discussed in the opinion, a reevaluation of the resolution Congress made of the competing policy considerations, that was obviously improper under this Court's decision, and Monsanto does not here try to defend the judgment on those grounds.

But it is pertinent to say that the present statute evolved through a repeated process of amendment in which Congress gave detailed consideration to some of the problems of the industry that seemed to move the district court to reach the judgment that it did, as well as to advances in scientific knowledge about problems in the use of these chemicals on the health and environment, and as well as its own experience with earlier versions of the statute, which it concluded were having some undesirable effects, such as extending periods of patent monopoly beyond the expirations of the patent.

And in response to the expenses involved in research and innovation, Congress included a number of provisions in the statute, including a protection for

trade secrets as defined by the statute, the provision for compensation for the second user of data, and a provision for exclusive use for a ten-year period.

QUESTION: Mr. Wallace, before 1978 the law was clear, was it not, that none of the information supplied by a registrant would be released to anyone else?

MR. WALLACE: Well, it would not be released to the public.

QUESTION: Right.

MR. WALLACE: That was part of the --

QUESTION: It would just be used by EPA.

MR. WALLACE: It would be used by EPA or the Department of Agriculture.

QUESTION: Yes, right.

Now, why should information of that kind, which was disclosed before 1978, not continue to be protected?

MR. WALLACE: Well, it could be protected. The question is whether there's a constitutional impediment to the disclosure of the information under a different rule --

QUESTION: Well, you take the position that it isn't even property?

MR. WALLACE: Yes, we are taking that

position, and let me get to that question. I think it is important for me to make a few general comments about trade secrets before getting to the specific questions involved in this case.

This Court has never held that a trade secret can qualify as property within the meaning of the taking clause of the Fifth Amendment, and while in order to rule for us the Court need not preclude the possibility that in any circumstances a trade secret could be so protected, we do think it's highly dubious that a trade secret in any circumstances should qualify as property under the taking clause or that that should be the focus of litigation concerning disclosure of trade secrets. Now --

QUESTION: Well, certainly the district court thought that the law, the state law in Missouri created a property interest.

MR. WALLACE: I understand that, although we happen to think that that was an erroneous view of the law. But that certainly would not be dispositive of what the Fifth Amendment to the federal Constitution means, regardless of how Missouri might want to define it.

Let me try to explain the reasons why the Court should be hesitant --

QUESTION: Well, if the district court is right about what the Missouri state law is, why wouldn't we accept that and say, yes, it is property?

MR. WALLACE: The Fifth Amendment -- the question of the meaning of the word "property" in the Fifth Amendment is a question of federal constitutional law, Justice O'Connor, rather than something that a state is free to define.

QUESTION: Mr. Wallace, would a copyright be property, or patents?

MR. WALLACE: We think they probably would be, Justice Powell.

QUESTION: You address a distinction between them?

MR. WALLACE: Yes. That's what I am attempting to do here, because the right to exclude is of a very different nature. Let me, if I can, just make these general comments about trade secrets.

In the Kewanee Oil case in this Court, in a statement that was not disputed by any other opinion in the Court and that is entirely consistent with the holding, Justice Douglas, joined by Justice Brennan, said in the dissenting opinion: "A trade secret, unlike a patent, has no property dimension." And then he quoted from the Court's opinion by Justice Holmes in Du

Pont Powder Company v. Masland, an opinion that is discussed in the briefs in the case.

But there is a great deal of additional basis for this statement. In the first place, it probably has come to the Court's attention that the Restatement provisions referred to by the district court and by the parties here are not from the Restatement of Property; they're from the Restatement of Torts, the 1939 edition.

And while the origins of trade secret law and protection have not been considered to be property origins at all, in fact comment A of the pertinent section of that Restatement, 757, says:

"The suggestion that one has a right to exclude others from the use of his trade secret because he has a right of property in the idea has been frequently advanced and rejected. The theory that has prevailed is that the protection is afforded only by a general duty of good faith, and that the liability rests upon breach of this duty, that is, breach of contract, abuse of confidence, or impropriety in the method of ascertaining the secret."

Now, it's true, as the briefs point out, that trade secrets have certain of the characteristics of property. They can be the res of a trust, they can be

treated as property for purposes of certain transactions under the Internal Revenue Code. But basically the law of trade secrets is a law concerning the regulation of commercial relations.

QUESTION: Mr. Wallace, you speak of the law of trade secrets as though perhaps there was one fount for that kind of law. Isn't the law of trade secrets derived from the law of the 50 states on the subject?

MR. WALLACE: Yes, it is, Justice Rehnquist. But it was this particular provision of the Restatement that the district court was relying on, and if I may just --

QUESTION: Well, I mean, I think there's perhaps a little more implied in this question. You say that the question of whether something is property for the takings clause purpose is a matter of federal law and not state law. But can you recall any case involving the takings clause where this Court has said, even though something was deemed property under the state law, we deem it not to be property?

MR. WALLACE: I can't recall the Court specifically saying that. Usually it has not been that specific about whether it wasn't property or whether it just wasn't a taking in the particular circumstances, although the Court came pretty close to that in a very

closely parallel case, the Corn Products case, in which it rejected a property claim as to the ingredients of the syrup that were required to be placed on the label and said that disclosure to the public of what it is that you're selling is not something that can be recognized as property for purposes of the Fifth Amendment.

But I can't say that the opinion was quite that explicit. But we really think the disclosure is covered by that decision in this case.

QUESTION: Just a minute. If you start out as an initial matter by saying that before you can market corn products under the laws of this state you must disclose what is in it, that's quite a different question from saying after 15 years that, although you disclosed it, we won't let anybody know, to say that as of now we're going to start letting everybody know what we earlier said we wouldn't let anybody know.

MR. WALLACE: I recognize that the effect of holding that this is a property interest protected by the Fifth Amendment would be that Missouri would have to freeze its own law with respect to trade secrets, or otherwise a change in the law would be a taking under the Fifth Amendment, and that is part of the reason why I'm trying to explain to the Court that trade secret law

is basically a law of evidentiary privileges rather than a law of property, which is qualified by additional tort duties.

QUESTION: Don't you think it has a market value, that someone can sell a trade secret and that it has economic value?

MR. WALLACE: Of course it does, of course it does. It can be sold in that way, but that doesn't mean that the protection -- it can also be discovered through reverse engineering and through overcoming the qualifications on the privilege against evidentiary disclosure.

In this Court's opinion in Federal Open Market Committee against Merrill, the Court stated, in discussing the nature of trade secret law, that federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information. It's a form of protection of confidential communications.

QUESTION: Let me suggest a possible analogy, hypothetical, but it's been in the Courts of Appeals. There's a federal statute that provides that if a record is copyrighted and goes on the market you or I or anyone else may make copies of that and sell them simply by writing a letter to the copyright owner saying, I am

copying your record, and then you pay a statutory royalty. Now, that's been upheld at least at the Court of Appeals level.

How do you distinguish the trade secrets in this context from that compulsory copyrighting system?

MR. WALLACE: Well, compulsory licensing systems have been -- are possibilities under the patent and copyright laws. The principal distinction of trade secrets is that it involves suppression of information. What the patent law provides is the right to exclude someone from making or using your invention or practicing it, but you've disclosed the invention in the patent application. And the copyright law prohibits plagiarism, but doesn't suppress the information itself.

QUESTION: Well, but it puts a price on it.

MR. WALLACE: Yes, a price for copying it. But the information is available --

QUESTION: Well, a price for using, a price for using the original work.

MR. WALLACE: Well, one, yes, in the form of copying it. But there isn't suppression of information from the public. The information is disseminated even though there might be a price on it, in that sense.

But the Court has never held that the Fifth

Amendment places as premium under the taking clause on the suppression of information itself, which is what the trade secret law protects in the form of a qualified evidentiary privilege.

Now, there are many instances in which that qualification of the privilege can be overcome that are familiar to the Court. There can be grand jury subpoenas of business records.

QUESTION: Mr. Wallace, you're talking again as if there were some uniform body of law on trade secrets. Am I wrong in thinking that you answered my earlier question that the law of trade secrets depends on the law of the 50 states?

MR. WALLACE: You're not wrong that it does depend on the law of the 50 states. We have contended in our brief that the district court misconstrued Missouri law in this case.

QUESTION: Do we ordinarily review that sort of a claim?

MR. WALLACE: Not ordinarily. But in the case of a nationwide statute, where the district court is relying on the Restatement of Torts which has been adopted in many states and where many other courts have reached a contrary conclusion about what is protected, I think the Court has to look behind the district court's

holding with respect to whether a scheme that Congress has set up for the regulation of these potentially hazardous chemicals is a taking of property.

QUESTION: Well, Mr. Wallace, let's just suppose that the Court were to disagree on whether we are bound by the determination of state law and were to find that the trade secrets in this instance constituted property under the taking clause. Then is there a difference in the pre-1978 data because at that point there was no expectation at all that it would be released to the public?

MR. WALLACE: We think there is not a difference with respect to pre-1978 data, even on that premise, because there was no legitimate expectation that the duties of federal officials in administering a federal program were prescribed by Missouri law or by the law of any other state, rather than by federal standards, which have long governed the duties of federal officials with respect to the handling of information that has been disclosed to them.

QUESTION: Well, but those standards provided before 1978 that they would be maintained secret.

MR. WALLACE: I understand, but not every possibility of a change in the law constitutes a taking of property within the meaning of the Fifth Amendment.

The law of evidentiary privileges could be changed by a state or by the federal courts or by Congress without it resulting in a taking of property, even though someone might have thought that he had an accountant's privilege, for example, and disclosed certain information to his accountants.

QUESTION: You know, it's just hard to understand why the company wouldn't have had a legitimate expectation of privacy or maintenance of secret information before 1978.

MR. WALLACE: Well --

QUESTION: May I ask you -- I'm sorry. Did you finish your answer?

MR. WALLACE: Well, I'd like to if I may.

It's because, to resurrect another old formulation from constitutional law, if there were ever a business affected with the public interest, where there is need to anticipate changes in federal regulatory rules as scientific knowledge and the needs of public health advance, this would be such a business.

There are provisions in the federal statute for rescinding the registration of a particular pesticide altogether, let alone -- and this can defeat investment-based expectations in plant and equipment.

And yet, if there are findings that protection of the environment and the public health require this, it nonetheless can occur, even though the expectations may have arisen before the particular rescinding provision.

If a company is dealing in a business of this kind, it has to anticipate that the needs of the public health can affect its expectations based on its investments, and the needs for disclosure to individuals, and particularly to physicians who might have to treat patients and to groups representing those who are exposed in unusual and concentrated ways to these chemicals, are something that the company had to anticipate that Congress might give further recognition to, such as the need for groups such as unions representing agricultural workers or workers in the pesticide factories or physicians groups to learn the information that they need to know to make sure that EPA is conducting its affairs properly and that the hazards that these people are exposed to can be properly avoided or treated.

QUESTION: Mr. Wallace, I don't exactly understand how the compensation provision would operate. If information revealed to the public is then conveyed by the public generally, through say a trade journal survey, you end up with ten competing companies

--

MR. WALLACE: The statute provides that that disclosure provision does not affect the provision with respect to the use of this information to support an application for registration. So the applicant still has to cite to the data, and by citing to the data puts himself in the position of promising to pay compensation for a part of the cost of conducting the tests and securing the data.

QUESTION: Not because the Constitution requires it, because the statute does.

MR. WALLACE: That is our view, that Congress could have simply done it by another method, saying that if a pesticide has already been recognized as fit for marketing other persons who are able to duplicate it, because it's unpatented and they have figured out how to make it, don't need a registration in order to sell it. But they did it in this form, partially as a convenient way to impose an obligation to compensate the innovator for the cost of his testing.

QUESTION: Is there a parallel here with the mandatory licensing that I spoke of?

MR. WALLACE: There's a parallel in the sense that Congress is providing for a scheme of compensation by competitors to the innovator that the innovator is

not entitled to under the Constitution once his patent has expired, so that the innovator is actually better off under this scheme than he would be without it.

And if it had been written the other way, that the duplicator didn't need a registration at all, the innovator could still say, well, in effect there's an implied reliance by Congress or by EPA on this costly testing that we have done, and the nature of the claim I think would then stand more clearly as what it is with respect to this aspect of it, which is not so much a taking claim as an equal protection claim, that I have been required to do this costly testing whereas someone else is allowed to market the same product without doing the costly testing.

But there's a rational basis for the distinction when in the one instance the product had not been previously established to be safe and effective for marketing and in the other instance it had.

QUESTION: But you could equally well argue that the claims in cases like Kaiser-Aetna should have been equal protection claims. The person who owned the property resented having to share his property with nine other people who hadn't paid for it.

MR. WALLACE: The difference is there's no use of the property in the second instance, under my

hypothetical where the statute doesn't refer to any use of the data by the second applicant. This is not a physical invasion similar to Kaiser-Aetna at all. It is a scheme that Congress has set up in order to compensate innovators for a portion of the cost of the innovation.

QUESTION: Mr. Wallace, let me ask you one question. As I read the statute, its primary provisions really are a rule of nondisclosure of trade secrets, but then there are a couple of exceptions, one of which is where public health demands it, and so forth and so on.

As I also understand, there are relatively few applications. There are not thousands and thousands of these things. How often has the issue actually arisen where you have disclosed something publicly that Monsanto has objected to?

MR. WALLACE: Well, not in that form -- there have been other suits to enjoin the enforcement --

QUESTION: I understand that.

MR. WALLACE: -- from the outset.

QUESTION: But has there been any specific litigation over specific disclosures --

MR. WALLACE: No.

QUESTION: -- or proposed disclosures?

MR. WALLACE: There is an exception to disclose normally protected information, if that's what

you're adverting to, when there is a finding that the needs of public health require it. That happened when it was discovered that vinyl chloride, which was used as an inert ingredient in a number of pesticides, was a carcinogen that caused liver cancer, and there was a disclosure at that time of something that the statute prohibits disclosure of, which is the identity of inert ingredients in the pesticides. The disclosure was just naming which ones included vinyl chloride.

But no one disputed that. The manufacturer simply stopped using vinyl chloride immediately because they obviously were concerned about product liability.

I'd like to reserve the balance of my time, please.

CHIEF JUSTICE BURGER: Very well.

Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.

ON BEHALF OF APPELLEE

MR. RANDOLPH: Mr. Chief Justice and may it please the Court:

In many respects this is an exceedingly complicated case. We're dealing with a subject matter, pesticides, which is highly technical, scientific, fully understood I think only by the members of the scientific community that deal in it.

And we're dealing also with research and test data that contains trade secrets. Some of the registrations may consume 100 volumes or more, 10,000 pages dealing with such subjects as metabolism, residue, methods of analysis, scientific protocols, toxicology studies, and so on and so forth.

And the statute that's involved in this case, the Federal Insecticide, Fungicide and Rodenticide Act, is not only difficult to pronounce but difficult to understand. It's arcane, esoteric, not highly readable.

And on top of all this we have the Fifth Amendment taking clause which, as the Court said in the Penn Central case, after two centuries of adjudication, it's been difficult to formulate any set, clear concrete standard with respect to its application.

QUESTION: Mr. Randolph, given all the complexities, it would be helpful to me if you'd tell me, give me a specific example of something that's been taken, or when the taking occurs in your understanding.

MR. RANDOLPH: We have an injunction, Mr. Justice Stevens, and the injunction has prevented EPA --

QUESTION: Well, assume there were no injunction. When would the first taking have occurred?

Was it on the enactment of the statute, the disclosure? What is your view?

MR. RANDOLPH: Well, with respect to disclosure, we don't believe that there would be a taking until the information was disclosed, so long as EPA retained possession of it and did not disclose it, as was the situation prior to 1978, when indeed there was a federal criminal statute that --

QUESTION: Well, taking specifically the example that Mr. Wallace gave us just a minute ago. Was that a taking in your view when they disclosed the inert ingredient in the vinyl chloride?

MR. RANDOLPH: I don't believe so, because I believe the companies consented to that.

QUESTION: If they had objected, would it have been a taking? That would be Section 10(b) of the Act.

MR. RANDOLPH: I don't know whether that would have been a trade secret.

QUESTION: Assuming it was a trade secret.

MR. RANDOLPH: If it were disclosed with the objections --

QUESTION: For the reasons that he gave, yes.

MR. RANDOLPH: Yes.

QUESTION: That would have been a taking?

MR. RANDOLPH: I think there would have been

compensation that would have to be paid.

QUESTION: And would there have been a Tucker Act remedy if that were the case?

MR. RANDOLPH: No, I don't believe so. Are we talking now in terms of the 1978 amendments or pre-'78?

QUESTION: No, no, no. I'm talking under the statute that the district court has enjoined, the disclosure provision in Section 10(d).

MR. RANDOLPH: Let me state my position clearly:

One, we believe trade secrets are contained in the material that has been submitted by Monsanto to EPA.

Two, we believe they are property within the meaning of the Fifth Amendment.

Three, we think that the statute in question here, the disclosure provisions, the use provisions, take that property in violation of the Fifth Amendment.

QUESTION: My question --

MR. RANDOLPH: Four, we don't believe that we have a Tucker Act remedy in this statute.

QUESTION: Back to three. When does the taking occur?

MR. RANDOLPH: If it's with respect to disclosure, it would be upon the disclosure. A trade

secret, it's not only the law but it's also common sense, it's no longer there if it's no longer a secret. If it's released to the world, Monsanto could hardly sell it to anyone because everyone knows the process.

And that is our position, but I'd like to start out if I may --

QUESTION: Let me ask just one other question. In your view does the taking occur when there's no disclosure but another competitor is permitted to cite some of your test data?

MR. RANDOLPH: Yes, because we've lost our right to exclude at that point. It's rather like --

QUESTION: So you've got two takings: one, when someone else uses without disclosure; and two, when there's a disclosure.

MR. RANDOLPH: Yes, but there will always be disclosure preceding use, because the information, once it gets filed, is available for release 30 days after the registration. It would then follow that once it's available and out in the public that other competitors may seek to share the information.

They may use it, by the way, in ways that Monsanto would never be compensated for under FIFRA. For example, the methodology, the detection techniques. There's evidence in the record here with respect to

radio labeling of molecules and detection of molecules and how to deal with metabolism studies, and so on and so forth.

If a competitor of Monsanto, or anyone for that matter, went and took that information, which has taken years and millions of dollars for Monsanto to develop, and did not seek when it registered a product to do it on the heels of Monsanto's product and register the same kind of product, but to take a different product, then Monsanto would not be compensated under the statute.

QUESTION: Tell me, Mr. Randolph, are you arguing that the pre-1978 submissions are taken under the 1978 amendments and also the post data submissions?

MR. RANDOLPH: Yes. Yes, we draw no distinction between the two.

With respect to Monsanto Company, let me explain why. The company's development of pesticides has been detailed somewhat in the brief and I'd like to maybe go through that and explain exactly what we're talking about with respect to research and test data and registration of pesticides.

The record indicates quite clearly that the development of pesticides is a risk-laden business, one that takes years and years to get going, let alone to be

successful in. Many major corporations have dropped out of the business -- Exxon, Clin, a number of others, Cities Service.

The company must make a commitment years and years before it gets to the point where it registers a product and ultimately recaptures its investment. Monsanto Company, the evidence also shows, has been in the pesticide business since 1948. The agricultural products division did not really begin turning a profit until the late 1960's, mid-1960's, somewhere in that range.

Even with all these risks that the company goes through and everything else that's involved, the company is now, again the record shows, making about a five percent return on its investment. But in making all of these tremendous commitments of resources, the company, Monsanto, has developed one thing, and I think I can state it graphically.

It has been able to find a new pesticide, a new active ingredient, at the rate of one out of every 10,000 chemical compounds that it invents or discovers. That sounds like an extraordinarily low average. In fact, it's twice as good as the rest of the industry is doing.

Within the material that EPA wishes to

disclose are the secret techniques and methods that Monsanto, after 17, 20 years, has used to start developing these new pesticides. Nevertheless, the last new chemical compound used as an active ingredient for pesticide that Monsanto has been able to discover was discovered and registered in 1975.

All of the registrations that have come since then have been for expanded uses of this latest pesticide, which is called Roundup, uses in areas other than the initial registration, which may have been for one particular crop, it may have been one particular type of application, and so on and so forth. And as Monsanto's research goes forward, they find different ways to use the same product.

Now, we claim in this case that the trade secrets are property. There is a fundamental disagreement between Monsanto and the EPA in this case, and that is with respect to the following. EPA has said throughout its brief and again in oral argument that Congress has created a good statutory scheme here, spent years developing and considering the various sides of the issue, and it had the right to reach the objective that it did, namely public disclosure and use.

And I might add as a parenthetical that I have combed the committee reports and the only thing that the

Court will find when it examines in regard to why Congress passed the disclosure statute are about three lines cited in the Government's brief that say the public right to know. You will find nothing beyond that.

QUESTION: How does that bear on the taking issue?

MR. RANDOLPH: I think it doesn't, Mr. Justice Rehnquist, and I'll explain why. The commerce clause which gives Congress the right to pass this statute deals with ends, ways of accomplishing -- the objectives. The Fifth Amendment deals with means. The Fifth Amendment says that, although the end may be proper, the public use, you cannot do it in a certain way, and the certain way that you cannot do it is by taking somebody's private property without paying them for it.

QUESTION: Let me ask you one more question if I may. You said earlier that you didn't distinguish at all between the pre-1978 information files and the post-1978. I would think that the Corn Products case which the Solicitor General relies on would give you some trouble if you don't make any such distinction.

MR. RANDOLPH: Well, the Corn Products case -- I don't make a distinction. The Government says, and I

heard it again here today, that the reason there should be a distinction is because beyond 1978 we had, Monsanto had, no "investment-backed expectations." I'd like to address that.

QUESTION: Well, I wonder if you would address the question I asked you a moment ago, and that is -- perhaps I should rephrase it. How do you distinguish the Corn Products case as to the post-1978 situation, when you're on notice that anything that you file in order to assist the EPA to evaluate anything is subject to disclosure?

MR. RANDOLPH: If I may, I think you've asked two questions. I'd like to answer them both.

One, the Corn Products case is a labeling case. Justice Pitney's opinion has one paragraph that talks about misbranding and the state's right to control it. It was a state case, it was a state regulation.

The Court has said -- Justice Rehnquist, indeed, you wrote the opinion in the PruneYard case -- that the states have more authority to define what is property than the Federal Government. In fact, I think the Court said that the Federal Government has no authority to define what is property under the Fifth Amendment.

We agree. One way of looking at the Corn

Products case is that the state was defining what was property in that situation.

QUESTION: But Justice Pitney's opinion states the contention of the parties that the requirement that they publish the ingredients on the labels amounted to a taking of their property.

MR. RANDOLPH: But it was a state regulation, and the state in that sense is redefining what the person's property, what the company's property right was with respect to trade secret protection.

Two, in the taking area the Court has always made an exception -- and I believe again in Justice Rehnquist's dissent in the Penn Central case the Court talks about this or the dissenters talk about it -- for noxious use cases.

Corn Products was a mislabeling, misbranding, adulteration case, and the state made a judgment that if the product was not properly labeled then it would be considered adulterated and misbranded, and that is the basis on which the opinion went off. This is not a labeling case. There is no dispute about the label, and it would be very difficult to see how 150 volumes containing 10,000 pages of research and test data filled with Monsanto's trade secrets could be attached to every can of Roundup.

QUESTION: No, but the principle is a lot closer than that, I think.

QUESTION: What if the Federal Government just passed a simple statute, a labeling statute: You can't sell economic poisons, as they used to call them, without disclosing their ingredients. And if one of the ingredients is an inert thing that would previously be a trade secret, you'd say that would be unconstitutional?

MR. RANDOLPH: You cannot sell without disclosing --

QUESTION: Without having a label on it that discloses all its ingredients, even though some of them may be trade secrets as a matter of Missouri law.

MR. RANDOLPH: I would say that's unconstitutional today. There's no indication, I want to be clear, in the legislative history that any provision here that's involved was passed for the purpose of preventing misbranding, adulterated products. In fact, the one thing that is clear here is that every --

QUESTION: No, but Mr. Randolph, the last sentence says the reason is to protect against an unreasonable risk of injury to health or the environment. It's the same sort of public interest.

MR. RANDOLPH: The disclosure, Justice

Stevens, here --

QUESTION: Right, and that's the only disclosure.

MR. RANDOLPH: -- comes after the EPA has passed upon the data and registered the product and it is being sold.

QUESTION: Right, but this is the only kind of material that may be disclosed.

MR. RANDOLPH: That's right.

QUESTION: Mr. Randolph, do you think the Government or the Congress could condition registration on the applicant's waiver of confidentiality?

MR. RANDOLPH: No.

QUESTION: Why?

MR. RANDOLPH: Several reasons. One, we don't think that, and we don't believe the Court has ever held, that the relinquishment of private property can be a condition of engaging in interstate commerce, because once the Court holds that then we have no Fifth Amendment with respect to the Federal Government.

The Federal Government's capacity to regulate interstate commerce is almost unbounded. The Court has made clear, I believe, in the Security Industrial Bank case, in the Kaiser-Aetna case, that the Fifth Amendment question does not depend upon whether Congress had the

power to reach the objective that was sought.

QUESTION: What if the EPA provided that for every application to use a pesticide there shall be a filing fee of $25,000?

MR. RANDOLPH: I believe it could do that.

QUESTION: Well then, why can't it require the sacrifice of other kinds of property as a condition for filing the thing, so long as it isn't just way out of sight?

MR. RANDOLPH: Well, it is way -- there is no relationship between disclosure here and compensation to Monsanto. Monsanto is not getting any compensation for disclosure, so in that sense it is out of sight.

Second of all --

QUESTION: Well, Monsanto is getting federal registration for a product. Now, I suppose it could just decide that it isn't worth it, I'd rather not register it and sell it in the United States, I'll stick to the foreign market or something. Having made the decision that you want federal registration, why can't the Federal Government, prospectively at least, say to get the registration you have to disclose this information?

MR. RANDOLPH: Because if it is, if it is the basis for requiring companies to give up property, then

there isn't a Fifth Amendment taking clause, and I'll explain why.

QUESTION: Well, but you give up property if you pay a fee. It's just no different.

MR. RANDOLPH: You're relinquishing private property. I think there is a difference between saying, for example, to General Motors, and I'll talk in terms of real property, that in order to sell cars in the United States you must give up five manufacturing plants, or in order to sell cars in the United States you have to pay a fee of X hundreds of thousands of dollars to the Department of Transportation. There's a difference because --

QUESTION: Would you think in a zoning case that a city can say, sure, we'll let you build a new high rise apartment provided you dedicate a street?

MR. RANDOLPH: Yes. They're not taking property then. What they're doing in that area, they're not destroying property, they're not requiring the owner to give up the property; they're restricting the way that the owner uses the property.

That is not the situation here. We are losing the property that we have. The disclosure of trade secrets destroys the property. It is being transformed into -- what was a trade secret at Monsanto if this

statute is allowed to go into effect will become not a piece of property any more, but public information. It is no different than if the Federal Government ordered Monsanto to open up its plant and its research facilities, conduct research in the sunshine, and allow the public to walk through and pluck out whatever trade secrets they seem to want at the moment. That is what this statute does.

So we are losing our property, and once it's gone we'll never get it back. And we're losing it in a way that we think the Court has held the Fifth Amendment prohibits, and that is by destroying our right to exclude. We don't have a right, Monsanto doesn't have a right to prevent someone else independently from discovering the methods that it's taken 30 years to develop. But what we do have a right is to exclude others from just coming in and taking them away.

QUESTION: Of course, this Court held that some entity in New York could take away a valuable right worth millions and millions of dollars from the Penn Central Railroad because it alone among a very few buildings could not build a high rise building over the site of the old depot.

Is that a taking that was any less offensive than the present one?

MR. RANDOLPH: Well, I think the Court held it wasn't a taking.

QUESTION: Yes, I know.

MR. RANDOLPH: Yes.

QUESTION: Are you any better off than Penn Central? That's my question.

MR. RANDOLPH: I certainly hope so.

(Laughter.)

MR. RANDOLPH: The Penn Central case can be, I think, distinguished on a number of different grounds, one of which was that Penn Central entered into its contracts to build over the Grand Central Station after the preservation law went into effect, and the Court relied on the investment-backed expectations point.

And I'd like to distinguish our case on that basis. Monsanto has been engaging in the pesticide industry since 1948. It has assembled a team of hundreds and hundreds of scientists. It has spent a quarter of a billion dollars just in developing, not the research and testing, just in developing the ten herbicides that form the backbone of the company at the moment.

FIFRA didn't create the pesticide industry and didn't spur Monsanto on. What spurred Monsanto on was the need in agriculture and ultimately the need of the

public for food. There are 30,000 different species of weeds in the world. There's 100,000 different species or types of diseases. There's 10,000 different species of plant-eating insects. One-third of the world's food population is destroyed by pests every year. $20 million is lost in the United States even with the pesticides that are in place now.

That is what spurred Monsanto on. That is where it relied upon to invest all the money that it did, take all the risks that it did, develop all the trade secrets that it has, and to keep the company going.

So when, on top of this long-term commitment -- and it is a long term. The record shows that it may take 14 to 22 years from the moment that the scientists identify a problem and begin synthesizing chemicals, it may take 14 to 22 years for the company to break even, to break even, to get a return, start getting a return or profit.

QUESTION: Let me ask you a hypothetical. What if you have an inventor who has spent 20 years trying to develop an invention and he's on the verge of being in a position to seek a patent and the Government decides to change the patent law and not grant patents for that kind of thing any more? Does he have a claim

for a taking?

MR. RANDOLPH: I don't believe so, Justice O'Connor. I think he would have property, though.

QUESTION: Why aren't you in substantially the same position after 1978?

MR. RANDOLPH: In the situation you describe, the inventor still would have property because he'd be entitled to a trade secret. He would not have the monopoly that would go with it, though, because the Government gave it to him, the Government can take it away. The Government, the Federal Government, EPA, did not give Monsanto its trade secrets.

QUESTION: Well, I guess it's in a position of either giving a registration or not.

MR. RANDOLPH: Yes. I was going to address that. I'm sorry, I think I got sidetracked on that point.

If it is a requirement that to engage in interstate commerce property owners must give up their property, my point was that the Fifth Amendment is emasculated. The framers when they developed the Fifth Amendment wanted to put a restraint on the Government. It is not Congress' choice to balance a private property right against the public interest, and that is essentially what the Government is arguing.

The Fifth Amendment says: "Private property shall not be taken for private use without just compensation." Once the Court accepts the notion -- and it has never accepted the notion -- that you should balance, as the Government invites the Court to do, then private property is gone.

It's difficult to think -- for example, if that were the rule, and it is not, an individual in a town that has a parking lot that the town needs for a school -- whose public interest should prevail there? How does one weigh it? Almost by definition, the public right, the public need will supersede the private use.

QUESTION: Of course, the Government does make an argument here that this is not property. And I think you would agree, would you not, that it's a good deal more ephemeral kind of property than the real property in your example of the town parking lot?

MR. RANDOLPH: Yes. I use that as a concrete example and to try not get into that.

But I'd like to address the question of whether this is property. The Federal Government does not define what is property. The Fifth Amendment defines it. And the Court has held in cases such as the Webb's Fabulous Pharmacies case, which relied upon Ross, that property is a broad and majestic term, and in fact

I think there was one case where the Court said that it would denigrate it to say that property can be a horse trainer's license, but not the right to bring an action for discrimination.

But what it consists of is this: existing rules and understandings derived from an independent source, and the independent source generally is state law. We have cited case after case from around the country dealing with state courts holding this is property within the meaning of the particular case involved. We've also cited the Internal Revenue Service: When you sell a trade secret, treat it as a capital gain or a capital loss, because it is property within the meaning of the Internal Revenue Code and has been for a long time.

And I might also say that the Court in Kewanee, in Chief Justice Burger's opinion on two separate occasions, I believe page 479 and page 483 of the opinion, called trade secrets property.

And the Department of Justice itself, which is now here representing EPA, told Congress in 1967 -- I want to quote this -- that trade secrets were in fact property. I can't seem to find it now.

QUESTION: Your colleague has it for you, Mr. Randolph.

MR. RANDOLPH: I think this states Monsanto's position better perhaps than we have. The Department of Justice, the Attorney General, said to Congress in 1967 that: "Formulae, designs, drawings, research data, et cetera, which although set forth on pieces of paper are significant not as records but as items of valuable property" --

QUESTION: What page were you --

MR. RANDOLPH: I'm sorry, Mr. Chief Justice. It's page 20 of our brief.

The point here is that the existing rules and understandings not only are derived from state law; they're within the Federal Government itself and, I might add, within Congress as well. Congress could not help but to operate within the framework of those rules.

And we have cited from the legislative history, Congress talked about the continuing proprietary interest of data submitters like Monsanto. They talked in terms and they legislated on the basis that the companies retained legal ownership of the data. In fact, EPA told Congress that the data itself has a "continuing commercial value beyond the value that is used for achieving registration".

It is property within the meaning of the Fifth

Amendment by every standard the Court has ever set down, and Congress knew full well that it was taking it away and it provided for compensation. Why else would Congress provide for compensation except to compensate the owner for something he's lost?

Compensation for use, but for disclosure it set against an abstraction, the public right to know, against Monsanto's property rights. The public right to know is not set forth in the Constitution. One can search the Constitution in vain. That's simply another way of saying Congress has decided to regulate interstate commerce in a certain way.

What is that way? Public disclosure, and we believe that public disclosure takes Monsanto's property, destroys it, and turns it into public information or a public library, and in doing that has violated the Fifth Amendment.

Thank you.

CHIEF JUSTICE BURGER: Mr. Wallace.

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF APPELLANT

MR. WALLACE: Although it's not always dispositive, one of the principal indicia of whether Government regulation is permissible regulation or constitutes a taking is whether it applies to an entire

category of persons or whether it singles out someone for special treatment.

QUESTION: Like singling out Penn Central for special treatment?

MR. WALLACE: That is correct. Even then, it may not be a taking.

But this is archtypical of the kind of adjustments of the benefits and burdens of economic life that reflect a change in the law that affects a whole category of persons, and Monsanto's benefits as well as burdens have been adjusted. It finds itself on both sides of the equation under the new rule in being able to rely in its own applications on other innovators' data and, while it cannot directly apply for them, in possibly being able to learn through the public disclosure provisions about testing methods of its own competitors.

Now, the Court has several times held that the mere fact that this operates, this kind of adjustment of the benefits and burdens of economic life may operate, retrospectively as well as prospectively does not mean that it's constitutionally prohibited.

That was specifically at issue in Andrus against Allard, where people had invested in eagle feathers and could no longer under the new rule, even

though they had bought them prior to the Act, could no longer market them. Their chief means of commercial exploitation was taken away because of important environmental concerns in that case.

Here the rights that Monsanto has, as we have stated in our brief, are much greater in value than the rights retained by the owners there. Usery against Turner Elkhorn Mining Company was another example where the Court upheld retrospective imposition of very great financial burdens.

And even in a case like Corn Products itself, it's not realistic to think that the Corn Products Company, after all of its investment in plant, equipment and goodwill, had the realistic option of just going out of business rather than putting on the new labeling requirements.

It doesn't make sense rigidly to distinguish between retrospective and prospective application of this kind of regulatory adjustment of the burdens and benefits, as this Court has called it.

In the absence of further questions --

QUESTION: I have a question. Suppose this material that was filed by Monsanto contained the formula, the development of something which they discovered by accident, which very often is the case,

and they point out that its only utility is that it will, if it's sprayed on grapes, grave vines, it will destroy them. And contingency planners in the Pentagon say, well, we better have a contingency plan in case we get into a war with France, which isn't very likely, but let's have a contingency plan where we can destroy their economy by spraying the stuff, and so we want this formula.

Do they have to pay for it?

MR. WALLACE: I think that the most difficult hypotheticals would involve expropriation by the Government of formulas and manufacturing processes that are needed in wartime or other national emergency and then allowing other contractors, for example, to use them to supply the equipment. And then the question would be whether the taking was of the trade secret or whether it was the kind of thing that's involved in patent infringement, a taking of the end product, the making and using and practicing.

QUESTION: Would you think this was a trade secret, this hypothetical I mentioned?

MR. WALLACE: Well, perhaps it could be, since it's a formula that the company chose not to disclose and keep to itself. I can't deny that it might be recognized as a trade secret.

CHIEF JUSTICE BURGER: Very well. Thank ycu, gentlemen. The case is submitted.

(Whereupon, at 2:44 p.m., cral argument in the above-entitled case was submitted.)

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# CERTIFICATION

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#83-196-WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Appellant v. MONDANTO COMPANY

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BY Pixie Hammond

(REPORTER)