ORIGINAL

In the

Supreme Court of the United States

GTE SYLVANIA, INCORPORATED, et al., Petitioners,	:	
vs.,	:	No. 78-1248
CONSUMERS UNION OF THE UNITED STATES, INC., et al., Respondents.	:	

Pages 1 thru 51

Washington, D.C.
November 28, 1979

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GTE SYLVANIA, INCORPORATED, ET AL.,

Petitioners,

v. No. 78-1248

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,

Respondents.

Washington, D. C.,

Wednesday, November 28, 1979.

The above-entitled matter came on for oral argument at 1:58 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

HARRY L. SHNIDERMAN, ESQ., Covington & Burling, 888 - 16th Street, N. W., Washington, D. C. 20006; on behalf of the Petitioners

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Federal Respondent supporting Petitioners

APPEARANCES (continued):

ALAN B. MORRISON, ESQ., 2000 P Street, N. W., Washington, D. C. 20036; on behalf of the Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1248, GTE Sylvania v. Consumers Union.

Mr. Shniderman, you may proceed as soon as you are ready.

ORAL ARGUMENT OF HARRY L. SHNIDERMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SHNIDERMAN: Mr. Chief Justice, and if the Court please:

We are here for a second time on a petition for certiorari from the Court of Appeals for the District of Columbia and for the second time that court has placed its District Court on a collision course with the District Court for Delaware and with the Third Circuit.

The petitioners here are twelve television manufacturers which furnished information to the Consumer Product Safety Commission with respect to television related accidents. The respondents are prominent consumer groups who have sought access to that data.

In early '75, the Commission notified all interested parties that it was prepared to release the data, and shortly thereafter the twelve manufacturers brought suit in four District Courts. Most of the suits were brought in the Delaware District Court; the balance were brought in other District Courts not in the District of Columbia.

Temporary restraining orders were promptly obtained and the non-Delaware cases were transferred to Delaware with consent.

In May '75, about two weeks after the manufacturers filed their suits, the requesters brought a suit in the District of Columbia against the Consumer Product Safety Commission and joined the manufacturers as defendants. The District of Columbia suit was fairly promptly dismissed by Judge Ritchey in September of '75. He found a lack of a case of controversy between the requesters and the agency because the agency stood quite willing to release the documents when not enjoined from doing so. And he found a failure to state a claim upon which relief could be granted as against the manufacturers because no documents were being sought from the manufacturers.

In October '75, Chief Judge Latchum entered a preliminary injunction in the Delaware case. He --

QUESTION: Mr. Shniderman, since so much of this case seems to depend on procedural history and so forth, was the theory of your case in Delaware solely a reverse FOIA case or was it partly a Chrysler-type case that there was some protection given to providers that couldn't be furnished regardless of whether an agency wanted to or not?

MR. SHNIDERMAN: Well, it was really a -- I guess in view of Chrysler, it is clear that a reverse FOIA case is

really --

QUESTION: There is no such thing --

MR. SHNIDERMAN: -- there is no such thing. It is a very convenient shorthand way of describing the Chrysler kind of suit, and that is what basically we have and basically what the Third Circuit ultimately found that we had.

In any event, Judge Latchum found that section 6(b)(1) of the Consumer Product Safety Act barred disclosure of the requested data and he entered a preliminary injunction.

Now, Judge Ritchie had explicitly noted that in his opinion it would be appropriate for the requesters to seek to intervene in Delaware but they did not do so. Instead they appealed, as they had a right to do, to the Court of Appeals for the District of Columbia.

In July of '77, approximately ten months after oral argument, the Court of Appeals for the District of Columbia reversed the decision below and directed the case to proceed on the merits, in spite of the Delaware preliminary injunction.

This Court granted certiorari, summarily vacated the judgment below, and it remanded the case for reconsideration by the court below because by that time there had been a permanent injunction which had been entered by the Delaware court.

The Court of Appeals for the District of Columbia reconsidered the matter and ultimately reaffirmed its decision

and hence we are here.

In April, in the meantime, in April of '79, the Third Circuit affirmed Judge Latchum's decision on the permanent injunction. Now, in that proceeding the respondents in this case appeared as amicus curiae on a procedural issue, and the Consumer Federation of America, of which at least one requester is a member, appeared as an amicus on the merits.

The Delaware case thus is final except for a pending petition for certiorari filed by the agency in this Court.

Now, the court below in this case first found that there was a case of controversy with respect to the effect of the then preliminary and final judgment, the injunction. Second, it failed to find, failed to discuss the argument that had been made by both the agency and by us that there had not been an improper withholding of the documents within the meaning of the Freedom of Information Act because the agency was willing to produce the documents but was injoined from doing so. And third, it concluded that neither principles of comity nor collateral estoppel preclude the District of Columbia from going forward.

Indeed, in its second opinion the District of Columbia Court advised and directed the trial court to consider whether it may enjoin the manufacturers from enforcing the injunction in Delaware in the event the injunction were disobeyed. And it also commented on class action opportunities for

joining all requesters, a technique which had been espoused by neither side and to this day is not espoused by either side.

We rely on three wholly independent arguments for urging reversal to this Court. The first ground is quite simple and it is this: The Freedom of Information Act, in section 552(a)(4)(b), provides a requester with access to a District Court which is given jurisdiction, in the words of the statute, to order the production of any agency records -- and here are the key words -- improperly withheld.

We have here a permanent injunction which bars disclosure of the records which the agency would willingly produce. It is a sufficient basis for this Court to dispose of this case in its entirety simply to rule that the documents are not improperly withheld in the circumstances when the agency is permanently or indeed temporarily enjoined from producing them. The injunction must obviously be obeyed unless or until it is vacated.

QUESTION: We would have to say, I suppose, that the requesters had a right to intervene in the Delaware action and to appeal the injunction against disclosure?

MR. SHNIDERMAN: I would suppose they would have had such a right and they still may have such a right. That is something that this Court would have to decide, whether they have waived that right or not.

QUESTION: I mean if we were to lay down a general

legal --

MR. SHNIDERMAN: Of course. Of course, certainly and they had every opportunity to do so at all levels, as I would point out.

Now, the entire orientation of this act -- and I am talking about the Freedom of Information Act now -- is to restrict unbridled administrative decisions. No one before has ever suggested that the agency is required to defy court orders. The act is directed at agency conduct, it is not directed at courts, it is not directed at court restraining orders blocking record production.

In Chrysler, this Court recognized that a submitter of documents has a right to sue to restrain production of those documents. Now, if a suit is authorized, it obviously has a prospect of success, and this means the prospect that there will be a restraint on the agency, and such a court restraint on an agency cannot be translated into an improper agency withholding.

There are ways of vacating or modifying a decree but only the issuing court can do so. Never a moment in time has there been since this case in the District of Columbia has been instituted when the agency was not under temporary or permanent restraint from producing those documents.

QUESTION: By virtue of --

MR. SHNIDERMAN: By virtue of temporary restraining

order in the Delaware court, by virtue of a temporary injunction and by virtue of a permanent injunction, all in another court. And yet the --

QUESTION: Just to be sure, you have told us that the respondents could have intervened at any time in taking part or sought to intervene at any time and then if allowed take part in that proceeding and have a direct attack on the injunction --

MR. SHNIDERMAN: Yes.

QUESTION: -- by way of court review.

MR. SHNIDERMAN: And, Mr. Chief Justice, it is very common in the reverse situation. There are many cases on the books where an agency has refused to produce documents and a requester has brought suit in some court where the submitter has intervened to help bolster the position of the government and make whatever arguments it thought was appropriate. That has been very common.

The requesters would have this Court consider this case as if there had never been any restraining order in effect, but that is not our case. And it is equally significant, I submit, that the requesters in their brief never take a position whatsoever as to what ought to be done, what ought to be done with this case now that there is a permanent injunction in place, and yet that is our case.

QUESTION: Well, under your position, you would

almost have to take the opposite position if they had first filed an action under the Freedom of Information Act before your clients had filed an action for an injunction against disclosure, wouldn't you, if you rely on comity?

MR. SHNIDERMAN: I would suppose that would be true and I would suppose we would have intervened. But in all candor, when the decision is that the agency will release the documents, it is usually going to be the submitter of the documents that will bring the suit first. And when the decision is not to release the documents, it will be the requester who will bring the suit first.

QUESTION: The agencies have set up internal procedures whereby they notify in advance, don't they, at least that was true in Chrysler, that the Secretary of Defense notify Chrysler ten days in advance that he is going to release them in case Chrysler wanted to do anything about it?

MR. SHNIDERMAN: Yes, of course, and because a party who is going to get what he asked for really has no cause of action and that comes to a second point as to whether there is a case of controversy. He has no basis for suing if the agency says I am going to give you these documents tomorrow.

So we come to the second ground, the second quite independent ground, and that is comity. We submit that sound principles of judicial administration really require that deference be given to a sister court which has first seized

hold of a lawsuit and is in the process of adjudicating it. Unfortunately, we witness here an almost deliberate effort to cause a collision. It is very unfortunate, but I must say to cause duplicative litigation, because I think the Court of Appeals preferred its own court, and yet it is, as I have said, quite natural for the plaintiff to select its jurisdiction.

The suggestion has been made that comity principles apply, as is the suggestion of the court below, only when all the parties in the second suit are parties to the first, but there is no such rule and we certainly urge that this Court not to construct such a rule when there is, Justice Rehnquist, an opportunity to intervene in the Delaware District Court, if there is a feeling that the government will be an adequate representative. Or the respondents could have intervened here in the Third Circuit. And when they moved to appear as amicus on a procedural issue, we opposed their appearing on that basis and said in our same paper that we would have no objection even at that late date if they were to intervene at the Third Circuit level.

So certainly where we do not have a recalcitrant agency in this case, we do not think that the Freedom of Information Act provides a basis for relief. What we do have here is that the manufacturers have a strong statutory basis in 1391(e) for bringing a suit in a locality where it resides,

a very strong government policy dating back to 1962. And with a potentiatl of 200 million requesters who might request a document at any particular moment, we believe that comity should indicate that litigation in this area ought to be focused in a single forum.

Now, my final argument, case or controversy, which I would only like to devote a few minutes so I may save a little time for rebuttal -- Judge Ritchey found that since the requesters and the government both desired the same result, release of the documents, that it was no case of controversy as to then.

No court, not even the court below here, has held that the joinder of manufacturers under rule 19 provides an independent basis for jurisdiction. We are a mere appendage and our being added as an appendage did not translate a non-controversy into a controversy.

Thank you, sir. I will reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Geller.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,
ON BEHALF OF THE FEDERAL RESPONDENT
SUPPORTING PETITIONERS

MR. GELLER: Mr. Chief Justice, and may it please the Court --

QUESTION: Mr. Geller, did the Court of Appeals

reject the argument that the District Court suit in the District of Columbia should be dismissed because there just isn't any wrongful withholding?

GELLER: The interesting thing about the D.C. Circuit's decision, Mr. Justice White, is they never addressed that question.

QUESTION: It was presented though, wasn't it?

MR. GELLER: It was.

QUESTION: But I don't see anything in the opinion about it.

MR. GELLER: That is an interesting point.

QUESTION: Mr. Geller, is that true as to both of the opinions of the D.C. Circuit?

MR. GELLER: Yes, I believe it is.

QUESTION: It was presented both times, I mean?

MR. GELLER: Yes, I believe so. I believe that is right.

Mr. Chief Justice, and may it please the Court:

The federal respondents in this case are in basic agreement with the petitioners that the D.C. Circuit erred in ordering the District of Columbia District Court to adjudicate essentially the same controversy with the same documents and the same legal issues as that involved in the already pending Delaware litigation.

The principal concern of the federal government in

this area, however, is not to urge this Court to adopt rules, procedural rules that favor FOIA requesters or submitters, but rather to urge the Court to adopt procedural rules to insure that federal agencies are not put in a position where they are subject to inconsistent and perhaps even irreconcilable injunctive orders of different federal courts, with one court requiring the agency to turn over to the public certain records whose disclosure another court has enjoined.

Now, this problem is unlikely to arise when the first suit brought is an action by a requester under the FOIA. In those circumstances, as Mr. Justice Rehnquist has mentioned, the practice has generally been for the agency to notify the submitter of the pendency of the FOIA request or of a legal action if one has been filed, and to give it the opportunity to intervene if it believes that its interests are not adequately protected by the agency.

The more significant problem, however, which is clearly illustrated by this case occurs when the first suit brought is a so-called reverse FOIA action by a submitter of information to the government and when the submitter obtains an injunction prohibiting the agency from disclosing the records in question.

The federal government's view is that a second District Court in a suit subsequently brought by an FOIA requester should not proceed to adjudicate the disclosability of

the very same documents that are the subject of the first suit.

QUESTION: Mr. Geller, do you think there are going to be any more reverse FOIA actions?

MR. GELLER: Well, we use the phrase --

QUESTION: After Chrysler, which said there were no such thing --

MR. GELLER: I understand that the FOIA itself doesn't give any rights to submitters, but we use the phrase reverse FOIA action here --

QUESTION: Just as a shorthand --

MR. GELLER: Yes, just as a shorthand, as Mr. Shniderman --

QUESTION: Let's call them Chrysler actions.

MR. GELLER: I would be happy to call them Chrysler actions, if that would please the Court.

QUESTION: Except that may be gone pretty soon, too.

MR. GELLER: Perhaps I will continue to call them reverse FOIA actions.

QUESTION: What you mean is action based on some statute which forbids an agency to whom information has been furnished by a private person from disclosing it to someone else.

MR. GELLER: That's right, and here there are allegations that the Trade Secrets Act and section 6(b)(1) of the Consumer Product Safety Act prohibited the agency from

disclosing the television accident reports.

Now, the first and most obvious reason why we think that the D.C. Circuit should not have ordered the District Court to continue to take this case is one that Mr. Shniderman has already touched on, but I want to emphasize it because of its obvious importance to this case, and that is the very language of the FOIA itself.

Section 552(a)(4)(B) empowers the District Court to order the disclosure of agency records that are being "improperly withheld under the FOIA." And we agree witht the petitioners that an agency's obedience to a federal court order can in no sense be regarded as improper. But the Consumer Product Safety Commission believes that the injunctive order that was issued in Delaware is based on an erroneous interpretation of the law and it has appealed that injunction to the Third Circuit and it has now filed a certiorari petition in this Court.

But the commission is bound to obey the injunction until and unless it is set aside. We simply don't understand -- and the D.C. Circuit, as I said a moment ago, didn't bother to explain -- how the agency could have "improperly withheld" television accident reports from the requesters when it refused to turn over those documents solely because of the outstanding Delaware injunction. The requesters never addressed this issue in their brief and they never

explained what the Commission is supposed to do if it is subjected to inconsistent injunctions.

Now, along with the petitioners, the government also believes that the D.C. Circuit's decision is wrong for yet another somewhat broader reason, and that is that it violates fundamental principles of judicial comity.

The Court has often applied the general rule that a federal court should refrain from duplicating or interfering with the proceedings --

QUESTION: That is a pretty general ground. I wondered why the -- you didn't petition independently, did you?

MR. GELLER: We did not. We filed a brief at the petition stage and that is why we appear here as --

QUESTION: But you didn't file --

MR. GELLER: No, but it was not because we did not believe that the D.C. Circuit's decision was wrong. We said precisely that we thought it was.

QUESTION: You do concede that there are eleven Courts of Appeals in the country?

MR. GELLER: I do concede that there are eleven.

QUESTION: Soon to be fifteen.

MR. GELLER: But we think in the FOIA area there is a strong analogy to be drawn to cases involving in rem or quasi-in rem jurisdiction. In such cases, this Court has

made clear that the second court in which an action is filed msut always defer to the court first asserting jurisdiction, not as a matter of discretion but as a matter of absolute necessity. So the Court of Appeals in this case itself recognized that actions seeking to require or to prohibit the disclosure of copies of specific documents are in many ways indistinguishable from actions seeking the particular disposition of a specific piece of property.

In both types of cases, exclusive control over the property is essential to effectuate the court's judgment. It is obvious that an injunction preventing release of certain information is absolutely useless unless it prevents agency action everywhere. And by the same token, an order requiring disclosure of information obviously can't be limited to a single jurisdiction and would forever foreclose a subsequent non-disclosure order from ever being effected.

In short, FOIA claims or reverse FOIA claims, when they concern the same agency records, we believe must be adjudicated in one and not multiple jurisdictions. And we believe that it makes the most sense from the standpoint of judicial administration to centralize that litigation in the first court to assume jurisdiction, subject, of course, to that court's further order transferring the case to some other district.

Now, the Court of Appeals candidly adknowledged that

its decision would require duplicate of litigation, but it felt that that result was justified in this case for a number of reasons.

QUESTION: It was on the competitive theory, competition is good for the judiciary as it is for business?

MR. GELLER: That was the reason that they did not offer, but they offered several others which we think are equally meritless. We discussed them in our brief. The only point I want to make about the D.C. Circuit's approach, its so-called creative approach or flexible approach, as the requesters call it, is that it totally fails to offer a satisfactory solution to what we believe is the most pressing problem in this area, which is the very real possibility that a federal agency may be subject to conflicting injunctive orders of two separate courts.

The procedural device is, what the D.C. Circuit said is, "We're not going to require that the litigation be centralized in the first court. It can proceed wherever the FOIA action is filed, despite the pendency of another case, and there are a number of procedural devices that can be used to try to consolidate the litigation.

But the problem with that approach is that the procedural devices that the Court of Appeals would rely on, such as Section 1404(A) of Title 28, Rule 19 of the Federal Rules of Civil Procedure, while they may be useful in some

cases to accomplish a consolidation clearly can't be used in every case, and then you are left with the specter of possibly conflicting inconsistent injunctions.

For example, Section 1404 only allows transfer to a district in which the case could originally have been brought, and Rule 19 often can't be used to bring a non-party into a law suit because of venue or service of process problems. And perhaps more important, the principal defect in the D.C. Circuit's approach is that it relies heavily on procedural devices that we submit are simply ill-suited to FOIA litigation, where a plaintiff need not have any legal basis or any legal interest in the documents that he requests.

For example, the Court of Appeals suggestion that FOIA submitters or federal agencies should make use of the so-called requester class action is totally unworkable in practice because every person in the United States, indeed I suppose every person in the world, is a member of the class. Anybody can make a request under the FOIA, and I might add it's significant, we think, as Mr. Shniderman said, that the requesters in this case have abandoned any reliance on that portion of the Court of Appeals' opinion in this Court.

Moreover, if in fact the commission had attempted to join these requesters in the Delaware litigation under Rule 19, as the D.C. Circuit later said they should have attempted, the tactic would have been of little practical value

in avoiding duplicate of litigation or inconsistent judgments, because even if the commission could have succeeded in joining the requesters, and the answer to that question is far from clear in light of the venue and service of process problems that I mentioned a moment ago, all that would have been accomplished is that these two particular requesters would have been bound by the collateral estoppal effect of the Delaware judgment.

However, anyone in the United States would still have been free to file an FOIA action in the District of Columbia seeking access to the very same documents, and under the D.C. Circuit's theory, since these new requesters would not have been parties to or bound by the Delaware litigation, they would have had a right to continue to litigate and to receive an adjudication of their FOIA claim in the District of Columbia, despite the existence of the Delaware injunction.

So we think that this so-called flexible approach just won't work in a substantial number of cases, and could lead to what we believe is the most important problem in this area, one that the Court I think should be concerned about in resolving the issue, which is the very real possibility that exists in this case and these types of cases of an agency having to either comply with an order requiring or an order prohibiting disclosure of the precisely the same document on pain of contempt.

QUESTION: You can't really enter a plea information, can you?

MR. GELLER: Well, it has been suggested, but there is certainly no case that the, I mean the requesters and Judge Robinson in the D.C. Circuit, in an effort to explain what they meant by "creative approach," listed every conceivable procedural remedy that might exist in this area, but there are no cases that ever applied it and we don't think it would be workable.

QUESTION: Is the government's position that the court in the -- the court handling the second suit, the later suit, should hold its hand from the very outset, or do you say that comity picks up when there has been a judgment in one court or the other?

MR. GELLER: Well, we think that the first, the second court in this case, the D.C. Circuit, District Court, could have stayed its action.

QUESTION: I know it could have stayed its action. What is your position, when should it have stayed it, from the very outset?

MR. GELLER: Yes.

QUESTION: Or would it have then erred to go ahead until there has been a judgment?

MR. GELLER: Yes, it would have been error.

QUESTION: It would have been error to go ahead,

even though predictably -- let's assume the District of Columbia District Court thought that the docket in this court is much freer, much more -- much quicker than the court in Delaware. Couldn't they have proceeded to judgment first?

MR. GELLER: I don't think so. First of all, there's of course the improperly withheld argument which exists in that situation. By the time the second District Court case was filed, the commission was already under an injunction not to disclose the documents. That's reason 1 why the D.C. District Court should not have continued to adjudicate the case.

But secondly, the problem --

QUESTION: I know, but the threshold issue, the threshold issue on the -- I suppose is whether a permanent injunction ought to issue.

MR. GELLER: It is --

QUESTION: Well, but under Walker v. Birmingham, it is not being improperly withheld, even though the injunction is erroneous, because the remedy is to appeal the injunction.

MR. GELLER: Precisely, and that's what the commission did here. It appealed that injunction to the Third Circuit, which is affirmed, and it's filed a certiorari petition in this Court. But until that injunction is set aside, I don't see how --

QUESTION: So you feel you must interpose that, the injunction, to answer my question? Suppose no temporary

restraining order, preliminary injunction?

MR. GELLER: Assuming that no temporary restraining order had been entered in the Delaware case in this Court, then we wouldn't have our first argument, which is the improperly withheld --

QUESTION: Until one court or the other had come to judgment?

MR. GELLER: No, we think that the principles of comity would apply here, even if the first court did not come to judgment, because I think, for the reason I gave, the analogy to the in rem or quasi-in rem, unless you apply a bright line test --

QUESTION: I guess we don't need to settle that, because there is a judgment.

MR. GELLER: Absolutely. You don't have to reach what I have stated is a broader theory, because we do think that --

QUESTION: Mr. Geller, I don't see how that case could arise, because if there is no injunction, presumably if Mr. Shniderman's argument is correct, anyway, you would have simply turned the documents over, notwithstanding the pendency of the Delaware action.

MR. GELLER: Well, we said that we would have turned the -- as I recall, we said in late March or early April, 1975, that we were planning to turn the documents over on May first.

QUESTION: And if there had been no injunction before May first, should we not assume that you would have done what you said you were going to do?

MR. GELLER: Yes, but --

QUESTION: So this hypothetical couldn't arise?

MR. GELLER: Well, it could arise in the situation where on April 10th the submitters ran into the Delaware District Court and asked for a temporary restraining order, which I think it's unlikely, you're right, the Delaware District Court might have refused. The case could then have been litigated, could have gone to judgment in the very short period of time between --

QUESTION: But Mr. Justice White's question was, assuming just the pending case and no order, and my understanding of the government's position all along has been, if there were no order, we would have turned the documents over.

MR. GELLER: Well, that's absolutely right; that's right.

QUESTION: You would have been obliged to turn it over, would you not?

MR. GELLER: Well, the commission has taken the position that it's not exempt, and we would have turned it over; that's correct.

QUESTION: Mr. Geller, do you think there's a case in controversy here?

MR. GELLER: Yes, we do. We have addressed that very briefly in our footnote. We think that there is a lot of controversy between the requesters and the commission as to whether these documents are being improperly withheld.

QUESTION: By virtue of the joinder under Rule 19?

MR. GELLER: No. No. There is a case of controversy between the requesters and the commission here in the District of Columbia as to whether the documents that the requesters have asked for are being improperly withheld under the act.

QUESTION: So the District of Columbia -- so the Court of Appeals should have done what?

MR. GELLER: The D.C. Court of Appeals we think should have reversed on the ground that the documents were not being improperly withheld and that the requesters had not stated a cause of action under the FOIA.

QUESTION: The Court of Appeals --

MR. GELLER: Excuse me, that's right, Judge Ritchey had, although on a different --

QUESTION: So you think the Court of Appeals is correct in deciding the case on the merits but simply that it decided the wrong way.

MR. GELLER: Yes, that's right. We think there is a case of controversy --

QUESTION: Well, would it have been all right for them to just say we are going to wait?

MR. GELLER: Well, I don't think that --

QUESTION: What about comity? What is the bottom line on the comity argument?

MR. GELLER: The bottom line is that we think that the --

QUESTION: It isn't to dismiss.

MR. GELLER: Well, it could be --

QUESTION: It is to wait to see if the other case really stands up.

MR. GELLER: That's right, that is a possibility. We say that Judge Ritchey could have --

QUESTION: Possibility? What else could you do?

MR. GELLER: Well, we don't think there is any practical difference between Judge Ritchey's having said I am going to stay my order, because if a permanent injunction was issued in Delaware and never overturned that stay would have been an indefinite duration.

QUESTION: I agree with you, but what if it was overturned?

MR. GELLER: If it was overturned then it is conceivable that these requesters could have just asked for the documents at that point. They wouldn't have needed a lawsuit to --

QUESTION: If you reverse -- if you affirm the District Court, it is a dismissal.

MR. GELLER: That's right.

QUESTION: Well, that isn't the bottom line on the comity case. You would just sit and wait.

MR. GELLER: No, I think that the cases in this Court have said that under rules of comity a case can be dismissed, it need not be stayed. The court has to decide what is the appropriate remedy under the particular circumstances of the case.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Morrison.

ORAL ARGUMENT OF ALAN B. MORRISON, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Virtually from the start of this litigation, the petitioners and the government have opposed the efforts of the requesting parties under the Freedom of Information Act to litigate this case in the District of Columbia. They have consistently asked why didn't you go to Delaware? And I want to answer that question today in three separate ways.

We didn't go to Delaware for three reasons. First, we didn't want to go to Delaware; second, we didn't have to go to Delaware; and, third, it is the wrong question to ask. And the proper question to ask is why didn't the parties, and

in particular the government, move to take the cases in Delaware and bring them down to the District of Columbia where everybody was here, the case could have gone forward for judgment on the merits in one court, this one.

Now, bluntly stated, this case involves forum shopping by all the parties. There is nothing inherently evil in forum shopping. Congress has provided alternate venue provisions and they are there to be exercised.

The manufacturers went to Delaware because they believed it would be favorable to them to go to Delaware. It is not, of course, the principal place of business of any of them. In fact, four lawsuits were not even filed in Delaware, they were filed elsewhere and later transferred to Delaware.

QUESTION: Isn't that usually a reason for venuing a case, though, counsel?

MR. MORRISON: Absolutely, Your Honor. And my point is that, like saying this is a forum shopping case, we don't decide anything. The manufacturers were there in Delaware, despite the absence of any witnesses, despite the absence of lead counsel. The documents weren't there. They were merely incorporated in Delaware.

We wanted to avoid Delaware for our own reasons, because we believed it was inconvenient and because it was more costly to litigate here in the District of Columbia. The clients were here, the counsel was here. We considered going

up to Delaware and moving to intervene in Delaware and attempting to have the case transferred here under 1404(a). But as soon as we thought about that, we saw we were in a box because there are cases that have held that if you voluntarily come into an action as an intervenor you waive your right to go to ask that the case be transferred. So we were put in a bind because they had run the race to the courthouse.

Indeed, we couldn't have gone to Delaware only at the time of filing. We would have had to have gone to the District of Delaware, the Western District of Pennsylvania, and we would have had to have gone to the Western District of New York and the Southern District of New York to litigate a single controversy.

Now, we also perceived that the action in the District of Columbia would be more favorably disposed of here. Presumably the manufacturers thought the contrary for they went to Delaware and the general reputation of the courts is at least a matter that counsel believed they ought to consider in their obligations to their clients. Moreover, there had been temporary restraining orders already entered in these other cases and it was a negative footing on which to settle the cases.

The result is that we would have been faced with the situation at the time we filed the complaint. I want to emphasize that this was four days after the May 1st self-imposed

deadline by the Court of Appeals.by the Product Safety Commission. Four days after that, we did the simplest thing, we filed one case here in the District of Columbia and, unlike the manufacturers, we named every single person who was relevant in the controversy and tried to get them all in a single forum.

So that is why we didn't want to go to Delaware. And as counsel, I must tell you that I am obligated to represent my clients to the best I can.

QUESTION: Mr. Morrison, I trust before you are through you will explain your views about the improperly withheld argument?

MR. MORRISON: Why don't I do that now, Mr. Justice Stevens. Let me say first that that argument was barely made at all in the Court of Appeals.

QUESTION: But made.

MR. MORRISON: Barely. It was --

QUESTION: Well, made. Apparently you recognize it.

MR. MORRISON: Mr. Justice White, I am saying that it was barely made because I can't say to you now that it wasn't made. I don't have any recollection of it, but I just want to say that I am only saying that from the point of view of the Court of Appeals.

QUESTION: You are not saying --

MR. MORRISON: The issue is here and I am prepared to answer it on the merits. I didn't think it was fair to the Court of Appeals. It was not a principal focus, it was certainly not an issue made --

QUESTION: Was there a petition for rehearing for this last --

MR. MORRISON: No, there was not, Your Honor. There was the first time --

QUESTION: Yes.

MR. MORRISON: -- but not the second time.

QUESTION: Where was it barely raised, this time or the time before? Or both?

MR. MORRISON: I think only the time before. The remand, Your Honor, was in connection with the fact of the permanent injunction.

QUESTION: Well, that is what this argument is about, isn't it?

MR. MORRISON: Yes, Your Honor.

QUESTION: That is what this whole point is, the existence of an injunction.

MR. MORRISON: That's right. Now, we suggest that there is now --

QUESTION: If they had disobeyed that injunction, what could have been the consequence?

MR. MORRISON: I'm sorry, Your Honor?

QUESTION: If they had disobeyed that injunction, what could have been the consequences?

MR. MORRISON: We have never suggested the Product Safety Commission disobey that injunction.

QUESTION: No, no, no.

MR. MORRISON: We believe that they should not disobey the injunction under Walker v. Birmingham. What we believe would happen is if this case had properly been --

QUESTION: What I understood you to suggest is that the agency should disobey that injunction.

MR. MORRISON: No, Your Honor, I did not suggest that. What I suggested would happen is if all of the parties were here in the District of Columbia as part of an ancillary relief on the merit, the court here in the District of Columbia would have power analogous to the comity power to stay an action, another action, to order the petitioners here to seek to withdraw the injunction in Delaware, to clean up, to be sure there is no outstanding injunction. After all --

QUESTION: Is there a case from this Court ever holding to that effect?

MR. MORRISON: No, Your Honor. I must say this case is unique in a number of different ways because it seeks to apply principles of collateral estoppel when we weren't a party, it seeks to apply comity based on a temporary restraining order which the petitioners not only say --

QUESTION: Mr. Morrison, don't forget to answer my question about improper withholding.

MR. MORRISON: I'm trying.

QUESTION: I know you're trying, but it is really terribly important.

MR. MORRISON: I know it is, Your Honor, and --

QUESTION: Regardless of how it got here or the equities or all the rest of it, we really have to address that.

MR. MORRISON: There is now a final injunction, affirmed on appeal, petition for certiorari pending. But the origin of the withholding argument, the improper withholding argument, the linchpin was the grant of the initial temporary restraining orders in the 13 different cases that were initially filed.

Now, according to this argument, if you cannot stop -- if you have no jurisdiction, it is because there was no improper withholding from the moment that that temporary restraining order, Mr. Justice White, was entered in those cases. And so we could not have from the very start had jurisdiction and --

QUESTION: Well, I didn't realize this was a jurisdictional argument. I thought you just lose on the merits of it.

MR. MORRISON: Well --

QUESTION: The court adjudicates your case that you

file and say you lose, there isn't any improper withholding.

MR. MORRISON: But as soon as the temporary -- but the argument is made that as soon as the temporary restraining order is entered, there can no longer -- the basis of withholding is no longer that there is a statutory right to withhold but that there is a temporary restraining order. That is the argument that was made the first time and every time it has been made that is --

QUESTION: Well, what about the argument, that is what I am trying to figure out.

MR. MORRISON: Now --

QUESTION: At any time during this case, could they, were they wrongfully withholding documents?

MR. MORRISON: There are two things that are wrong with that argument. The first is that presumably if we had won the race to the courthouse --

QUESTION: But you didn't.

MR. MORRISON: -- and filed a case and they had gotten a temporary restraining order some place else in another case without us being a party, at that point our case would have to be dismissed under this argument. And I don't think that Congress ever intended this statute, which was a broad remedial statute, to give the rights to requesting parties to come in, ever intended it to be so narrowly construed -- and I think this Court's decision in the Bannercraft case suggests

that the FOIA did not strip a court of its equity powers.

QUESTION: So if the agency says I'm withholding the documents because I have been ordered to or I will be held in contempt if I don't, they nevertheless are wrongfully withholding?

MR. MORRISON: That is correct, Your Honor. That is correct --

QUESTION: What is your second reason?

MR. MORRISON: I thought, Your Honor, the first that it was simply not a way of dealing with it, that it might be the case if we had a situation in which the manufacturers had gone in and requested and brought an action, had gotten a temporary restraining order, gotten preliminary injunction, a permanent injunction in the District Court affirmed on appeal, two years later we came in, at that point we might have a case in which not that we would be precluded from proceeding at all but that we might have to go back to the original forum.

QUESTION: Well, you are saying that FOIA is so broad and Congress didn't intend to strip a court of its equitable powers, and yet I understood a moment ago that you agreed that under Walker v. Birmingham the only way to challenge an injunction was to appeal it, not to disobey it. Are you saying that applies only to an injunction issued only four days ago?

MR. MORRISON: No, Your Honor, that is not what I meant. What I meant was you would have to bring a legal proceeding of some kind, I did not mean appeal in the traditional sense of appeal. I would feel that in Walker you resort to judicial process, which is what Walker was talking about, and the judicial process here that you would be resorting to is bringing in the manufacturers, the submitters, and the Product Safety Commission and the requesters in one forum.

QUESTION: And disagreeing with the other forum?

MR. MORRISON: Well, Your Honor, I think that we would have to -- the case would have to be transferred. It should have been transferred there. We should have been joined up there to begin with. I would have had no problems. They transferred the case down here from Delaware and we would have relitigated it here. But nobody tried to do that up there. And if we went up there to do it, we were likely to get our heads chopped off.

QUESTION: Mr. Morrison, you say relitigate, didn't you, just now?

MR. MORRISON: If I said it, I didn't mean it in that sense.

QUESTION: Well, was that Freudian moving in on you?

MR. MORRISON: I don't know. I don't know, Mr. Justice Marshall.

QUESTION: Well, that is what you are trying to do,

aren't you, relitigate?

MR. MORRISON: We are trying our first chance to litigate. We have never litigated --

QUESTION: What would happen to the Third Circuit case that is on appeal here, on cert here? What would happen to that case?

MR. MORRISON: We believe that we should have been joined as --

QUESTION: What would happen to that case? Could the D.C. Court of Appeals reverse us?

MR. MORRISON: No, Your Honor, they could not.

QUESTION: There are no procedures for transferring a case from one Court of Appeals to another, is there?

MR. MORRISON: At that point, no. The Third Circuit could have --

QUESTION: That is the point where we are now, is there is a Court of Appeals judgment and cert is pending here.

MR. MORRISON: If this Courg rants certiorari, in our view, and decides the case, if it affirms the decision below we would not be legally bound by the outcome because we were not parties to the Delaware proceeding. Now, as a matter of stare decisus, of course, I would advise my clients that the likelihood of success is very small.

QUESTION: How about as far as the fact that the agency would not be violating FOIA because it is not wrongfully

withholding, the injunction has been affirmed?

MR. MORRISON: I would say at that point, Your Honor, if we had brought a lawsuit after this Court affirmed the decision, I might have to go to Delaware to open the proceeding there and both sides of --

QUESTION: Meanwhile the agency would not be wrongfully withholding.

MR. MORRISON: I could presumably, if I had to join the agency up in Delaware, if their argument is right that it is pursuant only to a court order, it is the court order at that point that would preclude me from proceeding on the merits and I don't see how it is wrongfully withholding now I could ever relitigate.

It seems to me that the problem with what the government has suggested here is that they have made everything turn on a race to the courthouse which under these circumstances we could not win and we couldn't win because --

QUESTION: No, Mr. Morrison. They also had to get the injunction. They could have got to the courthouse first, but --

MR. MORRISON: They consented to it in most cases and everybody has agreed that it is virtually automatic. In this kind of litigation, if you don't give the submitters an injunction, the case is over. And every case, every government case that I have seen, the government has --

QUESTION: That isn't true without a permanent injunction. I mean that is after litigation.

MR. MORRISON: No, we were tossed out and the argument on improper withholding was made at both temporary restraining and the preliminary injunction stage, and that is when we lost our case in the District of Columbia, the District Court initially, because we were told we could not proceed. And what I am trying to say is that the government here and the petitioners are making everything turn on a race to the courthouse, a race which we couldn't win for one reason, because we let the administrative process take its course. And as sure as I am standing here today, I want to assure you that this will be the last case we will lose on a race to the courthouse, because next time we are going to be smart and we are going to be here in the District of Columbia and anyone who wants to come in is going to have to come in on --

QUESTION: Well, why didn't you do that on this case if you have it all settled? If you don't need us --

MR. MORRISON: Because I don't think that is a sensible way for this Court or other courts to resolve these kinds of --

QUESTION: Well, what if the District Court in which you apply your new tactics if you lose this case says the agency says it is going to give you the records, you say you

want them, what are you arguing about? You don't have a case of controversy.

MR. MORRISON: But we will get in there before they decide because most of them don't make it in the 10 or 20 days that the statute specifically authorizes --

QUESTION: What about the ones which do? Do you take a position that a wrongful withholding occurs when an agency says we need time to evaluate your request?

MR. MORRISON: Yes, Your Honor. The statute I believe is clear on this.

QUESTION: It is wrongful withholding unless they send you the documents by return mail?

MR. MORRISON: No, within 10 days plus the extension. Congress dealt with this in the 1974 amendments. They were concerned about this very problem and said we recognize the interruption in administrative processes is not a good thing in general, but we also realize that the agency, if they keep saying just wait a couple days, a couple days, a couple days, and you don't get them -- Congress said yes, the courts have jurisdiction if the statutory time frames have passed.

QUESTION: What if those statutory time frames have not passed?

MR. MORRISON: Your Honor, there are not going to be very many of those cases.

QUESTION: But what about the few of them that there

are?

MR. MORRISON: At that point, Your Honor, I think what would happen is -- what we urge is that the government is in the middle of all of these cases, it is the responsibility of the government who claims to be a stakeholder here and has no other interest besides doing that, to say we've got to try to do what we can, either join the parties under Rule 19, which we say they should have done here when we are known requesters, not a hypothetical 200 million but known requesters who have been asking for these documents, or move to transfer under 1404(a) which incidentally the government finally got around to doing after the first decision in the D.C. Circuit. Of course, at that imte it was denied as untimely. Moreover, the government didn't have all the cases in Delaware to begin with, there were four cases which they moved from other districts to Delaware instead of moving them all down to the District of Colu-bia, and we say that is a more sensible way, that neither requesters nor submitters ought to have the option of unilaterally choosing the forum and having the other person go up and have to intervene and then lose their right to move to transfer. That is not a sensible way of deciding in which forum these cases ought to be litigated.

QUESTION: Why prefer the forum in which the government agency is located to the forum in which either the submitter or the requesters are located?

MR. MORRISON: I'm not suggesting that you have to do that, Mr. Justice Rehnquist. All I am suggesting that you do is to look at the facts of a particular case and see where the appropriate forum for litigation is. Here it plainly would have been in the District of Columbia. The principal counsel for the submitters was here, the agency was here, the records were here, the principal counsel for the requesters was here and the requesters themselves were here.

What if the next case, someone requested the records of somebody who was living in Alaska and it was requested by a corporation down in Florida, say that one party or the other should automatically, without any consideration of fairness, be able to drag that person to an unfriendly forum doesn't seem to me to be a sensible way to do things.

QUESTION: Why don't you bring in Hawaii while you are at it?

MR. MORRISON: Well, we can do that, Your Honor.

QUESTION: Then you are going to create a whole new branch of law, depending on case by case situations as to whether --

MR. MORRISON: Just as we resolve other issues where there are two parties filing lawsuits in just the patent area, it happens all the time. The difference in the patent area is that the race isn't fixed because here if the government decides to release the documents the requesters no longer can

be in the race. There is no case of controversy. We admit that, without the bringing in of another party. But once the government says that they are not going to turn the documents over, then the submitters can't win the race because by that definition they don't have a dispute. Indeed, they don't have a dispute with the agency until the agency affirmatively decides to release the documents.

So whatever the sense of applying the race to the courthouse notion may be another context. It doesn't make sense here. It won't work. We need other procedural devices, Rule 19 and 1404(a), in order to be able to consolidate the cases in a single forum.

Now, in addition to the problems created by the race to the courthouse, we are going to have situations here. It is purely fortuitous that we were able to consolidate all of the cases brought by the submitters in Delaware, and that is only because the fact that all the corporations were there. In the absence of that, we would have had litigation around the country and indeed it could have --

QUESTION: Could the reverse be true, Mr. Morrison, you could have multiple requesters all over the country and not be able to consolidate them all?

MR. MORRISON: Well, I believe we would, Your Honor, and that is because there is a special venue provision under the FOIA that permits an action to be brought in the District

of Columbia. So under the "might have been brought test" of 1404(a), an action under the FOIA can always be brought in the District of Columbia, so that that likelihood makes it much more probable that we will be able to consolidate the cases in a single forum.

Now, I do not suggest that it will work in every case. What I do suggest is that if the District Courts are told you've got to try to work this thing out flexibly instead of just simply saying you lost your case to the courthouse, so good-by. That is all we are talking about, a temporary restraining order here is nothing more than the filing of a complaint and an automatic grant. They said -- the petitioners say so, and I think Footnote 11 of their brief, they say it is automatic and we don't dispute that --

QUESTION: Mr. Morrison, it may be that the TRO is automatic, but you don't suggest that District judges around the United States, when the government argues there is no legal basis for the submitters to get an injunction, that they automatically enter injunctions right and left, do you?

MR. MORRISON: No, I don't, Your Honor.

QUESTION: They must at least be a legal basis for the claim.

MR. MORRISON: I agree.

QUESTION: Shouldn't we presume that all judges are equally competent to weigh the merits of these claims, all

Federal District judges?

MR. MORRISON: That is correct, Your Honor, but we do have a problem of forum shopping and that is what it is, and the question is what are we going to do about it. And I don't believe that the principle that Your Honor is --

QUESTION: But really if there is a colorable legal basis, it persuades the district judge that the documents should not be released, they shouldn't be pell-mell released just to protect the forum of the other side?

MR. MORRISON: I agree.

QUESTION: Congress could stop the forum shopping, couldn't it?

MR. MORRISON: That is, of course, true. Everything under the FAOI, Congress can make any changes it wants in the statute.

QUESTION: So your answer is yes, but you would rather have us do it?

MR. MORRISON: No, I am here in court now, Your Honor --

QUESTION: Because you don't have to go all the way up to Delaware. That's strange.

MR. MORRISON: Or California, as other cases have been involved.

QUESTION: Well, California isn't involved in this. You just object to taking a trip to Delaware.

MR. MORRISON: And they object to taking a trip to the District of Columbia, with all due respect, Your Honor, because they don't want to be here and we don't want to be up there.

QUESTION: Neither of you like Amtrak.

(Laughter)

MR. MORRISON: Your Honor, this race to the courthouse theory which has been put forth is going to produce unnecessary and premature litigation. It is going to produce an unnecessary interruption of the administrative process as parties are facing to the courthouse to get their choice of forum so that everything can be consolidated there because they are going to win, and it provides an absolute choice of forum to one side or the other without regard to the merits. We don't think that is a sensible way of dealing with it, but if that is what the Court says we believe we can live with it in the first case, and we are here today because we agree with the Solicitor General that there is a problem with judicial administration. We agree that it is desirable to have proceedings consolidated in one forum. We disagree that the race to the courthouse with one side a guaranteed winner and the other side a guaranteed loser as a sensible way of resolving that conflict.

What we urge is that the flexibility entailed in Rule 19 and 1404(a) be used to solve the problems in virtually every case and that we don't think there are significant

problems that cannot be worked out through them.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Shniderman?

ORAL ARGUMENT OF HARRY L. SHNIDERMAN, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. SHNIDERMAN: Your Honors, first of all, in response to some questions from the Justice, I do want to point out the improperly withheld point was fully briefed in the court below. Those briefs indeed are lodged with this Court and if there is any question about it or --

QUESTION: Both times or the first time or the second time?

MR. SHNIDERMAN: It was briefed more sketchily the first time because we were placing greater emphasis on the case of controversy, but it was there by both the government incidentally and by us.

QUESTION: But more fully the second time?

MR. SHNIDERMAN: Yes, more fully the second time. And we frankly do not know why the Court of Appeals did not deal with the point at all. Perhaps some of the discussion here today would suggest why the point was not dealt with.

I might also add, although it may date me, Justice Rehnquist, when you rely on Walker v. Birmingham, I would also like to say that inour brief we point to the United Mine

Workers case where John L. Lewis made a mistake as to whether an injunction was binding or not and it cost his union $1 million. So I would think that injunctions are to be obeyed until such time as they were set aside.

We are frankly at a loss, although perhaps it is not important, as to why the government has changed its position on case of controversy. Part of the difficulty that we get in here is because we really did not have a case of controversy in this court. The government now states that there is a case of controversy as to the scope or the effect of the injunction. But I have not heard one word on the part of the government or on the part of the respondents as to what the controversy is about that injunction.

QUESTION: So you say there still isn't one?

MR. SHNIDERMAN: There still isn't one, and that is one of the reasons why we are in this bind here, wasting this Court's time --

QUESTION: So you say that is a threshold issue that you urge and that we must decide at the doorstep because that question is always open?

MR. SHNIDERMAN: No, Mr. Justice, you need not decide it. There are three independent bases for deciding it and --

QUESTION: Well, we can't decide anything else if we decide there is not a case of controversy. So don't we have to decide that before we can reach anything else? We just can't

assume jurisdiction and --

MR. SHNIDERMAN: Of course, that is quite acceptable to us.

QUESTION: Well, I mean isn't that inevitable --

MR. SCHNIDERMAN: I think it's good practice and --

QUESTION: You've raised it --

MR. SCHNIDERMAN: Although this Court and other courts upon occasion do avoid the jurisdictional issue, there are, for example --

QUESTION: We assume we have jurisdiction and therefore we decide the merits?

MR. SCHNIDERMAN: Well, this case is now in the United States Supreme Court and it is still undecided in the District Court whether Warwick, one of the twelve manufacturers, was properly served with process. That issue has not yet been decided either, which is sometimes considered jurisdictional.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 2:47 o'clock p.m., the case in the above-entitled matter was submitted.)

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