ORIGINAL

In the

Supreme Court of the United States

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,

APPELLANTS

V.

L. DOUGLAS ALLARD ET AL.,

APPELLEES

No. 78-740

Washington, D. C.
October 1, 1979

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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., Appellants	
v.	No. 78-740
L. DOUGLAS ALLARD ET AL, Appellees	

Washington, D.C.

Monday, October 1, 1979

The above-entitled matter came on for argument at 10:06 o'clock a.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:

MRS. HARRIET S. SHAPIRO, Attorney, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530 For the Appellants

JOHN P. AKOLT, III, ESQ., 1660 Lincoln Center, Denver, Colorado 80264 For the Appellees

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 78-740, Andrus, the Secretary of the Interior against Allard.

Mrs. Shapiro, you may proceed whenever you are ready.

ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO

ON BEHALF OF APPELLANTS

MRS. SHAPIRO: Mr. Chief Justice and May it Please the Court:

This case is here on direct appeal by the Government from an order of a Three-Judge District Court in Colorado.

The District Court entered a declaratory judgment and an injunction restraining the enforcement of two acts designed to protect our nation's birds, the Eagle Protection Act and the Migratory Bird Treaty Act.

Those acts prohibit the sale of any parts of protected birds.

The District Court decided that neither act applies to birds killed before the act prohibited the sale of the parts and that means that under the District Court's decision, that items containing old feathers, that is, preprohibition feathers, can be sold.

Appellees have various commercial interests in things made by Indians. The Allards, the Bovises and Ward own

stores that trade in Indian items.

Kelley works in the Bovis store and Eros is an appraiser for the Indian items.

Some of these items are quite old and rare and some are made, in part, of feathers.

In response to interrogatories, the Appellees have identified about 40 such items they own and apparently wish to sell. The items contain the feathers of birds protected by either the Eagle Protection Act or the Migratory Bird Treaty Act, feathers that Appellees claim are preprohibition.

Almost all of the feathers are eagle feathers.

The Eagle Protection Act and the Migratory Bird Treaty Act both prohibit the sale of any parts of the birds to which they apply. They also, of course, prohibit hunting or killing those birds or any commercial dealing in the birds themselves.

We have discussed the Migratory Bird Treaty Act in our main brief and our reply brief in some detail but the first point I want to emphasize today is that this is an Eagle Protection Act case far more than it is a Migratory Bird Treaty Act case.

The question of whether the Eagle Act applies to all feathers is more important, both to the Government and to the Appellees than whether the Migratory Bird Treaty Act applies.

QUESTION: And if you are correct about the Eagle

Act, you win, don't you, without consideration of the Migratory Bird Treaty Act?

MRS. SHAPIRO: Well, we win -- assuming that the Appellees don't want to take the eagle feathers off of the items they own and sell them as --

QUESTION: Well, if they wanted to take them off and took them off, they would be exempt under the other act, would they not?

MRS. SHAPIRO: No.

QUESTION: Why not?

MRS. SHAPIRO: Because there are about seven artifacts, I think --

QUESTION: Yes.

MRS. SHAPIRO: That contain both eagle feathers and Migratory Bird Treaty Act feathers.

QUESTION: I see.

MRS. SHAPIRO: So as to those, they could take the eagle feathers off and then there would be a question as to whether they could sell them and that would turn on the applicability of the Migratory Bird Treaty Act.

QUESTION: Now that I have interrupted you, what do you say about the hypothetical case adverted to by your colleague on the other side, that the vendor or the seller could simply take all the feathers off these artifacts and sell the artifacts without feathers and then make a gift of the feathers?

MRS. SHAPIRO: Well, that, we think, would certainly be a violation. It would be an evasion of the act. The act prohibits the sale, exchange or bartering of the feathers.

QUESTION: But not gifts.

MRS. SHAPIRO: Not gifts and if it was part of the same sales transaction, merely separating the artifact would not make it a different sales transaction.

QUESTION: Well, it would be a matter of litigating the facts.

MRS. SHAPIRO: It certainly would. That is the ultimate question, is that the tryer of fact would have to decide whether this was the sale of feathers or a barter or exchange that was within the prohibitions of the statute.

QUESTION: Mrs. Shapiro, the Court did not reach the constitutional question, did it?

MRS. SHAPIRO: No, it decided the case on statutory grounds. It stated that the reason that it was deciding it on statutory grounds was in part to avoid serious constitutional questions.

QUESTION: What was the occasion, then, for continuing a Three-Judge Court?

MRS. SHAPIRO: Well, we argued in our jurisdictional statement that, in fact, the Three-Judge Court was not necessary because the constitutional questions were not substantial.

QUESTION: Well, then, should this case not have

gone to the Court of Appeals?

MRS. SHAPIRO: That was the argument that we made in the jurisdictional statement. The difficulty was that the appeal to the Court of Appeals was filed one day late and we sought --

QUESTION: But have we not, on some occasions, directed the putative Three-Judge Court to enter a new judgment and to allow an appeal to the Court of Appeals?

MRS. SHAPIRO: Yes.

QUESTION: Do you think that would be an appropriate solution here?

MRS. SHAPIRO: Yes, that is the solution we urge this Court to adopt in its jurisdictional statement.

QUESTION: But despite your urging we noted probable jurisdiction, did we not?

MRS. SHAPIRO: That is right. Yes.

QUESTION: It is not too late to follow that course now, is it?

MRS. SHAPIRO: No.

QUESTION: On your submission that the constitutional issue is frivolous?

MRS. SHAPIRO: Yes.

QUESTION: And despite the three judges thinking to the contrary.

MRS. SHAPIRO: That is right.

The reason this case -- that the Eagle Protection Act is more important to this case for the Appellees is because almost all the items that they have identified contain eagle feathers. Almost none contain Migratory Bird Treaty feathers.

The Eagle Act is more important to the Government in this context because the Appellees' artifacts are typical.

The question involved here is more likely to arise in enforcement of the Eagle Act than of the Migratory Bird Treaty Act. The question comes up mostly in connection with Indian items and the feathers in those items are usually eagle feathers. I emphasize this point because the District Court focused on the Migratory Bird Treaty Act and Appellees repeat that error. They thus avoid facing both the plain language of the Eagle Act and the justification for that language, Congress' desire to protect our national symbol from extinction.

I turn now to those two points.

The Eagle Protection Act was enacted in 1940 in order to protect the Bald Eagle. It was extended to the Golden Eagle in 1962. The act prohibits the killing or taking of eagles. It also prohibits the possession, sale or purchase of eagle parts.

There are only a few carefully-limited exceptions to this total ban. The most important for this case is the exception that permits the possession and transportation of the parts of eagles taken before the act applied to them. That is,

the act says that no one may possess, purchase or sell eagle parts except that preprohibition eagle parts may be possessed.

We submit that the negative implication is absolutely clear. No one may purchase or sell preprohibition eagle parts.

This is not a case where you have to decide what Congress would have done if they had focused on the problem. Congress did focus on the problem of preprohibition parts and decided that they could be possessed but not purchased or sold.

The total ban on any sale of eagle feathers, including preprohibition feathers, is an important part of the legislative plan for protecting the living eagle population.

There are three related factors that justify the ban. First, there is the difficulty in distinguishing between old and new feathers. There is no scientifically reliable way of proving how old a feather is and certainly not whether it comes from an eagle killed between 1940.

Second, there is the high value of feathered Indian artifacts. Appellee Ward has a ceremonial shield that he claims is worth $7,500 and the other appellees have identified 12 other items that they have valued at more than $1,000 each.

Third, there is the very real possibility that the Bald Eagle, our national symbol, may become extinct in this country outside of Alaska. That was the reason Congress passed the act in 1940, the reason it extended it to the Golden Eagle in 1962 -- the problem apparently is that Golden Eagles and

Bald Eagles can't be told apart before they reach maturity and the reason that Congress strengthened the act in 1972.

The possibility of extinction still exists today. A recent survey indicates that there are fewer than 800 eagle nests in the original 48 states.

The value of old, feathered artifacts plus the ease of passing off new feathers for old, taken together, give a strong incentive to counterfeit artifacts for sale or at least to replace lost feathers in genuine artifacts that are offered for sale.

Eagles will be killed to supply the necessary feathers and a total ban on sales destroys the market and saves those eagles.

Even if a relatively few eagles are saved this way, those few may be important to the survival of the species in the original 48 states.

Congress could have decided that less drastic methods would be good enough. It could have struck a different balance between the importance of saving the eagle and the interest of dealers in Indian artifacts but the point is that any less drastic measure, for instance the registration system that the District Court thought would be sufficient, would provide less protection to these eagles. If there is any market for old feathered artifacts, they are so valuable that they are likely to be counterfeited.

A counterfeiter who believes he can persuade a purchaser that the feathers in his article are old, it is also likely that he can persuade a registrar and, ultimately, a judge or a jury of that fact.

For that reason, the most effective deterrent to counterfeiting and to the eagle killing it requires, is to abolish the market by a total ban on any sale of feathers and that is the solution that Congress chose.

That choice violated no constitutional right of Appellees. The violation they claim is the taking of their property without just compensation.

As we explained in our briefs, Appellees have no standing to raise this constitutional claim with regard to either act because they have not alleged that they, themselves, owned any of these feathers when the act first applied to them.

QUESTION: Was that argument made in the District Court?

MRS. SHAPIRO: The standing argument?

QUESTION: Yes.

MRS. SHAPIRO: No but it is a jurisdictional argument.

Unless they did, the act could not have taken anything from them.

QUESTION: What is the jurisdiction argument, Mrs. Shapiro?

MRS. SHAPIRO: Well, their standing to raise a --

QUESTION: What do you mean by "standing"?

MRS. SHAPIRO: Whether they have the right to raise this argument.

QUESTION: No, but the argument is whether -- whenever we owned it -- whether you agree with the argument or not is another matter but the argument is, it does not make any difference. Whenever they acquired it there is a statutory issue.

MRS. SHAPIRO: Oh, yes, I am sorry. I did not understand. We don't have any --

QUESTION: Well, then, it is not a jurisdictional issue.

MRS. SHAPIRO: We do not contend that they do not have standing to raise the statutory issue but we do contend that they do not have standing to raise the constitutional issue.

QUESTION: I know but the constitutional argument is the same. They still assert that whenever we acquired it, there is a constitutional issue here.

MRS. SHAPIRO: But --

QUESTION: Now, you may not agree with it and you may think it is a worse argument than if they had acquired it before the act but the argument is there.

MRS. SHAPIRO: Well, the -- but it is there in the

sense that --

QUESTION: Well, if it is, they certainly have standing to raise that issue, do they not?

MRS. SHAPIRO: Well, they have standing to make the argument that there is property --

QUESTION: They have standing to argue that, even if we acquired the feathers after the relevant acts were passed, the statute is unconstitutional as it is applied to us. They have standing to make that argument.

Surely they have standing to do it. But you may think the argument is, there is even less to it than the constitutional issue with respect to feathers that were acquired prior to the act but they certainly can assert it.

QUESTION: Are you not arguing that they do not have standing to attack the constitutionality to act insofar as it applies to pre-Act feathers?

MRS. SHAPIRO: Well, but that is all they are trying to do.

QUESTION: Well, then, I do not understand why your standing argument does not have some substance.

MRS. SHAPIRO: Well, I --

QUESTION: Because Mr. Justice White is assuming they are attacking the constitutionality of applying the act to post-act feathers.

QUESTION: I assume they are attacking both of them.

MRS. SHAPIRO: No, they are rather careful to say that they --

QUESTION: No, not post-act feathers but they are attacking the application to pre-act feathers that were acquired by them post-act. That is what you say they do not have the standing to raise.

MRS. SHAPIRO: Yes. Yes.

QUESTION: I am just suggesting to you that they do.

QUESTION: Well, that is all right. You say it is jurisdictional and I just suggest there is a question on it.

MRS. SHAPIRO: Well, in any event, the act as to feathers that they acquired after the act became effective, the act itself took nothing that they had. What it did was prevent them from obtaining something when they acquired the feathers after the act became effective.

QUESTION: Mrs. Shapiro, we have got you interrupted and I would like to ask you one other question, if I may. You mentioned the figures on the number of eagle nests in the 48 states. What is the relevance of the eagle population in Alaska and what is it?

MRS. SHAPIRO: Well, the eagle population in Alaska is somewhat larger than it is in the lower 48 states. I am sorry, I do not have the figures on that.

QUESTION: There is no shortage of eagles in

Alaska, is there? Is your necessity argument valid? Is not this a nationwide statute, not just 48 states covered by it.

MRS. SHAPIRO: Well, it certainly is a reasonable conclusion for Congress that the eagle deserves very strict protection. The fact that there are somewhat more eagles in Alaska does not alter the fact that the eagle is in a rather perilous situation and that Congress was perfectly reasonable in concluding that a very strict law was appropriate.

QUESTION: You do not rest on the fact that there are -- I mean, the eagle population really is not terribly relevant to your argument, then?

MRS. SHAPIRO: It is relevant to the extent that Congress was legitimately concerned about preserving eagles.

QUESTION: In 48 states or 50?

MRS. SHAPIRO: In 48 states and killing in Alaska also interferes with the population up there and they are not limitless.

QUESTION: Mrs. Shapiro, this is an inconsequential question but I am curious. The Eagle Act was passed in 1940 and the regulations came along in 1963, 23 years later.

MRS. SHAPIRO: No, the Eagle Act was passed in 1940. The first regulations were in 1941, I believe. We discussed this in footnote 7 of our main brief.

QUESTION: When did the regulations come out under the other Act?

MRS. SHAPIRO: The Migratory Bird Treaty Act? Well, I am sure there have been regulations of some kind, since shortly after the Act was enacted.

QUESTION: I did get that impression from the briefs but then, you may be right.

MRS. SHAPIRO: The regulations have been certainly expanded and modified as new birds are added to the Migratory Bird Treaty Act but it is not a question of their not having been there. For instance --

QUESTION: If there were a delay, I would be interested in why but you say there has not been.

MRS. SHAPIRO: There certainly has been no delay under the Eagle Act and the regulations under the Migratory Bird Treaty Act originally were fairly minor.

The Migratory Bird Treaty Act is primarily a hunting act and it was -- the regulations were modified in early 1973 to make absolutely explicit the Secretary's interpretation of the Act as applying to pre-prohibition feathers. Before that, they were arguably ambiguous but there certainly have been regulations. Well, they have been regulations since 1968.

QUESTION: How can you say they are arguably ambiguous when they almost parroted the language of the statute, which you said was abundantly clear?

MRS. SHAPIRO: Well, on the theory that regulations

ordinarily are more specific.

QUESTION: Do you think the statutory prohibition in the Eagle Statute would be clear if there were not the proviso in the statute?

MRS. SHAPIRO: Well, I think it would. It would be less clear, I think --

QUESTION: It would be clear as applies to pre-Act eagles, even without the proviso there?

MRS. SHAPIRO: Well, the thing is, as we mentioned, that in the Eagle Act Congress did specifically focus on this question in so many words.

QUESTION: Do you have evidence of that, other than the statutory language itself?

MRS. SHAPIRO: I should think the statutory language would be enough.

QUESTION: Well, but I mean, that is what you are talking about?

MRS. SHAPIRO: That is what I am talking about, yes. There is no --

QUESTION: There is no evidence of any discussion in committee about the problem of pre-act, even?

MRS. SHAPIRO: No, there is really very little legislative history. I guess we pointed out in our reply brief that in the 1962 Act they did mention their concern with the killing and these Indians selling --

QUESTION: There was nothing wrong with the barter, as I read it, nothing wrong with bartering, with Indians exchanging the eagle feathers, which would seem to have been explicitly prohibited by the statute. Is not that your reading?

MRS. SHAPIRO: Well, the legislative history did not -- what the legislative history was saying was, was that the main problem for eagles -- that the motivation for killing the eagles was to sell them to dealers in artifacts and --

QUESTION: But did not the committee also say, we cannot see anything wrong with Indians exchanging feathers for religious purposes and the like?

MRS. SHAPIRO: Well, that is quite a different situation. The exchange of feathers for religious purposes is only under specific permits issued by the Secretary on the -- and before issuing them and he issues them Indian by Indian for a very limited period and only after he has made the determination that that won't interfere with the survival of the population so it is a very narrow limitation.

QUESTION: Without those specific exceptions that would have been prohibited by the statute.

MRS. SHAPIRO: Oh, yes. Yes and the religious purposes is in the statute.

We also pointed out in our briefs that under the Regional Rail Reorganization Act cases, the remedy of any one

who does have standing is a suit in the Court of Claims under the Tucker Act for just compensation. We do not suggest that anyone could prevail in such a suit because we do not think that these acts under any circumstances involve a taking in the constitutional sense.

But even if we are wrong about the merits, these acts could in some factual circumstances involve taking of property requiring just compensation. Those circumstances have not been shown here.

This record just does not provide an adequate basis for deciding the novel and complex issues that would have to be faced before a court could properly conclude there had been a taking here.

For example, Appellees' claim is that the Acts place such a heavy burden on them that fairness and justice require that they receive compensation. The burden they identify is the total loss of value of their artifacts containing pre-prohibition feathers but Appellees themselves have suggested that the artifacts can be sold without the feathers.

That is true. Anyone who is more interested in making money than in the integrity of his artifacts is free under either Act to remove the feathers and sell the rest. That sale does not threathen the living bird population and that sale is not prohibited by the Act.

As I mentioned before, we do not agree with the

Appellees' suggestion that the ban can be avoided, either by separating the feathers and attempting to make them a separate transaction or, of course, that the article can be sold intact and just claimed that it was a sale of the artifact without the feathers and a gift of the attached feathers.

But it is still true that the Acts prohibit only the sale of feathers and of products composed of feathers.

Appellee Ward, for instance, could remove the nine eagle feathers from his ceremonial shield and sell it without violating the Act.

There is no way of telling from this record what the value of the shield would be in that condition but any burden on Ward is limited to the difference between the value of the shield with the feathers and its value without them, discounted, probably, by his right to retain possession of the shield intact if he chooses to do so.

Since the record does not show how much the value of any artifact would be reduced if its feathers were removed, there is no way of telling what burden the Act places on any Appellee, let alone of concluding that the burden is one which in fairness and justice must be shared by the public.

But there is no need for this Court to advance into that thicket. Appellees have simply not met their burden of showing that the Acts take their property without just compensation.

Unless there are any further questions, I would like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Shapiro.

Mr. Akolt.

ORAL ARGUMENT OF JOHN P. AKOLT, III, ESQ.

ON BEHALF OF APPELLEES

MR. AKOLT: Mr. Chief Justice and May it Please the Court:

The Appellants' argument has solely addressed itself to the preservation of existing wildlife. In this particular action, however, we are not concerned with wildlife alone but with antiquities, feathered Indian artifacts for which there is also an express Federal policy of encouraging of private preservation.

The Historic Sites and Antiquities Act 16 U.S. Code Section 470 specifically recognizes that cultural objects such as are before the Court have been predominantly preserved by private efforts and states that it is the federal policy to provide for the maximum encouragement of the continued preservation of such items by private means.

Whatever else might be said of the regulations by essentially having made it unlawful to continue with the ability to preserve such artifacts by private means, they are certainly contrary to the express policy of the Historic Sites and Antiquities Act.

This action is specifically concerned with 42 pre-Act feathered Indian artifacts. They stand admitted in the record as being pre-Act and additionally they stand admitted as being valueless if they are unable to be sold with the feathers intact.

The action in the District Court was on a cross-motion for summary judgment and no issue was raised in the Court as to the pre-existing nature of the feathers nor was any issue made in the trial court that the artifacts themselves would have any value whatever if the feathers had to be removed and sold without the feathers which are an integral part of most feathered Indian artifacts.

QUESTION: Mr. Akolt, does the record show when your clients obtained these artifacts, before or after the Acts?

MR. AKOLT: The question, Your Honor, the answer to the question is dependent upon when, if ever, the Acts are determined to have become effective as against pre-Act items, particularly when --

QUESTION: What about the date the Acts were -- does the record show when your clients obtained the artifacts?

MR. AKOLT: In large part, Your Honor, the answers of the Appellees to the interrogatories submitted by the Secretary does state the years in which these items were acquired.

QUESTION: Well, were those years that you stated before or after the passage of the relevant Acts?

MR. AKOLT: They were after the passage of the Acts. In the history of the Acts, as Mr. Shapiro has noted, the Eagle Protection Act originally was enacted in 1940. They were all acquired after 1940.

Additionally, they were all acquired after 1962 with respect to eagle feathers.

QUESTION: Was any issue raised about the standing of your clients in the District Court?

MR. AKOLT: Not as to that issue on standing, Your Honor, in the trial court. The issue was whether or not there was a case or controversy upon the basis that there was a lack of any administrative enforcement.

QUESTION: Well, the District Court apparently approached the case on the basis that even if your client did acquire these artifacts after the passage of the Acts, the relevant Acts just did not apply to them.

MR. AKOLT: That is correct, Your Honor. Upon the basis --

QUESTION: And that was your position?

MR. AKOLT: That was our position as well, buttressed by the prior determinations of several federal district courts from the 1920's on that have stated specifically with regard to the Migratory Bird Treaty Act that such Act did not include pre-existing feathers.

Those various cases from Montana and Texas were

the only statutory interpretation of the Migratory Bird Act until this case is to be resolved by this Court so as interpreted by the Federal District Courts throughout the country there was a universal interpretation that the Acts did not apply to pre-existing artifacts.

QUESTION: And it was irrelevant when a certain party acquired those pre-existing artifacts.

MR. AKOLT: That is correct, Your Honor. So long as the objects themselves were pre-Act artifacts. The Appellees make no claim whatever to be entitled to any rights to own, trade, barter or whatever with respect to post-Act artifacts, artifacts that are made with feathers of any illegally-taken bird.

We claim no continuing right to the taking of existing wildlife.

QUESTION: But is there not some tie-in between the standing question and when your clients acquired the feathers in question as with respect to the passage of the two Acts?

MR. AKOLT: If the Acts had been interpreted as applying to pre-Act items, the Solicitor General's office does have a point that we would never have acquired the rights which could thereafter have been claimed to have been taken by the unconstitutional regulations which were sought to be upheld.

That is not the case, that is not the status of the

Acts as interpreted by the different courts prior to the acquisition of these items by my clients.

QUESTION: According to Mrs. Shapiro there is no way to tell how old these feathers are.

MR. AKOLT: Mr. Justice Marshall, the Appellees, through a particular affidavit, have raised a single question about age and their affidavit states that there is no technical scientific test to date the protein content of a feather.

QUESTION: You say the Appellees?

MR. AKOLT: The Appellants, excuse me.

QUESTION: Yes.

MR. AKOLT: That stops far short of stating that a feather itself and certainly artifacts containing that feather cannot be adequately dated by documentation or other recognized records.

QUESTION: My question is, without documentation, records and any other thing, is there any way to look at the feather and tell how old it is?

MR. AKOLT: Without documentation or adequate records there is no scientific test, Your Honor.

QUESTION: Well, that was my question -- which was yes and no, so the answer is --

MR. AKOLT: The answer is no, there is no scientific test.

QUESTION: Thank you.

MR. AKOLT: That I am aware of.

QUESTION: Well, did I correctly understand you to say that -- and you write in your brief that with respect to these artifacts, in any event, it is conceded, not stipulated, that the artifacts including the feathers are pre-Act?

MR. AKOLT: That is correct, Your Honor. The record in this case is clear vis --

QUESTION: How can you stipulate that?

How can the Government stipulate that?

MR. AKOLT: Because --

QUESTION: How can your client stipulate that?

MR. AKOLT: Because, Your Honor, they are in fact pre-Act by documentation, by record, by personal knowledge --

QUESTION: I see.

MR. AKOLT: -- and expert appraisal.

QUESTION: I see.

MR. AKOLT: Their own affidavit suggests that the museum records would be a sufficient basis upon which to date a feather or an artifact.

QUESTION: I see.

MR. AKOLT: And those do exist in this case.

QUESTION: With respect to these artifacts.

MR. AKOLT: That is correct.

The premise of the Solicitor General's office is that these items must be totally banned from commerce upon the

basis that there is an existing market for counterfeit items which must be supplied by the taking of existing birds from the wild. These premises are not supported by the record and their position is an impermissible attempt in which to infer a negative from an omission in the statutes or, more particularly, to infer a negative from the positive statement, none of which can be statutorily sustained.

QUESTION: Mr. Akolt, do they not start the plain language argument and then they say this is the reason for the plain language and how do you read their plain language argument that the coverage of the Act is broad on barter, sale and so forth; the only exception is with respect to pre-Act items, their possession and transportation.

MR. AKOLT: Yes, Your Honor.

QUESTION: How do you meet that argument?

MR. AKOLT: The Acts themselves do not specifically include pre-Act items. They are concerned with birds and parts of birds whereas this Court and the issue concerned with this Court is something in addition to birds and parts thereof.

The Migratory Bird Treaty Act alone also includes the term "products" which products I will address shortly.

Mr. Justice Holmes, in McBoyle versus the United States 283 United States 25, was concerned with whether or not the term "motor vehicle" included a boat or an airplane and he said, "In common terms it called to mind a picture of a thing

moving across the land, an automobile."

The same determination can be applied to the use of the term "bird" and "bird parts," in these statutes.

In common terms, such partial terminology does not include pre-existing Indian artifacts any more than it would make logical sense to call them wood or cloth or any of their other component terms.

QUESTION: Except that maybe your argument would be valid if there were not the proviso. That is what makes it -- that is what -- it seems to me that is what lends a lot of force to their argument.

MR. AKOLT: The proviso under the Equal Protection Act as to "Nothing shall prohibit the possession or transportation."

QUESTION: Of pre-Act --

MR. AKOLT: I believe that is solely addressed, Your Honor, to an ex poste facto consideration. It does not address, it was not designed to address the Fifth Amendment question because it is our position and understanding that the Equal Protection Act itself does not apply to pre-existing artifacts, that the Eagle Act itself does not include the term "products."

"Products" is solely contained within the terminology of the Migratory Bird Act and nothing in the legislative history of the passage of the Eagle Protection Act or the

Migratory Bird Act has made any reference whatever to pre-existing items. The sole matter raised by the Appellees --

QUESTION: The proviso does. The proviso does in words. The proviso in so many words talks about preexisting items.

MR. AKOLT: The proviso refers to items which were owned prior to the passage of the Act.

QUESTION: Right.

MR. AKOLT: And it says that nothing shall prohibit the possession or transportation.

QUESTION: And the preceding part of the Act says "We prohibit barter, sale and all the rest of it," too. And given the proviso, why does not the previous part necessarily apply to pre-Act parts and parts would include feathers, of course.

MR. AKOLT: Because we do not believe that simply by the use of the term "parts" that the Legislature was considering the pre-Act Indian artifacts --

QUESTION: Well, then, what you are saying is, the proviso really was not necessary, it was just thrown in -- as kind of an abundance of caution they threw it in.

MR. AKOLT: I think it is necessary, Your Honor, to avoid an obviously invalid ex poste facto act because if they made possession alone illegal, the entire act must fall because without any further affirmative act by an owner of such items --

QUESTION: But I think you are contradicting yourself because if I understood you correctly you were saying, without the proviso the first part of the statute simply does not apply to pre-Act items so it just would not apply. It would not violate the ex poste facto clause or anything else, it simply would not apply.

QUESTION: Well, your present argument is that the language of the Act simply does not apply to products such as these.

MR. AKOLT: That is correct, Your Honor.

QUESTION: Pre-Act or post-Act.

QUESTION: Because feathers are not parts.

QUESTION: No, because products are not parts.

QUESTION: Oh, but the statute applies to parts.

MR. AKOLT: The statute does apply to parts, Your Honor.

QUESTION: So you are saying feathers are not parts of the bird. Is that right?

MR. AKOLT: No, we are not saying feathers are not parts of the bird. We are saying in the passage of the Act, the use, simple use of the term "birds and parts thereof" did not contemplate --

QUESTION: Feathers?

MR. AKOLT: -- the existence of feathered Indian artifacts among other types of products when it banned --

QUESTION: Well, what do you think "parts" referred to? What parts other than feathers would be of interest with respect to eagles?

MR. AKOLT: There are additional parts of eagles that are made use of in Indian artifacts, Your Honor. Predominantly, they are feathers.

QUESTION: Well, Mr. Akolt, this argument, it seems to me is, as my brother Stewart suggests, would equally apply to Indian artifacts that use -- that are made today and use eagles that are killed today.

QUESTION: It would.

QUESTION: Because you just say, the Act does not apply to products.

MR. AKOLT: The Act does not apply to pre-Act products, Your Honor.

QUESTION: Any products.

QUESTION: Well, but it does apply to post-Act products?

MR. AKOLT: We do not believe that the law can be evaded simply by the taking of an eagle illegally from the wild and moving the feathers and placing them on another object. We do not believe that the law can be evaded in that regard.

The person involved would still be --

QUESTION: But you say the Act would apply to post-Act products?

MR. AKOLT: The Act would apply to post-Act products because necessarily the transaction would have applied to illegally-taken birds and there can be no property rights in such birds. So it would apply to post-Act products is our position that the Act did not contemplate then-existing artifacts at the time of the passage of the Act.

The premise of the Appellants is not supported by the record on this case. Obviously, their concern with what might be counterfeited does not have any relevance to what is admittedly a pre-Act item nor is their presumption shown to be any legislative concern.

I have alluded to the fact that in the entire history of the Eagle Protection Act and the Migratory Birds Treaty Act there is not a single Congressional reference to any concern with respect to pre-existing items. In 108 Congressional Record at page 5511, as cited by the Appellants in their reply brief, there was a reference to the legal taking of eagles at the time of the passage of the Amendment to the Eagle Protection Act.

The concern of the Congress at that time was to stop what was not only legal but was encouraged by the payment of bounties by various states during the early part of the 1960s.

It does not relate to any concern with pre-existing items and it does not, in fact, relate to any concern with any illegally-taken eagles.

The concern of the Congress was to stop the legal

killing of eagles which was taking place at that time.

Nor is their premise one which can be justified by the case law which is reported under either the Migratory Bird Act or the Eagle Protection Act. In the nearly 60 years of administration of the Migratory Bird Act and nearly 40 years of administration of the Eagle Protection Act there is not a single reported decision in which the age of a particular item was involved in the prosecution with the exception of the 1975 case in the Western District of Oklahoma, United States versus Blanket, which has been cited in our brief.

In that case, it may be noted that the government prosecutor prevailed and was able to distinguish between a post-Act artifact and a pre-Act artifact. Nor is the existence of a counterfeit market sustainable from the Appellants' own knowledge. In reply to Interrogatory number 11 as cited at page 8 of our brief, the Appellants themselves have stated that they have no knowledge or information with respect to the taking of illegal wildlife for the purpose of the creation of counterfeit craft items.

The premises are not sustainable from the record and not being based upon fact, their regulations are not rationally based.

Mr. Justice Cardozo, in DuParkay Company versus Evans, 297 U.S. 216, suggested that in considering the application of a statute one must consider its several parts and their

relation, both physical and logical to each other.

The permit sections particularly, of both the Eagle Protection Act and the Migratory Bird Treaty Act, Section 668A and 704, focus exclusively on permission to have the Secretary permit the continued killing of eagles and other migratory birds under the various acts. None of the discretionary matters which he had to consider, which include such things as breeding habits, the times and flights of migratory birds, have any applicability to pre-existing artifacts.

All of the factors are relevant to the taking of existing birds and it is solely that to which the Secretary's discretion is directed.

The statutes themselves do not contemplate that pre-act items would have become regulated and made unlawful. Certainly, as the Appellants suggest, in Section 668A they say there is no authority even to make such a discretionary decision, to permit the acquisition of a cultural object by a museum or any other institution but the Act specifically does provide that the Secretary has the discretion to permit the continued killing of eagles from the wild.

It is not logical to suggest that if the Acts were contemplated to apply to pre-Act items and in light of the express policy of the Congress that these are items which are to be preserved, it is not likely that they contemplated that all sales of pre-Act items would be completely foreclosed

without any discretion whatever having been granted to the Secretary to permit the sale of what cannot be a threat to existing wildlife.

QUESTION: Well, now, I take it that you are not suggesting that the Secretary has discretion to permit this, either, if that would simply be conceding that the Act applies.

MR. AKOLT: We do not think that the Acts granted him that discretion because we think that none is required. That is correct. But it is not logical to state the negative, that he has no discretion whatever in light of the existing policy.

With respect to the Migratory Bird Act and the use of the term "products," that Act was amended in 1974 to conform with the language of the convention between the United States and Japan which had been concluded in 1972.

The Act, for the first time in 48 years of its passage, referred to products but which products is clarified by the reference to the convention between the United States and Japan as cited in our brief at page 14.

It is clear that the convention, which are the operative terms of the Migratory Bird Act, stated that birds and parts thereof and products thereof which had been taken illegally were contemplated as being subject to regulation, a specific exclusion of the intent to include pre-existing items.

I think the crosslight of the subsequent statute,

particularly the Endangerd Species Act of 1973, throws considerable light on the Congressional intent in these Acts with respect to pre-existing property.

The Endangered Species Act of '73 is not simply a comparable statute but it is, in fact, a co-applicable statute with respect to the bald eagle to which the Appellants have drawn our attention.

As this Court noted in Tennessee Valley Authority Versus Hill, the Endangered Species Act of 1973 was passed to afford the greatest protection to truly endangered species but that Act and the regulations adopted pursuant to that Act, Section 1538B, clearly provide that the Act does not apply to fish or wildlife held in captivity or controlled environment on the effective date of the statute, which was December 28th, 1973.

The Act does not apply to the object itself unless it was being held on that date for a commercial purpose. In large part, the objects being considered by this Court in this action would qualify for such an exclusion under the Endangered Species Act as they were being held in private collections as private property.

Under the Endangered Species Act, the one that protects, that gives the greatest protection to truly endangered species, the artifacts could subsequently be sold.

Is it logical to state that under the Migratory

Bird Act, which protects such birds as millions of blackbirds that the Appellants themselves were called upon to kill by the millions in 1976, that an artifact containing one of those feathers is illegal?

But under the Endangered Species Act where Congress did specifically consider pre-Act items, the exclusion is granted?

Similarly, in the Marine Mammal Protection Act, 16 U.S. Code Section 1361, the specific exclusion of then-existing artifacts was granted. The rational conclusion which is to be drawn from the lack of administrative enforcement during the last 50 years in which not a single case from the 1920's until the prosecutions that have culminated in this appeal were made with respect to pre-Act items should be considered by this Court as a determination of what truly was being regulated by the Eagle Protection Act and the Migratory Bird Act.

QUESTION: If your clients did not know anything about that, why did they build up all this history to show that these were pre-Act artifacts?

MR. AKOLT: Because --

QUESTION: Why did they keep those special records to be able to get a stipulation that they were?

MR. AKOLT: Because, Your Honor, it was important to them as collectors.

QUESTION: Yes, they were good business people.

MR. AKOLT: It is important to collectors, Your Honor, to adequately document what you would pay thousands of dollars to acquire. They would take that with the same care as they would acquire any other major asset and documentation and record-keeping and appraisal is available and is utilized by persons that would own such objects.

QUESTION: I am sure, Mr. Akolt, that you realize that your argument based upon the Endangered Species Act and the Marine Mammals Act can cut against you because it indicates that when Congress wanted to exempt something it knew how to do it.

MR. AKOLT: Yes, Your Honor, that is correct but it also indicates that when Congress considered the inclusion of then-existing artifacts it specifically excluded them from the greatest protection that was to be afforded.

QUESTION: Exactly. When it wanted to exempt them, it exempted them specifically.

MR. AKOLT: When it considered the inclusion of them it exempted them. It is our position that Congress was not considering the inclusion of the passage of the Eagle Protection Act and the Migratory Bird Act.

This Court itself has recognized that the subject of the Migratory Bird Treaty Act was living birds. The Act was originally upheld in Missouri versus Holland based upon the

fact that the subject of the Act was living birds, not birds that had been reduced to possession, not artifacts but living birds which had no permanent habitat in any particular state.

It was upon this basis that the federal power to enact the Migratory Bird Treaty Act was upheld.

This Court originally inquired as to whether or not the direct appeal was appropriate from the Three-Judge District Court. It is to be noted that the constitutional issues upon which the determination of the District Court was made remained in the case until its determination. Those constitutional issues show additionally that it was improbable that Congress intended this Act to apply to existing artifacts.

The improbability is shown by the analysis that this Court provided in the Penn Central Railroad case decided last year. In that case, the Court extensively analyzed the fairness of a provision regulating the ability to make use of the Grand Central Terminal.

In this case, none of the indices of fairness are presented to the Appellees. The Acts foreclosed all value of the Appellees' artifacts. There is no administrative opportunity provided in which to prove that these are, in fact, pre-Act items. It is the lack of opportunity to prove that they are pre-Act and not any particular determination that condemns the statutes.

There is no opportunity provided to the Appellees

to mitigate the losses that they have sustained.

In short, based upon the constitutional principle of the Fifth Amendment, it is not likely that Congress would have intended to include pre-Act items into a statute which has no provisions for fairness or adequate determination as to whether or not these property items in fact pose any threat whatever to the continuation of the existing wildlife.

If there are no further questions from the Court, I have used my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Akolt.

Mrs. Shapiro, do you have anything further?

MRS. SHAPIRO: Just two points relating to the Endangered Species Act.

REBUTTAL ARGUMENT OF MRS. HARRIET S. SHAPIRO

MRS. SHAPIRO: The first, the Appellee suggests that the exemption in the Endangered Species Act for articles held in private collections would exempt the artifacts in this case.

We do not agree. We believe that the exemption in the Endangered Species Act is, in effect, has precisely the same scope as the one in the Equal Protection Act.

As we point out in our reply brief on pages 3 and 4 and particularly the footnotes, the Endangered Species Act exemption does not apply to wildlife held in the course of a commercial activity and it is not available to people -- only

persons holding such goods and animals for other than commercial purposes would be enabled to plead this exemption which means that although the original purchaser, the original holder, as long as it remained in his private collection, would be entitled to the exemption.

That exemption would be lost for the article as soon as it entered into commercial activity, as soon as it was put on the market so that in fact the exemption in the Endangered Species Act and the exemption here in the Eagle Act have the same scope.

QUESTION: But I take it a genuine gift would be all right?

MRS. SHAPIRO: Yes.

QUESTION: Or an inheritance.

MRS. SHAPIRO: Yes, under both. It is the commercial activity that poses the threat. It is the commercial activity that is banned.

QUESTION: How about a rental?

MRS. SHAPIRO: Again, you are getting into situations for the tryer of fact. If it is essentially a sale, exchange or barter, no. If it is a lease --

QUESTION: Six months' lease to a museum?

MRS. SHAPIRO: That would probably be all right.

QUESTION: What about a 99-year lease to a museum?

MRS. SHAPIRO: Well, then you are getting into

a situation where probably, in effect, it is a sale.

QUESTION: You would suggest that was a subterfuge --

MRS. SHAPIRO: Yes.

QUESTION: -- to cover a sale.

MRS. SHAPIRO: That is right.

QUESTION: Mrs. Shapiro, I think that Mr. Akolt has made one argument that I am not sure you have answered yet. He argues that the statute expressly permits the Secretary to exempt present takings if necessary for museums and exhibitions and rare situations. But that there is no statutory permission, no statutory authority for the Secretary to exempt the sale of an existing artifact made of pre-Act eagles and that does not make much sense.

Do you agree that there is no statutory authority in the Secretary now to say to these people, "Well, we know you have pre-Act items. We will let you sell them to the Smithsonian Institute if you want." You cannot do that, can you?

MRS. SHAPIRO: You have to give them to them.

QUESTION: And it does not seem to be very logical if it gives the Secretary the authority to permit more killing of birds but will not let the Secretary even allow us an innocuous sale like that to take place which tends to suggest that the Act was really focusing on live birds rather than pre-Act birds. How do you respond to that argument?

MRS. SHAPIRO: The point is that the only time the

Secretary can issue permits for the killing is in the very narrow situations identified in the statute and only after a decision that it will not hinder the bird population.

QUESTION: How do you explain the fact that if Congress thought of that problem, why did not Congress also give you the authority to permit the sale of a pre-Act artifact which certainly could not be harmful to anything?

MRS. SHAPIRO: The problem is that as long as you have any sales of any artifacts, pre or post-Act, then you get into the problem of being sure that those artifacts -- that the feathers in the artifacts, not so much the artifacts themselves but that the feathers in the artifacts are, in fact, pre-Act; as long as you have any kind of a commercial incentive to make, to substitute post-Act feathers for pre-Act feathers, then that is the kind of thing that Congress wanted to guard against.

It is once the commercial incentive --

QUESTION: But surely, how would the policy of the Act be thwarted if the Secretary of the Interior had the authority to say to these people, "You can sell your present inventory for $5,000 and if we ever catch you with another feather you are going to jail but you can sell what you now have," how would that do any harm?

MRS. SHAPIRO: Well, that would -- I mean --

QUESTION: Well, why would not Congress allow that if it would allow them to go out and kill some more eagles?

MRS. SHAPIRO: Congress' theory was that you cut off the market, that that was the most effective way of stopping the killing; as long as you permit any market, you have got an incentive to try and counterfeit. It is the commercial incentive that Congress was worried about, plus the value.

QUESTION: But it would permit -- it does have the authority to let a live eagle be killed and sold to a museum, even though it is done for commercial purposes.

MRS. SHAPIRO: That is right, if it is for a scientific purpose --

QUESTION: Right.

MRS. SHAPIRO: -- if it is for some kind of non-commercial purpose, yes.

QUESTION: Well, a museum could, somebody, I suppose, can get this special permit by an arrangement with a museum and be paid for it and make a profit on it, on a present bird, on a post-Act bird -- a post-Act taking of a bird can result in somebody making a profit, can it not?

MRS. SHAPIRO: Only if there is the scientific --

QUESTION: Permit.

MRS. SHAPIRO: Yes, if the Secretary --

QUESTION: All right but nevertheless it is a profit on a scientific activity.

MRS. SHAPIRO: That is right.

QUESTION: Yes.

MRS. SHAPIRO: My time has expired.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Shapiro.

Thank you, Mr. Akolt.

The case is submitted.

[Whereupon, at 11:06 o'clock a.m. the case was submitted.]