

ORAL ARGUMENT - 11/20/96

96-0745

TEXAS BOLL WEEVIL V. LEWELLEN

&

96-0839

TEXAS BOLL WEEVIL V. ABBOTT

DOW: May it please the court. I am Matt Dow, and I represent the Texas Boll Weevil Eradication Foundation. Chapter 74 of the Texas Agricultural Code also known as the Boll Weevil Act is a proper exercise of the legislature's police power. And as a proper exercise under the police power, the Boll Weevil Act is constitutional. The Act begins in the very first sentence with a declaration from the legislature that it has found and declared that the boll weevil presents a major economic threat to the Texas cotton crop.

HECHT: Do you concede that the Act is not proper under art.16, § 68?

DOW: No your honor. I think if the court can make it work under art.16, § 68, that's what the court should do under the Nutzi(?) decision, under the Barsop decision. If there is any state of facts that you can find this act constitutional, then that's the rule that the TC below ignored and that should be remedied.

BAKER: Isn't it your argument that that section doesn't apply at all in this case? Are you changing your position?

DOW: You honor I haven't made that argument because I think the police power answers that question.

BAKER: Well there's a sentence in your brief that says: This is not a § 68 case; it doesn't apply.

DOW: And I agree with that. I don't think that this act was grounded in art.16, § 68.

BAKER: Just police power; is that your sole position then, that the police power is to where you're going from?

DOW: My position is you look at how you can make this work under any state of facts. My position is it works under the police power. I know the bank and Mr. Ratliff think that it can work under art.16, § 68. I never got there because I think it begins and ends with the police power.

CORNYN: There's no question that's what the legislature thought they were doing; is there?

DOW: As far as?

CORNYN: They can come under the §68?

DOW: I don't think that's right. I think that the legislature in the very first sentence of the act states: It is found and declared that this cotton pest creates a major economic threat to one of the largest industries in the State of Texas. The legislature recognized that there is a serious problem here to one of our biggest industries. And then in the act, the legislature created a flexible and reasonable regulatory scheme to deal with that problem. Here's how we are going to eradicate this pest. And that is done under the police power. All the legislature did as far as art.16, § 68 is they said: We think that the creation of a foundation and the imposition of assessments to fund this regulation, that those things are consistent with the goals and uses of art.16, § 68. The legislature did not say this act is created pursuant to art.16, § 68. If you wipe out the boll weevil, then perhaps you're going to generate a larger market for the Texas cotton industry. Perhaps there is going to be benefits associated with research and education in pest eradication. But it's not grounded in art.16, § 68 as the plaintiff's have argued.

ENOCH: Does it affect your argument...well I guess I should hear your response to the plaintiff's argument that it couldn't be...in answer to the police power because the enactment of the provision really is dependant on a referendum of local zones voting or not voting for it. And so the application has nothing to do with the existence of boll weevils on any particular appeal in any particular zone. The enactment really depends on just a number of voters in a particular zone saying we will vote for this assessment.

DOW: I think the legislature answered that question in the very first sentence when it stated that it is found and declared that there is a major economic threat, i.e. the boll weevil to the Texas cotton crop. The fact that the voters were allowed to vote in referendum to create their zones and set their maximum assessments, that simply the regulatory framework that the legislature believed was the best way to deal with the problem.

PHILLIPS: But the legislature was willing to abrogate its police power through this necessary and critical governmental operation if a majority of the people who voted did not want to do it in a particular area.

DOW: I don't think they abrogated their police power. I think as part of their police power they created a flexible regulatory scheme that allows the growers to determine based on their geographies, their economics when they will come into the program to wipe out the pests.

HECHT: But what sense does it make to say this is a terrible problem and something has got to be done, but if the people in one region vote no it's not going to be done?

DOW: I think the legislature decided just like with fire districts and hospital districts sometimes

regulation involves voter participation, and the legislature determined that as far as ch. 74 this is how we want to regulate this cotton pest.

HECHT: In your view would a hospital district be a regulation of a community?

DOW: That's part of the regulation of a community I believe. And likewise the regulation in ch. 74, the framework has been set, and the legislature has determined that we've got the threat. Once the growers determine that the infestation level is necessary to begin eradication, once the growers in a particular zone have determined that it's time for us to deal with this because we can now afford it for the infestation level, that's the flexibility that the legislature put into ch. 74.

HECHT: Usually a regulation says thou shalt, or thou shalt not, and this just says go and do right.

DOW: I think if you read the entire act it does say we've got a problem here, here's how we are going to fix it.

HECHT: Accept if the voters say no, that's not how we are going to fix it?

DOW: But the fact is the voters have not said no.

HECHT: Sometimes they have.

DOW: After they said yes.

HECHT: They think they should have said no.

DOW: I think the regulatory mechanism that the legislature created has worked so far. Growers that create a zone and decide on their assessments only spend their money in their zone. And their money is only spent to eradicate boll weevils. And that goes to this court's decision in the Conlan(?) case and it goes to this court's decision in the Rowl(?) case.

PHILLIPS: Let's talk about Conlan(?). Could programs of research, disease, insect control, predator control not be a valid exercise of government regulation, and this boll weevil eradication program here be a valid exercise?

DOW: I think those things could be a part of a valid regulation under the police power. But I think under Conlan what you look at is the primary purpose of the money that is being raised. In order to answer the question: Is this an occupation tax, or is it a fee imposed under the police power to fund regulation? And if you look at the money that these assessments generate it is clear that this money unlike Conlan and unlike Rowl is not spent on generally promoting the cotton industry.

PHILLIPS: That may be true as of the time the proof was put into these records. But the act itself is broad enough to permit those kind of expenditures, and to permit them to dominate the total foundation, is it not?

DOW: I don't think that it states that it's allowed to predominate. I've said in my brief that perhaps one of the reasons the legislature made it's reference to art. 16, § 68 is that if they decide to do something other than eradication, then those assessments would have to comply with art.16, § 68.

HECHT: But what's the difference between raising money to promote a particular area of agriculture, and raising money to try to save it by eradicating the boll weevil, which is what the statute purports to do?

DOW: That goes to the very heart of this case. The difference is when you're just raising money to promote an industry, you're imposing an occupation tax on an agricultural pursuit, and you're not spending that money on any particular purpose.

HECHT: You're spending it only on that occupation?

DOW: Right.

HECHT: As opposed to build highways or fund schools?

DOW: Or as opposed to fund the effort to kill a cotton pest. And that's what this money is being used to do. It's being spent for one purpose, a specific purpose, to eradicate the boll weevil.

HECHT: So the legislature could just divide the state up into zones, different places and say: We are going to let the people in this area vote on whether to fix their highways, and that will just be a fee; impose a fee like they do here. Hospitals you mentioned. Any number of things they could do.

DOW: We might not have a lot of highways if we did that. But I think in this instance though, the legislature decided that the best way to deal with this problem was to put in some flexibility and allow growers to have input on deciding whether they come into the program. And so far that has worked.

OWEN: If this money were just spent for research, marketing and education, wouldn't we have a problem under Conlan(?) if none of the money was spent on eradication of boll weevil, but was simply spent on research, marketing and education could you distinguish this act from Conlan(?)?

DOW: If the money was only spent on those 4 things, then I think that it would then have to comply with art.16, § 68. Because then the primary purpose of the money being raised falls under the

exception created by art.16, § 68 to the prohibition on occupation taxes. That's what art.16, § 68 was designed to do. You can impose an occupation tax provided that the money is spent on research, marketing and provided that there is a refund mechanism. But here it's being spent on eradication under the police power so art.16, § 68 I don't think applies because we're not dealing with an occupation tax.

HECHT: You've not argued that Conlan is wrong?

DOW: Oh, no. I'm relying on Conlan. Because I think Conlan points out the distinction between an occupation tax and the general nature of revenue being raised to do that, and revenue raised to pay for regulation, money raised to pay for an eradication effort.

PHILLIPS: Why is research into the uses of a product and marketing of that product not police power, and eradicating the pests...Justice Hecht asked that but I just didn't understand the answer?

DOW: Well I probably didn't answer it then. I think in this instance at the very beginning of the act, the legislature declared that it has found that a major economic threat exists to the Texas cotton industry. I think that shows the legislature's intent that...

PHILLIPS: Well what about the invention of Rayon as a major economic threat to the Texas cotton industry, and so in exercise of our police power we are going to find some new uses for cotton?

DOW: I think that would be like the Rowl(?) decision where the legislation in question talked about we're doing this to protect the orange industry, or the citrus industry. But if you looked at what was really happening they were just raising money to raise money. And they weren't raising money to fund regulation. Here the money being raised is being spent solely on an eradication effort under the regulatory scheme created by the legislature under ch. 74. And under the Barshot decision, under the Nutzi decision you try and avoid an absurd or pointless reading of a statute. If you can make it work, then that's what you do. And that's what the TCs below did not do.

PHILLIPS: And you think the SC in Conlan tried to make that work and just couldn't get there?

DOW: No. I think the SC in Conlan recognized the difference between occupation taxes and fees imposed under the police power. And clearly in Conlan the money being raised in that situation was just being raised to promote the grain industry. And there were no specific purposes enunciated in that legislation as to how to spend the money. It could be spent at the whim of that producer's board. Here it's very clear both in the legislation and in the evidence that the money being raised is to fund the regulation and it's being spent to do just that.

I think you have to look at ch., 74 by beginning with the rules set forth by this court in

looking at the constitutionality of a statute. You begin with 1) that the Texas constitution is not a limiting document, and the legislature has the power to enact any law that does not violate the federal or state constitutions. You also presume constitutionality. And as a result of that this act is a valid exercise under the police power, and as a valid exercise under the police power it is correct as far as being analyzed for its constitutionality under this court's prior decisions.

And we would ask that the court reverse and render both decisions below.

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APPELLEES

OWEN: May it please the court. My name is Rudd Owen. I represent 10 farmers from Hale county. I appreciate the court's insight already. Mr. Dow stated under any state of facts. We have a situation not only under any state of facts but in the facts as they actually exist. We have a group of farmers over here who farm cotton, who may or may not have boll weevil infestation, that aren't in the program that don't pay an assessment, may never be in the program, may never pay an assessment. We have a group of farmers over here who voted the program in, and they are ostensibly paying an assessment to reach a goal of statewide boll weevil eradication. Then we have a group of farmers like Mr. Whittington's clients who voted the program in under the premise of statewide boll weevil eradication, paid money for a little while, incurred \$9-10 million in debt, then got out of the program before the goal was accomplished. They didn't accomplish the goal, and they are still paying debt. Then we have my 10 people who are in a zone. They either voted against the program, or in one instance I think one of my clients threw the ballot in the trash, and they are paying an assessment yet they have never seen a boll weevil, never had cotton infested by boll weevil, nor have they ever been sprayed by the organization for any boll weevil protection.

GONZALEZ: Is that because the surrounding areas have been so successful in eradicating the boll weevil?

OWEN: That is a possibility. We do not believe that. We do not believe we will ever have the problem with the boll weevil in our location. My clients believe that. When analyzing this particular set of facts we have to keep two controlling areas of law in mind at all times. The first in the constitution is what it prohibits when you are going to take money away from farmers. Two sections, specifically speak to taking money from farmers. Article 8, §19, dealing with farm products in the hands of the producer; art.8, §1c, dealing with an occupation tax. These areas restrict the state when they start taking money from a farmer. Taking with that, and you need to take both of them with it at all times, is what does the constitution permit? Article 16, § 68, of the constitution...

PHILLIPS: Well you do concede if the constitution does not prohibit something, then it's permitted is it not under the Texas constitution?

OWEN: I would agree with that. But when the Texas constitution also talks about how it's permitted in a certain circumstance, then it is preemptive in that nature also.

PHILLIPS: So it's your argument that if this doesn't fit within art.16, § 68, that's the end of the _____?

OWEN: Yes.

PHILLIPS: Will you spend a little time on that; but then I want you to go to the police power argument too?

OWEN: The reason...if you take both of them together, you've got art.16, § 68, and the prohibition, the people have spoken to when farmers get involved in their own assessments. People of the state of Texas said: When farmers decide they are going to assess themselves they may be taken into a lofty goal type thing like statewide boll weevil eradication. They may want to pay for it, but they may lose track, or it might not work. As in this instance, it has not worked. Under those circumstances if the farmers are involved in assessing themselves, then the people of Texas are going to take care of them some. They are going to say these assessments have to be refundable. They can only be on product sales, not before the time you sale the product, and you can only spend the money under specified circumstances. If you don't keep both aspects, both constitutional parts in mind, the points get obscured. You start chasing rabbit trails to me that lead you off into taxation, or leads you off into some other aspect that doesn't apply to farmers when they get involved...

OWEN: But that argument assumes that it's a tax. Your argument necessarily assumes that it's a tax. If it's simply a regulatory fee you're not even within the ambit of that constitutional prohibition as you are here?

OWEN: I respectfully disagree because I don't think it matters under these set of circumstances whether it is a regulatory fee or a tax.

OWEN: Well certainly farmers can be charged regulatory fees in other areas; they are not exempt altogether from regulatory fees are they?

OWEN: No, but when you allow the farmers to get involved in it and start setting the fee, setting the assessment, then art.16, §68 kicks in. And that's what this act has done.

CORNYN: Why would farmers vote to assess themselves if there is not a problem; and why doesn't that basically take care of your complaint?

OWEN: My clients do not have the problem. The act as it is constructed they waive the police power and say we have a goal of statewide boll weevil eradication. When they then delegate that to the farmers to say go provide a statewide boll weevil eradication, some do, some don't. Some

get in awhile, and get out before it gets accomplished. The regulatory purpose is lost. It's gone. That's under any particular set of circumstances. That's under what has happened.

HECHT: You don't disagree I suppose that the state could pass a law forbidding growing of cotton if it's infested with boll weevils?

OWEN: I believe that.

HECHT: You would require farmers to either treat it, or plow it up if it's discovered that it had been infested with boll weevils?

OWEN: I agree with that. There is no doubt and it's not an issue in this case as to whether the legislature can pass a boll weevil eradication statute in some form or fashion under police power. I will even concede that. I don't think it's a relevant issue at all.

CORNYN: They just can't assess farmers?

OWEN: Or allow the farmers to assess themselves if they do it.

CORNYN: Now tell me why they can't allow the farmers to assess themselves?

OWEN: When they let the farmers assess themselves any relationship between the assessment, whether it's regulatory or a tax, and the benefit that they are going to receive, which is statewide boll weevil eradication, is lost. My guys are paying an assessment on the premise that their cotton will be benefitted by statewide boll weevil eradication when it's not.

CORNYN: There's no threat that at some point in the future it might be infested or, otherwise, affect the price of cotton statewide...

OWEN: Even if that is true, the lower Rio Grande Valley is out.

ABBOTT: It seems like what you're arguing then is that since your farmers are not benefitting at all from this, that makes it an unconstitutional assessment on your farmers, which if you flip that around are you saying then that if your farmers did benefit from this, then you would no longer be claiming that it's unconstitutional?

OWEN: That is an argument that can be presented, but with this statute that will never occur under any set of circumstances.

ABBOTT: So it doesn't matter then in reality to your argument whether or not your farmer or any farmer benefits from this?

OWEN: No. Because the statute is based on the premise of statewide boll weevil eradication. That's why you are paying the money, and that's not going to happen.

CORNYN: So in order to be constitutional the benefit has to be uniformed; is that what you're saying?

OWEN: I think there has to be, I might not word this correctly, there has to be some rational relationship between the assessment that you're paying, and the ultimate goal to be accomplished between my clients' cotton, and the ultimate goal, the reason he's paying the money, that statewide boll weevil eradication.

CORNYN: And statewide boll weevil eradication is not an adequate purpose. It has to have a particular benefit on your client's cotton farm?

OWEN: In regard to the assessment, yes. But when we are never going to get to the statewide boll weevil eradication, then the assessment has no relationship to it. What they are paying has no relationship to it even assuming they are under some kind of threat.

The police power fails, regardless of what I have said before, fails for 3 other reasons. First, the legislature cannot invoke the police power as a vehicle to levy assessments on farmers in contravention of clear and specific constitutional rights. Applying common sense to the thing if the foundation sets a megamillion dollar figure out here and then goes out and plugs various formulas in by trial and error in one place or another, plug in \$1 figure here, \$1 figure there, acreage here, production there, plug it in - nope that's not enough money, no that's not enough money, now that's enough money. Then they go out have a referendum that raises that amount of money, that's raising revenue. No matter what they goal is, that is raising revenue. That makes it according to Conlan at page 624, that makes it an occupation tax.

ABBOTT: Just on a practical basis, let's say you have all these farmers in a certain region and they all get assessed, and through the assessments they are able to eradicate boll weevils basically on one farm. All of the farmers in that region have paid their money to benefit one farmer who's crop improves because the boll weevil is eradicated for that farmer. And so everyone is being taxed to improve the situation of one single farmer. Is that a potential result of this?

OWEN: It is a potential result, but that same potential result is then left with the vote of a particular segment of people, farmers, to reach that ultimate goal before we lose the aspect of the police power, and we lose the relationship between the amount of money he's paying, and the goal that we are trying to accomplish.

PHILLIPS: Would you without argument state your other two reasons the police power fails?

OWEN: The legislature cannot delegate police power to all or a portion of the people. The

legislature cannot delegate police power without definite standards.

GONZALEZ: In your opinion if the statute would not allow an opt-out provision, would that save it?

OWEN: No.

GONZALEZ: Why not?

OWEN: The opt-out provision illustrates why the statute is not saved because if you opt-out, if a zone opts-out, then statewide boll weevil eradication is...

GONZALEZ: I understand. But if you could not opt out?

OWEN: If you could not opt out it still doesn't save it because you still have the opportunity to opt in or not.

GONZALES: There's only one - everybody's in. What if everybody was in? There is no option, everybody had to participate.

OWEN: That's not the terms of this statute. If that were the case, if it was mandatory to get in, that would save the aspect of the primary purpose. I don't think it saves the aspect of the assessment problem.

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WHITTINGTON: May it please the court. My name is Randy Whittington, and I am from Harlingen, Texas. I represent 120 cotton farmers from the Rio Grande Valley. Our clients are in almost every respect similar to virtually every cotton farmer in the State of Texas. Like most cotton farmers our clients have boll weevil problems. They've been fighting boll weevils for as long as they've been farming cotton. They would love to be rid of them. However, under this particular statute our clients are treated very differently than over 2/3 of the cotton farmers in this state. Two-thirds of the cotton farmers in this state because of the way the statute is written have decided either by in most cases inaction by not holding a referendum at all to not subject themselves to this particular program or the assessments under this program. It has nothing to do with whether they have boll weevils, or boll weevil infestation, and it has to do with the fact that they have decided for their own reasons whatever they may be, and under the statute it could be any reason, that they do not desire to participate in this program.

Our clients on the other hand are subjects to the act, because for whatever reasons the voters in the Rio Grande Valley decided that they would subject themselves to this particular program. As the court knows from the record in this case after a disastrous crop in 1995, and approximately a \$10

million debt being incurred, the farmers opted out of the program in the Rio Grande valley as they are permitted to do under the statute. So their situation now is that they are no longer participating in an eradication program. There's no spraying going on; there's no eradication under the statute going on in our area at all. They still have the boll weevil problem. But they are still paying assessments and will be paying assessments to the tune of millions of dollars for many years to come to pay the debt that was incurred during that less than 12 month period. It is that different treatment of my clients in the Rio Grande valley from for example: some 400,000 acres of cotton in the Black land prairie zone, that leads to our constitutional challenge in this case. The Black land prairies zone includes approximately 39 counties, 400,000 acres of cotton. The record in our case indicates that they have boll weevil problems in that zone, but they've never held a referendum. And so they are not subject to the assessments, they are not subject to any of the provisions of this act. There are 3 other zones, and 9 in the State of Texas that are not subject to the provisions of this act, because they have elected by their enactment in not holding a referendum not to subject themselves to it.

There are only 89 counties approximately in the State of Texas that either are participating in, or have participated in the program, including the 9 in the Rio Grande valley. The remaining 180 some odd, how every many there are, have never participated in the program. Some of the questions that have been addressed by members of the court I think point to the very problem with this statute, and the reason why this statute is not an appropriate exercise of police power.

Mr. Dow described it as a flexible regulatory statute. I think, and I would point out to the court, I believe that it's clear both at the TC level in our case. And in the Hale county case, that the appellant has conceded in this case that this statute does not comply with, and does not depend for its validity on art. art. 16, § 68. The argument is that it is a valid exercise of the police power.

CORNYN: The argument you've made so far what provision of the Texas constitution does it violate, or what constitutional violation is it addressed to?

WHITTINGTON: The aspect of the statute which creates the flexibility itself, the referendums, violates the due process requirements under both the state and federal constitution, the equal protection provisions of both the state and federal constitution. If it's a regulatory power, if it is indeed an assessment in the form of an assessment under art. 16, § 68, then it obviously does not comply with that provision. So either way I think it has a serious problem. The fact that the legislature injected this flexibility aspect into the statute, the referendum, so that you can decide for yourself for whatever reasons, there are no standards under the statute, decide for yourself whether you choose to be regulated or not, or whether you choose to continue to be regulated or not, that particular aspect of the statute is the most critical problem that it has, and it leads to at least 3 constitutional problems that I can think of right off the top of my head. One is that it eliminates any tie between the regulatory objective of the statute, which is boll weevil eradication, and the regulatory aspects of the statute itself as well as the assessments by making it voluntary. The second is that it creates an arbitrary and unconstitutional classification of cotton farmers, or a classification scheme of cotton farmers in the State of Texas. You have those who are regulated only because they

held and passed a referendum, that's one class; you have another classification of farmers who are not regulated under the statute and they are not regulated either, because they defeated a referendum, or because they never held a referendum, or because they opted out. The classification being tied to the referendum rather than the existence of boll weevils, or the threat of boll weevil infestation creates these two classes, which bear no relationship whatsoever to the regulatory purpose of the statute. That's the second problem. The third problem is, and it's related, is it creates an unconstitutional delegation to the electors - cotton growers - of the decision making authority of the state if the state is exercising a regulatory police power.

CORNYN: Why isn't this problem analogous to lack of participation in presidential elections where less than...if people don't want to vote to basically you can't make them vote, if they don't want to pass a referendum, if they don't deem it in their self interest, they won't, why isn't this more of a political problem within the nature of this act as opposed to an unconstitutional problem?

WHITTINGTON: I believe that it's not analogous at all with that situation for a couple of reasons. One, is that this statute identifies as Mr. Dow says, it identifies in it a problem that exists in the State of Texas, the boll weevil infestation and the threats that it presents to the cotton industry, which we would concede is a legitimate target or objective of police power if it is exercised in the constitutional fashion. Once you do that and you set up a regulatory statute or claim to set up a regulatory statute, or try to defend a statute as regulatory when in fact it's not, then the democratic process itself defeats the regulatory purpose of the statute by being able to elect-in, elect-out, decide on the basis of whim, or caprice, or selfish reasons whatever mired reasons you could have that you don't want to be regulated. Under the scenario that Mr. Justice presented a presidential election you're not dealing with a regulatory function of the government. You're dealing with the very heart of the democratic process in electing your representatives.

CORNYN: So if this were compulsory and uniform it would address that concern?

WHITTINGTON: I think if the participation in the program were compulsory that that would be a major step in the right direction. In our brief we talk about the history of agricultural pest control regulation in this state. And with the exception of art. 55c, which was struck down by this court in Conlan, every regulatory statute directed at controlling agricultural pests was mandatory. It was also tied to the existence of the pest, or the imminent threat of the pest with safeguards in the statute to determine that it truly existed. If this statute were tied directly to the regulatory objective, the existence of the boll weevil as opposed to whether you vote or don't vote in a referendum, then it would not suffer from any of the problems that it suffers from now. I think you would still have the problem of the assessments themselves. The statute in 7401.13a mandates that the assessments be set on the basis of what it would take to accomplish those 4: research, promotion, marketing and education purposes under art. 16, § 681

. That's how the assessment has to be set under the statute if they spend it as it is applied for an entirely different reason

OWEN: On the ballot when the Rio Grande valley opted-in, was the assessment commensurate with the debt that was incurred? In other words has the debt that's been incurred been according to plan based on what the assessment on the ballot reflected?

WHITTINGTON: As it has turned out not. The ballot itself merely established an assessment based on a per acre charge: \$18 per acre for irrigated farm land; \$12 per acre for dry land farmland. That was the assessment across the board, and that was the only factor in the assessment. Unlike the representation that's been made by the court, that it was somehow tied to boll weevil infestation, it was not. It was strictly per acre planted and it didn't tie itself to what the debt ultimately might be. The debt in fact turned out to be greater than anybody anticipated for a number of reasons. But the assessment itself was for a fixed amount per acre planted. It was to continue for a set number of years and then stop. That was changed in the recall referendum. As a condition of getting out of the program, to vote to get out of the program you had to vote to extend your obligation indefinitely until the debt was paid.

PHILLIPS: If this statute were stuck down what would happen to that debt?

WHITTINGTON: I'm not sure that I know your honor. I suspect that Mr. Ratliff's clients would have a difficult time collecting the debt. And I suspect that you will hear from Mr. Ratliff when he stands up that that is a disastrous consequence of what the potential action of this court. But I would submit to you, that does not control whether the statute is constitutional or not.

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RATLIFF: May it please the court and to pick up on what the Chief Justice just asked. I'm here representing the amicus in this case, Farm Credit Bank of Texas. As we have set out in the brief, the money that is already been expended in connection with the boll weevil eradication programs in Texas, and that amount of money is in the range I believe of \$20 million dollars with the commitment to loan up to about \$60 million. The fact of the matter is, that money has been spent, it has been utilized for purposes of eradication.

When Mr. Whittington that can't save an unconstitutional statute, I agree with that. But at the same time I think the law of this court says that one of the things that you look at is if the result of an interpretation of either the statute or the constitution leads to ludicrous or disastrous results, that is at least a factor the court is entitled to take into account.

GONZALEZ: In Edgewood, the court allowed the collection of unconstitutional tax because we did not want to close the schools. But here there is no schools to be closed. What is the rationale, I mean what is your best argument why this unconstitutional tax, if it's unconstitutional, should be collected?

RATLIFF: As long as everybody understands I don't say 1) it's a tax, or 2) it's

unconstitutional. I would say...

GONZALEZ: I am asking you to assume that.

RATLIFF: I would say that you can utilize a similar rationale to that utilized in the Edgewood case and that is, the court recognized the practicalities of the situation, the fact that right or wrong that is the way the system had been carried forward to that date, and there was reasonable reliance on that system, and a necessity for a period of time in order to right the ship. It occurs to me to say: Well we can do that in education, but we can't do it in something that was deemed by the legislature to be extremely significant to agriculture would be to say that this court can establish a hierarchy of values to be protected. And I don't believe that's correct.

ABBOTT: The legislature says that the boll weevil presents a major economic threat to the Texas cotton crop. If none of these referendums passed there wouldn't have been anything done at all to eradicate the boll weevil?

RATLIFF: Presumably other than voluntary efforts, that's correct.

ABBOTT: So in essence they could have created legislation that had zero impact?

RATLIFF: They could have. But I think the point is, and I think what the case law tells us is is that this court...the legislature can decide within boundaries what it believes as a matter of policy is the best way to approach a problem. And if they had decided, whether we would have agreed with that decision, or you would agree with it as an initial matter, if in fact it is a rational policy choice to allow people to determine whether they believe the problem is sufficiently significant in their area to vote on the matter and decide to assess themselves it seems to me that is well within the ambit of the legislature's prerogative and one that this court should not interfere and say: We disagree with your judgment. It should have been made mandatory, or you should have not had the program at all.

HECHT: The difference between this and Edgewood though it seems to me is that in Edgewood since it was unconstitutional, the people bore the brunt of the problem. There was no one else to go to but them. Here if this is unconstitutional, there are two groups of people to go to: the farmers who were saddled with the obligation in the first place; or the people generally. Why shouldn't the state have to bail itself out if this is unconstitutional?

RATLIFF: The people that are going to suffer if this is held unconstitutional and there is no way to reclaim these assessments, are many of these same farmers who were in the cotton program because it is the Production Credit Association (PCA) that have funded this debt. Farm Credit bank and the PCAs are the ones that have funded it. So the debt is going to fall back perhaps it is not going to fall back uniformly on the people who were in the program. But it is going to fall on that particular group of people. It occurs to me though that we are jumping way down the track here talking about how we are going to collect this unconstitutional assessment. And the fact of the

matter is we believe it's not unconstitutional for several reasons. One, let me just change the facts just a little and I will date myself clearly with this. The situation is this: the legislature has declared that polio is a health threat. It does not impose a mandatory program; it does not impose a mandatory requirement that you close your swimming pools and that you now allow people to go to the public theaters because nobody knows what causes polio. But they do say that if there are expenses incurred in carrying out that program, there will be an assessment made on those who present their children for polio shots. That's police power one. Is there any question that is a fee associated with police power? It is voluntary with the parent bringing their child to be vaccinated. It is not mandatory in any sense, and yet the legislature has declared it a health threat. Here we've got a situation in which the legislature has determined that the boll weevil is injurious to the economic health of the State of Texas. Now they were faced with a policy choice. They already knew as we pointed out in our brief you could have said on a mandatory statewide basis these are the punishments for continuing to grow cotton that has not properly been treated. The legislature made a decision and I submit if you will go look at the findings you will see that what the legislature determined was is that a voluntary method in their judgment was a better way to do it, and this foundation was a way to promote that purpose. And as opposed to Conlan and 55c, if you look at what they are entitled to spend money on, it is in fact spent to enhance the people who have voluntarily decided to accept this program and to fund it, it is to enhance their efforts and perhaps cause others to voluntarily agree that they should go into the zone.

HECHT: Is there any difference between this case and Conlan other than the money in that case was spent to promote, and in this case to eradicate?

RATLIFF: Yes sir. I believe it is material if you look at the purposes here that all of these purposes when they are talking about spending money they all are ultimately tied back to the eradication and suppression program. In Conlan, that was not true. It simply was a general marketing.

PHILLIPS: That may be born out by the record, but it's not born out by the text of either legislation. Conlan talked about research. And this talks about education and promotion.

RATLIFF: When the statute was originally passed in Conlan there was no reference made to pest control or research. It was passed as a pure marketing matter. It was only a subsequent amendment that is mentioned in the opinion. I agree it's there. It was only a subsequent amendment. If the court is going to make a determination which I think is the critical determination between tax and occupation, and an assessment is the primary purpose one of the things you might look at is was the legislature willing to pass it without reference to some police power? But I think we are also traveling a down road that I don't believe this court needs to go on. And that is, there seems to be an assumption here that any statutory enactment by the legislature has to be sustained on one constitutional basis. And I know of no such rule.

ENOCH: You used the analogy of the polio vaccine. It seems to me that this is a little bit

different than that. If I choose to protect myself by the polio vaccine and then be assessed for choosing to do that, that's one thing. But it seems to me this is a situation of where the neighbor has to eradicate the boll weevil on their property to protect me, my crop. And so unlike the polio vaccine where you are protecting yourself you undertake this activity to not only protect yourself but you have to do it in conjunction with your neighbor in order to have this protection. And so the argument seems to me the farmers are making is well it's all fine and well if we have a program that protects us, but if the program permits my neighbor not to protect me, then I am divorced from the protection; I am being assessed for my effort that doesn't result in the protection because the state has not equally imposed the obligation on my neighbor to eradicate themselves. So I can take the polio vaccine, I could be assessed for it, but that's not going to protect me from contracting polio because my neighbor is not obligated to protect me.

RATLIFF: I understand but I think that you would have that same problem anytime you are not dealing with something that is statewide. For example: It's clear under our law that I can go out and with my neighbors I can form a fire prevention district; and I can tax myself inside that fire prevention district for fire protection measures. And yet there may be somebody immediately adjacent to my fire protection district that still poses a threat to people within the district, but that is the nature of boundaries it seems to me. And I don't believe this court wants to be in a position to say that the legislature is constitutionally mandated to only deal with problems on a statewide basis. Because I don't believe that would be an appropriate finding for this court to make.

PHILLIPS: Could you speak very briefly to _____ to overlapping districts and an open meeting being posted in Austin, Texas?

RATLIFF: I will speak to it only to this sense. It doesn't seem to me that assuming that either one of those statements were true, that they would sustain a judgment of the courts below, one of which was to permanently enjoin these districts from these zones from imposing any assessments. So I don't think those arguments will support this judgment. And they certainly wouldn't go to the question of the unconstitutionality of the statute. It may well be although I don't believe that...I'm just not up enough on those particulars, but it does not seem to me that those go to the heart of this controversy. And that is, that these zones have been unconstitutionally formed in the first instance and all assessments therefore have been illegally obtained. And we are going to let the loss fall where it will. It doesn't seem to me that the question of the attachment of additional counties would go to the basic question at least in the _____ county as to whether it's constitutional...

PHILLIPS: If those arguments are correct they might require some other things to be done?

RATLIFF: That is correct. I wish I could be more responsive on that. I really was concentrating more on the unconstitutionality issue.