

Supreme Court of the United States

In the Matter of:

Universal Interpretive Shuttle, Corp.,

Petitioner,

vs.

Washington Metropolitan Area Transit
Commission, et al.

Respondent.

Docket No.

19

Pt. 1

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

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4 Universal Interpretive Shuttle, Corp., :

5 Petitioner, :

6 v. :

No. 19

7 Washington Metropolitan Area Transit :
8 Commission, et al. :

9 Respondents. :
- - - - -X

10 Washington, D. C.

11 Monday, October 21, 1968

12 BEFORE:

13 EARL WARREN, Chief Justice
14 HUGO L. BLACK, Associate Justice
15 WILLIAM O. DOUGLAS, Associate Justice
16 JOHN M. HARLAN, Associate Justice
17 WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: Number 19, Universal Interpretive Shuttle Corporation, Petitioner, versus Washington Metropolitan Area Transit Commission, et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Nagin.

ORAL ARGUMENT OF JEFFREY L. NAGIN, ESQ.

ON BEHALF OF PETITIONER

MR. NAGIN: Mr. Chief Justice, this case is here on a writ of certiorari to review a decision of the Court of Appeals for the District of Columbia, which reversed the District Court dismissal of the complaints of respondents.

The Decision of the Court of Appeals required that the District Court restrain the operation by petitioner under a concession granted by the Secretary of the Interior, of a mobile interpretive service on the Mall, in the District of Columbia, until petitioner secured a Certificate of Convenience and Necessity from WMATC, the Washington Metropolitan Area Transit Commission, a local agency created by an interstate compact between the States of Maryland, Virginia, and District of Columbia.

In a mobile interpretive service, which is a term we are going to be using throughout this proceeding, the purpose of this kind of a service is to provide essentially the same type of narrative, guided tour as the Park Service,

1 which of course is a department within the Interior Department,
2 provides to visitors of National Parks across the country.
3 Except that instead of providing the service on a tour which
4 goes on foot, the Secretary has determined that it would be
5 appropriate to provide it in this instance by using motorized
6 trams, which would move at speeds not to exceed ten miles an
7 hour to the points of interest, and around the points of
8 interest, permitting the tour to go on.

9 The principal issue in the case is whether the opera-
10 tion of such a mobile interpretive service by the Secretary
11 through a concessionnaire is subject to the certification and
12 regulatory requirements of WMATC. If the operation proposed
13 by the Secretary of the Interior is subject to WMATC juris-
14 diction, then even though the Secretary has determined that
15 there is a need for the service on the Mall, WMATC would not
16 be allowed to permit the service to be conducted unless it,
17 WMATC, the local agency, determined that there was a need.

18 Furthermore, WMATC would have the obligation to
19 determine that petitioner was qualified to render this service,
20 even though the Secretary had made the same determination, and
21 if the Certificate of Convenience and Necessity were granted,
22 the local agency would also have the responsibility to supervise,
23 under its general regulatory powers, the operations of this
24 concession on the Mall.

25 The setting of the case, the actual physical setting

1 of the case, takes place on the Mall of the District of Columbia,
2 and when I use the term "Mall", I am using it a little bit
3 generally, because it embraces park areas that are adjacent to
4 the Mall, such as the Jefferson Memorial, the Elipse, but these
5 are areas all within the exclusive charge and control of the
6 Secretary of the Interior.

7 I think perhaps the best description of the Secretary's
8 responsibilities in this area is set forth in Sections 1 and 3
9 of Title 16, United States Code. It says: "The Secretary is
10 charged with the obligation to preserve, by such means and
11 measures as conform to the fundamental purpose of said parks,
12 and which purpose is to conserve the scenery and natural historic
13 objects and the wildlife therein" -- which I guess on the Mall
14 would probably be limited to squirrels -- "and to provide for
15 the enjoyment of same in such manner and by such means as will
16 leave them unimpaired for the enjoyment of future generations."

17 In line with this responsibility, the Secretary
18 determined that the facilities on the Mall, the interpretive
19 facilities on the Mall were already crowded to the point where
20 both because of population pressures and vehicular pressures,
21 he could no longer provide adequately for the visitor interpre-
22 tive services which he wished to provide under his charge of
23 responsibility.

24 Using the authority conferred upon him by Title 16,
25 including Section 13 and Section 20, the Secretary requested

1 proposals from private concessionaires to operate an interpretive
2 service on the Mall, and a number of private persons responded,
3 including Petitioner, and including Respondent, D.C. Transit,
4 with proposals.

5 The proposal of petitioner was selected. The Director
6 of the Park Service, Mr. Hertzog, stated that he felt the
7 proposal by the Petitioner provided the "best means of inter-
8 pretation and operation." He also stated what impressed him
9 most about petitioner was its "interpretive qualifications."

10 The Secretary and the Petitioner entered into a
11 contract, in March of 1967, which called for the rendition of
12 this interpretive service. The contract specified that
13 the service to be provided on motorized trams, that each tram
14 would be manned by a driver and by a guide. The guide, or
15 interpreter, would use a prepared script, approved by the
16 Secretary in interpreting the Mall, because he felt that, and
17 expressly provided for in the contract, that interpretation,
18 the narration part of the service, was a prime consideration.

19 Q We don't have any First Amendment issue in this
20 case, do we?

21 A No, sir, there is no First Amendment. At least,
22 if there is one, I think my client would be the person who would
23 be in a position to raise it, and we are not raising it, Mr.
24 Justice.

25 The Secretary would have complete control over all

1 facilities, over the employees, over the qualifications, over
2 the train, over the time and method of operation. The franchise
3 fee of 3 per cent of the gross would be paid by the conces-
4 sionaire to the United States.

5 At the time Universal entered into this concession
6 arrangement, they were advised -- actually, prior to it, they
7 were advised by the Secretary -- that no other agency had
8 economic regulatory jurisdiction over this particular activity,
9 including, since we had asked the question, WMATC.

10 Q Are you going to tell us what use your client
11 would plan to make of the streets outside of the Park Service
12 area?

13 A Actually, I wasn't aware of the fact that they
14 would make use of any streets outside of the park area, because
15 the streets, the Section 8144 of the District of Columbia
16 Code, provides that the streets between park areas are under
17 the regulation of the Secretary. The trams would cross streets
18 such as 14th Street, and so on.

19 Q So there would be no pickup point outside of
20 the park area that was so confined. Is that right?

21 A There would not be any pickup points outside the
22 park area. There is one problem at the end of the park, where
23 they are doing this construction at 2nd Street, where the trams
24 might have had to go over one small area outside the jurisdiction
25 and control of the Park Service. As a matter of fact, a

1 temporary service which is being operated now, to which I will
2 address myself later, is not going that far, and is staying
3 wholly on park territory.

4 There is authority, if the service is to be extended,
5 say, for one block, or for a short turnaround area off of park
6 territory, for the Secretary to arrange to have this permitted,
7 by an exchange of letters with the D.C. Government. Arrange-
8 ments to do this were initiated, but pending the outcome of
9 this litigation, the Interior Department did not pursue them.

10 Q Because the Washington Metropolitan Transit
11 Commission, or whatever it is called, does have jurisdiction,
12 does it not, on the District of Columbia streets, at least
13 outside of the park areas?

14 A It does, Your Honor, although one of our
15 theories, which I will discuss later, would, I think, even if
16 the trams operated for some distance off the park property,
17 mean the service is still exempt from regulation by WMATC,
18 for reasons that have nothing to do with Section 8144 and 8108,
19 specifically.

20 Q So it is your understanding that this court
21 should consider the case, as if these trams operated solely
22 on park service land?

23 A Yes, except to the extent that it may at some
24 future date, because of the turnaround problems, go onto
25 District of Columbia streets for almost what I would call a

1 de minimis distance, and provided, of course, that the Secretary
2 were able to arrange with the District Government for the
3 necessary exchange of regulatory authority, which isn't required.

4 The D.C., WMATC initiated this action in the District
5 Court, when Petitioner, after being advised by the Secretary,
6 refused to apply for a Certificate of Convenience and Necessity.
7 The United States immediately intervened by filing a representa-
8 tion of interest, and has participated throughout these
9 proceedings as a party in effect either under the representation
10 of interest or as an amicus, at all times supporting Petitioner.

11 Pending the outcome of the loss of this action,
12 Petitioner has not operated the service. Starting around
13 September 1, the Secretary utilizing Park Service personnel
14 and leasing equipment from Petitioner, has in fact been con-
15 ducting the service for, I guess it is, almost two months now.

16 The WMATC complaint at page 5 of the Appendix, I
17 think, in a sense, really sums up, or at least gives a feeling
18 as to what WMATC is seeking. They say that unless the
19 Petitioner applies for a Certificate of Convenience and
20 Necessity, WMATC will be deprived of the opportunity to
21 determine whether the Petitioner is qualified to render this
22 service to the Secretary and for the public.

23 Now, significantly, and underplaying throughout this
24 proceeding, is the fact that the WMATC has not particularly
25 emphasized the fact that if the compact applies, not only would

1 the WMATC have the right to determine whether we are qualified,
2 but they would also have the right to determine by virtue of the
3 very same sentence that gives them the former power the right to
4 determine if the service is even needed.

5 Q What is the test? Public convenience and
6 necessity?

7 A Public convenience and necessity, and of course,
8 that particularly regulatory body sees it, and at the very least,
9 we could have a clash of determinations between the Secretary
10 and the --

11 Q Certainly, there are two diverse points of view.

12 A That is right.

13 Q The agency would see it in terms of the other
14 competing or complementary transportation services in the
15 metropolitan area, I suppose, and the Secretary would see it
16 in terms of a national park.

17 A I think that's a fair statement, Your Honor.

18 Q That's your point, isn't it?

19 A Yes, sir.

20 Q Is that supposed to mean that the resolution of
21 this would be then going to have any impact beyond the resolu-
22 tion of the streets? In other words, anything in the way of
23 any basis of law, conflicts of this nature, between the
24 Secretary and agencies elsewhere are going to be heard, however
25 we come out?

1 A I think that to the extent that it would further
2 substantiate the control which the Secretary enjoys over park
3 lands. In this context, the control vis-a-vis a local agency
4 was based upon Section 8108 and 8144. However, certainly there
5 are other areas and not being the representative of the
6 Government, I don't think I can speak with extreme authority on
7 it, but there are other areas from time to time where the
8 Secretary of Interior's jurisdiction in the other park areas
9 could be challenged by local jurisdiction and I assume that a
10 strong precedent here would be very convincing, that the
11 Secretary's control in other park areas would be vindicated.

12 But we are dealing here only with the interpretation
13 of the Washington Metropolitan area compact, and to that
14 extent the literal application of this decision, I think,
15 would be much more limited than that.

16 The Secretary, under the contract, has control over
17 the hours of service, the points of interest to be served, the
18 rates to be charged the public -- and of course that is a prime
19 factor -- the records to be kept by the Petitioner, the
20 insurance to be maintained. In other words, throughout the
21 entire contract, there is this complete scheme of regulation.

22 If WMATC is correct, then they would have the power
23 to determine the service, the hours of service, the rates to be
24 charged. They could suspend rates. They could postpone the
25 effectiveness of rates. They would have the usual plenary

1 jurisdictional powers which they do over other regulated
2 agencies.

3 The petitioner has consistently throughout these
4 proceedings resisted this assertion of power by WMATC on a
5 number of grounds, which I would like to just summarize at this
6 point, and maybe we can explore the ones which are most
7 susceptible to oral argument at this time.

8 The first is that the proposed service is exempt from
9 regulation under the compact, by virtue of the exception con-
10 tained within the compact for transportation by the Federal
11 Government. That is, in a sense, an answer to Mr. Justice
12 Stewart's question. Namely, that even if the service were
13 off of the Mall for some distance, if this is transportation
14 "by the Federal Government", provided by a concessionaire, it
15 would be exempt from the compact coverage.

16 Secondly, Congress has committed the Mall itself to --

17 Q You say it wouldn't be?

18 A It would be.

19 Q I thought that, and perhaps I incorrectly recall
20 this, but as I read the papers here, I thought that that
21 exemption applied only to transportation of the Federal Govern-
22 ment's own personnel.

23 Am I wrong about that?

24 A Mr. Justice Fortas, that is the issue. Mr.
25 Cunningham, to my right, Mr. Russell Cunningham, on behalf of

1 WMATC, has urged that transportation by the Federal
2 Government is limited to --

3 Q I am talking about the express exemption. How
4 does that read?

5 A The express exemption is just "transportation
6 by the Federal Government", and then it goes on, as on political
7 subdivision of the signatories.

8 Q I see, and does not expressly limit it to
9 employees, then?

10 A No, not at all. That is the very first issue
11 to which we will address ourselves.

12 The second, of course, is that the Mall itself, that
13 is, has a territorial exclusiveness of jurisdiction here,
14 which the Secretary possesses, and since this takes place
15 within that area, it is within his exclusive charge and control.

16 The third is that this kind of transportation does not
17 fall within the basic handle by which WMATC claims jurisdiction,
18 because it is not, quotes "transportation for hire." This is
19 a question, of course, of what is meant by the term "transportation for hire."
20

21 Lastly, DC Transit has claimed that under its
22 franchise, which was granted in 1956, it has, quite apart from
23 the compact, an independent basis for claiming that before the
24 Petitioner can operate in its service, it must obtain a
25 Certificate of Convenience and Necessity.

1 I would like to focus on the point that Mr. Justice
2 Fortas just mentioned, and that is, whether this is transporta-
3 tion by the Federal Government.

4 In our view, transportation by the Federal Government
5 is present in this case because in the first place, the Secre-
6 tary is discharging through this concessionaire a fundamental
7 function which he has traditionally and historically furnished,
8 either directly or through concessionaires.

9 Secondly, the Federal Government, through the
10 Secretary, has control over every phase of this operation, to
11 the same extent, as it would if it were conducted by its own
12 employees. Perhaps even more, because you don't have certain
13 things like Civil Service regulations, which would prevent
14 people from being discharged in that sense.

15 Thirdly, the Petitioner's day-to-day activities will
16 be physically intertwined with those. The Park Service of the
17 trams will bear Park Service emblems, the personnel will wear
18 uniforms approved by the Park Service, the script, the narrative
19 script, the First Amendment problem, which is the very heart of
20 the service, will be subject to the Park Service's approval.
21 The schedule of service, the operation will be tailored to the
22 day-to-day changing needs on the Mall, so that if something
23 is taking place at the Smithsonian Institute, the service can
24 be rerouted either to take that into account, or move around it.

25 So whether viewed from the standpoint of the public,

1 who are the beneficiaries of this service, or from the stand-
2 point of WMATC's own regulatory jurisdiction, it makes no
3 difference that the Secretary has decided to do this service
4 through a private concessionaire, as opposed to simply using
5 his own vehicles and his own personnel. The control elements,
6 the discharge of his responsibility elements, are all there.

7 Finally, quite apart from this, of course, is the
8 exclusive charge and control which the Secretary enjoys over
9 the Mall. Since 1898, in a statute now codified in Section 8108
10 exclusive charge and control has been delegated now to the
11 Secretary of the Interior over these areas, and this was made
12 clear in 1909, when the Congress extended this charge and
13 control to the roads between park areas, and to the sidewalks
14 adjacent to park areas.

15 The Public Utilities Commission, and the ICC, never
16 were given any statutory authority to regulate activities within
17 this Mall area. Now as petitioners, he have been met by the
18 point by respondents that PUC in fact did regulate bus lines,
19 because they certified. One example was given of a bus line
20 that went to various points in the District of Columbia, and
21 went on Washington Drive, which of course is part of the
22 Mall, over by the National Art Gallery. Well, of course this
23 regulation was not hostile to the Secretary. There would be
24 no incentive for him, as long as he was willing to permit the
25 service, to be conducted on the Mall, and did not exclude the

1 vehicles, there really wasn't anything for him to do. He could
2 go to WMATC and say, "Take that one line out", so that your
3 sentence will read, "Up to the Mall", and they will be silent
4 about what happens on the Mall, and then extend beyond the Mall?

5 No, there is no point to that. There is no advantage
6 to it. The point is that when there are not contributing regu-
7 latory schemes, and if the Secretary is willing to let the
8 activity continue, there is no reason for him to interfere.
9 However, here we have an activity on the part of the Secretary
10 himself, through a concessionaire, in which he does not want
11 interference, and that I think is the essential point of dif-
12 ference between the fact this PUC might have, in the course of
13 regulating carriers, whose activities could be and were
14 substantially outside the Mall area, also, probably without even
15 thinking about it, inserted the reference to the traveling one
16 block in the mall area.

17 The same thing, of course, would apply to taxicabs.
18 We have seen the maps in the back of the taxicabs, and there
19 is not a big block out there for the rates to be charged in
20 the Mall area, but what good would that have done? I am sure
21 the Secretary, if he is going to permit cabs on the Mall, I am
22 sure he is not going to try and prevent them from a rate
23 structure to be imposed by the applicable authority who gets
24 jurisdiction because the activity is outside of the Mall.

25 Finally, I would like to address myself to

1 D.C. Transit's point, that its franchise gives it the right to
2 insist on certification. The franchise which is set forth on
3 page 36A, et seq., of our brief, towards the rear, provides
4 first, a grant of authority to D.C. Transit to operate a mass
5 transit system. Then in Section 6, there is also granted to
6 D.C. Transit the right to operate special charter and sight-
7 seeing services. Section 3 contains a provision that no
8 competitive street railway or busline, that is a busline for
9 the transportation of passengers of the character which runs
10 over a given route on a fixed schedule, shall be permitted
11 without certification by WMATC as to its necessity.

12 Now we interpret taht to apply, No.1, only to the
13 regular route service of D.C. Transit. Because this, in
14 effect, not monopoly, but this protection to be afforded to
15 WMATC was meant to protect the service which it was being
16 required to render, and that is, its regular route service, not
17 a permissive service of sightseeing.

18 The language "competitive street railway line which
19 runs over a given route on a fixed schedule", maybe if they
20 didn't insert the word "competitive", you could argue it also
21 protected the sightseeing situation, and certainly as the
22 District Court found, this does not compete, at least in any
23 significant way, with the regular route service.

24 I think it rather hard to envision a tram moving at
25 less than ten miles an hour from various points around the Mall

1 as competing with the regular route service of D.C. Transit.
2 But even if Section 3 extends its protection to D.C. Transit's
3 "sightseeing activities", we still believe that it is not a
4 applicable; because it requires that the service, which is being
5 limited or prohibited, itself, must travel over a given route
6 on a fixed schedule, and this service, being provided by
7 Petitioner, will be subject to change from day to day by the
8 Secretary to meet the changing needs on the Mall.

9 Also it is not within the issue concept of what is
10 regular route service, in the meaning usually given to that
11 term in public utility proceedings. It says, " Given route
12 on a fixed schedule." That is language which is meant to
13 mean regular route service, as far as we can see, and regular
14 route service, the best discussion of that I have seen was in t
15 the case cited by Respondent -- by Respondent D.C. Transit --
16 in the Bingler, where the District Court pointed out that
17 sightseeing service, or tour service, even if it went basically
18 on a relatively fixed schedule, does not come within the
19 concept of regular route service, unless there is something
20 significant added in addition to the expeditious transpor-
21 tation between points.

22 In our case, we don't even have expeditious trans-
23 portation between points. It is going too slow, and we have
24 the something substantial added, in the sense that the
25 interpretive service, which is certainly within that concept

1 of something substantial added -- that is the reason why people
2 would be taking the service -- is present in this case. There-
3 fore, we concede that D.C. Transit's independent argument has
4 no merit.

5 For the reasons which we have advanced, we believe
6 the Court, and respectfully request that the court reverse
7 the decision of the Court of Appeals, remand the case with the
8 direction that the complaints be dismissed.

9 Thank you.

10 MR. CHIEF JUSTICE WARREN: Mr. Martz.

11 ORAL ARGUMENT OF CLYDE O. MARTZ, ESQ.

12 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

13 MR. MARTZ: Mr. Chief Justice, may it please the
14 Court:

15 The United States approves and incorporates the
16 argument that has been made by Petitioner, but appears here
17 as amicus and in the Court below in representation of interest,
18 because of an independent and broad concern that the authority
19 which has been vested in the Department of Interior by Congress
20 and in other areas of national interest not be subject to review,
21 modification, and possibly a frustration by a parochial District
22 of Columbia by a regional regulatory commission.

1 The issues in the case, we think, are simple.

2 Congress, as the Petitioner has shown, has vested the Interior
3 Department with exclusive charge and control over the Mall
4 area, one of the most heavily frequented National Parks in
5 the whole United States.

6 By express Act of Congress, the Director of the Park
7 Service has been given authority to make and enforce all
8 regulations pertaining to movement of vehicles in the park,
9 and to extend those regulations to carriage ways that may
10 intersect parts of the public grounds.

11 Q May I ask, Mr. Martz, a question?

12 Whatever we may decide here, will it have a sig-
13 nificance beyond this conflict, this local conflict?

14 Q Yes

15 A Well, not beyond the local conflict, perhaps,
16 but this case has been through the Court before, Mr. Justice
17 Brennan, basically in United States against Wittek.

1
2 The question of the proper area for legislation
3 within the District of Columbia, under Article 1, Section 8,
4 of the Constitution, pertaining to municipal affairs on one
5 hand, and the broad, national legislation, particularly with
6 respect to Article 4, Section 3, on public lands, on the other,
7 and the compatibility of legislative actions between those
8 two areas in particular.

9 I think the question here is the extent to which
10 the broad national policies, promulgated in the park legis-
11 lation, and vested by Congress in the Department of Interior,
12 should be deemed modified or qualified by the enactment of
13 local and parochial legislation for the administration of the
14 municipal government of Washington, D. C., and the region.

15 Q That matter being paragraph 18, or whatever
16 it is?

17 A Paragraph 17, clause 17, of Article 1, Section 8.

18 We think there is no question but what Congress has
19 given exclusive charge and control to the Secretary over the
20 National Parks.

21 It has, as Petitioner has pointed out, placed a
22 responsibility upon the Secretary to promote the use of these
23 parks, for the purposes for which they were created, in
24 16 USC 1.

25 It has further authorized the Secretary, in Section

1 3 of 16 USC, and encouraged the Secretary in 1965, by Sec-
2 tion 20A of 16 USC, to use concessionaires, by contract, in
3 the performance of the functions of the Secretary within the
4 National Park enclaves.

5 The Secretary, after study, has entered into the
6 compact described in this case by Petitioner, in March of
7 1967, for 18 months, and two tourist seasons. That compact
8 has been dormant because of the injunction of the Court of
9 Appeals against the conduct of this interpretive service by
10 concessionaires within the National Park enclave without
11 certification and all it means by the Washington Metropolitan
12 Area Transit Commission.

13 Q Sir, you said compact. Do you mean contract?

14 A Yes.

15 Q Because there is a compact in this case.

16 A Mr. Justice Fortas, forgive me. I was refer-
17 ring to the contract between the Secretary and Petitioner.

18 Q All right.

19 A We are of the opinion and respectfully submit
20 that this decision of the Court of Appeals, which was not
21 supported by opinion, but only an Order that said in substance
22 that reading the relevant statute, one with the other, does
23 not permit the concessionaire's service to be performed
24 without certification.

25 No opinions were subsequently filed by any member

1 of the Court?

2 A No, Mr. Justice Stewart.

3 Q I noticed there was a reservation of the privi-
4 lege to do so.

5 A They were not filed.

6 Q All right.

7 A We submit that broad Order is erroneous under
8 at least three persuasive, if not controlling, decisions of
9 this Court.

10 The first, United States against Wittek, on the ques-
11 tion whether a national agency's authority within the District
12 of Columbia is going to be impliedly negated or qualified by
13 the enactment of general District of Columbia legislation.

14 The second question arises under Yearsley against
15 W. A. Ross Construction Company, as to the question whether
16 a concessionaire, operating under the close supervision and
17 control of Federal officers in the performance of governmental
18 functions, is an agent of the United States and acts in place
19 of the United States and in context would be subject to the
20 exclusion for transportation by the Federal Government set
21 forth in Article 12, Section 1-A of the Compact.

22 And third, by analogy, to Leslie Miller, Incorporated,
23 against Arkansas, where this Court said the mere existence
24 of duplicate regulatory authority over a Federal activity
25 by the Federal Government, on the one hand, and by a local

1 government on the other, creates conflicts, and is a frustra-
2 tion of the Federal purpose.

3 We submit, contrary to the broad opinion of the Court
4 of Appeals, that if this be so, it is inconceivable that
5 Congress would place administrative control over any part of
6 the National Park program in a tri-State, local administrative
7 body.

8 We submit that as in Wittek, so here, confusion has
9 arisen between the operation and effect of congressional
10 action in the national sector and the operation and effect
11 of congressional action on the local sector.

12 The problem in Wittek was this: Did the Emergency
13 Rent Control Act of the District of Columbia, of 1940, apply
14 to Federal low rent housing and defense housing within the
15 District of Columbia, which was then under the control of the
16 National Housing Administrator, and operated by the National
17 Capital Housing Authority?

18 In that respect, this Court said, on page 351:

19 "It is practically inconceivable that Congress
20 would have subjected the Government-owned low-rent housing
21 program in the District of Columbia to the additional control
22 prescribed by the District of Columbia Emergency Rent Act."

23 And on 355, the issue is whether the United States,
24 through whatever agency it operates, is to be controlled in its
25 rental policies by the District Administrator of Rent Control.

1 Here we were not concerned with an interstate or a
2 State agency, but a very creature of Congress, in the District
3 of Columbia, by legislation, that was denied that authority.

4 But even more in point, on 358, I think the Court
5 uses language that could almost be paraphrased and applied
6 to the problem before this Court. It said:

7 "The Act" -- referring to the District of Columbia
8 Emergency Rent Act -- "contains no express reference to the
9 United States as a landlord or to the application of the Act
10 to Government-owned housing of any kind. The text, surrounding
11 circumstances and legislative history of the District Act
12 neither express nor imply a change in the authority already
13 vested in permanent Federal agencies in their management
14 of the Government-owned housing in the District."

15 Q What is that case?

16 A United States against Wittek, Opinion by Justice
17 Burton, in 1949.

18 Now, our fact situation here is very similar. There
19 is nothing in the Compact, and for that matter in the D. C.
20 Transit franchise that purports to extend jurisdiction into
21 the National Park enclave.

22 Congress has operated the National Parks throughout
23 the country under Article 4 of Section 3, and the District
24 of Columbia under Article 1, Section 8, clause 17, and in the
25 past has been meticulous to try to separate the areas of

1 conflict within the District of Columbia.

2 It has, for instance, we think, in every instance
3 where District of Columbia legislation was to apply within
4 the National Park enclave, to expressly so provide.

5 It has considered transportation a local, municipal
6 problem, handled by the District of Columbia, by committees
7 in Congress.

8 Back in 1925, when the first Traffic Act pertaining
9 to motor vehicles was enacted, present Section 4613 was
10 included, that provided that nothing contained in this Chapter
11 shall be construed to interfere with the exclusive charge and
12 control heretofore committed to the Director of the National
13 Park Service over the park system of the District.

14 This section has never been repealed.

15 There is nothing in the language of the Compact or
16 its legislative history to show that Congress was thinking of
17 Federal park properties. There is much, which is set out in
18 our brief, to show that it could not have been thinking of
19 this type of regulatory extension.

20 Q Mr. Martz, just as a matter of information for
21 my ignorance, as to the parks in the District of Columbia,
22 are some District of Columbia parks, and some National Parks?

23 For example, Rock Creek Park, and Montrose Park, or
24 Lafayette Park -- are some one, and some the other?

25 A Right. There are some local parks, which by

8
1 District of Columbia Code have been specified, either because
2 of their size or location, as subject to the jurisdiction of
3 the District of Columbia. These include the Squares, for
4 instance.

5 But Rock Creek Park is a National Park.

6 Q It is a National Park.

7 Montrose Park, I suppose, is a District of Columbia
8 park.

9 A No, it is a National.

10 Q National.

11 A And these are enumerated in detail in the Dis-
12 trict of Columbia Code, under language essentially the same
13 that is set out in 8108, that transfers exclusive charge and
14 control to the National Park Service.

15 Counsel advises me that at the exception I should
16 have said it was playgrounds. I was calling them the small
17 areas, but the playgrounds in the District are under the juris-
18 diction of the District.

19 Q And all the parks, as so defined, are National
20 Parks, in the District?

21 A Yes.

22 Q No matter what their size?

23 Well, that doesn't matter. I was just curious.

24 A I can't pursue it, because I have never checked
25 out the exclusiveness of the question.

1 Q Yes.

2 A I want to spend just a moment on the other very
3 significant aspect of the case, which is the exclusion under
4 Article 1, or Article 12, Section 1-A, applicable to transpor-
5 tation by the Federal Government.

6 In Yearsley against W. A. Ross Construction Company,
7 a contractor was performing services for the Corps of
8 Engineers in straightening the channel of the Missouri River,
9 and was under the supervision and control of the Corps.

10 On the question of whether he was subject to
11 independent liability to third persons, it was determined that
12 he was acting as the agent of the Government.

13 All the more so, we submit, in this peculiar National
14 Park concession situation, where the very services which the
15 Secretary of the Interior is directed to perform under 16 USC,
16 Section 1, are by a policy of Congress to be performed by
17 concessionaires.

18 The concessionaires are acting under the supervision
19 of the Director. The concessionaire is performing a service
20 that the Government is obligated to perform.

21 It is the act of the United States, in the transpor-
22 tation of the United States, for which the exclusion was
23 intended.

24 It would elevate form over substance to say that the
25 interest of transportation in the District of Columbia is

0
1 affected differently by the operation of these trams wholly
2 within the National Park enclave, by the Secretary of the
3 Interior ---

4 Q Mr. Martz, suppose the Secretary were to decide
5 that it would be a good idea to have this sort of interpretive
6 tram service serving all of the capital park areas, all of
7 the park areas under his jurisdiction in the District of
8 Columbia.

9 Would the principle there be any different with
10 respect to the problem that we have before us?

11 A Not with respect to the construction of the
12 Compact.

13 There would be a threshold question as to the author-
14 ity of the Secretary to conduct the service outside the park
15 areas.

16 Q He would then have to use the streets in the
17 District.

18 A But if the Secretary had the authority, and
19 it was conveyed to him by Congress, then we would submit
20 that under the 1-A exclusion, the services that were being
21 performed for and on his behalf would be services of the United
22 States.

23 Q He would have the authority there, as much as
24 he has it in the present case, wouldn't he? Particularly
25 when you assume that in the present case these trams would

1 have to use some city streets?

2 A 16 USC, Section 1, authorizes him to act only
3 in National Parks.

4 Section 1-B, added in 1953, authorizes the Secretary
5 to do certain things outside of the parks, in emergency situa-
6 tions.

7 When the Secretary has engaged in services outside
8 of the park, as transportation to Carlsbad Caverns, he has
9 obtained special authorization by Congress to do it.

10 Q By Congress to do it?

11 A Yes.

12 Q So that you think this would be a different
13 and substantially more difficult case if the operation of
14 these trams required the use of city streets in the District,
15 outside the park area?

16 A As far as the issues in this case are concerned,
17 we would submit it is irrelevant. We are only construing what
18 the language of the Compact says.

19 Q Well, similarly, then, he could provide service
20 to all of the capital parks, because that is transportation
21 by the Federal Government.

22 A That is correct, Your Honor.

23 Q So that in your submission, the Secretary of
24 the Interior could now set up an interpretive tram service
25 to all of the parks in the District of Columbia under his

1 jurisdiction, even though that would require a very substantial
2 use of the city streets, and to do that, he would not have
3 to obtain the authority of or clear with the Washington
4 Metropolitan Area Transit Commission?

5 A That is correct, Your Honor, as long as it is
6 contained within the exception.

7 If that goes beyond what the Compact administrator --

8 Q By "exception," you mean the Federal Government
9 exception?

10 A Yes.

11 Q You don't have to maintain this position for
12 purposes of this case.

13 A No.

14 Q Because I take it if the city streets are used
15 at all, if the so-called city streets are used at all by this
16 service, it is actually on city streets that are within the
17 park area.

18 The only streets that are used are city streets
19 that are actually part of the park?

20 A That is right.

21 Q And those city streets are used in the Mall
22 area with the consent of the Secretary?

23 A No, with consent of Congress, Justice White,
24 because in 8 D.C. Code 144, the Secretary was given authority
25 to use the carriageways intersecting parks and portions of the

1 public grounds.

2 Q Are the streets, the actual streets that
3 traverse the Mall, are they part of the park?

4 A Part of them are, and part are not.

5 3rd, 4th, 9th, and 14th, I believe, are D.C. streets,
6 subject to the authority of the Secretary.

7 Q Specifically, then, where does the Secretary
8 get the authority to use the city streets, as in furnishing
9 this kind of a service? Where does he get that authority?

10 A 8 D.C. Code, Section 144 provided that the
11 Director of the Park Service could apply his regulations to
12 carriageways intersecting public grounds, and the only --

13 Q So I gather, then, that even if this tramway
14 service did run for a block, and run on a public street, which
15 actually traversed the Mall, that it would be within that
16 authority?

17 A Yes. We think there is no question.

18 Q This wouldn't reach your furnishing that service
19 between parks?

20 A That is correct, sir.

21 Q Is the new proposed reception center in the
22 old Union Station to be under the Park Service?

23 A Yes.

24 Q Well, assume that it is, for the moment. I
25 rather thought it was, from what I had read in the paper, but

1 assume that it is, for the moment.

2 If we held with you in this case, would that mean
3 that the Secretary of the Interior would put this mini service
4 over there, and go over the streets of the city from the parking
5 area over to that and back?

6 A When the bill was before the House Public Works
7 Committee in Congress last spring, the Secretary of the
8 Interior proposed an amendment that would allow the extension
9 of the minibus service off the park area, and to the Visitors'
10 Center facilities and Capitol.

1 The House Public Works Committee didn't extend this
2 legislation to that area, but directed the Secretary to inves-
3 tigate it and make a report.

4 But I would anticipate that if that were to be
5 done, the statutory procedure would be followed.

6 MR. CHIEF JUSTICE WARREN: Yes, sir.

7 Very well.

8 Mr. Hamilton.

9 ORAL ARGUMENT OF RUSSELL W. CUNNINGHAM, ESQ.

10 ON BEHALF OF THE TRANSIT COMMISSION

1 MR. CUNNINGHAM: Mr. Chief Justice, may it please
2 the Court, I am Mr. Cunningham, General Counsel of the Transit
3 Commission.

4 If the Court will recall, there was a franchise
5 issue involved here, that the Commission has consistently

5
1 disassociated itself from, throughout, since the beginning of
2 the Trial Court.

3 Consequently, I have, while the Court has graciously
4 allocated me 50 minutes to argue, Mr. Davis of D.C. Transit,
5 who will argue the franchise issue. It will be within my time.

6 MR. CHIEF JUSTICE WARREN: If it will be within your
7 time, sir.

8 MR. CUNNINGHAM: Fine.

9 If the Court pleases, the Washington Metropolitan
10 Area Transit Commission was created in 1960 by an Interstate
11 Compact between the State of Maryland, and the State of Vir-
12 ginia, and the District of Columbia, by and with the consent
13 and directive of the United States Congress.

14 The Court will recall Congress has a dual role, or
15 a dual hat to wear in the District of Columbia. That is, that
16 the Congress sits as a local legislature for the District, and
17 in this case its consent legislation directed the District
18 of Columbia to enter into the Compact.

19 On the other hand, under its national purpose, the
20 Congress consented to the terms of this Interstate Compact
21 Agreement.

22 The creation of the Commission marked an historical
23 landmark in the field of transportation and regulation in this
24 country. It is the first attempt to regulate and merge the
25 national and State, county, and city interests into one unified

6
1 regulatory agency.

2 This was the purpose of the Compact. This, the
3 Commission advocates before you, was what the Congress and the
4 legislatures accomplished when they enacted --

5 Q You don't really mean to include the word
6 "national" in that sentence, do you?

7 A Yes, sir, I do.

8 The preamble to the consent legislation of the Com-
9 pact stated that enactment of this Compact would merge the
10 national and State interest, insofar as regulating transporta-
11 tion is concerned, in the Washington Metropolitan Area, in this
12 single Compact.

13 Q The ICC certainly still exists and has juris-
14 diction in the affected area.

15 A Mr. Justice Fortas, within the Washington
16 Metropolitan Area, the Congress took away the interstate regula-
17 tion of transportation from the Interstate --

18 Q So far as the purely interurban, so to speak,
19 or the interarea?

20 A Oh, yes; transportation in Washington.

21 Q Intraarea transportation is concerned. They
22 are not under this.

23 A Right, sir.

24 The Transit Commission is vitally interested in this
25 case, on both a legal and a factual basis.

1 Legally, we feel that the position advocated to you
2 by the Petitioners and the United States will emasculate,
3 emasculate the very basis upon which the Commission can perform
4 the functions and duties conferred upon it by the Congress and
5 the State legislatures.

6 From a factual standpoint, the Commission is inter-
7 ested because we are very greatly disturbed as to what will
8 happen when another large transit system is placed not only
9 over on top of the existing transportation system, but placed
10 upon us within the very heart of the Washington metropolitan
11 area.

12 Q Do you have any control over the District of
13 Columbia vehicles?

14 A Vehicles operated by the District of Columbia
15 itself? No, sir.

16 Q Or Maryland, or Virginia?

17 A No, sir.

18 Any passenger --

19 Q Or the Federal Government?

20 A That is right, sir.

21 Q You don't have any control over any of those,
22 and that is by virtue of Article 12, paragraph 118?

23 A Yes, sir.

24 Q Now, how do you construe that provision that
25 was the subject of colloquy here? The transportation by the

8
1 Federal Government is exempted from your jurisdiction?

2 A Mr. Justice Fortas, we followed the traditional
3 concept of regulation that has been imposed nationally as well
4 as within the State concepts. That is, that where a transpor-
5 tation service is operated by the Government, in its own
6 vehicles, by its own personnel, that that transportation is
7 by the Federal Government, or by the State government, or by
8 the county government, and, therefore, is exempt.

9 Q All right. Suppose the National Park Service
10 itself operated, owned and operated these trams, and provided
11 this interpretive service on the Mall. Would you claim juris-
12 diction?

13 A No, sir, and it has so operated these vehicles,
14 it is today operating vehicl-s, and we have made no attempt to
15 exercise jurisdiction. We feel it is exempted under that
16 statutory exception.

17 Q So that actually maybe this case can be disposed
18 of on that one question.

19 If we should believe, for example, that the correct
20 construction of the Compact is that whatever the Federal Govern-
21 ment may do correctly is exempt, therefore, whatever the Federal
22 Government may do through a concessionaire is also exempt.

23 That would dispose of the case.

24 A Yes, sir; and I submit to you, Mr. Justice
25 Fortas, that you would effectively dispose of any type of

1 regulation of transportation in the metropolitan area, for you
2 would thereby completely emasculate the jurisdiction of the
3 Commission to control regulation in this area.

4 Every city, every town, every county, even the State
5 jurisdictions themselves, would be freed on the stroke of a
6 pen by entering into a contract with a private carrier to
7 set up and operate their own mass transit system.

8 Q We didn't write the Compact. We have to
9 read it.

10 A Right, sir, and that is why the Commission
11 advocates that the construction given to that clause should
12 be strictly construed, as I understand this Court has ruled
13 previously, all, any exemption to a broad remedial statute
14 like a compact, the exemptions are strictly construed, and
15 that is the position we advocate to this Court, that that
16 proviso should be strictly construed, not only for the
17 mischief that it would do in the future, and do today, but
18 because it would destroy the whole historical scheme of
19 regulation.

20 Q Suppose this kind of service was rendered in
21 Yellowstone National Park, or Yosemite, or Glacier National
22 Park. Would there be any reason to say that the Government
23 couldn't do it without going to the Interstate Commerce
24 Commission?

25 A No, sir, Mr. Chief Justice Warren, there would

1 not, because the Congress has not imposed the scheme of regula-
2 tion, i.e., it has not passed an Interstate Compact in Yellow-
3 stone Park, as it has here in Washington.

4 I submit to you, sir, that the Congress, when it
5 looked at establishing the Compact here in this area, said
6 we are to look at the metropolitan Washington area as
7 a single unified city, and this includes park areas.

8 It has to. It is sitting right here in the very
9 heart, the very core of our city.

10 On the other hand, there is no such scheme existing
11 in Yellowstone National Park. That park sits out by itself.
12 It is not part of a transit regulatory system. It is not the
13 heart and core of a city.

14 And Congress has, under the ICC laws, specifically
15 exempted transportation before and pursuant to contract by
16 the Secretary in the National Parks, but that proviso was
17 not enacted, was not carried over and reenacted, sir, in the
18 Compact.

19 Q But I understood you to say that if the Govern-
20 ment itself performed this service in Washington that it would
21 be all right.

22 A Assuming he has the statutory authority to do so
23 If that Government agency has the statutory authority to do
24 so, under the terms of the Compact it would be permissible.

25 Q Why in that respect couldn't it do what it does

1
2 in Yosemite, or Yellowstone Park, and delegate that to a
3 concessionaire, and have that the act of the Government?

4 A Because I think in this case it was to discourage,
5 No. 1, to discourage active engagement by the Government in
6 this, by contract or otherwise, in engaging in transportation.

7 Q It would do what?

8 A It would discourage governmental units from
9 getting into the contract, into the transportation business.

10 First of all, if a Government unit decides, "We
11 want to get into a particular phase of transportation," if
12 it has to go to the legislature and get the statutory authority
13 to do so, if it has to go in and have the appropriations
14 enacted for it, this is quite a different thing from saying,
15 "Well, let's just go get Joe Jones and sign a contract with
16 Mr. Jones, and let him operate this service and pay us a profit."

17 There is much more involved in operating in con-
18 cession or a contractual service than there is -- and more-
19 over, this is directly contrary to the whole concept of regula-
20 tion that has existed in this country since 1887, and that is,
21 that the Government itself is not subject to its own laws, and
22 if it wants to operate its own service, it may do so.

23 On the other hand, if it wishes to have a service
24 performed by a private carrier, a private person, that person
25 is subject to the regulatory scheme of that governmental
agency, whether it be the national Government, vis-a-vis the

1 Interstate Commerce Commission, or State government, or in
2 this case, the Interstate Compact.

3 Q What power of regulation would your Commission
4 have over these people, if you win this case?

5 A The same broad regulatory jurisdictions that we
6 have over all carriers.

7 Q Character of service?

8 A Character of service, rates, schedules.

9 Q Everything?

10 A Everything, yes, sir.

11 Q The Secretary of the Interior, then, would
12 be divested --

13 A Oh, no, sir.

14 Q -- of all his regulatory powers, would he not?

15 A Oh, no, Mr. Chief Justice.

16 Q I ask the question: Would he?

17 A No, they would not be divested.

18 Today, carriers, every single carrier we operate,
19 changes schedules.

20 Q Changes what?

21 A Changes chedules. They change their routes,
22 they change their fares, they change all aspects.

23 Now, that is subject to the overall scheme of regula-
24 tion, but there is that freedom of movement, within the
25 regulatory aspect.

1 The Transit Commission is a regulatory agency, not
2 a manager. Not a management agency. And we try to fit what
3 is going on within the broad regulatory concept to provide a
4 good transit system throughout this whole metropolitan area.

5 Q Would you determine the fares?

6 A No, sir. The fare, that would be determined
7 by the Secretary of Interior, and Universal, pursuant to their
8 contract.

9 Universal, if they were the recipient of a Certificate
10 of Public Convenience and Necessity, would then file a tariff
11 with the Commission, stating that these are the fares to be
12 charged, and that would be subject to approval.

13 Q Would you be obliged to file that?

14 A Oh, yes, I would think, under the law, yes,
15 sir.

16 Q You would have to?

17 A Yes, sir. And this is done today, within, for
18 example, the last three weeks, if I may.

19 Q I will get this: If a tariff is filed, is it
20 subject to the Commission's approval?

21 A It is subject to the Commission's approval.

22 Q Well, then, perhaps I misunderstood your answer
23 to the Chief Justice.

24 It has to be approved. It could be reviewed by the
25 Commission, could it not?

1 A It could be reviewed, yes, sir.

2 Q And could be rejected?

3 A Yes, sir.

4 Q Even though it had been pursuant to an arrange-
5 ment between the Secretary of the Interior and the private
6 concessionaire?

7 A That is true, Mr. Justice Brennan, and I would
8 think the Commission would give the greatest weight --
9 I would think whenever a concessionaire of the Secretary of
10 the Interior came before the Commission stating that this is
11 the type of service, or this is the type of fare that we pro-
12 pose to charge, that that would be accorded almost an auto-
13 matic presumption of being legitimate, because the Commission
14 would recognize the special interest that is involved in this
15 area.

16 If you will recall, not all Certificates of Public
17 Convenience and Necessity are all-embracing. Many are issued
18 involving only a very limited scope, and this, I presume,
19 would be the case insofar as the Secretary's concessionaire,
20 that he would come not for an unlimited Certificate to serve
21 all of the metropolitan area, but on a limited basis.

22 Q Suppose the Commission authorized somebody
23 else, D.C. Transit or somebody, to provide tourist service
24 on the Mall. Suppose you authorized D.C. Transit to do that,
25 and the Secretary of the Interior says, "Because of my

1 responsibility over the National Parks, I would like them to
2 point out such-and-such as they take tourists through, and
3 say, 'This is the Thomas Jefferson Memorial.'"

4 First, does your Commission have any control over
5 the script that is used by the tour guides?

6 A The scrip" is a bad word to use, recently,
7 with me, Mr. Justice. We have been on this scrip system
8 because of the bus robberies here in town.

9 Yes, sir, I would assume all aspects of subject --

10 Q I wasn't talking about a substitute for money.

11 A I assume this is what they were talking about.

12 Q Suppose that the Secretary of the Interior --

13 You would agree that the Secretary of the Interior
14 has a legitimate interest, I suppose, in having the Thomas
15 Jefferson Memorial pointed out to tourists.

16 A Yes, sir.

17 Q But he would have no way of seeing that that
18 was done, unless the tourist service were under his juris-
19 diction, would he?

20 A I am sorry, Mr. Justice Fortas. I thought you
21 said "scrip," s-c-r-i-p, and you are talking about the script.

22 No, sir, the Commission would have very little
23 interest in that, although probably --

24 Q Do they have jurisdiction?

25 I am talking to jurisdiction.

1 A I can't conceive of the Commission having any
2 jurisdiction over the script itself, no.

3 Q But the Secretary of the Interior might have?

4 A Oh, yes, sir, I think a very legitimate interest
5 just as the carriers today who perform these lectured
6 sightseeing tours have scripts for their drivers to follow.

7 Now, we have no concern with that, unless there
8 would be some vulgarity or something of this nature involved,
9 but I am sure there would be many instances where
10 we would have no idea what the script itself even purports
11 to be.

12 Some of them are even on tapes, in some of the
13 carriers, multi-lingual languages.

14 Q Now, what the Secretary proposes to provide
15 here is not exclusive of other services of this sort, is it?

16 Suppose the Universal Service here were performing
17 under this contract, then D.C. Transit or sightseeing services
18 of one sort or another could continue to operate on the Mall
19 area, could they not?

20 A According to the District Court decision, that
21 is not up to either the Transit Commission or the carriers,
22 but any such service would be at the sufferance of the Secretary
23 of the Interior, and presumably he could draw his curtain around
24 the Mall and say, "Nobody is coming in here."

25 Q Has he ever done that? Has he done that?

1 A No, sir. As a matter of fact, the Secretary
2 has never been known as a regulator of transportation.

3 Q Is there any provision in the Secretary's con-
4 tract with Universal by which that is an exclusive service,
5 that they have exclusive rights to run the tours on the Mall?

6 A I don't recall, Mr. Justice Fortas, from my
7 reading of the contract, whether there is an exclusivity
8 connected with it. I presume that there is.

9 Q Don't some other companies actually furnish
10 some transportation?

11 A There is other service on the Mall now.

12 Q So it isn't exclusive service?

13 A As of this moment, no, because Universal is not
14 running the service, but I would assume that once Universal
15 begins running, it would be in the Secretary's interest to
16 discourage other service, because he is going to get a
17 fee for it.

18 Q I know, but that's not what I am asking. I am
19 asking whether the contract so provides.

20 I have forgotten. I will have to check the contract,
21 if you don't know the answer.

22 Q Well, would your interpretation of the Com-
23 mission's authority mean that you could provide for this
24 service, and the Secretary could not keep it out?

25 Let's assume that Universal applied to you, and you

1 granted the permit. You wouldn't have to ask the Secretary
2 or anything else?

3 A Well, I would assume that Universal --

4 Q If you wanted to authorize service on the Mall,
5 you could just authorize service on the Mall, and as far as
6 the transportation part of it was concerned, the Secretary
7 would have nothing to say about it.

8 That's your position?

9 A No, sir. Our position is that there exists
10 dual jurisdiction in parklands, and that anyone wishing to
11 offer any transportation service there must have authorization
12 from the Secretary of Interior to operate his vehicles on the
13 park property, and he must also have a Certificate of Public
14 Convenience and Necessity from the Commission.

15 Q So even if there was no exemption, I mean,
16 whether there is an exemption or not, the authority of the
17 Commission is subject to the authority of the Secretary.

18 If he wanted to keep your permittee off the parklands,
19 he could do that?

20 A I would think so, yes, sir.

21 Q Would it work the other way, too?

22 A Or the other way around, yes, sir.

23 This is specifically a situation where there has to
24 be a great deal of comity between the two bodies.

25 Q Suppose the Secretary of the Interior, in order

1 to take care of children who visit Washington, said, "We want
2 a five-cent fare," and the Commissioners said, "No, we don't
3 dthink that that is equitable. We want a ten-cent fare,"
4 and there was a clash there between the Commission and the
5 Secretary of Interior. Who would prevail?

6 A The Commission.

7 Q The Commission?

8 A Solely because we feel that under this scheme
9 of regulation for this metropolitan area, Mr. Chief Justice,
10 the Commission has to fit every form of transportation into
11 the overall program.

12 Now, I say this not lightly, because right now I am
13 sure most of Your Honors are aware of the fact that we have
14 literally hundreds of buses in the rush hour on Constitution
15 Avenue, hundreds of them, and as a matter of fact, I wish
16 some of those buses could make 10 miles an hour in the rush
17 hour.

18 But to set another large mass transit system -- and
19 this is what we are talking about; we are not talking about
20 running one or two or three articulated vehicles; we are talk-
21 ing about the movement of thousands of people a day on these
22 vehicles.

23 Now, suppose that the traffic conditions are such
24 that we can't, that there has to be some inter-scheduling of
25 this service, that there has to be some accommodation made.

1 Now, if the Commission does not have jurisdiction
2 overall, the Secretary says he is going to run this service,
3 and the bus carriers say, "We are going to run this service,"
4 and we are in an irreconcilable position, who is going to make
5 the distinction?

6 Q Does the Secretary of the Interior propose to
7 have this service run on the highways of the city?

8 A Sir, they can't run anywhere else. Every single
9 street that they have talked about in this initial service --
10 and I remind you, sir, that it is initial service -- operates
11 over a public street in the District of Columbia.

12 I don't care who owns it, whether it is owned by
13 the Park Service, and maintained at least by the Park Service,
14 or whether it is owned, maintained, and policed by the District
15 of Columbia, it is a public street, and everybody is out using
16 it.

17 Q You mean whether it is in or out of the park?

18 A Yes, sir. And the service that is operated
19 today, down on the Mall today, is on a public road.

20 Q He isn't about to run these buses on Constitution
21 Avenue?

22 A My understanding is that it is running on
23 Constitution Avenue, and will run.

24 How else can it run? It has to turn around down
25 at the Capitol, and run back up, Mr. Justice White, and they

1
1 are also talking about running --

2 Q You think the issue that Mr. Fortas raised
3 with counsel a while ago is really here, whether or not the
4 Secretary has the authority without consulting the Commission
5 to operate this service over District of Columbia streets?

6 A Yes, sir, very much so.

7 Q I didn't know that.

8 A The service that is being operated today,
9 I think without question, is in the Secretary's mind, the very
10 minimum of service that would be provided. Unquestionably,
11 he will want to extend the service to the Union Station
12 Visitors' Center.

13 Unquestionably, he will want to run the service up
14 around the Capitol.

15 Unquestionably, he will want to run it up around the
16 White House.

17 Q What is the issue that is here?

18 A Because any decision you make here, Mr. Justice
19 White, is going to be just as applicable tomorrow, when the
20 service is extended another block, or another two blocks, or
21 across the river to Arlington Cemetery, or down to Mount
22 Vernon.

23 Q That may be true insofar as the construction
24 of the exemption is concerned.

25 A Yes, sir, as that's the one the Commission is

1 most worried about.

2 Q Yes, I know, but it wouldn't be true insofar
3 as his base of authority was concerned.

4 A Well, Mr. Justice White, if you decide this
5 question on the basis that the Secretary's legislative enact-
6 ment says that he has exclusive jurisdiction, and we will not
7 consider any other legislative enactment, then, if you stop
8 there, that would be one thing, but I think you have got to
9 take this one step further and say, "Is this service to be
10 provided transportation?"

11 Now, I don't think there is any other conclusion that
12 you can come to, other than that it is transportation.

13 This is what is going on, going to be going on,
14 throughout the Mall area, is transporting people.

15 Q Well, I understood counsel on the other side
16 to say that the only place that they went on the public high-
17 ways was to go across 3rd and 5th and 7th, 9th, and 14th,
18 something like that, across those streets.

19 They did not run along those, they crossed those
20 streets, and that those streets were only public streets,
21 subject to the regulation of the Department of the Interior.

22 Now, I wonder if I am wrong about that.

23 A That is what the United States stated to you,
24 sir.

25 Q All right. Now, is that true, or untrue?

1 A I don't believe it is true.

2 That Act states as follows:

3 "The applicability of the rules and regulations
4 prescribed and applicable to the Secretary is hereby extended
5 to cover the sidewalks, the sidewalks around the public
6 grounds, and the carriageways of such streets as lie between
7 and separate said public grounds."

8 Q What?

9 A It is hereby stated and covered "... the side-
10 walks around the public grounds, and the carriageways of such
11 streets as lie between and separate the said public grounds."

12 Q Now, isn't that 3rd, 5th, 7th, 9th, and 14th,
13 or whatever those cross streets are across the Mall? Doesn't
14 it include those?

15 A That would include it to the extent, now, for
16 example, that the streets are involved now, perhaps 2nd Street,
17 3rd Street, and 9th Street.

18 Now, the thing the Commission is worried about, Mr.
19 Chief Justice, is that the rule you lay down here will also
20 have to embrace transportation to Ford's Theater, to the
21 White House, to the Visitors' Center.

22 Q Not necessarily.

23 A Now, if you start talking about connecting
24 streets between the Mall and the Visitors' Center, we have got
25 a space of four blocks, five blocks, of all District streets.

1 Q But these streets, as I understand, bisect
2 the Mall, that some years ago did not bisect it, and the
3 Congress, in order to take care of that situation, said that
4 the Mall might be bisected, provided the Secretary of the
5 Interior had control and jurisdiction over those streets.

6 A Yes, sir.

7 Q But now it hasn't done that to the streets
8 between the Mall and Ford's Theater, or between the Mall and
9 the old Union Station, or any of those places, and if they
10 want that, I suppose they would have to go and get statutory
11 permission to do it, wouldn't they?

12 A I really don't know, Mr. Chief Justice, because
13 they talk about such streets as lie between and separate public
14 grounds.

15 Now, they are not referring to the Mall, here.

16 Q Well, doesn't a street across the Mall separate
17 the Mall?

18 A Yes, sir.

19 Q Well, then, it would be included, then.

20 A And there are perhaps seven or eight streets
21 which separate the Mall from the Visitors' Center.

22 Q Well, they are not separating the Mall, when
23 you have a street between it and the Visitors' Center.

24 A Yes, sir, but some of this operation is out on
25 the D.C. streets, and not just going across.

1 Q I didn't get that last statement. I didn't
2 understand that last statement that you just made.

3 A If you will defer just a moment, sir, I wanted
4 to get to my map I have here.

5 Q Yes.

6 A In the Appendix, on pages 16 and 17, appears
7 the map, and it shows the service that will be run by Universal.

8 Q What page?

9 A On pages 16 and 17 of the Appendix.

10 You will note that the lines run, the arrows, down
11 Constitution Avenue.

12 Q Is that Exhibit B?

13 A Yes, sir, Exhibit B.

14 The service contemplated will run down Constitution
15 Avenue from the intersection of Bacon Drive and Constitution
16 Avenue to 15th Street.

17 Now, that street, Constitution Avenue, does not
18 appear to be a street, a sidewalk, or a carriageway that lies
19 between and separates the Mall.

20 Q That is what? Constitution Avenue, you say?

21 A Yes, sir.

22 Q It does separate the Government grounds, though,
23 there, not just the Mall, but the Government grounds, because
24 on both sides of Constitution Avenue on those streets are
25 Government buildings.

1 A Yes, sir.

2 And I also remind Your Honor that we have now in
3 the rush hour several hundred buses going down that street,
4 Constitution Avenue.

5 Q Does this prohibit you from doing that?

6 A I really don't know what it is going to do to
7 us, unless this transportation is subject to our jurisdiction,
8 because one of the problems we have, and it is a great one
9 today, is accommodation of vehicles on these streets.

10 Mr. Chief Justice, you will recall that in one of
11 the statutory requirements placed upon this Commission, which
12 has never been placed upon a transportation regulation agency
13 before, is the alleviation of traffic congestion on the streets
14 of the District, through the regulation of the mass transit
15 system.

16 And it could cause us considerable problems, but the
17 biggest problem to come about is if this service is not melded
18 in in an orderly fashion with the other service.

19 Q Is this route being used now by the National
20 Park Service? Is this a correct representation of the route
21 now being used by the National Park Service?

22 A No, sir. The service now being --

23 I said no, sir. You understand my answer is limited,
24 my knowledge is limited.

25 To the best of my understanding, the service is not

7
1 operating up around the White House, around the Ellipse, today.

2 Q Is it operating on Constitution Avenue?

3 A Yes, sir, to the best of my knowledge.

4 Q As shown on this map?

5 A To the best of my knowledge, it is.

6 Q And is Constitution Avenue, where these buses
7 run, speaking now of the new proposed buses, is that street
8 under the jurisdiction of the Secretary of the Interior?

9 A I believe it is classified as one of the streets
10 in which there is dual jurisdiction, that both the Park Service
11 and the District police it and maintain it.

12 Q Is that the way it appears in the statute,
13 dual jurisdiction, or does the statute say that the Secretary
14 of the Interior shall have jurisdiction over it, and that
15 these other people who use it, use it in accordance with regu-
16 lations of the Secretary of the Interior?

17 A Mr. Chief Justice, my recollection of the record
18 is that this portion of Constitution Avenue that is shown on
19 Exhibit B is owned and maintained by the District of Columbia,
20 and not the Secretary of the Interior.

21 I could be wrong. It could be another section, but
22 that was my understanding.

23 We feel that the language of Section 1, and that
24 this case really must turn on the language of Section 1-A,
25 and that language clearly defines the scope of the Commission's

1 jurisdiction, and that is that it is transportation, and
2 embraces the person who engages in that transportation.

3 Now, transportation is not defined in the Compact,
4 but it is not given a restricted meaning, other than the general
5 term.

6 I believe that the service that would be engaged
7 in by Universal will be, or any concessionaire of the
8 Secretary's, will be transportation.

9 As I said before, this legislation stated that
10 Title II provides a regulatory law which is to be administered.

11 Section 1 defines the scope of the Compact, and the
12 scope of the transportation coverage.

13 Section 1 does not say mass transit, or any other
14 kind of specialized service, but used the term "transportation,"
15 which we feel embraces all types of transportation services.

16 That language is clear and unambiguous. Neverthe-
17 less, it is urged and decided below in the District Court that
18 the term "transportation" does not really mean transportation,
19 it means mass transit.

20 Now, the Court of Appeals quite obviously reversed
21 that decision, and felt that transportation must be construed
22 to mean simply all forms of movement by motor vehicle of
23 people.

24 To reach the determination that it is mass transit
25 rather than transportation per se, one must ignore, No. 1, the

1 plain language of the law; must ignore the legislative history;
2 must ignore the historical concept of regulation; and you must
3 ignore previous decisions of the United States Court of
4 Appeals for the District of Columbia.

5 In each case, that Court said that this Commission's
6 jurisdiction should be given the broadest construction
7 possible, to embrace all forms of transportation.

8 It also conforms to the major principles of law
9 that remedial statutes of the Compact shall be broadly construed
10 and all exemptions narrowly construed.

11 The Commission feels it can't be argued or denied
12 that the function under Universal's contract is Universal
13 has performed a movement of people in motor vehicles.

14 This service is going to be operated on streets.
15 It is going to be operated on public streets, regardless of
16 who is the owner and maintainer of that street.

17 It will be in a vehicle that will be owned by a
18 private carrier, it will be driven by employees of that
19 private carrier, and as the contract itself specifies, those
20 employees shall be dressed so as to be distinctly known as
21 Universal employees; not Park Service employees, but Universal
22 employees.

23 Now, what happens when a man gets on at the end of
24 the Mall to take a tour? He is not only getting in Univer-
25 sal's vehicle, driven by Universal's driver, he pays Universal

1 a fee, and that money then becomes Universal's.

2 Clearly the act of any carrier, any common carrier
3 in this country -- this is the role that it performs, and that
4 is the role that a utility carrier provides, whether that
5 act is done for the general public, which is this case, here --
6 this is not a service for the United States; it is a service
7 for the public.

8 Now, contrast that, if you will, with the USAC
9 Transport case, in which the transportation being provided
10 there was to the Federal Government itself.

11 Here the service is not being provided to the Govern-
12 ment. It is being provided to the millions of people who will
13 come down on to the Mall.

14 The Federal Government is giving up, or allowing a
15 carrier to come on its property and operate to perform certain
16 services that it requests, and would like to see performed
17 for the public, and in turn, receives a percentage fee of the
18 fares collected through the fare box of that contract carrier.

19 Now, today we have numerous carriers operating under
20 contract with various governmental agencies, Department of
21 State, Department of Defense, the Army, the Navy. In each
22 case, those carriers have authorization from the Commission.

23 Now, that service is regulated insofar as the stan-
24 dard of service is concerned and insofar as fares are concerned.

25 We have not had one single conflict with those

1 governmental agencies insofar as what service they want, and
2 what service is directed and authorized by the Commission.
3 Not one single bit of difference.

4 And we submit, Your Honors, that this would be the
5 case under this situation.

6 Thank you very much.

7 MR. CHIEF JUSTICE WARREN: Thank you.

8 We will recess now.

9 THE CLERK: The Honorable Court is now in recess
10 until tomorrow at 10:00 o'clock.

11 (Whereupon, at 2:30 p.m., the Court recessed, to
12 reconvene Tuesday morning, October 22, 1968, at 10:00 a.m.)
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