

Supreme Court of the United States

In the Matter of:

Docket No. 19

Universal Interpretive Shuttle Corp.,

Petitioner,

v.

Washington, Metropolitan Area Transit
Commission, et al.

Respondents.

Pt. 2

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

Place Washington, D. C.

Date October 22, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

I N D E X

P A G E

Oral Argument of Russell W.
Cunningham, Esq., on behalf of
the Transit Commission

63

Oral Argument of Manuel J. Davis, Esq.
on behalf of the Transit Commission

68

Oral Argument of Clyde O. Martz, Esq.
on behalf of the United States

77

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1968

3 -----X
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 Tuesday, October 22, 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

18 APPEARANCES:

19 JEFFREY L. NAGIN, ESQ.
20 9601 Wilshire Boulevard
Beverly Hills, California 90210

21 CLYDE O. MARTZ, ESQ.
22 Assistant Attorney General
Department of Justice
Washington, D. C. 20530

23 RALPH S. CUNNINGHAM, JR., ESQ.
24 1815 H Street, N. W.
Washington, D. C. 20006
25

1 APPEARANCES (Continued) :

2 MANUEL J. DAVIS, ESQ.
3 1420 New York Avenue, N.W.
4 Washington, D. C. 20005
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S

2 THE CLERK: Counsel are present.

3 MR. CHIEF JUSTICE WARREN: Number 19, Universal
4 Interpretive Shuttle Corp. versus Washington Metropolitan Area
5 Transit Commission, et al.

6 Mr. Cunningham, you may continue your argument.

7 MR. CUNNINGHAM: Mr. Chief Justice, may it please
8 the Court.

9 I feel in closing I would like to stress and accentuate
10 two points the Commission feels very strongly about.

11 First, we feel that there must be an accommodation
12 made between the laws of the Secretary of the Interior and the
13 Compact. Otherwise, we fear deeply that there will be
14 irreconcilable conflicts on the streets of Washington served by
15 carriers subject to our jurisdiction and those operating pur-
16 suant to the franchise of the Secretary.

17 We feel that someone must be in a position to resolve
18 any irreconcilable conflicts on the one hand, and on the other
19 hand to coordinate and improve in every fashion all of these
20 transportation services.

21 This may be accomplished not by accepting the argument
22 of the Petitioners that the Secretary's laws are mutually
23 exclusive and the Compact cannot be applied.

24 We feel very strongly that there will be no mischief,
25 no harm done, if the Court accepts the view of the Commission

1 that the Compact is applicable, that dual jurisdiction does
2 exist, that, on the one hand, the Secretary of Interior has
3 ministerial duties and the right to organize and supervise
4 the transit service on the Mall or between any Park properties.

5 On the other hand, we feel that the Congress very
6 clearly did not intend that any public transportation service
7 would be excluded from the regulation by the transit commission.

8 Q I thought you told us yesterday that if the Secretary
9 of the Interior did it himself the Commission would have no
10 jurisdiction.

11 A That is true, sir.

12 Q Would you have the same conflict then that you would
13 have under this arrangement?

14 A Quite possibly.

15 Q What is the difference?

16 A The difference is, Mr. Chief Justice, I feel that
17 Congress, when it enacted the exemption by the Federal govern-
18 ment, or signatories, intended to leave a small area open
19 whereby the Government could operate its own service and follow
20 the traditional regulatory scheme, statutory regulatory scheme;
21 that where the Government itself provided the service, that
22 service is not regulated by another Governmental agency, but,
23 on the other hand, where it does require a private carrier to
24 provide that same service, then that service must be regulated.

25 That is the holding of the USAC transport case and that

1 has been the holding of every Supreme Court case and State
2 court decision that I know of. This is the primary distinction.

3 I think clearly this was a scheme that existed prior
4 to the enactment of the Compact and is what the Congress and
5 State legislatures intended to be accomplished in the future.

6 We don't feel there will be any problem arising under
7 this dual jurisdiction. The regulatory agency in most instances
8 accepts the managerial decisions of the owners of transit
9 companies, and in this case the Secretary is free to contract
10 with the concessionaire and supervise it day and night and
11 we welcome a service of this kind.

12 But we feel there must be an accommodation between
13 the Secretary's service and a melding of that service and
14 supervision of that service under the regulatory concept by the
15 Commission.

16 Q If you are correct, it seems to me that this is not
17 transportation by the United States, then the exemption in the
18 Compact doesn't apply and your authority does exist.

19 A Yes, sir.

20 Q And it seems to me that the extent of the Secretary's
21 power in that situation would be just what you wanted it to be
22 and no more. You would have, if you wanted to have, exclusive
23 power. There wouldn't be any real legal authority in the
24 Secretary.

25 Isn't that right? He would be operating at your

1 suffrage? I am not saying that is wrong. But, as a legal
2 matter, if the Compact applies, you have the authority?

3 A I think, Mr. Justice White, there is a comingling
4 of authority.

5 On the one hand, we have the Secretary saying "I will
6 allow or I will provide certain service on the Mall area, and
7 I will exclude what service that I feel there is no rational
8 basis for it to be on there, because this Congress has said
9 I shall administer this problem."

10 On the other hand, the Congress has also said we
11 want the transit commission to regulate a unified transit
12 system of all kinds throughout this metropolitan area.

13 Q Why doesn't that go so far -- if you are right and
14 the exemption does not apply -- as to mean that your Commission
15 can exclude this service, if it's a transportation service, if
16 the choice of the Secretary is to franchise that to a private
17 operator?

18 Doesn't it go that far?

19 A Yes, sir, I think it does.

20 Q But what you are telling us is that isn't the way
21 the Commission acts?

22 A I am saying, in this instance, wherever a Governmental
23 agency comes in. And I would think in this case, being the
24 Secretary of the Interior, it would carry even more of a
25 preponderance of evidence and weight. That if the Secretary

1 came to the Commission and said -- I am sorry -- if a con-
2 cessionaire came to the Commission and said "We wish a cer-
3 tificate of public convenience and necessity, and here is a
4 contract from the Secretary of Interior saying we are the
5 only carrier that he is going to permit to provide this service
6 on the Mall," I would think it's almost--

7 Q That may be. But in terms of power, and if you are
8 right and the exemption doesn't apply, you can still say to
9 the concessionaire, "no, we will not give you a certificate."

10 A That is right. And we feel this is what Congress
11 intended when they set up the Commission and said there will
12 no longer be any subdivision chopping up the Metropolitan
13 Transit.

14 Q Not dual authority, one authority.

15 A There will only be one regulatory agency, yes, sir.
16 But, on the other hand, the Secretary's power to maintain and
17 supervise and administer the Mall still remains open to him.

18 Q If you permit it.

19 A Yes, sir. And we feel under this law this was a
20 statutory scheme that the Congress and Legislatures intended
21 it not only the Secretary of Interior would be subject to this
22 control, but any municipality, any town, any other federal
23 government agency, and in fact we have this going on today
24 where we have contract services between various carriers and
25 various federal agencies.

1 I went into that aspect yesterday.

2 Mr. Chief Justice and the Court, that concludes my
3 argument this morning. Mr. Davis has the remainder of the time
4 to argue the franchise issue, and may I thank you gentlemen.

5 MR. CHIEF JUSTICE WARREN: Mr. Davis.

6 ORAL ARGUMENT OF MANUEL J. DAVIS, ESQ.,

7 ON BEHALF OF THE TRANSIT COMMISSION

8 MR. DAVIS: Mr. Chief Justice, may it please the
9 Court.

10 I would like to cover an issue that was not covered
11 by Mr. Cunningham, but which was referred to by counsel for the
12 appellants in this proceeding; namely, the issue as to whether
13 or not the Congressional franchise granted to D. C. Transit
14 protected against such applicants as here today for the for
15 hire transportation operation which Universal proposes to per-
16 form within the District of Columbia.

17 D. C. Transit's franchise, as Public Law 757 7598,
18 grants a franchise to D. C. Transit to perform a mass trans-
19 portation service in the District of Columbia and in the areas
20 which go on to comprise the Metropolitan district. That
21 particular authority is set out in Section 1 of the said
22 franchise.

23 Two other sections in this franchise are materially
24 important to the issue which I raised; namely, Section 3 and
25 Section 6.

If I may skip Section 3 for a moment. Section 6 grants to D. C. Transit the additional authority known as Charter Sightseeing and contract authority within the areas that I have described.

Now, Section 3 of the Compact says that no authority or certificate shall be granted to any applicant for that authority if it intends to operate a given route over a fixed schedule, unless the Commission, that is, the WMATC, finds that public convenience and necessity demand said certificate.

The lower court in treating this question attempted to allude to the fact, and did, as a matter of fact, that mass transit referred solely to transit within the District of Columbia.

Now, I am certain that a reading of that Section will show that mass transit was not restricted to transit solely within the District of Columbia, or to residents in the District of Columbia, but applied to anyone within the areas that we serve and any of the service we serve as a result of the franchise and certificates which were eventually issued to us by the WMATC as a result of the said certificates.

Section 3, which becomes/paramount section in this case as far as our argument is concerned, definitely points up that the service which they must endeavor to render must be by a given route or over a fixed schedule.

Q Do all of the sightseeing agencies in the District

1 of Columbia obtain franchises from the Commission?

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

3 Q All of them that we see on the street? How about the
4 individuals?

5 A If they want to run a bus operation they must get a
6 certificate from the WMATC, yes, sir.

7 Now, it's hard for us to visualize the underlying
8 reason as to why the lower court endeavored to single out
9 Section 6 as not being protected by Section 3 of the Compact.

10 Perhaps it is because it was in a separate Section
11 in the Compact -- I am sorry -- in the franchise, and was set
12 out at a later time. But the court seemed to conclude, as a
13 general reason, it would not necessarily fall within the
14 protection afforded to D. C. Transit under Section 3 of the
15 Compact.

16 We have endeavored, and I believe you will find in
17 our brief, sufficient law and cases to show that it is possible
18 for a sightseeing operation to be over a given route and on a
19 fixed schedule. That is easy to visualize.

20 The Courts have said it's possible that -- as a
21 matter of fact, D. C. Transit does it itself every day at a
22 given hour. A particular sightseeing trip goes through the
23 Mall area which begins outside of the Mall and continues
24 around the areas described by the appellant as to the route
25 it will operate the service if the authority is granted to them

1 by the Secretary and is held to be valid.

2 Q Who issued the franchise here?

3 A The Congress of the United States.

4 Q The specific franchise?

5 A An Act of Congress, sir.

6 Q Congress authorized it, but did they prepare the
7 exact Commission?

8 A Yes, sir.

9 Q Or did the Commission itself write the franchise?

10 A The Commission was written.

11 Q In other words, what I am trying to get at is this:
12 are we governed by the breadth of the Compact, or are we
13 governed by the breadth of the franchise?

14 A Of the franchise, I say, sir.

15 Q Can you tell me what is the statute that wrote that?

16 A The statute to which I refer, sir, is public law
17 757.

18 Q Does that contain verbatim the franchise?

19 A Yes, sir, it does.

20 Q Is that in your brief?

21 A Yes, sir.

22 Q What page, may I ask? Page 36 A of the brief of
23 the Petitioner, the Act of July 24, 1956; is that right?

24 A That is right, sir.

25 Q Page 36 A of the main brief of the Petitioner.

1 A Now, we get to the point and we are bound by the
2 terms.

3 MR. CHIEF JUSTICE WARREN: You may have five minutes
4 more. And, counsel, you may have five minutes more.

5 MR. DAVIS: We get to Section 3. And there we must
6 determine whether or not the service contemplated is over a
7 given route or on a fixed schedule.

8 As to that, the District Court went to great pains
9 to set out the description of the given route -- and so we
10 didn't go any further than that -- over which the respondent
11 will operate.

12 That appears on page 32 of our Brief.

13 The fact that the Secretary has designated a given
14 route is further evidenced by the Respondent's Vice-President
15 when he enumerated the eleven points of interest it will operate
16 over.

17 Q Is there really any difference of opinion on the
18 question you are now covering, that is to say, that if Universal
19 is to be considered in its purely private capacity and not as
20 an agent of the Secretary of Interior, it would have to get the
21 necessary authority from the Commission?

22 Is there any conflict as to that?

23 A Yes, sir.

24 Q Why?

25 A Universal was advised by the WMATC that if it

1 desired to render this service it would first have to secure
2 a certificate from the Commission.

3 Q I didn't make my question clear, I guess.

4 If you assume that Universal is operating in a
5 purely private capacity and not as the alter ego of the
6 Secretary, there is no dispute, is there, that Universal would
7 have to go to the Commission and get authority to perform the
8 service that is here involved?

9 Is that in dispute or is it not?

10 A I say it's in dispute by Universal who says they do
11 not have to get such a certificate.

12 Q Well, that is the question. They say they are
13 operating as the alter ego of the Secretary. Is that correct?

14 A That is correct.

15 Q And if they were not operating as the alter ego of
16 the Secretary, would they still contend they do not have to
17 get the permission of the Commission?

18 A They haven't gotten to that point in their argument.
19 We have taken the position that under any circumstances they
20 must apply to the Commission for a certificate.

21 Q The argument you are now making, your franchise
22 argument -- tell me if I am wrong -- is that the Secretary
23 himself cannot do this? He cannot make this contract because
24 of your exclusive franchise?

25 A We take that position. We can't stop him from making

1 a contract. But we believe the franchise does protect us as
2 far as the operation by a concessionaire or private person in
3 this area.

4 Q Or by the Secretary himself?

5 A Or by the Secretary himself.

6 Q Is that your position?

7 A Yes, sir. And in this respect we differ from Mr.
8 Cunningham. We say the Secretary has no authority. And no one
9 as yet has come up with any law, whether it be case or statute
10 law, which says the Secretary has any authority to operate this
11 service.

12 Q What you say is that you have exclusive jurisdiction?

13 A Subject to Section 3 of the franchise. We are bound
14 by that Section.

15 Now, if the Commission, in its wisdom, were to find
16 public needs and necessity required the service, it doesn't
17 necessarily say it must give it to us. But there is a Section
18 in the Compact which says that nothing in the Compact shall
19 abridge or take away from D. C. Transit the rights which they
20 held under the franchise. There is such a Section.

21 There is another Section under the Compact that says
22 the Commission shall not grant the right to an applicant to
23 run over the routes of another applicant, andher operator,
24 without first giving that operator the right and opportunity
25 to render the service. So that we feel our protection lies

1 within the franchise and the Compact.

2 Q Then you would feel that if the Secretary undertook
3 to operate this service himself directly, he could not do it
4 without violating the terms of -- he could not do it?

5 A That is correct.

6 Q Your position differs from the position of your
7 colleague?

8 A That is correct.

9 Q It is important for us to know that that is the thrust
10 of your argument.

11 A It definitely goes beyond that. We contend definitely
12 he has no such authority to operate this service.

13 Q But, nevertheless, that is only true if the service
14 is over a fixed route?

15 A On a fixed schedule.

16 Q And that it is competitive with yours?

17 A That is correct, sir.

18 Q Do you have authority now to operate any kind of a
19 sightseeing tour you want to in the Mall area?

20 A We have authority from this Commission to operate
21 sightseeing services in the Mall. We hold such a certificate.
22 We hold, in addition, ten different certificates. I am sorry.
23 One certificate for ten regular route operations in the Mall.

24 I would say that to the extent that Universal was
25 permitted to operate in the Mall, it would deprive Transit's

1 regular every day riders of the opportunity of riding exclusively
2 with D. C. Transit even in the Mall.

3 Q You don't recognize that the Secretary has any
4 authority at all to regulate or forbid your operations in the
5 Mall?

6 A He does, sir, under the Compact. The Compact reserves
7 to the Secretary, after suspending all the laws of the United
8 States which have any applicability to the transportation in
9 this area. It said that the ordinary and normal police powers
10 are reserved to, and it enumerates various parties, one of
11 which is the--

12 Q About the speed limits and things like that?

13 A That is correct.

14 Q Not about regulations?

15 A It reserves nothing like that to him, to my know-
16 ledge. That is right in the Compact.

17 Now, as to the competitive feature, I would like
18 to mention--

19 Q Your franchise antedates the compact?

20 A It does.

21 Q You got the franchise directly from Congress in
22 1956?

23 A Yes, sir.

24 Q And the Compact came along in 1960?

25 A That is correct.

1 MR. CHIEF JUSTICE WARREN: I think, Mr. Davis, we
2 will have to leave much of the rest of it to your Brief.

3 MR. DAVIS: Thank you, sir, and I do want to thank
4 you and the Court for the additional time, sir.

5 MR. CHIEF JUSTICE WARREN: Mr. Martz.

6 ORAL ARGUMENT OF CLYDE O. MARTZ

7 ON BEHALF OF THE UNITED STATES

8 MR. MARTZ: Mr. Chief Justice, may it please the
9 Court.

10 Mr. Justice Fortas' inquiries pointed up that we
11 have apparently failed to make clear to the Court that we have
12 two separate and distinct bases for reversal.

13 First is the exclusion of the United States and its
14 concessionaire under the transportation for federal government
15 exclusion in Article 12, Section 1(a).

16 The second and completely independent basis for
17 reversal is that the Compact by its terms and by any reasonable
18 construction does not extend in to the National Park enclave
19 and does not purport to regulate activities of the federal
20 government or any contract party it might use in connection
21 with the operations in the Mall.

22 This latter does not rest upon the exclusion in the Com-
23 pact, it goes to the scope, to the heart of the Compact itself.

24 I think the legislative history and the language of
25 the Compact that was developed in the Briefs will make this

1 abundantly clear.

2 In the first place, the Compact in Article 8 called
3 for Congress to enact legislation that would suspend conflict-
4 ing federal statutes and to grant jurisdiction to the Commission
5 to carry out the Compact so far as necessary.

6 In Section 3 of House Joint Resolution 402, consent-
7 ing to the Compact, Congress performed this function. It
8 granted to the Commission only the authority of the Interstate
9 Commerce Commisssion and the authority of the Public Utilities
10 Commission. Neither of those Commissions, in fact, as found
11 by the District Court in this case, had any certification
12 authority over any operation within the federal enclave.

13 Q Mr. Martz, you have two quite distinct arguments,
14 both of which are answered or responded to, at least, by your
15 opponents.

16 In addition, they have a third argument, depending
17 not at all upon the Compact, but upon the 1956 franchise that
18 Congress directly gave to this Company.

19 Now, neither of your points really go to meeting
20 that argument.

21 A Well, Mr. Justice Stewart, in addition to the specific
22 answers that were set out in anticipation by petitioner yester-
23 day, it's our general position that there is no difference in
24 construction between the franchise and the Compact. Both are
25 Acts of Congress. The construction of both raises the question

1 did they run against the sovereign? Did they run against the
2 federal park enclave?

3 Did they apply to a performance of a service by the
4 federal government within that enclave?

5 Q You don't think there's two questions there, whether
6 they apply, even the franchise, to a direct operation by the
7 Secretary? That is the first question.

8 And, secondly, whether if they do not in that instance,
9 do they apply, or at least the franchise apply, to an operation
10 by the Secretary?

11 You don't think those are separate questions?

12 A We submit that the same rules of construction would
13 apply to determine--

14 Q So that if operation by the Secretary is not involved
15 at all, only the right of the franchise or the Compact, then
16 it is immaterial whether the operation by the Secretary is
17 by himself directly or by him through an independent contractor?

18 A That is our position, conditioned, as explained
19 yesterday, by the fact that this is a concession contract, in
20 accordance with Congressional policy, to carry out the govern-
21 mental program within the National Park enclaves.

22 Q Do you suppose that the federal government itself,
23 or the District of Columbia as a municipal government, despite
24 this franchise given to this Company by Congress in 1956, could
25 all of a sudden say "we are now going to have governmentally

1 owned and operated public transportation in the District of
2 Columbia; we are not going to pay a nickel to the franchisee;
3 no condemnation, no purchase involved, because we are the
4 government and this franchise doesn't affect us"?

5 A The franchise by its terms permits termination after
6 1963, without liability. The District of Columbia could do
7 that. It could as long as the Compact remains in effect.

8 Q I am not talking about the Compact. I am talking
9 about the franchise.

10 A I should have said as long as the franchise remains
11 in effect.

12 Q That is putting aside the termination question?

13 A I think we are obligated to protect the regular
14 route service of the franchise operator.

15 Q And not to compete with it on a governmental
16 basis?

17 A It depends on whether the franchise extends into the
18 National Park enclave and affects the operation of the Secretary
19 of Interior directly or through his agents.

20 Q Could the Secretary of the Interior Department say
21 "We are going to establish and operate a public transportation
22 system in the City of Washington despite this franchise"?

23 A It has no authority to do so outside of the Park
24 enclave.

25 Q Your point, as I understand it, is that the charter

1 did not include this servide in the park enclave that is at
2 issue here?

3 A That is correct. And Respondent has acknowledged this
4 by getting permits for the movement of his vehicles through the
5 Park.

6 Q Permits from whom, the Secretary?

7 A Yes.

8 Q In addition to the other?

9 A Yes, sir.

10 Q I thought your further argument was this didn't run
11 against the Government at all, this didn't run against the
12 sovereign?

13 A As a rule of construction, a franchise is not
14 presumed to run against the sovereign.

15 Q Isn't the franchise in the nature of a license
16 agreement or contract?

17 A It's a contract to provide protection from competition
18 by private enterprise within the area, not from the government
19 itself in its use of federal properties.

20 In this connection I would like to call to the
21 Court's attention the map---

22 MR. CHIEF JUSTICE WARREN: Go ahead and finish your
23 statement.

24 MR. MARTZ: At page 88 of the appendix sets out the
25 jurisdiction of the park and shows that Constitution Avenue

1 from 15th Street west, which was questioned yesterday, is
2 wholly within the park enclave and can be operated not under
3 the Section 8144 jurisdictional decision, but as part of the
4 park itself. Section 8108.

5 Q This is all of Constitution Avenue?

6 A From 15th Street to the west. As shown on Government
7 Exhibit 6 set out in the appendix at page 88.

8 Q Who polices that, the Metropolitan Police or Park
9 Police?

10 A Both can do it. Under the laws of the District of
11 Columbia, the federal law, the Park Police can police all park
12 lands and the Metropolitan Police can do so also.

13 (Whereupon, the above-entitled oral argument was
14 concluded.)

15 -----

16

17

18

19

20

21

22

23

24

25