In the

Supreme Court of the United States

The National League Of Cities, et al.,
Appellants,
v.
William J. Usery Jr.,
Secretary of Labor
Appellee.
No. 74-878

State Of California,
Appellant,
v.
William J. Usery, Jr.,
Secretary of Labor,
Appellee.
No. 74-879

Washington, D. C.
March 2, 1976

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Washington, D.C.
Tuesday, March 2, 1976

The above-entitled matter came on for argument at 1:00 o'clock p.m.

BEFORE:

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

APPEARANCES:

CALVIN L. RAMPTON, Governor of Utah, Salt Lake City, Utah; for the Appellants.

CHARLES S. RHYNE, Esq., 839 17th Street N.W., Washington, D.C. 20006; for the Appellants.

ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in National League of Cities v. Usery and California v. Usery.

Governor Rampton.

ORAL ARGUMENT OF GOVERNOR CALVIN L. RAMPTON

ON BEHALF OF THE APPELLANTS

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

I am participating in the reargument of this case today even though I did not participate in the first argument, not in the hope that I can add any legal expertise to our chief counsel, Mr. Rhyne, but because my fellow governors of the 50 states desired that I express their deep concern to this Court in regard to the Fair Labor Standards Act amendments of 1974, concern not only for the immediate effect it will have on the operation of state and local government but also on the fact we feel this is another step forward toward wiping out state sovereignty and perhaps an irretrievable step.

In this case there appears to be a great deal of argument of fact based upon no evidence because of course there was no evidence presented below. And yet there have been assertions made by brief on both sides as to the effect of the act. The Solicitor General asserts that as a basis for the need for Congress to extend the provisions of the Fair

Labor Act to state and local government, that there were some 95,000 employees in the United States in state and local government that were being paid less than the minimum wage. By the same token, I would say I doubt very much that that is so. I have done a survey in my own state, and there are not.

Also the appellants have made certain allegations regarding the cost of the application of these rules to state and local government. Here again I doubt, if we were in a trial court, that the evidence would stand out.

But this much I think must be true, and it appears to me that the Solicitor General is sort of in a dilemma here. On the one hand he alleges that there is a great problem to cure, the 95,000 people that are below the minimum wage, and, on the other hand, that it is not going to put a burden on state and local government to cure it because whatever the problem is, it is a problem that has got to be cured by money. And the cost of the cure is going to be commensurate with the size of the problem. If it is a big problem, as he attempts to assert, as indeed he must if he is to prevail here, if there is a big problem, then the money required from state and local government to meet it is indeed going to put a burden on the budget of those units of government.

Most of the states provide for overtime for their employees up to a certain level, generally above a given

salary level or a given salary classification; the pay scale will provide for compensatory time off. However, in my opinion, it would not be difficult in regard to a portion of state government to change to comply with these rules to pay the time and a half or overtime because you could then do, as many governors have said, "All right, we will do this, but from now on there will be no overtime."

However, in regard to a certain classification of employees, those engaged in public safety, there is no way that you can conform to an eight-hour day or a 40-hour week. And if they are to perform the functions which it is their duty to perform, even though the act and the regulations under the act make some modification to the requirements to firemen and policemen, they cannot and should not be met.

Congress has not attempted to bring the armed services--that is, the military personnel--except for civilian employees, under the provisions of these acts, and yet there is not a fire department, a police department, or a highway patrol in this country that does not have to operate fairly well under military rule and where, if there is an emergency, in the 40-hour week or the 57-hour week rings the bell on you, they cannot quit and go home from the job.

So, it is not within the power of state government to comply in full and avoid the impact of these new orders. The 40-hour week will, in my opinion, bear much more heavily

on cities and counties than it will on state government. But all of the governors feel a responsibility to the subsidiary units of government within their states because they are creatures of the state legislature. The legislature has got to give them the power and authority to render the service that they are charged with rendering. And so as governor, I feel equally responsible for units of local government and their budget and their ability to render the services they do for the state government itself.

In most states and in most larger cities the supervision of employee relationship is under a merit system council. By this provision, these amendments, the merit system council for state and local government would be first. The Department of Labor. And secondly, Mr. Chief Justice, as you were mentioning this morning, the 425 federal courts in this country. Already these courts are overloaded and new judges are necessary, and here is an act which would throw a new burden on them, a much greater burden than was thrown on them by Wirtz, because in the case of Wirtz the cities and counties and states were able to adjust reasonably well so that most of the cases that have gone into federal courts, pursuant to the Wirtz case, were violations that occurred while Wirtz was pending. But in this case, under the 1974 amendments, as I mentioned a few minutes ago, because it extends so much further and because you cannot conceivably

comply because of emergency situations, the amount of litigation will be truly great. The local merit system councils have been able through their acquaintanceship with local problems to keep labor disturbances within the states and cities and counties to a minimum. And there is no danger here, contrary to what the Congress found, that strikes which might be prevented by payment of the minimum wage are going to place a burden on interstate commerce.

However, the greatest fear I believe that I and my colleagues have in regard to these 1974 amendments--

Q Do you happen to know, Governor, do most of the states laws prohibiting strikes by public employees?

MR. RAMPTON: There are very few that permit them. Many are silent on them. Some have them. I could get a schedule of that and file it as a late brief.

Q No, I just wondered if you happened to personally know.

MR. RAMPTON: But in those states which do not specifically permit strikes by public employees, the governors have taken the same position that was taken in 1924 by Governor Coolidge of Massachusetts, that you cannot strike against the public welfare.

We believe that this case takes us a great deal further than Wirtz does. While I do not agree with Wirtz, I feel it is clearly distinguishable from this case. In the

Wirtz case you can base the jurisdiction solely on the competition theory because the activities of government which were there covered by the early amendments all can conceivably be said to be in direct competition with firms in interstate commerce. Not so under the '74 amendments.

You can uphold the '74 amendments and say that the activities there covered are under the Interstate Commerce Act only by the application of the enterprise theory. I know you did discuss the enterprise theory in Wirtz and cite that as one basis of the holding in Wirtz, but it is not necessary to the holding in Wirtz and that could be changed without overturning Wirtz. But if the enterprise theory actually is to apply to states and local government and go to its logical conclusion, then I think you have destroyed the sovereignty of states.

Q Is your position that just as a matter of commerce power, the federal government cannot reach these activities of the states, or is it that--of course this was in the commerce power but the commerce power is limited by some other considerations.

MR. RAMPTON: The commerce power is limited. It is my position, Mr. Justice White, that the attempt to apply the enterprise theory to local and state governments--it has always applied of course to private concerns--but to attempt to apply it to local and state governments which would then bring under

the commerce clause every single act that local and state government might make would effectively wipe out the sovereignty of the states.

Q That is a little bit different point in the sense that there are some limitations that considerations of federalism put on the reach of the commerce power.

MR. RAMPTON: Yes, certainly. I would say that is true.

Q Rather than if some private industry was performing--let us assume that the states decided to farm out its police job and have some independent contractors perform it. Would you suggest that the commerce power would not reach it?

MR. RAMPTON: I would suggest that no state would do that, Mr. Justice. I think the difference, to use the words of Chief Justice Burger, when we argued this the last time, the things reached by Wirtz are activities that a state may or may not do. I guess it is another way of saying that there are things that they do in a proprietary capacity. The things that are now reached under the 1974 amendments are things that they must do if they are going to continue as a state, if they are going to continue to exercise the state police power. And, therefore, not only in terms of the people covered but in terms of the principle, a giant step beyond Wirtz, and from that step I can see no logical stopping point.

Right now there is pending before the Congress bills that would extend all provisions of the National Labor Relations Act to states, including the requirement for negotiation, the requirement that locally elected officials submit to binding arbitration in giving employees the right to strike, and those bills are held up there only because of the pendency of this case.

Again I repeat that I and my fellow governors are concerned not only with the immediate effects of the 1974 amendments but with the fact that it strikes down the last bar that prevents the intrusion of Congress on the powers of the states.

MR. CHIEF JUSTICE BURGER: Thank you, Governor.

Mr. Rhyne.

ORAL ARGUMENT OF CHARLES S. RHYNE, ESQ.,

ON BEHALF OF THE APPELLANTS

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

In this case I will argue that the 1974 amendments to the Fair Labor Standard Act, as they apply to states and cities and counties--which they do encompass all of their employees, with minor exceptions--are unconstitutional on two bases.

Number one, I am going to argue that the nexus to commerce is so insubstantial not to warrant the validity of

this act under the commerce power. But, Mr. Justice White, I would certainly and with great vigor urge that this Court's decision in United States v. Fry, which I do not think touched this case at all, held that in any case where a federal statute impairs the ability of a state or city or county to function in a sovereign capacity, it comes up against constitutional federalism and is invalid.

First of all, let me address--

Q Mr. Rhyne, some time during your argument will you address yourself to the question of whether the states are necessarily in the same position as the counties and the cities here because, as I see it, there are two lines of authority; a county or a city acting is state action for purposes of the Fourteenth Amendment, but a county is not a state for purposes of the Eleventh Amendment. So, I can conceive of there being some distinction made, even if your argument were accepted.

MR. RHYNE: Your Honor, I would like to answer the question right now in this way. Of course cities and counties are creatures of the state. They take all of their powers from the state. And it is true that one county may perform 50 functions for its cities and one city like Chicago may perform 5,000 functions because of their size, and that the state may perform a thousand different functions for the overall of the citizens. So, with respect to the Eleventh

Amendment, it would be my contention that in the context of this act that the states and the cities and the counties are one.

Q If you are relying on the Eleventh Amendment, I think the law is rather clearly against you because Justice Marshall's opinion in Moore v. Alameda County just two or three years ago reaffirmed the old holding of this Court that a county was not a state for purposes of the Eleventh Amendment.

MR. RHYNE: I say I am not addressing myself to the Eleventh Amendment in the context of that particular action that was addressed there. I am talking about governmental functions that the county performs for the state which I think are on an entirely different basis from the functions that were involved there.

But addressing myself to the nexus to commerce, let us look at what the Congress thought was the nexus to commerce. First of all, they said there was this famous 95,000 state, local and city employees who received a sub-standard wage. From the time I have been in this litigation until now I have tried to find that 95,000, and I am still trying to find them, and I say that even if they exist, where and who are they employed by, what county, what city, what state? They all deny that they have anyone who is paid less than the minimum wage. But 95,000 out of 11,400,000 is a

mighty small number. And so I say it is insignificant in the overall of the picture. So that the substandard wage argument is no nexus to commerce as far as I am concerned.

Q Where did that 95,000 figure originate, Mr. Rhyne?

MR. RHYNE: It originated evidently in some study done by the Labor Department where they made some kind of survey of the nation, and they put out this series every month. The latest one, for example, is very interesting in connection with this case. For example, it shows that there are only 56 million people, for example, covered by the Fair Labor Standards Act, as compared to Fry. And when I come to Fry, I will address myself to that because there are 94 million people, 94 million workers, and there are fifty-six of those covered by this act. When I mean covered, that means just a record like they have on Governor Rampton, not a regulation like they have on firemen.

But returning to my argument, which I think is very important, that there is not substantial evidence here of a nexus to commerce sufficient on which to find a rational relation upon which to base this act.

The second, beside substandard wages, is labor stirfe. Let us look at labor strife. They cite it. They do not say where it is in the Solicitor General's brief. So, again we have to look at the statistics in his client's own

publication; the latest in 1973 says that three stoppages by public school teachers caused one-half of the 2.3 million days of government idleness in 1973. In 1973 employees of educational institutions or institutions for teachers and support personnel were on strike more frequently than any other category of government employees.

Contrast that--contrast that with the very careful approach of Mr. Justice Harlan in the Wirtz case where he specifically--specifically--linked strikes and work stoppages involving employees of schools and hospitals, the things that were covered there. You see, here the big problem is you cover everybody, everybody, but here Mr. Justice Harlan was quite careful, and I am reading from 392 US 195, and he says, "Strikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent, obviously interrupt and burden the flow of goods across state lines. It is therefore clear that a rational basis exists for congressional prescribing minimum wage law."

I say there is no finding here that there was a strike by any one of these 95,000 ghosts that impeded or burdened interstate commerce in any way. You are talking about school teachers, and they are exempt.

So, the appellee goes then to purchases, and there he is talking about the minimal effect up to now. He says all this does not have any effect on states and cities, one percent

or less, something like that. He balloons up and takes all the purchases for all of government, $134 billion, and he says that affects interstate commerce. But he does not show in any way, as you have found in these other cases--and as Mr. Justice Harlan found in Wirtz--that some of these 95,000 people who were paid too little were striking and burdening those purchases in any way in interstate commerce. So, I say the evidence before Congress was non-existent, non-existent.

And then he goes to unfair competition. What does he have for evidence? He has two ads in the New York Times. In one, New York asks for business to come there because they have low taxes. In the other one, Massachusetts asks business to come there because they have low taxes. And from that he draws the conclusion that because they have low taxes, they pay subminimal wages. Well, baloney. I use such a word in this august body, but it is the truth.

So, unfair competition, the idea of a state engaging in unfair competition--now, you did have unfair competition in Wirtz, and it was so found by Mr. Justice Harlan. But then the next thing he does is talk about spreading employment. This Court does not sit, as one of you said, nine months. You realize what is going on in the world. If there is anything that is going on in the world, it is that people in the public sector are losing their jobs by the thousands every day. And so here where you increase the

pay of a few, you cause a loss of jobs of many, and that is exactly what this act does. And he referred to less welfare. I cannot in my wildest imagination leap that up in any way. So, I come to the conclusion, may it please the Court, that the act is bottomed on a false bottom in so far as its nexus to commerce is concerned. And I therefore urge that the act be held unconstitutional on that ground alone.

Q Are you familiar with the Perez case, Mr. Rhyne?

MR. RHYNE: Your Honor?

Q In 402 US, case of Perez. It is not in your field of the law. In that case the Court upheld the constitutional validity, under the commerce clause, of a federal law that made local loan sharking a federal criminal offense.

MR. RHYNE: Yes.

Q And in which in the course of its opinion the Court dealt with the general power of Congress under the commerce clause. Are you familiar with that?

MR. RHYNE: Yes, Your Honor, I am familiar with that case; and, Your Honor, they had a lot more evidence there--I mean, almost none. But here it is so insubstantial. When you look at the entire nation--I say this, I drew this from Perez and I drew from United States v. Bass, I think written by Mr. Justice Marshall, the idea that in each case you have required the people before you who assert that the interstate

commerce power exists to show how. And here, when you encompass the whole of the United States of America, the whole of government--not only state and local government but all federal government--you cannot come to grips with it. And I say they have not shown any nexus to commerce such as has been required by this Court over and over again.

Let me go to Fry because I think Fry disposes of this case. I think that in Fry when this Court said, number one, Wirtz had a small effect or intrusion on government and Fry had even less, and then in the footnote you resurrected from the dead the Tenth Amendment and said that if the functions of states and cities are impaired or their policies are interfered with so as to impair them, that that would violate constitutional federalism.

Look at what we have here. Eighty-five percent of the budget of every city in this nation is personnel. Seventy-five percent of the budget of every state is personnel. What you are doing in this legislation is imposing down upon an existing civil service that is obviously and I think clearly is satisfying an awful lot of people because there was a trial below, and the testimony in that trial was that there were long lines of people who wanted to get police jobs and long lines of people who wanted to get firemen's jobs because of the fringe benefits that go with them. These are among the most desirable of all jobs, so was the testimony there. And states

and cities do pay very, very high, they think, wages. And I call attention to the fact that a man who earns $13,000 in Havre, Montana is a pretty high paid guy and that his $13,000 is worth about ninety here.

Q Mr. Rhyne, is it your position that there are no state employees that are actually engaged in commerce?

MR. RHYNE: No, sir, that is not my position.

Q What about those employees?

MR. RHYNE: My position is that if there are, they should pick them out specifically and legislate as they did in Wirtz.

Q You would not concede that there would be any problem about that with respect to the constitutionality of a law like that?

MR. RHYNE: No, I would not. After reading Mr. Justice Rehnquist's dissent in Fry, in which he approved California--United States v. California--I would say there is no problem. The big problem here, Mr. Justice White, is everybody is covered, the local judge and his clerk. And the one point that has been made most to me, I would say--and I have had a lot of advice--is that--

Q You just got some more.

MR. RHYNE: Yes, I did. And it is this, it is this--and this is a good point, Mr. Justice White, and I got it from a good source--

Q And I am going to hear it right now.

MR. RHYNE: You are going to hear it right now. It is this, that the action of a city or a county or a state in fixing their budget, which is their highest policy thing, is an intrastate act. It is an atrastate act. And so you have to show all of this nexus to commerce in order to cover that act. And here Congress in its findings has totally failed to do that.

Q Could you suggest to me some test that would be satisfactory to you to sort out the employees of a state that the Fair Labor Standards Act may properly reach and those that it may not reach?

MR. RHYNE: I would say that what you are doing, Mr. Justice White--to me who represents only states and cities and counties, as you well know--is asking me to tell some of my clients what is going to happen to some of their people. But I will do it.

Q I am just trying to find out how far your position goes.

MR. RHYNE: All right.

Q Would you adopt Governor Rampton's dichotomy of proprietary as distinguished from purely sovereign governmental functions?

MR. RHYNE: Your Honor, I would, except I would say, having lived my whole life in trying to define proprietary

and governmental, I have some difficulty with it. But I would say the railroad--if they run a railroad in interstate commerce, Mr. Justice White, would you accept that as an illustration of employees that--

Q I know there is any amount of illustrations, but I do not want to pursue it. I thought maybe you had some formulation in mind that--

MR. RHYNE: It is very, very difficult, but I could certainly say to you that a policeman, when he gives you a ticket or a fireman when he puts out a fire--

Q But whatever that formulation was, would Wirtz fall within it or without it?

MR. RHYNE: I would say that Wirtz would fall within it. I think that one of the things that I would say to you about Wirtz is that since I argued the case here the first time, I went back and read every word of the record, every word. And one of the things that impressed me there was that the employees there of hospitals and schools, according to that record, were the lowest paid employees in the whole United States of America. These cafeteria people were getting 85 cents an hour, for example.

Q Do you think in those situations the Fair Labor Standards Act application should be accepted in terms of strictly on a constitutional basis?

MR. RHYNE: I think they should be picked out

specially and you should not do it on a meat ax approach. And I think what they have done here is the meat ax approach.

Q You would not quarrel with the state power company, would you? State power company--you would not have any trouble with that, would you?

MR. RHYNE: State power company, no, I would not have much trouble with that at all.

Q How about a state lottery?

MR. RHYNE: That falls in the category of the railroads.

Q State lottery.

MR. RHYNE: State lottery--Your Honor--

Q I always give you the easy ones, you know that.

MR. RHYNE: The attorney general of Maryland is back here somewhere laughing. He ought to answer that better than I.

My point is that when you take the whole of government, you are talking about--Mr. Justice White, I know because you people have just forced me to go through it, that the City of Richmond renders 161 separate services and they are broken down into over a thousand.

Q Are you saying these amendments are invalid on their face or they are in part valid and in part invalid?

MR. RHYNE: I am saying that they are so broad that they are invalid on their face completely. And if they want to

get at a specific piece of commerce that a city or a state is doing, let them adopt a special law for your power company.

Q This whole doctrine of the overbreadth in the commerce clause area, is there such as there is in the First Amendment?

MR. RHYNE: Well--

Q Or you could say it just is not severable. You could say in terms of severability the statute just is not severable.

MR. RHYNE: I find it very difficult, Mr. Justice Rehnquist and Mr. Justice White, to separate out the different functions of a city. We have 50 states and 18,000 cities and 3,000 counties. Every one of them does something different. Some of them have public power, and I think San Francisco has voted 18 times not to take over the private power company. The people vote. And that is another thing about this whole thing. The Solicitor General says it does not interfere with policy. What is policy except the spending of money? And the people are voting down bond issues wholesale now. So, here the act is so broad it covers the all of state, and these exemptions it makes are by grace only. So, I would really urge that the whole act is invalid under constitutional federalism.

If the Congress wants to come back and pick out this

act and that act, which it says is commerce and should be regulated because it is in competition with commerce, let them point it out as they did in Wirtz, as they did in Wirtz, and as Mr. Justice Harlan pointed out. And one of the things that he did point out too, in that famous footnote 27, was that never would he stand for a trivial--a trivial--impact on interstate commerce as a basis for regulation of interstate commerce.

Q Mr. Rhyne, may I ask you two questions. Supposing that the whole matter went back to Congress and Congress held some hearings and found that there were some police strikes, there really were 95,000 people who were underpaid according to their standard, and then they reenacted the statute. Would we have a different constitutional issue than we have today?

MR. RHYNE: I think you would have a different constitutional factual situation with respect to who are the 95,000, what were they doing. Were they doing, as the Chief Justice points out, a governmental function? Or were they engaged in commerce, in competition?

Q I was supposing they were police and fire people. Supposing there are 95,000 policemen and they have engaged in strikes and so forth, would that be a different constitutional question than we have?

MR. RHYNE: I think that any time that you are

dealing with policemen, Your Honor, you are dealing with one of the two most fundamental services that government renders, and I do not think there that the federal government has any business interfering.

Q So, then in final analysis you are really not relying on the absence of evidence before Congress but rather on the fact that this is an area which Congress may not legislate in.

MR. RHYNE: I am really relying on both, Mr. Justice Stevens, as I said at the outset. I wanted to point out to you that there was no evidence and, secondly, that I was relying on constitutional federalism which, in my judgment, invalidates this act on its face.

Q Even if there were a factual basis. The second question--I did not quite understand, and I am not sure if you finished your development of the point--what is your real distinction of the Fry case?

MR. RHYNE: In the Fry case you had an emergency and a compelling national interest, and it covered the whole of the nation.

Q But the Court did rely on the commerce power rather than--

MR. RHYNE: That is right.

Q And I think there there was a primary national concern that would override, under the balancing act that this

Court should do, the state interest in trying to pay higher wages that would interfere with a national policy that had to be effected because of the emergency. Here you have neither the emergency or the compelling national interest. If anything, you have a compelling national interest the other way to uphold the elements of federalism because it is those elements of federalism that have made this nation what it is today.

Two weeks ago I was up in Philadelphia, and I persuaded a friendly policeman to allow me into the old city hall where Chisholm v. Georgia and other great cases were argued. And I watched a film about the cases and about all the long time that you gave people in those days to argue their cases in the formative days of our country. And I went over to Independence Hall, and I again, with the Federalist in my hand, thought a lot about the beginnings of this country. And I must say if there is any one thing that is important, it is that diversity that federalism has allowed.

I refer to the fact you have got 50 states and every one of them does most things different.

Q Mr. Rhyne, getting back to modern times, would you not say that Fry did not help either side?

MR. RHYNE: Getting back to Fry?

Q Yes.

MR. RHYNE: And I say it did not help either side.

It did not touch either one.

Q That is what I thought.

MR. RHYNE: That would be my interpretation of it. But I would say it helped me in my argument because it resurrected the Tenth Amendment and recognized the principle of federalism. And so I would have to say it did help our side.

Excuse me, Mr. Justice White.

Q Let me ask about Fry. Is there a distinction between that case and this one in that there the Congress said to the states, "You must not," whereas here they are saying to the states, "You must"? Is that a valid distinction?

MR. RHYNE: That is a distinction. There have been a good many cases where you have got them coming to you now under the Environmental Protection Act. There are a good many cases where this Court has held that the federal government cannot force states to spend money to carry out a federal purpose. So, I think that is a distinction which I had not mentioned.

Q Is it a valid one?

MR. RHYNE: I think it is. I think it is. Look at what they are doing. They are altering states and counties and cities to alter their budgets to pay overtime. Let me just illustrate what this is all about in a way by talking for just a moment about California. I am represnting them

also, and they once pointed out to you and I do point out to you that their firefighting costs under this act will go up from $64 million to $94 million. This is caused not because they treat their employees badly but that they treat them well. And they also point out that it takes two years for them to train anybody; if they are going to cut down on the overtime of the existing people, it is going to take them two years and cost them $27 million. They in California of course spend more money on fire fighting as a state than any other state. And this is an enormous changeover.

But the big changeover is this. Up until now most firemen and policemen paid on a bimonthly or monthly basis or a yearly basis. Under this regulation put out by the Secretary of Labor, everything is on a 28-day basis. Why? Heaven only knows. And they have got all kinds of regulations; if a man is interrupted in the middle of his 30-minute lunch period, you have got to give him so much more time. If he is sleeping and called out, you have got to keep all kinds of records. Just the record keeping alone in connection with firemen is going to be an enormous thing and shows the kind of minute intrusion that goes on here. And those regulations which are in the record--and a particular provision that I call your attention to is on page 600 because it shocks me every time I read it. It says that the director of the wage and hour division is going to fix the work week, and he is going to fix

the work conditions. He is going to fix everything with respect to police and fire.

I just do not think that the police and fire departments, which have done pretty well up to now, ought to be run from Washington. And if they are run from Washington, and this act is put into effect, you are going to get--as we point out here--overwhelmingly less service at a higher cost, and it is going to mean that every home owner in this nation will have to pay higher fire rates because the fire rates depend on the amount of fire service you have.

The ramifications of this thing are enormous, and Congress did not consider those any more than this thing that was referred to about the courts, and I will finish with that.

Q There is nothing new, Mr. Rhyne, about Congress enacting legislation without understanding all of its consequences, but that does not bring a constitutional question, does it?

MR. RHYNE: I would just still, Your Honor, in agreeing with you, say one thing about Section 16(b), class actions. Under this act, you have a right to bring an action on behalf of all those similarly situated. And then you get costs and you get attorneys' fees, you get liquidated damages--if it is liquidated damages and you are entitled to time and a half which is of course triple time--and you get the help of the Labor Department in carrying out your

litigation.

I was handed last night late a reply brief by them in which they say this is not so. Unfortunately for them, the two cases they cite do not sustain--they claim you do not have class actions although it allows the filing of the suits on behalf of all those similarly situated. But because they say it requires the consent of all the employees. In one of these decisions, a Fifth Circuit decision, that they cite where it says it is the opt in, opt out. It is not a Rule 23 class action, but it is still a class action. And my major point, Your Honor, is that because of all the benefits that flow from 16(b), all this litigation from now on is going to be in the federal courts and not in the state courts, and as we have pointed out time and time again and as the city attorneys point out in their briefs, there is no question but what one half of all their litigation involves personnel matters. So, talk about a flood of litigation, this would create it.

So, we urge, and we urge most strenuously, that this act is invalid because they do not--Congress in its findings does not show any real nexus to commerce and, above all, that under constitutional federalism it is invalid under the rules laid out in Fry which, Mr. Justice Marshall, I think does help us because I do think the Tenth Amendment now has meaning and even beyond the Tenth Amendment because constitutional federalism existed before the Tenth Amendment. I insist

that when you have such a mammoth, massive takeover of state and local government affairs as this act provides here--for example, in their reply brief they say that we complained that they might come in and have inspections, that each inspection only takes 16 hours. Imagine how many inspections New York City with their three hundred and something thousand employees--one inspection each or one for the whole city? Your Honor, I urge again this act has not been thought through. The regulations that have been promulgated, they fit cities like a square peg in a round hole. They are unreasonable, they are invalid. They were issued six days, as Your Honor will recall, before Christmas and could not be even read by cities or received by them much less considered.

So, we urge that this act be held invalid for the two reasons that I have urged. And I will reserve my time.

Q Mr. Rhyne, I take it that not only would you think that there might be some activities of states and cities that were within the reach of the commerce power and some that are not but you would also think that in terms of whether an exercise of the commerce power might impair the functions of the states, there might be some exercises of power under the Fair Labor Standards Act that might threaten the local government and some that might not.

MR. RHYNE: That is true. But here you have the meat ax approach; so, you do not know what they are talking

about. You would have to fight them out one by one in the courts.

Q Do you think Maryland v. Wirtz is within the--

MR. RHYNE: I would say on Maryland v. Wirtz, on the evidence there, of the substandard wages and the competition with private business, it is within the area that Congress can reach. Before when I was here, I asked you to set Maryland v. Wirtz aside and I think that while it does cause some confusion in the overall field, because of those two facts, I would change that statement.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF SOLICITOR GENERAL ROBERT H. BORK

ON BEHALF OF THE APPELLEE

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

I am going to discuss a case which initially at least will not seem to bear very much resemblance to the case Mr. Rhyne just discussed because my version of what that act does is considerably different from appellants'. The central issue here of course is the effect of the '74 amendments to the Fair Labor Standards Act upon federalism.

Mr. Rhyne has described a massive and disastrous impact upon cities and states. I think I can state and show that there would be very little impact, certainly no impact that threatens the value of federalism.

The issue between us can be stated as whether or not--and I think it can be stated that the popularity of Maryland v. Wirtz with the appellants varies from time to time, but I still think the issue is whether or not Maryland v. Wirtz should be overruled and the dissent there become the new law. And I will suggest in the course of my argument that such a decision overturning Maryland v. Wirtz would do much more than that. It would undercut the rationale of almost all of the major commerce clause decisions of this Court, including decisions in the field of agricultural statutes, labor law, civil rights law, and so forth.

Q It might depend on what ground it was overruled on.

MR. BORK: It might, Mr. Justice White, but I am going to suggest that there are not adequate grounds for overruling it except a rationale that would indeed have that kind of constitutional counterrevolution.

The government's position rests upon three propositions. And I would like, as to the first one, to put aside the question of federalism for a moment and just deal with the jurisdiction or the power, the coverage, of the commerce clause. And I think as to the coverage of the commerce clause, as to its application here, I would think that that much--not the federalism issue but that much--would have been settled certainly decisively by Fry v. United States and

certainly by a lot of cases before then.

My brother Rhyne would suggest that no consideration was given to this. Indeed, Congress debated--both the Senate and the House debated, and the reports included discussions of the facts of interstate commerce involved here and the theories by which the commerce clause applied. I do not want to spend much time on this, but I feel I must spend some time on it because it has been attacked so strongly today.

There is no doubt that interstate commerce is in play when we have state and local governments which in 1971 purchased $135 billion worth of goods and services, and that was 12 percent of our gross national product. Nor, I think, can there be any doubt of the significance of this statute to that commerce when it is realized that this amendment extends the statute to 3.4 million employees, not just minimum wage or overtime provisions; it also has age discrimination provisions and so forth. And that makes with the 1966 amendments upheld in Maryland v. Wirtz, a total of 6.3 million employees who are covered by the statute.

There are a variety of reasons why extending a wages and hour law to these employees is rationally related to commerce. Congress made the findings in our main brief at pages 23 and 24, the Senate report discussion of this is set out. Of course, it is not up to the government here to prove again the factual findings that Congress made. And the

standard of review for Congress's factual findings of that nature of course is set forth forth in the heart of Atlanta Motel and Katzenbach v. McClung, and I think they easily withstand that kind of review.

The theories upon which Congress attached this law were, first, that substandard working conditions are likely to lead to labor disputes and hence the strikes that interrupt the flow of goods and services in interstate commerce. That was in the original finds of the 1938 act. The theory was adopted to support the 1966 amendments in Maryland v. Wirtz. It was advanced in debate here for the 1974 amendments. And this labor strife theory of course was accepted by this Court as long ago as Labor Board v. Jones & Laughlin in upholding the National Labor Relations Act.

It should be said that Maryland v. Wirtz covered mostly custodial workers, orderlies and nurses aides, and it is hard to think that any of the employees covered by the 1974 amendments have a more tenuous nexus to interstate commerce than those employees that were dealt with in Maryland v. Wirtz.

Second, I mentioned that competition between governments tends to or can spread substandard working conditions as governmental units compete with lower taxes and lower wage rates to make up for that. I do not think again there is a rational relationship. Congress can act on that ground. I am not obliged to have held a trial and prove that Congress's

factual findings were correct.

Thirdly, the increase of purchasing power through higher wages and the spread of work tends to stimulate interstate commerce. That is a theory of course very much like the theory in which the 1964 Civil Rights Act was upheld in Katzenbach v. McClung where it was pointed out that eefusal of certain restaurants to serve blacks led to smaller food purchases which adversely affects interstate commerce. So that too is an established constitutional motive applying the commerce clause.

And, finally, it is quite clear, as the Senate report states, that raising the minimum wage rate at a level which will at least help to assure the worker an income at or above the poverty level is essential to the reduction of the welfare rolls and the overall reform of the welfare system in the United States. And certainly taking people off welfare rolls and giving them productive jobs is a means of affecting interstate commerce.

Q How do you get someone off of the welfare rolls if he is a fireman or a policeman and you pay him overtime? Are firemen and policemen on the welfare rolls?

MR. BORK: The firemen and policemen may not be on the welfare rolls, but there are people on the welfare rolls, I believe, Mr. Chief Justice, because the kind of wage they can get in certain kinds of jobs is so low that it leaves them well

below the poverty level.

Q I hear what you are saying, but I do not understand it.

MR. BORK: There are people, I suppose, who will not take jobs that are of very substandard wage who would take it if the price was raised.

Q You mean they would stay on welfare.

MR. BORK: There may be such people, and there may be people who find that they cannot support themselves on these wages.

Q But that they can on welfare?

MR. BORK: In some cases yes, I think.

Q Unless we had some hard evidence on that, I think it so defies reality that I for one could hardly make any judgment based on that kind of sweeping statement.

MR. BORK: Let me try this, Mr. Chief Justice. One of the purposes of the overtime provisions of course, as Congress specifically stated in this Senate report I referred to, is to spread work, to get some employers for some kinds of jobs not to pay overtime but instead to hire an additional worker at straight time. So, that would take people off the welfare roll. That of course was one of the theories of the original Fair Labor Standards Act upheld in the Darby case and it is a theory that has carried over to the 1974 amendments.

Q I think that you are advancing that argument

only for the purpose of sustaining the power of Congress, not as an argument of persuasion to us.

MR. BORK: No, no, I do not think this Court has to be persuaded that this act was wise social policy or was unwise social policy. I am merely, as you say, Mr. Chief Justice, raising that as showing the jurisdiction of Congress in this area before coming to the federalism point. I have not even come to that. I am just talking about the straightforward application of the commerce clause as it would be applied in any case except for the claim that you cannot do it when a state or local government is involved.

Q Is that affirmatively recited in the legislative history?

MR. BORK: I believe it is. Yes, it is affirmatively recited. In our brief at page 24, the main brief, the Senate report talks about raising the minimum wage level to assure workers an income above the poverty level and reduce the welfare rolls. Of course the purpose of spreading work by encouraging the hiring of additional workers at straight time is in the legislative history extensively.

But I would have thought that on the pure question of whether this was rationally related to interstate commerce, that there was no question but for Mr. Rhyne's statements today.

Coming to the other issue, which I think is the

crucial issue as to whether this statute impinges on the value of federalism, I take it we know at the outset of course that there is no immunity of state or local government from federal regulation as cases like the Sanitary District case and the California case attest. But I want to make two arguments--one conceptual--about the nature of this statute and one factual about the actual impact of the statute.

The conceptual argument is this. The 1974 amendments seem to me by their nature less intrusive, less coercive, less damaging to state sovereignty, local sovereignty, and so less threatening to the value of federalism than most of the statutes which this Court has upheld under the commerce clause in the past and has done so regularly for decades.

Q Are you talking about cases like Jones & Laughlin?

MR. BORK: Yes, I am, Mr. Justice Rehnquist.

Q Do you not recognize any distinction between the federal government exercising commerce authority over a private business and thereby displacing the state's legislative authority to exercise its jurisdiction over that business and the federal government's exercising commerce power over the state itself?

MR. BORK: No, I do not think I do, Mr. Justice Rehnquist unless the commerce power or any other power was

used in a way that struck at the state's ability to be a policy making government and a policy implementing center. But I cannot for the life of me see any distinction between telling a state that your social policy is henceforth superseded and void and a federal policy which we impose takes the field. That seems to me much more intrusive upon federalism, upon local sovereignty, than saying you must pay a minimum wage which we pay and which private employers pay.

Q And yet there is no doubt in the decisions of this Court that the commerce power can go just about all the way down the road so far as preempting state authority over private business. And yet the Court in its footnote in Fry last year--and your argument concedes--that there is a limit apparently a good deal short of there when you the federal government is dealing with the state as a state.

MR. BORK: I never meant to put the concession or affirmation, as I recall it, about federalism on that ground. I think there is a limit to how much state law the Congress can oust, and I hope there certainly will be a limit because I think it would be meaningless to worry about federalism if it turned out that the only thing states could do was tax and pay employees who were not allowed to do anything because the federal government had taken over all the policies.

Q Is there any doubt from our decisions in cases like Perez that the federal government pretty well can take

over all the policies so far as regulation of private individuals is concerned?

MR. BORK: I thought I had detected in this case, Mr. Justice Rehnquist, and in the dissent in Wirtz and in the dissent in Fry the beginning of a concern about federalism and an attempt to find a judicial formulation that would preserve it against all kinds of attacks of a kind that I have not seen in cases since the 1930s, and I think this formula--I think that is a desirable attempt to find a formulation that controls federal power short of a point where state and local sovereignty is destroyed, both in the field where you are affecting a state's budget and in the field where you are ousting the state's laws. I do not see any distinction between those.

Q Do you think Congress would have authority to require all the states to enact a merit system roughly comparable to federal civil service standards?

MR. BORK: I do not know that they would, Mr. Chief Justice. I have not really thought about that. This act does not do it.

Q We are talking about fundamental power though, and I am trying to test that out through the hypothetical question. How about the power to have a federal act that would regulate all the employee relations of the states and municipal and local governments, that is, a--quote--Taft-Hartley

for public employees?

MR. BORK: That might be within federal power. I do not know. I hesitate to try to guess about all the cases because I am going to suggest that this case is quite easily solved, much more easily solved, than any of the other kinds of statutes such as the one you have mentioned, and I was trying to suggest why this is a much less intrusive statute than the kind of statute you just mentioned. And I think it is possible, of course, to think of all kinds of federal incursions into state power that one would say federalism has effectively gone. But my point here is that these are always matters of degree and no principle is being put forward today which would justify the overwhelming of the states.

Q Mr. Solicitor General, we are talking today about a case that involves the regulation by the federal government of wages and certain conditions of employment of state and localities, so we do not have to go quite as far afield as you suggested a moment ago to answer the question I am now going to put to you. In Fry we dealt not with putting a floor under wages but with putting a ceiling not only on wages but on all salaries of state and local governments. In your supplemental brief, you say the principle of Fry controls this case. Let us suppose that the Congress at this session were to enact a statute--I recognize the political unpopularity of it, but we are dealing in principle, not politics, I hope, at the moment--

assuming the power to regulate the ceiling; in other words, enacting controls on what the states could pay their people at all levels. What would you say about that?

MR. BORK: If I understand correctly, Mr. Justice Powell, I think there would certainly be a serious problem about applying such a ceiling permanently--on other than an emergency basis--permanently to elected officials and top policy makers because that might affect the quality of people you could get for those jobs.

A ceiling generally on the kinds of workers who are covered here--that is, essentially ministerial tasks--I think that is the other side of this case, which is why I think the Fry rationale basically supports us here.

Q Right.

MR. BORK: And I think the question then becomes one of degree of impact. It is quite possible to imagine a world in which state and local government were so unable to maintain themselves that even a statute like this which puts a lower burden on the states and local governments than the federal government places upon itself and a lower burden upon them than is placed upon private employers. It is possible to imagine a universe in which still that would be too much for the state and local governments to shoulder. But that is not the factual situation that we face here.

Q No, but as a matter of principle, did I

understand you to say that if this case is decided in favor of the government, there would be no principled way to avoid holding that the government also could impose ceilings on salaries and wages--

MR. BORK: On any kinds of employees unless the ceiling were low enough so that it could be shown that it actually hindered the states and localities from carrying out their policies. That is my point, that this is always a matter of degree, and one cannot find, except--I must suggest one line of principle. One cannot find by the nature of this kind of law a bright line distinction that will never be availabe.

Let me put it this way, the dissent in Maryland v. Wirtz thought that a principle had been adopted by which the federal government, if it wished, could overwhelm the state budget, the state fiscal policy and virtually draw up the state budget. I think what I am saying to you is that I do not believe that such a principle was adopted there.

If such a principle were adopted there, I would suppose that the case was wrongly decided. I do not think it was.

Q Are we not moving substantially beyond Wirtz in this case; and if you bear in mind what you just said about Fry, as Justice Cardozo said, that principle is commencing to run a bit wild, is it not?

MR. BORK: I do not think it is. I confess that the emotional impact of my brother Rhyne's brief and argument really rests upon a statement of things as facts which, I am sorry to say, are not facts. When I got his brief last week and read it, I was terrified. I thought I was defending a monstrosity of a statute because it turned out that we were going to bankrupt the cities, drive the police forces from the streets, send the firefighters in California home just as the forests erupted into a blaze, destroy the volunteer concept and with it civic virtue. This thing apparently has about the social policy attractiveness of a nuclear holocaust.

Q Mr. Solicitor General, I do not wish to interrupt you except to say so far as I am concerned, I have no interest in the facts in this case. I speak only for myself. I am concerned with whether or not, if we decide this case in favor of the government, there will indeed be any limitation as to how far the federal government can go in regulating the affairs of the states and localities themselves. Give me the power of purse, give me the power to decide what you are paying, I control you. I think that is inevitable. I would like to stick to principle. I am not the least bit interested, so far as I am concerned, in any of my friend Charlie Rhyne's arguments about the dreadful results to individuals. I am thinking about the long-time doctrine of federalism that seems to me to be on the verge of being

destroyed by vesting in the federal government the power to put floors under and ceilings over the wages of federal and state employees.

Let me ask you this, to move to a slightly different area. The Governor of Utah put some cases that I think illustrate the problem. Does the Congress have the power, if you prevail in this case, to say to the states that they have no authority to outlaw strikes against the government by employees?

MR. BORK: I do not think that necessarily follows at all from this case, Mr. Justice Powell. Let me suggest this case presents a particular type of statute, and if you were asking, What could I do with this type of statute to protect federalism, I think the answer would be quite simple. This case lends itself to an easy rule, and that is a no-discrimination rule. It would be appropriate for this Court I think to hold in the right case that the federal government may not impose costs and burdens upon the states and local governments significantly greater than it bears itself. Here the costs and burdens, in terms of minimum wage, imposed upon the state and local governments are less than the federal government imposes upon itself because the federal government employees are subject to this act or to Title V, whichever, provision by provision, is more favorable to the employee. So that I think if it were always held that there could be no

discrimination against the states by the federal government, that would be a perfectly adequate protection for the states.

Q So, if the government concluded that it would allow strikes against yet at the federal level, it also could--

MR. BORK: No, no, I am sorry, Mr. Justice Powell. I was trying to say that when you are dealing with pay levels, that type of statute in which obviously federalism could be destroyed by a minimum wage which said $30 per hour for state employees or it could be destroyed by a statute which said, "You may pay no state employee more than $4,000 a year"-- obviously those things would destroy statutes. But if you use a no-discrimination rule, the federal government, without destroying itself, can never destroy federalism.

Q That was the position Justice Frankfurter took in New York v. United States, and I think a majority of the Court felt that something more was required than just laying down a no-discrimination rule in order to protect the states.

MR. BORK: I think the taxing field is somewhat different than this field, Mr. Justice Rehnquist, and I think it is different for a variety of reasons. But I fail to see in this context why a no-discrimination rule would not be a complete answer to the fears about federalism.

When you get to a case like the 1964 Civil Rights Act, the labor law and the other cases, obviously a no-discrimination rule is not going to work as well to protect

federalism. But here it would work perfectly.

Q Why does it work here and not say in the case where you make the states subject to the Taft-Hartley Act?

MR. BORK: For this reason, Mr. Justice Rehnquist. If the federal government said, "We will subject the states to all the laws of the United States and thereby oust the states completely from any policy enforcement or policy making function," I suppose there would be no discrimination, but there would also be no state sovereignty.

Here if you say the states must pay a minimum wage of the same size that the federal government pays--in fact, here it is less because of this Title V comparison--or, to take Mr. Justice Powell's case, the limitation upon state salaries must be no greater than the limitation upon federal salaries, that kind of test I think would adequately protect federalism.

Q But that precise same argument could be used to say, "Now we come to the question of collective bargaining and so forth." And why not say it is all right just as long as Congress does not discriminate, if it is treating the states no differently than it does a private employer? How could you distinguish that case from this under this principle?

MR. BORK: I think I can. I think we are dealing with fundamentally different types of statutes. The collective bargaining case is a case--or the other cases we

have been talking about are cases in which you subject the states to your rule policy, what the law should be.

Q But Mr. Rhyne suggests, rightly or wrongly--I do not know--that what is a higher policy making function of the state than determining its budgetary priorities and determining who is going to get how much in the way of wages.

MR. BORK: I think the budget in some sense follows from the choice about the various policies you want to carry out and the various programs you want to carry out rather than the other way around. And it seems to me, for another reason, that this kind of statute is less intrusive.

Suppose a state has 500 policies it carries out through its programs, the approach of the standard commerce clause case, when the Agricultural Adjustment Act or the Labor Relations Act is being considered, is to come along and say to the states, "Two of your policies have just been completely wiped out, and our policy is going to take over."

The approach of this statute is to say, "It is going to cost you somewhat more"--and I have been trying to get to the point that it is not going to cost very much more at all--"It is going to cost you somewhat more to run your 500 policies. You may raise taxes and run them all as you wish. You may cut back some of them slightly, cut back all of them slightly, or drop two completely. The choice is yours." That is a much less intrusive kind of statute than a statute that says,

"Remember that law you just passed. It no longer exists. Our law has taken over."

Q But you are being required here to give up absolutely one policy, and that is your policy of paying these particular workers a particular amount set by the state.

MR. BORK: It is quite true, Mr. Justice Rehnquist, that you are required to give up the policy of paying a worker less than $2.20 per hour. I cannot believe that is as much of a threat to federalism as policies go as a statement that in labor relations your policy is ousted and ours takes over.

Q You may feel the state's choice of policy is unwise, but it is every bit as much the state's choice there as it was the state's presumably before Wickard v. Filburn to allow unlimited production of wheat. Maybe that is not a wise choice but it is nonetheless the state's choice.

MR. BORK: But that is my point, Mr. Justice Rehnquist, and that is that this case is like those cases, and to strike this case you would have to have a constitutional counterrevolution that I think would take you back to Schechter and--

Q At least I take it it is your position that if you lose this case, whether we say so or not, the Wirtz case is really dead or it really should be dead.

MR. BORK: I think so.

Q And in all fairness to the law, you would suggest if you lose this case we overrule Wirtz?

MR. BORK: In all fairness to the law. I hesitate to think of the number of cases I think you ought to call overruled if I lose this case.

Q But at least Wirtz.

MR. BORK: But I do not want to suggest that the scorched earth all around these federal statutes--

Q Let me come back to one of your responses a moment ago, Mr. Solicitor General. You said you could not, if I understood you correctly, you could not believe that a $2.20 an hour--I think that was the figure--minimum wage is going to hurt anybody very seriously; is that about what you said?

MR. BORK: That is correct.

Q Suppose Congress raises it to $3, $4, $5, so that in Duke, Iowa and Cheyenne, Wyoming and every other area this new minimum prevails even though costs of living vary substantially from New York City, Washington, to Cheyenne, Wyoming and Billings, Montana and so forth. What is to prevent Congress--is there some constitutional bar to prevent Congress from raising the minimum wage to $5 an hour next week?

MR. BORK: No. I think, Mr. Chief Justice, part of my answer and I think the major part of my answer is the no-

discrimination rule because that shows nobody is attacking federalism.

The answer which I made partially was--

Q Five dollars across the board would not discriminate by definition.

MR. BORK: Oh, no, that is quite right.

Q But is there any constitutional barrier to Congress next or tomorrow making $5 the minimum wage all over the United States and then to apply all of your arguments that you have made here today?

MR. BORK: I think there is no constitutional barrier unless after the statute had gone into effect--and this one has not, and we are dealing here with the grossest kind of speculation as to what this is going to do--after the statute had gone into effect and it turned out that even though there was no discrimination and the federal government was bearing those costs too, that there were states and localities which simply could not function as effective sovereigns with that kind of wage rate, then I think you would have a different kind of lawsuit. That is why I said before I could imagine a universe--I do not think we are in it, but I could imagine a universe--in which even though there was no discrimination, and even though there are not the political safeguards to federalism that do exist--after all, these appellants have an enormous amount of influence with Congress--

Q It is certainly not evident in this case.

MR. BORK: I think it is, Mr. Justice Stewart, because they managed to get their figures by overlooking the exemptions in the statute that Congress put in at their request, which, I must say, is a way of getting high figures.

Q Mr. Solicitor General, on your no-discrimination test, what about a statute that said no state may pay its judges more than federal judges are paid?

MR. BORK: I think I would have a great deal of trouble with that. One point--

Q There would be no discrimination there though. It would meet your test.

MR. BORK: No, no, one of the things I was saying was that I would have more trouble as any regulation got applied to policy-making officials or elected officials. I mean, I would have trouble with any coverage there, but I am talking now about coverage of essentially labor--

Q In Fry the elected officials were not included because under the Ohio statute they were not covered. But were they not covered by the federal regulation?

MR. BORK: In Fry?

Q Yes. Did not the 5-1/2 percent ceiling apply across the board?

MR. BORK: Frankly I am sorry to say I do not recall. Mr. Justice Stewart says it did not.

Q That is my recollection, that it did not.

MR. BORK: Certainly this statute was very carefully drafted to leave out anybody who was professional, anybody who was supervisory, anybody who was policy making or elected.

And I might say my brother Rhyne talked about the local judge and his clerk; neither of them is covered by this statute.

Q May I ask, why would you have constitutional difficulties with my brother Stevens' example of an act of Congress limiting the salary of all state judges to the maximum pay of federal judges?

MR. BORK: When I say difficulty, Mr. Justice Stewart, I mean difficulty, not that it was unconstitutional.

Q Why would you have it?

MR. BORK: Because it seems to me that you are then affecting the quality of people or the type of people that a state may attract to its highest offices.

Q What under the Constitution prevents Congress from affecting that quality?

MR. BORK: If there is anything under the Constitution, it is that value of federalism we are discussing.

Q What about the commerce clause? You thought that there were some limits somewhere that would reach the commerce clause a while ago.

MR. BORK: That is true.

Q I would suppose you would think the judges might be outside its reach.

MR. BORK: I beg your pardon?

Q I would think you might think that judges were outside its reach.

MR. BORK: I might think that, but I think that a large part of my reason for thinking so would be the federalism counterweight.

Q If you apply the Perez analysis, you can define a class of employees that would include judges.

MR. BORK: You can if you stick to the commerce clause in its usual rational relation test and do not bring into play the counterweight of federalism, which I am explicitly willing to do and indeed think should be done. And I am arguing that in this case when that counterweight is fully considered--

Q If you acknowledge the judges example presents you with difficulties, it seems to me you are also acknowledging that your non-discrimination test is an inadequate test.

MR. BORK: I am sorry. For this kind of case, the statute we are facing today, it is a totally adequate test because this statute very carefully does not reach--

Q Shall we use different tests in different cases?

MR. BORK: As circumstances change, Mr. Justice

Stevens, I think you would have to. For example, if you begin to see federal statutes proliferating into every field so that the divorce law is taken over and the commercial code is taken over and so forth, I suppose at some place this Court would have to frame a test to call a halt some place.

Q Of course, these things always happen eventually, do they not? No one has a coup d'etat in this area. They take it over piece by piece and bit by bit, and that is what I thought some of this case was about.

MR. BORK: I was trying to suggest, Mr. Chief Justice, that this case, by its nature, lends itself to control more easily than other kinds of cases and by its nature is--

Q Control by whom?

MR. BORK: The judiciary. And also is less intrusive upon state sovereignty than the other kinds of statutes that this Court has held well within the commerce clause. So that my point is I quite agree there may come a time when a stopping place has to be defined. But to call this case the occasion for drawing that line I think would be to draw a line at an illogical place for the wrong reasons.

Q In some of the colloquy, Mr. Solicitor General, there was some discussion about elected judges, elected officials. There are some states where the judges are appointed, and let us assume for the moment that half of the states followed the hopeful trend among many judges and had

something like the federal system--that is, if Congress did not impose it on them first. Let us assume that they did it voluntarily. Then would the appointed judges be exempt from the reach of Congress and the elected judges would be subject--

MR. BORK: No, Mr. Chief Justice, when we were discussing judges, I did not intend to make a distinction between elected and appointed judges. It seems to me you are dealing with high policy officials at that point, and I would have grave trouble in allowing regulation of such officials.

Q One of the very figures that you mentioned--I think you had a figure of $135 billion, the total purchases of all government except federal.

MR. BORK: Yes, in 1971.

Q And there seems to be some consensus that somewhere, give or take, 80 percent of all that money is spent for payroll. Assume it is somewhere close to that. At any rate, it is a great many billions of dollars. It would be somewhere from $100 billion to $110 billion of the total expenditures of all state and local government in the country that would now come for certain purposes within the reach of the control of Congress. Is that not so?

MR. BORK: I have the figures on that, Mr. Chief Justice. The 1974 amendments cover workers whose total wage bill is $36.6 billion. The Labor Department has worked this out, and the Bureau of Census has provided statistics. The

cost of the minimum wage to the 90,000 persons we think are paid less than the minimum wage in our brief--the supplemental brief, the most recent one--discloses how that figure was arrived at. The cost of the minimum wage would be to add $33 million to the $36.6 billion or to add one-tenth of one percent. The maximum overtime cost would be to add $366 million and that is inflated because that is based on a 40-hour week and, as our brief explains, a 60-hour week without overtime is allowed and all kinds of exemptions are allowed. But basing on a 40-hour week and with no averaging, it would come out to $366 million, which is one percent of the wage bill that it covers. That is a total of $400 million all together, which is a little different than the figure of well over a billion that Mr. Rhyne derived on a basis we do not know.

Q Whose figures are these, Mr. Solicitor General?

MR. BORK: These are the Labor Department figures.

Q And they are in by affidavit or how do we have them before us?

MR. BORK: They are in our latest brief. It is in typewritten reply to the supplemental brief.

Q Yes, but before that--there I was aware that you had it. But we take judicial notice of these figures because they are Labor Department figures; is that it?

MR. BORK: Some of them were in reports to Congress,

and I forget precisely where that one was. Maybe I can be told where it was. I do not remember whether that was in a report to Congress or where it was.

Q I suppose if we were to give them any weight, we would have to take the risk that they might not be any more reliable than some of the figures of the Social Security System and a great many other things that are suddenly discovered to be gravely wrong mathematically, actuarially.

MR. BORK: These are Bureau of Census figures and Bureau of Labor Statistics figures. They are published. They may--I cannot say that there is no possibility of any error in them, but it is possible to reconstruct the way they were compiled and published. And the other figures we have are based upon Mr. Rhyne's correspondence with various local officials, and there is no way to tell how those were compiled. But Congress's estimate was that this bill would cost less than two percent, perhaps over one percent, of the wage cost.

I would say these figures suggest that the total cost would be 1.1 percent, which is not, I think, controlling 85 percent of state or city's budget.

Q I have been thinking about your suggestion that perhaps federalism would be saved in part at least if the federal government were not required to impose any different limitations or different obligations on the states than it is willing to impose on itself. But does that not cut against the

basic tenet, one of them, of federalism that allows for diversity and experimentation?

If you were a judge in New York or California where the salaries are higher than for federal judges, if you were told that you would be paid exactly like the federal judges in Washington--or take the case of the government of Utah, which is a relatively rural state with wage levels there presumably far lower than they are in New York City or Washington, D.C.--simply because somebody up here in Washington imposes on you the same rules and regulations it is willing to operate under in an entirely different environment does not seem to be very helpful.

MR. BORK: In the first place, of course, Mr. Justice Powell, the federal government employees do operate in the same area so that they are imposing upon themselves a cost for that area the same as they impose upon the state.

Q But does the federal government have differentials by region?

MR. BORK: Not, I think, in this area. Perhaps it should. But I do not think that is a constitutional requirement that it should.

Q Do you really think federalism is promoted by homogenizing the whole country in the way you suggest?

MR. BORK: Now, Mr. Justice Powell, I trust I have not suggested homogenizing the country.

Q It is a step toward that.

MR. BORK: Of course, every exercise of the commerce power is a step toward the obliteration of federalism.

Q I understand that, but I come back to Justice Rehnquist's distinction. This case arguably is different. I realize you have a different view, but I say arguably. This is the first major intrusion, starting with Wirtz, that I know of in which the federal government is saying to the states and localities, "We are going to run your labor policies and fix your wages and salaries," and that is a major departure, as I view it.

MR. BORK: That entire part of my argument, Mr. Justice Powell, was devoted to saying there is no difference between this case in its effect upon state sovereignty than in Darby--United States v. Darby--where they told the state of Georgia that for the first time Georgia had a minimum wage, which it did not want, and that was ousting state sovereignty. I do not see the difference.

The suggestion is that the difference is that you have touched the state; in some metaphysical way, you have touched the state's body in a way that you do not when you merely take the laws that the state passes away from it.

Q Arguably you have impaired the freedom of the state to function, as you suggest; if these wages were set at a limit that impaired its solvency, maybe you would have a

different case. But it would start down this road. As a principle, it is hard to see where one would stop.

MR. BORK: Mr. Justice Powell, I think that has certainly been true ever since the first exercise of the commerce clause. You have introduced a principle which becomes a matter of degree.

Q But did they not relate to private activity?

MR. BORK: My point about that is that I think there is no distinction between a statute that touches the state in this way and a statute that touches the state by saying it may not govern its citizens in the way that it has chosen to do so in the past. I recognize that in the Fry dissent this kind of point was being made, that cases like Darby and Jones & Laughlin are not really relevant because those were private citizens who were making a claim which could only be a claim that Congress lacked legislative power. I think those cases are relevant. The suggestion there is that the state has a different inherent objection based upon federalism. I cannot understand how that would come about.

For one thing, the Tenth Amendment reserves the rights to the states and the people and makes no distinction as to whether it is a person or a state that is raising the federalism claim.

Q Then if you cannot understand that, why--if I may go back--do you have any doubt at all about the power of

Congress to limit the salaries of state judges?

MR. BORK: Why do I have any doubt about it? Because I think, Mr. Justice Stewart, that when you get to limiting, controlling what the state does with respect to what the state does with respect to its governor, its judges, its legislators, its policy making officials, its cabinet officials, you are effectively limiting them in the way they can get people and deal with people in making policy. Here the federal government has gone nowhere near that area. The statute stayed as far as possible away from anybody who could be called a supervisor--

Q I know that as a matter of fact. But we are talking about a constitutional principle.

MR. BORK: It seems to me that constitutional principles change with circumstance, and it seems to me that when you are dealing with the governor of a state, with the state supreme court, you are dealing with the state in its most intimate--the center of its policy making apparatus. Say you are paying that man who is shoveling snow 20 cents more an hour; I do not think you have done the same thing at all.

Q Do you make the same argument for a minimum salary for a state judge as for a maximum salary?

MR. BORK: Mr. Justice Stevens, I do not think I can elaborate all the distinctions I would want to make if I were

faced with that kind of thing. But as a general matter I would be much more troubled by any federal regulation of what you can do with respect to a state judge in paying him and so forth.

Q That is because the judge is such an important part of the state government?

MR. BORK: I think it is because the judge--

Q Is he less important or less in the traditional sense than the police force?

MR. BORK: Yes. I think when you are dealing with a policy making individual, it is different.

Q Because of the policy factor.

Q But judges did not make policy generally.

MR. BORK: There is a school of thought centered in the Yale Law School, Mr. Justice Rehnquist, that suggest that they do occasionally. But I was trying to prevent it in this case. [Laughter]

Q Touche.

Q Mr. Solicitor General, I have been thinking also about just drawing a distinction between policy makers. Let us assume for the moment that we are talking about the superintendent of education of a state. And you would say, I take it, that the federal government would not have power to regulate his salary but obviously would have power to regulate, under the argument you advance, the salaries of

people whom he employs.

MR. BORK: The secretary's salary.

Q I am going up to an intermediate level and see what your position is. Suppose he has, as state superintendents necessarily do have, 20 or 30 quite key positions in the organization, maybe 50 or 100, depending on the size of the state. Are they policy making people?

MR. BORK: They may well be.

Q How far does this go down the line?

MR. BORK: Obviously, Mr. Justice Powell, we are dealing with a complete and unbroken spectrum from somebody who is emptying wastebaskets to somebody who has the power to call out the National Guard and so forth--the governor--to suppress insurrections. And I do not know that I can--the trouble with this whole field is we are dealing with a complete spectrum of power in the commerce clause, and I do not think it is possible to specify with a bright line right where the power breaks or right where the distinction breaks.

Q Wherever anyone has what could fairly be characterized as a policy position, however small it may be in terms of impact on the state government, would be different from--

MR. BORK: I think so. I think so because then you are getting close to the essence of sovereignty.

Q You surprise me, Mr. Solicitor General. Do you

think of this as a matter of a place where the commerce clause power stops or a place where, despite acknowledged power under the commerce clause, there is an impediment or prohibition in the Constitution?

In other words--and I borrow this from my brother Rehnquist's dissent in Fry--Congress has undoubted power under the commerce clause, I would suppose, to limit the content of what shall be published in interstate magazines, magazines that go interstate. No question of its power under the commerce clause. But also no question of its lack of power to do that, not because of a limitation under the commerce clause but because of the prohibition of the First Amendment. That is what you run into, is it not?

MR. BORK: I think what I am saying is that the position in the Fry dissent seems to separate out the commerce clause and something like a personal privilege that the state can assert.

Q A prohibition or a limitation imposed from elsewhere in the Constitution.

MR. BORK: I had always thought that the Tenth Amendment merely made explicit what the fact of the enumeration of powers implied, and that federalism lived in the interstices of the enumerated powers. But I think there is something more than that, and I do not think one has to use the Tenth Amendment as a textual peg. What there is more than

that is a document that contemplates this dual system of government; and if the document contemplates that, then I think, reasoning not from any particular textual passage but reasoning from the structure, the Constitution in the pure sense of the word, one, says if the federal government undertakes to destroy a state government, the judiciary may stop it.

Q The Constitution stops it.

MR. BORK: The judiciary does because of the warrant given it by the Constitution.

Q More simply, yes.

MR. BORK: So, there is that counterweight in the Constitution. I have no problem with it. I think in order to make a distinction between this case and all the other commerce clause cases, I really think one has to adopt the Fry dissent. And I think if one does that, one has all kinds of difficulty--

Q You yourself have some difficulties, it seems to me, in answering Justice Stewart's earlier question where you are talking about a maximum salary for judges and you say Congress cannot impose that and presumably because of some sort of principles of federalism. Yet it is perfectly clear, I would think, under Jones & Laughlin, that Congress can impose a maximum salary on any president of a business located within its jurisdiction, and the reason for that is because there is

no federalism principle there or at least none that has ever been enunciated by this Court.

MR. BORK: I find great difficulty there. I would like to address that, if I may, at a little length.

Q And also you mentioned the dissent in Fry. There was also, you may remember, a dissent in Wirtz.

MR. BORK: Yes. I had attempted to discuss that one twice. But I think in order to distinguish Darby from this case, which is the real question for us, that you would have to have a constitutional innovation of really some dimensions because one has to say that to touch state is forbidden and a state can raise objections that an individual cannot in the name of federalism, which is of course what the Fry dissent suggests.

Q You should have answered Mr. Justice Stewart no, that was not your approach at all because I thought he was conceding everything about Darby, yet nevertheless there is something like the First Amendment operating here, not in Darby.

MR. BORK: But I am suggesting it was operating in Darby, Mr. Justice White. The case came out as it did, but I am suggesting that the federalism objection is validly raised by an individual or an enterprise as much as by a state.

Q You could still accept the federalism

implications of Darby and have a completely different view of it here.

MR. BORK: I do. Oh, I am sorry. I am sorry.

Q Oh, I wish you would.

Q Then why do you get the different result for the setting of a maximum ceiling on a corporation executive by Congress and the setting of a salary on judges if Darby and Wirtz are the same?

MR. BORK: Darby and Wirtz are the same only, Mr. Justice Rehnquist, in the sense that federalism could be considered in both cases, in each case, even though in one case it was raised by a lumber manufacturer and in the other case it is raised by a state. But it depends upon what you are applying the federal regulation to. If you are applying it to a set of individuals, a bank president, then you have--let me put it this way. I do not think the distinction between whether the law operates upon the state, as this one does, or upon the state's citizens makes any difference. And I would suppose it does not because I would suppose, among other things, that that would mean that the states could waive federalism, that if only individuals came in here to this Court and said Congress has exceeded its power and is taking away the policy making functions of the state by replacing its legal code, that this Court would have to say, "But you are not the state and therefore we do not consider federalism even though

federalism is destroyed." I do not believe that. I do not believe that federalism is an immunity personal to the state which the state may waive if it does not choose to raise it.

Q Then your assurances to the various members of the Court that when we get to a really tough case of impairment of state sovereignty in the sense of affecting the state as a state will have a remedy, are really illusory because you cannot tell me that the Perez line of reasoning governs this type of case where you are talking about the state, that there is any stopping place. There is not.

MR. BORK: I think if this Court becomes impressed with the idea that in fact the states are being ousted as law making and law enforcing bodies, that a stopping point will have to be called.

Q Even if it is done little by little, bit by bit?

MR. BORK: I would think so, Mr. Chief Justice.

Q What do you do, add it up cumulatively and say, "No one of these would have been a serious invasion but taken all together, they now amount to one"?

MR. BORK: There may be various kinds of tests that can be constructed.

Q If the Court did not stop short of Perez, where can it stop so far as commerce power goes? And it is your submission that that is all that is involved here, as I

understand it--that the same federalism interests are present in a Perez type case as they are in this type case. That is your submission.

MR. BORK: Yes, but the circumstances of that case may not raise it.

Q Has the Court in Perez passed any conceivable stopping point as far as commerce power goes?

MR. BORK: I trust not. If it becomes apparent that the commerce clause is in fact destroying the states as entities with sovereign powers, I trust at that point--I do not think the Perez case involved that--I trust at that point you would call a stop.

Q Where did a state enter into Perez?

MR. BORK: I do not think it does very much. That is why I think that federalism is not very heavily implicated there.

Q It was a question of whether the federal government, the Congress, could regulate some hoodlums engaged in loan sharking. You have not got any sovereign state and its powers involved there, have you?

MR. BORK: You probably have state laws about the subject.

Q You mean whether the state had gone into that field or not.

MR. BORK: The state probably does have laws about

loan sharking and so forth.

Q You mentioned the Tenth Amendment twice but only in passing. And at least I got the impression the second time that you thought the Tenth Amendment really was not necessary, that the enumerated powers took care of the same proposition. Does the Tenth Amendment have nothing to do with this case?

MR. BORK: Only I think in the sense that the Tenth Amendment confirms the implication to be drawn from two other things. One is the implication to be drawn from the fact that powers are enumerated and therefore in some sense limited. And the other is the fact that the document, the Constitution, specifies dual sets of governments and to that extent specifies that there is a federalist value in the document just as there would have been, I think, constitutional protection for free political speech if there had never been a First Amendment.

Q You do not think the Tenth Amendment has any function such as the First Amendment has on the commerce power in Justice Stewart's hypothetical?

MR. BORK: If it does, one could say that the federalist value is located in the Tenth Amendment, but I think it is located elsewhere. I think the Tenth Amendment is just a truism as this Court said in Darby. If it is located in the Tenth Amendment, then it is certainly not true

that this case is different from Darby, because the Tenth Amendment explicitly says the rights are reserved to the states and to the people if not delegated to the Congress.

Q Assuming, Mr. Solicitor General, that there may be some who disagree with you that Darby and Wirtz are really the same or that the dissent in Fry takes a different approach. I take it that you would think that using the limitation approach on an exceeded power might be less bothersome to you. Let us assume that some of us thought that we could either take it on the commerce ground or the so-called Tenth Amendment ground or the federalism ground. Which would you suggest?

MR. BORK: I would suggest, if we are talking doctrinally, conceptually, I would suggest that the federalism ground is an independent weight which inheres in the structure of government the Constitution establishes, and I think it is mistaken to try to attach it to the Tenth Amendment as a peg or the commerce clause as a peg. It is a generalized constitutional value.

Q Would you prefer that approach to saying that the commerce power of the United States just does not reach this particular segment of state activity because it does not have a nexus with it?

MR. BORK: As a professor of law, I would prefer that approach. As Solicitor General, I would find either approach

that reached that result extremely painful. And, furthermore, I think it will prove very hard to explain why this case is more dangerous than Darby and all of those cases without returning to something like the 1930s.

Q You do not think this case goes beyond Wirtz?

MR. BORK: I do not think this case goes beyond Wirtz. I do not think this case is very threatening to federalism at all. I think it is a very light impact upon workers of really a menial status, and this Court has ample means of using the federalism value to limit future statutes that might begin to move towards judges or legislators or do something terrible.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Rhyne, do you have anything further?

REBUTTAL ARGUMENT OF CHARLES S. RHYNE, ESQ.,

ON BEHALF OF THE APPELLANTS

Q Mr. Rhyne, before you start, I would like to mention to you a thought that has been running through my mind and give you a chance to comment on it. Article IV provides that the United States shall guarantee each state a republican form of government, and the Court, as you know, has held that questions under that section are political in character. As I listened to the Solicitor General characterize your argument about policy and the disastrous effect of this

statute on the states, it occurred to me that your clients are in a peculiarly effective position to make rheir arguments known to the Congress. I wonder if you would comment on whether or not this is the kind of problem that could best be addressed by Congress.

MR. RHYNE: Let me tell you exactly what happened in Congress. They did address their arguments to the Congress, and they were beaten by big labor. Two Secretaries of Agriculture testified that this act was--opposed the act, and one on the ground that it would so overburden small government--really they should have said big government--that it was unwise. Then there was a presidential veto, which was upheld. And then without further hearings, big labor steam-rollered this through the Congress again. That is the congressional record which cannot be challenged. It is the record of this particular legislation.

Q Is there another answer to that question, if I may suggest it, that that is the political remedy, but you claim you have a constitutional barrier that prevents Congress from doing what it has done?

MR. RHYNE: That is right, Your Honor.

It always disturbs me when counsel on the other side attacks figures. I would like to call the attention of the Court to one very important thing. Last night, I say, I got very late a brief from the Solicitor General in which he

comments a lot on a brief that we had filed, and the Urban Data Service is relied upon throughout that brief. It so happens that the Urban Data Service, which I agree is the most reliable, the most knowledgeable, the best of all sources of interest in this country on government, is the one that in the appendix to our brief made the estimate of $1 billion a year.

Q One million?

MR. RHYNE: One billion dollars per year. They know what they are talking about. They base this on reports from city managers and those on the local level. Those people are not liars. They report what the facts are. And so I say if the Solicitor General in his brief can rely on the Urban Data Service, so can we. And that is exactly what we have here.

Secondly, I would like to say there was some question about whether 85 percent of the budgets are indeed personnel. That is a fact that has appeared, it seemed like, a thousand times in the media. I find at the first argument on page 38 that the Solicitor General himself said, as I understand it, in municipalities the budget is 80 to 85 percent wages.

The whole business that is so bothersome here is that the policy of a state, the policy of a city, the policy of a county is its budgets. They are like telephone books. It tells what they are going to do, who they are going to serve, who they are going to hire, and what they are going to

pay them. And what happens here is for that telephone book we are going to have this telephone book; the federal regulations replace it. And in addition to this telephone book, which sets forth all the federal regulations under the Fair Labor Standards Act, there is in addition the very minute regulations as to police and fire that makes you report every time--how long they eat, how long they sleep. It is the most intrusive, most absolute interference that one can imagine.

So, I would conclude that if we want in this 200th year to have a unitary government, this is the way we will get it.

I went to the trouble of calling the solicitor of the City of London to ask him who fixed the wages of his people. I would like to know; I wanted to know what Parliament had to do with it. He said in the overall, Parliament can do it. "But underneath it, we do it all."

We have checked in Australia; we have checked in New Zealand; we have checked in many other countries. There is no country in the world where the national government, unless it is unitary, fixes the pay and the wages of everybody the way it is proposed here. And I think that this idea of the federal regulations and the federal regulatory and the federal courts--because you are going to be the final arbiter of all of this--they point out in these regulations that these are merely suggestive, that you go to court and get

everything, and you are going to have class actions and you are going to have all these costs and attorneys' fees, and you are going to have it in the federal courts because that is the only place you can get it.

Q Of course, that is Congress's perfect right to confer a cause of action to go into federal courts if the statute is valid.

MR. RHYNE: Yes. I am merely urging that this is one of the intrusions into this whole thing that states and cities and counties, as the county brief points out, that they are not used to dealing with. Why have duplicate regulation, regulation on top of regulation? That is what you have here. And we have a complete system now, and when you dump all of the federal regulation on top of it, it will simply make states' and cities' fiscal integrity a question not only in some of our larger cities but in our smaller cities as well. They are on the borderline now. They cannot take the cost of this legislation.

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

[Whereupon, at 3:00 p.m. the case was submitted.]

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