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In the

Supreme Court of the United States

Environmental Protection Agency, Petitioner)	
v.)	
Edmund G. Brown, Jr., Governor Of California, Et Al.;)	
Environmental Protection Agency, Petitioner)	Nos. 75-909
v.)	Nos. 75-960
Maryland, Et Al.,)	Nos. 75-1050
State Air Pollution Control Board, Petitioner)	Nos. 75-1055
v.)	
Russell E. Train, Administrator, Environmental Protection Agency;)	
and)	
Russell E. Train, Administrator, Environmental Protection Agency, Petitioner)	
v.)	
District Of Columbia Et Al.)	

Washington, D. C.
January 12, 1977

Pages 1 thru 111

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546-6666

IN THE SUPREME COURT OF THE UNITED STATES

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ENVIRONMENTAL PROTECTION AGENCY, :
Petitioner :
v. :
EDMUND G. BROWN, JR., GOVERNOR OF :
California, ET AL.; :
:
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Petitioner : (909
v. : Nos. 75- (960
MARYLAND, ET AL.; : (1050
:
(1055
STATE AIR POLLUTION CONTROL BOARD, :
Petitioner :
v. :
RUSSELL E. TRAIN, ADMINISTRATOR, :
ENVIRONMENTAL PROTECTION AGENCY; :
and :
:
RUSSELL E. TRAIN, ADMINISTRATOR, :
ENVIRONMENTAL PROTECTION AGENCY, :
Petitioner :
v. :
DISTRICT OF COLUMBIA ET AL. :
:
-----X

Washington, D. C.,

Wednesday, January 12, 1977

The above-entitled matter came on for argument at
10:58 o'clock, a.m.

BEFORE:

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

APPEARANCES:

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C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
A. Raymond Randolph, Jr., Esq., for the federal parties	3
David G. Hawkins, Esq., for the Petitioners-Intervenors	53
Joel S. Moskowitz, Esq., for California Petitioners	61
Henry R. Lord, Esq., for Maryland as Respondent	88
<u>REBUTTAL ARGUMENT OF:</u>	
A. Raymond Randolph, Jr., Esq., for the federal parties	110

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Randolph, after reviewing these briefs and seeing some of the developments that have come in those briefs, it occurs to us that perhaps you and Mr. Lord, who have the lion's share of the two hours that we've allocated, may not need all that time. And of course you know there's no compulsion to use it just because it's been allocated. We'll leave that up to your good judgement.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,
ON BEHALF OF THE FEDERAL PARTIES

MR. RANDOLPH: Thank you, Mr. Chief Justice.

May it please the Court:

These cases are here on writs of certiorari to the United States Court of Appeals for the 4th, 9th and District of Columbia Circuits. At issue are the Clean Air Act Amendments of 1970 and regulations promulgated by EPA requiring the respondents to take certain actions to control motor vehicle air pollution.

Two of the Courts below, the 9th and 4th Circuits, decided the case on statutory grounds, calling EPA's regulations invalid insofar as they required states to comply with them. The District of Columbia's circuit's decision is more difficult to summarize. Basically, it agreed with EPA that the state, as owner of the pollution source, the highways,

oxidizes nitrogen in the air. In the presence of sunlight several of these pollutants react in complex ways producing photochemical oxidants, or what is commonly called smog.

The result is thousands of deaths yearly, millions of days of illness, and billions of dollars in health cost and property damage throughout the United States.

One more fact -- and I think this is very important to our case: air pollution travels. It moves. It doesn't respect state boundaries. It doesn't stay located in one place. The Court may have seen an article, I don't know the truth of it but it illustrates my point, in last month's New York Times where it was reported that the vineyards in Western New York were being destroyed by air pollution from automobiles in Gary, Indiana. I think that's a vivid illustration. It's possible; whether it's true or not I don't know.

One other fact: in Section 101 of the Act that's in issue here Congress found that the predominant part of the nation's population -- this was the very first finding in the Act -- is located in the rapidly expanding metropolitan areas of the country, which generally cross state borders or are very near state borders.

Now I don't think I exaggerate -- before I talk about the Act -- to say that when Congress legislated in the Clean Air Act, it was doing so, it was acting, for

many of the very reasons that the founders met in Philadelphia in 1787 and established the Constitution of the United States. Let me be explicit.

One of the framers' main objectives was to keep a national system of government whereby one state could not pursue its own selfish interests to the injury and detriment of its sister states and the citizens of the sister states.

I think you all recall, one of the most famous statements about why the constitution met was made by Madison. He likened New Jersey, sitting between Philadelphia and New York, as a keg tapped at both ends. Or North Carolina sitting between South Carolina and Virginia as a patient bleeding from both arms.

My point is that in arguing here against national action because of compulsion on the state, the respondents have to confront the Congress clause at its very core. The air is a national resource. Air pollution travels. And as I hope to demonstrate in this argument, it is no part of our federalism that the health, the welfare and the property of the citizens of one state have to suffer because surrounding states refuse to take action to combat air pollution stemming from the use of their highways.

Now, in the Clean Air Act amendments of 1970 Congress recognized that control of air pollution was the primary responsibility of the states. But strong national

action was demanded. Previous efforts -- federal efforts -- to combat the mounting crisis had failed. The history is recounted in the Court's opinion in NRDC v. Train, -- or Train v. NRDC.

Suffice it to say here that despite offers of technical and financial assistance to the states, the states have made little progress in meeting their responsibility.

The 1970 amendments -- I can describe them quickly. The Court had two cases last term dealing with the Clean Air Act, and I'll be rather brief in this description. In the 1970 amendments the EPA administrator was required to set air quality standards at a level that protects against the adverse effects on health and welfare.

Section 110 of the Act set forth the process for establishing state programs to achieve and maintain these air quality standards.

Now exactly how air pollution was to be controlled within a state was left initially to the state itself. The state was to submit a plan to EPA which EPA was required to accept if the plan met the broad outlines set forth in Section 110 of the Act.

Now two of those requirements set forth in 110 are that the state plan contain, where necessary, transportation controls and an inspection and maintenance program.

If the state plan was deficient, EPA would issue a substitute, at least for those parts of the state plan that were deficient.

Although the state plans were due by January of 1972, EPA gave an extension to all the states where transportation controls would be required to meet ambient air quality standards. It did this because EPA realized, just like everyone else did, that we had very little experience with transportation controls. As a matter of fact, that was why we had a problem.

However, a federal Court of Appeals sitting in the District of Columbia Circuit held that the Act did not permit this delay, and ordered that the extension of time be rescinded, and EPA complied.

By late 1973 the process of formulating state plans had been completed. Some of EPA's final regulations -- which in many instances, I might add, reflected state choices; and by that I mean, reflected the choices of the states when they submitted proposals or proposed plans -- imposed duties on the states with respect to state owned highways, and required the establishment of an emissions inspection and maintenance program for vehicles registered by the state.

Now respondent's statutory argument in this case is that the amendments -- the 1970 amendments -- do not

allow compulsion on a state to act to reduce motor vehicle air pollution. In other words, to put it bluntly, a state can never be in violation of an implementation plan signed to meet air quality standards.

#184

QUESTION: The argument doesn't declare that part of it--

MR. RANDOLPH: I think that's the problem with it.

QUESTION: I mean, don't they concede that a state can be in violation as far as the municipally owned incinerators?

MR. RANDOLPH: That was the point I was about to make. So if that is true -- and I think there is no doubt whatever --

QUESTION: And they concede that to be true, do they not?

MR. RANDOLPH: They concede that.

QUESTION: Therefore, they do not make the broad argument that you just paraphrased.

MR. RANDOLPH: I think they --

QUESTION: By that, if they concede that, they don't.

MR. RANDOLPH: A state can be a violator, and I would say the respondents admit he can.

The question then is, is whether a state, by owning the highways, can be a source of pollution -- an owner of a source of pollution -- which has to comply, like anyone else, with the Clean Air Act's requirements.

Certainly if the state owns a municipal incinerator, it's clear that it's a source of pollution, and it has to comply.

I think that is their position. And the EPA's position, I think, is clearly set out in our brief. And I think it's fundamental to our argument. The EPA administrator determined early on, before any constitutional issue was raised -- this was purely a matter of dealing with statutes. Given the legislative history it's a judgement by the administrator, and I don't think it's open to reasonable doubt that the states, by owning a highway, own a pollution source, and can be required to take action just like a private source owner can.

QUESTION: But you've gone over that pretty quickly by saying that they own the pollution sources. Well, the source of the pollution isn't the highway really, is it? It's the automobile.

MR. RANDOLPH: Well, I agree that without automobiles we would not have air pollution. Without people driving their automobiles about, we would not have air pollution. Without a highway we would not have air pollution.

QUESTION: On your theory the ownership or the control of -- as exists in some places -- of the airports and of other such facilities would --

MR. RANDOLPH: Yes.

QUESTION: -- put them into the same --

MR. RANDOLPH: Yes. Yes. Any facility --

QUESTION: And municipally operated sewers --

MR. RANDOLPH: Right.

QUESTION: -- in which the private sector puts effluents?

MR. RANDOLPH: Any sewer --

QUESTION: The sewers wouldn't pollute unless there were effluents put in there by private people.

MR. RANDOLPH: Yes.

QUESTION: Without spark plugs you wouldn't have auto pollution.

MR. RANDOLPH: That's right. Without manufacturers of automobiles we wouldn't have air pollution. I don't know whether this is properly characterized as a pass-the-buck case, but where does the buck stop? Does it stop at the automobile manufacturers? I think Congress said, yes it does. It stops right there. And we're going to regulate that and require them to manufacture cars in a certain way. They are being required to do that. Does it stop with the citizen who is driving the car? Well, of course it does, it stops with the citizen. Who's going to pay for all this in the end? The citizen is going to have to pay. Does it stop with the federal government? Yes, it stops with the federal government. The Clean Air Act imposes, I think

as the Court said in Train, an incredibly difficult problem of regulation on the federal government. Money has to be spent and so on and so forth. Does it stop in states? States say no: or at least these four states and the District of Columbia say no. The federal government should do it all. Well, we don't think that's the right construction of the act, and we don't think the constitution requires that result.

We think it's quite a simple proposition involved here as far as the EPA's determination. Is it unreasonable, as the Administrator found, that when a property owner invites others to engage in certain activities on the property, the owner can be held responsible for the harm caused by those activities? That is the EPA's Administrator's decision.

The property owner in this case happens to be the state. The property is the highway. The person using them, the invitees or licensees, are the citizens.

Further -- and as Mr. Justice Stewart said, we believe the highways are quite analogous to the sewer systems. In both instances the polluting matter comes not from the state, it comes from the private citizen. Yet a state system of sewage disposal is subject to federal regulation under the commerce clause. The Court so held in the Sanitary District case.

QUESTION: Well, of course, nobody questions that. The question here is whether Congress has authorized the Administrator to require the states to enforce his plan. No one questions the Administrator can promulgate his own plan and enforce it, if he finds the states' plan is not adequate. The question is whether he can force the states to enforce it.

MR. RANDOLPH: Yes, well I don't know if I'll accept that construction of the Act. It's not the Administrator forcing the states to enforce his plan. I mean that's like saying -- what it is is forcing the states to comply with his plan, not forcing --

QUESTION: Well, to provide all of the inspectors and police and so forth to carry out his plan, rather than having the federal government provide those people in implementation of the federal plan, isn't it?

MR. RANDOLPH: Well, that is the choice, I suppose, yes. It may be something different than that, it may be requiring the state to do this or not having it done at all, depending on what the practical difficulties are of having, for example, a federal highway control on the nations highways.

QUESTION: Well, during the second World War we managed to have OPA federal officials in every hamlet; during those various times we've been at war we've had

draft boards which were -- you know, the salutation was, you've been chosen by a board consisting of your friends and neighbors. And that's who they were.

MR. RANDOLPH: Well, I think we pointed out in our reply brief that the draft -- I think is far afield now, but we used it for another point; the draft in World War II was done by requiring state officials to register the people.

And the question here is not -- I don't think the question here is really, which is the best system, having federal highway controls for the first time in the country's history, having federal inspection of maintenance. The question here is whether the states have a responsibility here to do this by themselves.

QUESTION: Well, the question is whether Congress has authorized what the EPA Administrator has done.

MR. RANDOLPH: That's one question. And -- the first question in the case, I agree.

Now, the only response -- I've developed what the EPA Administrator determined. We've set forth in our brief the legislative history. We set forth in our brief the various statements that were made on the floor of Congress.

The only response, I think -- I think it's fair to say that respondents make is that they seek to answer our argument by misstating it. They argue that Congress

could never have intended this, because EPA's position knows no rational bounds. One might as well say that pollution from the factory results from state action through, for example, zoning decisions. I think that's the example that they give at, if I'm not mistaken, page 44 of their brief.

But that ignores the fact that the factory unlike the highway sits on private land. And if there is one thread running through the entire Clean Air Act, it is that the owner of a source of pollution is responsible, can be made responsible, for controlling the pollution. It's --

QUESTION: If you carry that to its logical conclusion, most of the highways in this country are resting on easements with a diversionary right to the fee owner; isn't that so? So that if you're talking about the ultimate fee owner, you're talking about the owner of the adjoining land.

MR. RANDOLPH: I don't think that's so, Mr. Chief Justice. At least I -- that the highways of the country are resting on easements. I think the highway is taken by eminent domain.

#316 QUESTION: The states said that it reverts back to the fee owner of the underlying land.

MR. RANDOLPH: Well, that may be. But the fact is that the states are the ones that have that highway. The

states, like a private owner, are the ones that are allowing people to come on it and use it for a certain purpose. And as a result of that, pollution is generated.

It would be no different, for example, if the state owned a facility in the municipal incinerator, let's suppose; but the state never operated it; and invited a private contractor to come on and run the municipal incinerator. We think that the state in that situation could be regulated and required to control that private contractor, just like if the private contractor had been operating on his own property with his own factory spewing resources into the air, pollution into the air.

Now, they make another point in this regard with which we agree. They say the states are forced to comply with federal law because they haven't exercised their police power. I think that's accurate. But all that means is that we would not have federal legislation under the Clean Air Act if the states had controlled air pollution. It can't mean anything more than that, because, to use the example that we've been talking about, if a state incinerator is poisoning the atmosphere, it's because the state hasn't exercised its police power in the way the Congress wanted the state to do it.

Yet respondents admit that such facilities must comply with federal pollution standards -- air pollution

standards.

Now this brings me to the point, I think, unless the Court has further questions in regard -- I probably should mention one thing which is not mentioned in our brief as far as the statutory point is concerned. And I informed respondent's counsel of the fact that I may mention this.

I think the appearance and the impression the Court may have is this whole idea of requiring states to comply under federal law is something that was never talked about very much during the hearings. And it's not accurate. The reason why we don't find great debates about that -- and I might remind the Court, the Clean Air Act passed the Senate 73 to nothing; it passed the House, I think, 347 to 1. The reason one doesn't find great debates about that, and I think it's fair to say, is that the Court examines the hearings, the legislative procedure -- what you'll find is that they're filled with statements from cities and states and governors saying, we need this legislation. We need tough legislation. We need demanding legislation. We need to be required to do these things.

The fact is, there wasn't any -- very much opposition. As a matter of fact, the only opposition I found from a state representative -- and I have to give California credit for consistency -- is a statement of

Governor Reagan's on page 1300 of the Senate hearings, where he objected to -- as he put it -- reserving for state and local governments the task and cost of implementing decisions of the federal government under threat of fines and punishment if the job is not done to the satisfaction of then-Secretary of HEW but now EPA Administrator.

Governor Reagan, I might add, added later on in his testimony that yes, I do think however that interstate air pollution regions would benefit from federal overview to resolve disputes and to prevent inaction in one state imposing pollution problems on a people of a neighboring state. This is page 1301 of his testimony.

We have 17 states in which -- and the District of Columbia, in which pollution/transportation controls have been required. I've counted up the cities which are either right on the border of a state or within a hundred miles of the border of another state, and the number I get is somewhere between 75 and 85 per cent of all the cities where the controls we're talking about here are required are of that category, either right on the border of another state, or within at least 100 miles of another state.

Now, I don't want to give the impression that Governor Reagan would be -- was the only governor that talked against this. But I might add this: the Douglas and Head -- and this again is not cited in our brief -- it was the state -- the

Attorney General of the State of Minnesota testified on behalf of the National Associations of Attorneys General, and stated at page 1183 of the Senate hearings that if a state like my own state of Minnesota has not adopted the Motor Vehicle Inspection Law, and they still have not -- he was saying what kind of legislation he wanted -- we would still be pretty much compelled to install an inspection program for emission control devices. And without dragging this out too much further, the National Governors' Conference, represented by Governor Sargent of Massachusetts, from page 449 of the Senate hearings to page 453, testified in favor of the legislation. And I think Governor Sargent, on behalf of the National Governors' Conference, said at the end of his testimony, I think the states can't just shrug their shoulders and say, well, let the federal government do it.

I submit to the Court that that is the position of the respondents in this case.

As far as the statute is concerned, I think we rest on solid grounds. And in fact, the courts -- the 1st Circuit and the 9th Circuit -- said that they were construing the statute only because of constitutional doubts that they had.

Now, let me address those constitutional doubts.

QUESTION: Let me, before you leave the statute --.

Let's take the simple case of the municipally operated incinerator, which everybody agrees in this case is subject to the statute. And so the administrator establishes criteria for standards for ambient air, both primary and secondary pollution. And the state comes in with a plan that is found by the Administrator to be deficient insofar as it regulates municipally owned and operated incinerators in the state.

Is it all that clear under the statute that the Administrator can then say to the state, your problem is that you don't have stringent enough laws, or ordinances. And so you go enact those, controlling municipally operated incinerators.

MR. RANDOLPH: Well, there's been a lot of confusion about that, and maybe I can clear it up.

First of all, the Administrator's position in this case before all the Courts of Appeals, has not been: we can force states to make laws.

QUESTION: Well, I think it's clear despite the disclaimers that there has been some change of position by the government in these --

MR. RANDOLPH: Well, I think -- I beg to differ with you, but we won't get any place arguing about that.

QUESTION: I suppose not.

#418

MR. RANDOLPH: The fact of the matter is, it's a silly position, if we took it. I mean we all know gives legislators immunity from failing to -- like speech or debate clause.

QUESTION: No, we're not talking about for sanctions now, we're talking about --

MR. RANDOLPH: Yes. But what's -- the problem here is that what has happened is that regulations that the -- the EPA Administrator, in imposing these controls, walked in on cat feet. He didn't charge in like a buffalo trying to knock the states down, which is the impression, I think, that one gets maybe, from reading the briefs in this case. And we're as responsible for that as anyone else.

What he did is, first of all, he tried to give an extension of time which, I think, was cut back by a court and told, no, you can't give an extension. And then, when he was forced to impose controls, he tried to give the states as much leeway as possible. I mean he could have gone and put in his regulations details down to -- that far, and said: you do it this way, and this is precisely the way you have to do it.

Instead, he tried to be moderate. He tried to -- in imposing something on the state, tried to give the state leeway. The states had come to him and said, look, we're going to get legislation to direct. So, you know, we're

going to have this passed in the House, we're going to have this. And the EPA Administrator said, okay, fine. When you get the legislation, please submit it to me--"please" wasn't there, I admit--submit it to me, and then you'll be in compliance.

It's the same with regulations. We have accepted the DC Circuit's opinion that says that the EPA Administrator, in promulgating a substitute plan for a state, cannot in that plan, say, the state shall submit regulations doing x. Instead, the EPA has to put down in as much detail as is required exactly what has to be done.

That's the history behind that, Mr. Justice Stewart. And I think that the impression that's been given is probably -- unless I've dispelled it -- is not an accurate one, and not one representative of the EPA --

QUESTION: Well, what's the answer then to my question? How -- let's assume that the state regulation of these municipal incinerators is deficient in the opinion of the Administrator. Then what can he do?

MR. RANDOLPH: He can say --

QUESTION: Well, under the -- just as a matter of statutory authority, before you get to any constitutional questions.

MR. RANDOLPH: He can say to the state that the municipal incinerator shall emit no more than x amount of

whatever it is emitting, period.

QUESTION: As far as such particulate --

MR. RANDOLPH: Right. Now, I admit --

QUESTION: And now he's gone much further in this case with respect to the roads and highways, hasn't he?

MR. RANDOLPH: I don't think so. I think he's gone far less than that. Because what he's done here, is, he's tried to give the state a lot of leeway. These regulations are going to have to be re-promulgated. We were put in the position on the one hand of being told that under the law we couldn't promulgate any regulations requiring a state to do something. And then in the District of Columbia Circuit, the case was remanded, you remember, to the Administrator.

But what he has done in this case -- what he tried to do, and the DC Circuit, of course, said you can't do that -- is say to the states, well, look, you fill in the details. It doesn't say exactly how much pollution has to -- we're going to allow on the highways. It says, you set the regulations. You set a certain failure rate for the automobiles being inspected. And you set up the program. And then require --

QUESTION: Well, that's -- and that's much more detailed, much more direction to the states than you told me he could do with respect to the incinerator.

MR. RANDOLPH: I --

QUESTION: And all you said he could do with the incinerator is just reduce the amount of these particulate pollutions.

MR. RANDOLPH: In an effective way, yes.

Well, I think what we're talking about here is very analogous to a court exercising its equity power. I don't claim the Administrator of EPA has any such authority. But if you recall, when you're issuing injunctive orders requiring certain things to be done, the first one sometimes is very broad. The next one gets a little narrower. And the next one gets a little narrower and narrower and narrower.

I don't think that that difference make a difference under the statute. I don't see anything in the statute that makes that in any way different. I think the Administrator perhaps could say that in order to control pollution a scrubber shall be installed.

QUESTION: Oh, you think he could do that?

MR. RANDOLPH: Oh, yes.

QUESTION: Well, that's -- maybe I'm quite mistaken, but it seems to me that's fairly important. Even -- what can he do, beginning with a government operated incinerator that everybody agrees can be a subject to regulation?

MR. RANDOLPH: He can do anything with a government operated incinerator that he could do with a private sewer

system.

QUESTION: We could say that you have to pass some regulations having to do with how many scrubbers there should be, and have to appropriate money if there are an insufficient number of scrubbers, and so on and so forth.

MR. RANDOLPH: I don't think he can order the state to appropriate money.

QUESTION: How about closing down the plant? The scrubbers aren't given away, you know?

MR. RANDOLPH: I realize that. But my answer to your question is precisely the same answer as Justice Holmes gave in Sanitary District, that is that -- and I think perhaps analogous to the answer that was given in #490 Adelman v. Jordan -- it may be a necessary consequence of compliance, that the state has to spend money, but that's of no concern to the federal government, or even, indeed, to the constitution itself, if a requirement is imposed on the state that is a valid requirement and it has to meet it.

The consequence may be appropriation of money. I think the consequence of complying, for example, with the regulations in United States v. California on a railroad may be the appropriation of money. The consequences of complying, for example, with the municipal incinerator regardless of what you require the states to do, may be the expenditure of money.

QUESTION: Well, is EPA's argument here limited to the contention that -- is it in effect conceding that the Administrator himself has to fill in all the details of a federal plan after a state plan has been rejected either in whole or in part?

MR. RANDOLPH: Oh, yes.

QUESTION: And that you're simply dealing with the state in its essentially proprietary capacity? The thing I thought was still an issue was that the Administrator said, in filling those details, he could say, state, you hire 10,000 people to carry out the details of this plan.

MR. RANDOLPH: The Administrator will say the state must have an inspection and maintenance program that is adequate to do the following such and such and such and such. Whatever detail is required. You know, one thing --

QUESTION: But that isn't a detail. It's one thing for the EPA to say, we're going to see that no vehicle in the State of California violates federal standards. Which everybody in this case, I understand, concedes; that Congress has a perfect right to authorize, and the Administrator has a right to promulgate. It's another thing to say, we're going to see to it, and we're going to conscript 10,000 state employees to enforce this.

MR. RANDOLPH: I'm not clear why you think it's another thing. The fact of the matter is -- the only

objection that could be made to that, I think, is that -- well, what you're doing is requiring the state to exercise its police power; that is, it is enforcing federal law against its citizens.

If it takes -- if you require the state to set up a program, and it takes 10,000 people, yes, that's -- but the court has never viewed that, so far as I'm aware, as a constitutional objection. Let me give you an example.

QUESTION: Well, how about as a statutory -- I mean, it's in the -- what about the statute authorizing?

QUESTION: We're still at that level.

MR. RANDOLPH: Does the statute authorize it? I see nothing in the statute that prevents it.

QUESTION: Well, but it isn't a question of, does -- is there anything in the statute that prevents it? Does anything authorize it?

MR. RANDOLPH: Yes.

QUESTION: What?

MR. RANDOLPH: Number one, the state has to have an implementation plan. If the state doesn't have an implementation plan, the EPA is to substitute an implementation plan for the state. Under that implementation plan, any source -- owner of a source of pollution can be required to abate the pollution. The EPA's argument in this case, which I said is fundamental to the case, is that the state is an owner

of a source of pollution, and therefore can be required to abate that pollution just as if the steel industry was required to hire 10,000 people in order to abate the pollution that they caused. We treat them no differently.

That's the extent of the argument here. And there's nothing under the statute. The statute says, any person.^{It} defines the state as a person. If the state can be required to clean up the pollution as a result of this municipal incinerator, it can be required to clean up the pollution as a result of the air pollution from the highways or from the sewer system. As a matter of fact, the distance between sewer systems and highways I don't think is a very large distance. The sewer systems are to the water what the highways are to the air: it both collects pollution; the pollution comes from private sources; and yet the state owns both. So we think the state is responsible for both.

And it's not just us. I think the Court has so held. I think the Sanitary District case stands for that: I think the City of Milwaukee v. Illinois stands for that -- as a matter, it's even clearer because the Court held there that even in the absence of federal law the Court was going to create federal law to govern just that kind of pollution. And it indicated -- in dictum, I agree -- that it would do the same in regard to the ambient air.

QUESTION: But the sanction wasn't at all clear.

I suspect that the view might be quite different in a court if the federal government said, if you don't provide this corps of inspectors, we're going to deny you federal funds, federal grants. It might be quite different --

MR. RANDOLPH: Well --

QUESTION: -- if you said, we're going to put the head of the motor vehicle division in jail. But your statute provides that this kind of an issue can't be raised in the enforcement proceedings.

MR. RANDOLPH: You've mentioned grant-in-aids, and so have respondents. I'll talk about that for a minute.

If you mean that -- the alternative for the federal government in this case is to offer the state a grant-in-aid with the condition attached. And if they accept it and then fail to live up to the conditions, cut off the money.

I have two responses to that. Number one, that was what the history of that Act was before this. But the states failed to take the money, and the pollution went unabated.

Number two, the law is that that puts the state in the position of a foreign country. I mean, we might as well say to China, don't put off -- please don't blast in the atmosphere anymore and allow a cloud to come over the east coast of the United States. Here, we'll offer you a grant-in-aid, we'll put conditions on it. If you accept it, and then don't comply with the conditions, we'll cut it

off.

But we think the states are in somewhat more of a responsible position than a foreign country.

If you mean by that, however -- if you mean something more than that; if you mean that the 60 billion dollars that is flowing into the states each year from the federal government, what we should say is, unless you comply, we're going to cut off that 60 billion dollars. We're not going to appropriate money for you. If that's the point, I don't see any difference.

The lower courts said, well, the alternative is to use the whip of coercion. Well, that's like using the death penalty for a misdemeanor. And one of two things can happen: either an awful of people are going to get killed, and money is going to be cut off all over the place for the slightest violation; or else, it's not going to be enforced, it's not going to be used.

QUESTION: What about closing the plant? I raised that question before?

MR. RANDOLPH: Yes, I --

QUESTION: The incinerator -- they can close the plant?

MR. RANDOLPH: I think they can close it, yes.

QUESTION: But, blocking -- closing the highway? You said the sources are the same. The highway is the source

of it in one case, and the incinerator in the other.

MR. RANDOLPH: If there was no other way to do it, I think that would be true. But there are other ways.

QUESTION: Just chop transportation --

QUESTION: And how would you move your military?

MR. RANDOLPH: Under the War Powers we'd move them right down the highway.

QUESTION: Yes, but the question here is the power of the Administrator to tell the state to close the highway.

MR. RANDOLPH: Yes, yes.

QUESTION: That's where we are in this case.

MR. RANDOLPH: Yes, but --

QUESTION: Just to take the --

QUESTION: Sorry.

QUESTION: Just to take the other extreme, let's assume that the Administrator concluded that dispersal of highways was really the answer to the pollution problem and ordered, say, the State of Virginia and the State of Maryland, despite their proximity to Washington, to build a billion dollars worth of new highways.

MR. RANDOLPH: That would be requiring them to own another pollution source, and I don't think we could do that.

QUESTION: What's the difference between their saving,

you shall have pool car lanes?

MR. RANDOLPH: Because what we're doing is, requiring them to control the pollution they already have, rather than telling them to own another one, buy another one.

QUESTION: Suppose, instead of building distinctly different highways, the answer was suggested that you widen the highways that you now have to include pool car lanes?

MR. RANDOLPH: Well, again, I think that's the same thing. I think that's requiring them to own more property. And we're not requiring them to do that. More polluting -- another source of pollution. What we're trying to do is keep them -- if they have the source of pollution they're the owners of it, they invite people on it, the people should use it in a way that doesn't cause harm to others or other states.

QUESTION: But if, for example, every incinerator in a state where deemed to be so inadequate that it had to be replaced, would that be constructing new property?

MR. RANDOLPH: There's no doubt whatever that that could be required.

QUESTION: It is required of private industry, as you say.

MR. RANDOLPH: Not only that, Mr. Justice Powell, I think that the Sanitary District case stands for that. And we cited a history of that. The fact is, the City of

Chicago had an inadequate way of disposing of its sewage. It ran it by draining Lake Michigan, and then ran it down into the Mississippi River where it travelled all down to the other states. And what the Court finally held there was that the City of Chicago had to devise another system. And I think there's recorded in a footnote, and I --

QUESTION: But Mr. Randolph, isn't there a rather plain distinction between operating a sewage system, which deposits effluents into the water or the air, as opposed to operating a highway which deposits nothing?

MR. RANDOLPH: Oh, well, the highway deposits --

QUESTION: What is your best precedent for saying a highway is itself a source of pollution? It is indirectly, but within the meaning of your statute.

MR. RANDOLPH: Well, I think the best precedent is --

QUESTION: Is a sewer system?

MR. RANDOLPH: -- corpus juris secundum black letter law that says the owner of a piece of land that invites --

QUESTION: We're not talking about common law nuisance, we're talking about statutory authority to compel a state to establish a program affirmatively.

QUESTION: Or in fact, it is the highway that is the polluter.

QUESTION: It's not like the sewage system, I don't think.

MR. RANDOLPH: We're not saying the highway is the polluter. Obviously, the stuff comes out the end of a --

QUESTION: Well, sure you are. You're saying they're the owner of the source of the pollution.

MR. RANDOLPH: But the -- yes. But the sewer system --

QUESTION: That's the heart of your theory, as I understand it.

MR. RANDOLPH: The sewer system is not a polluter in that sense either. If no one -- if no citizen --

QUESTION: Certainly it is. It deposits directly into the environment.

MR. RANDOLPH: It collects matter from other citizens -- from citizens, and deposits it.

QUESTION: Correct.

MR. RANDOLPH: The highway collects air pollution from citizens and, instead of depositing it into the streams and waterways of the country, it throws it up into the air and allows it to travel throughout the rest of the 49 states, depending upon which way the wind blows.

QUESTION: But exhaust doesn't travel down the highway.

MR. RANDOLPH: No, it travels up into the air,

and off into the --

QUESTION: Which the state doesn't own.

MR. RANDOLPH: That's right. So if the state can simply put in a complex of highways and say, our citizens, living here, will not do a thing about controlling -- we won't do a thing about controlling the air pollution from new vehicles because we're a state that has the fortune of being upwind from everybody else. So we don't have to do anything. And that means that when the wind blows, then all the states downwind get it. And as --

QUESTION: And the Administrator can step in and say, we're not going to have the state doing that. We're going to enforce these prohibitions against them.

MR. RANDOLPH: That's right.

QUESTION: So the question here is whether the Administrator is going to do it through federal agents or whether the Administrator can force the states to do it through their agency?

MR. RANDOLPH: Yes, force the states to take on responsibility that we think they have as component parts of this union. And to put it Governor Sargent's words, speaking for the National Governors' Conference, to not be allowed to simply say, well, let the federal government do it. We think they have more of a responsibility in this case.

QUESTION: Governor Sargent, I take it, was not the author of the legislative history, or did he vote on the Clean Air Act.

MR. RANDOLPH: That's correct.

QUESTION: And I think you have to find some authority in the statute, as Justice Stevens suggests, to authorize what you're talking about.

MR. RANDOLPH: Well, I think we've found it. And I think our brief talked about it at length. And --

QUESTION: Well, Mr. Randolph, is there some separate, narrower issue in the case? I take it there is. As to whether the state is required to enforce a federal prohibition? I take it from your brief you're not saying that the state has to pass any law or any regulation or anything like that? Is that it?

MR. RANDOLPH: That's right. Yes. We're not saying --

QUESTION: And are you saying -- is your total claim that we have some federal prohibitions, that the Administrator is going to reissue some --

MR. RANDOLPH: Prohibitions --

QUESTION: -- plans, and there are just going to be some prohibitions.

MR. RANDOLPH: Against -- well, I don't know if you mean mandatory versus prohibitory, that kind of a line?

QUESTION: Well --

MR. RANDOLPH: I don't think I can say that the Administrator's issuing new regulations will just prohibit the states from doing it. They may be mandatory.

QUESTION: Yes. Well, you do want something more than, say, the states -- you want something more than the court to hold that a state must enforce a federal prohibition. Let's take the national speed limit --

MR. RANDOLPH: I don't want the Court to hold that.

QUESTION: Let's take the national speed limit. Is a state required -- could the federal government, or is the state required to enforce the national speed limit?

MR. RANDOLPH: Well, now you're asking a constitutional question.

QUESTION: Yes.

MR. RANDOLPH: Certainly not under the statute. But if you're asking me a constitutional question, I would say, maybe. And the reason I'd say that, and the reason I can't get a definite answer, is, I think the case would have to be analyzed under National League of Cities. And as far as -- you know, we've gone through the calculus and the difference. And we're talking -- one difference automatic in the case you posed is that air --

QUESTION: Well, it may be --

MR. RANDOLPH: -- pollution travels from one state

to another.

QUESTION: -- it may be a constitutional question in part, but it might also be a statutory question in the sense that anytime Congress passes a law you ought to infer that they intend the states to enforce it.

MR. RANDOLPH: Now, we're not claiming that.

QUESTION: You aren't?

MR. RANDOLPH: We're not -- if we had claimed that, Mr. Justice White, then the limit of our argument would not be in regard to highways. We would be saying that the Administrator can require a state to enforce all of the requirements, like, for example, with respect to steel plants, with respect to smelters, with respect to any other pollution causing activity by private industry within the state, the Administrator would be standing up here and saying to the Court that if we promulgate a substitute plan, or even if the state has a plan, we can require the state to enforce it against private people. We're not saying that.

QUESTION: You say then, what you're arguing then, is that you think Congress has said that if the Administrator wants to require the states to enforce these requirements, he may do so?

MR. RANDOLPH: If they are the owner of a source of pollution. And since I mentioned National League of Cities, I'd like to at least spend some time on that case.

QUESTION: I have some trouble with this, owner of a source of pollution. I still -- with my brother Stevens and some others.

You said that the states could not be required to close down the smelter plant or anything else, right?

MR. RANDOLPH: Right.

QUESTION: Anything like that.

MR. RANDOLPH: The state doesn't own the smelter in anyway.

QUESTION: But the federal government can compel the state to close down the private automobile. And the difference is?

MR. RANDOLPH: The difference is that if the smelter were on state land, we could require the state to not allow it to be used for that purpose, for smelting purposes. If the private automobile is on state land, we can do the same. That's the difference. The difference is that when a land owner allows somebody else to use his property --

QUESTION: I don't agree with either. I don't have to agree with either, do I? Isn't that what we've got before us? You're really aiming at the automobile? It is not owned by the state.

MR. RANDOLPH: Yes, right. But the highway is, and without that, the automobile would not be polluting.

QUESTION: Well, Mr. Randolph, you would draw

a distinction then between a state which owned its own highways and one which has decided to finance all its highways by vesting them in some turnpike commission or something like that.

MR. RANDOLPH: Yes.

QUESTION: Then they would not be a polluter.

MR. RANDOLPH: Absolutely. And then we would be regulating the turnpikes.

QUESTION: But they would still have the same normal authority over traffic control, regardless of their ownership. Is the ownership of the highways really the significant factor?

MR. RANDOLPH: Yes.

QUESTION: When you look at the operation of a state running its highways?

MR. RANDOLPH: That is the --

QUESTION: Or is it the fact they have police forces, and they have an interest in people not getting killed on the highways, things like that?

MR. RANDOLPH: If we argued that it was the fact that they had the police force, if we argued --

QUESTION: What is the specific statutory support for this argument? I really have trouble finding that the text lends any support at all to this.

MR. RANDOLPH: Let me pull out the statute. If

the court turns to 110 -- I'll read it. Which is the requirements that have to be in an implementation plan.

QUESTION: Which is -- just go slowly enough so I can find where it is. Now, in what --

MR. RANDOLPH: Oh, well maybe I ought to refer to the briefs, then.

QUESTION: On page 5 (a) of your brief -- of the appendix to your brief.

MR. RANDOLPH: Yes.

QUESTION: 5(a) in the Appendix to your brief, right?

MR. RANDOLPH: That says -- as far as Section 110. In Section 110 (g) it's required that the implementation plan that the state imposes provides to the extent necessary for periodic inspection and testing of motor vehicles to enforce --

QUESTION: I'm sorry I'm awfully slow, but 110 (a) is on what --

MR. RANDOLPH: 7 (a), I'm sorry.

QUESTION: 7 (a).

QUESTION: 7 (a). I don't mean to be -- "it provides to the extent necessary...", I see.

MR. RANDOLPH: "...to enforce compliance with applicable emission standards..." Now if the state doesn't have that in it's plan, EPA can require it. All the states

do, I think, with the exception of California, had such a requirement in their plans.

QUESTION: Well, again, let me slow you down, Mr. Randolph, because I do want to understand your argument.

This Section, as I understand, deals with the duty of a state as a regulator, not with the duty of a state as an owner of highways.

MR. RANDOLPH: It deals with -- well, this section 110, deals with the state in both capacities.

QUESTION: Well, where does it deal with the state in its capacity as a potential polluter or as an owner of an highway?

MR. RANDOLPH: If it doesn't deal with -- your honor, in the case of any implementation plan, it has to include -- this is (b) -- "...emission limitations, schedules ...timetables for compliance with...limitations, and such other measures as may be necessary to insure attainment...."

QUESTION: But my point, Mr. Randolph, is: this section is talking about what it must do because it's a governmental agency, not about what it must do because it's an owner of property which may pollute the atmosphere. What talks about its duty as an owner of property that may pollute the atmosphere? And that's what your whole theory is, if I understand you.

MR. RANDOLPH: The entire section 110 speaks to

the state in both capacities. And it must, because if it does not, then a state would be under no obligation in an implementation plan promulgated by them, or by the federal government, to comply with the requirements of that plan.

QUESTION: To regulate itself?

MR. RANDOLPH: To regulate itself. It must be under those requirements. One ten must mean that, and the reason it must is, because, number one -- and the states admit this -- if they have a municipal incinerator, they have to comply.

QUESTION: Well, I understand that. But what is there in this section that teaches anything about the owner of a highway being a polluter? I think Mr. Justice Marshall and I are concerned about the absence of anything in the statute to suggest that that kind of activity makes the state a polluter. Within the meaning of the statute.

MR. RANDOLPH: You cannot read -- I would readily admit, you cannot read section (a) to get to that conclusion, like you cannot read a lot of other statutes. You have to look at the --

QUESTION: Section (a) doesn't say to the incinerator owner, either --

MR. RANDOLPH: It does not. It does say that transportation controls have to be put on, and that's on page 6(a), Mr. Justice Stevens.

QUESTION: Well, I can understand, the state as a regulator would control the transportation that takes place on its highways. That's easy. But does that mean that in its capacity as an owner of the highway it has a different duty than as a regulator?

MR. RANDOLPH: Yes. We think the legislative history supports that. We think -- if you read the statute any other way, then what you wind up with is a statute that makes no sense with regard to municipal incinerators. If you say 110 doesn't mean the state can be enforcing something against itself, then I don't know what you do with the respondent's concession in this case. It must --

QUESTION: You don't -- I could understand your argument better if you would place this on the state's power to license automobiles, which clearly the state has -- power, I'm sure you'd agree. Now, would the state have the power to have the emission standards for each particular automobile as a condition for getting a license to drive the car?

MR. RANDOLPH: Yes.

QUESTION: Well, then, isn't that --

MR. RANDOLPH: The Administrator --

QUESTION: -- does this statute operate through that kind of a --

MR. RANDOLPH: That would be a very broad claim

by the Administrator, and he makes no such claim here.

QUESTION: Broader than the one you're making?

MR. RANDOLPH: Yes. The reason is, because we would then have to say, and we don't say, that simply because the State has the power to regulate a certain activity, therefore the EPA Administrator can require the state to regulate that activity. That would mean the EPA Administrator could require them to control private smelters. It could require them to control anything.

QUESTION: You said before -- you said before -- I thought, in response to the question I put -- the federal -- the EPA could close the highways within the state. Isn't that a -- isn't that a bolder claim than the claim that they should exercise their licensing power in a particular way?

MR. RANDOLPH: We are not -- we have never imposed any such requirements, Mr. Chief Justice. We say that the state can be required to close down a source of pollution that it owns, if that's absolutely necessary for compliance. In fact, what you mean by closing down the highways, is probably the people use other means of transportation, for example. I don't know whether -- maybe block them off, or something. But we've never made that kind of claim here. The Administrator realizes the difficulty of changing habits in the country.

That's what this -- this is demanding legislation. It is stiff legislation. The reason it's stiff is because

we have done nothing about it. And something had to be done. Controls had to be imposed. The primary responsibilities of the states had to be met.

And I think the Court said, in NRDC v. Train, that the innovation of the statute was that under the Act that a state had no choice but to meet that responsibility. Are they responsible for the pollution coming from the highways? We think they are.

Now, I'd like to say at least a word about National League of Cities. We don't believe the federal laws cross the line marked out by the Court in that case, and there is one difference between this case and National League of Cities that I think is immediately apparent. Unlike National League of Cities, the activity here is not one that -- to use the words of that decision -- is essential to the separate and independent existence of the states.

And what is more, the respondents admit it's not. And I'll tell the Court why. They say that if the operation of their transportation system have to be modified to reduce air pollution, the federal government should do it. I submit that's an admission that the activity that we're talking about is not one that's essential to the states. Why not? Because they say, well, we want the federal government to do it. If it were essential to their continued existence, they would be making no such claim. There was no such

claim made in the National League of Cities case by the states, that the federal government should come in and control their employees.

QUESTION: Mr. Randolph, may I ask you a question before you sit down?

What specific regulations are left in this case as of today? Can you identify those? In other words, what are we addressing? What is left? Compared with what was before the Courts of Appeal?

MR. RANDOLPH: Well, Mr. Justice Powell, in the 9th Circuit, the only regulation that was struck down in that case -- there was only one regulation struck down, for example, in the 9th Circuit. It's the --

QUESTION: That was inspection maintenance for --

MR. RANDOLPH: Pardon me a second. It was the regulation on page 439 of the appendix.

QUESTION: What's that page?

QUESTION: 439.

MR. RANDOLPH: 439. If you look at the judgement of the 9th Circuit, that's the only regulation that was struck down; and that's the enforcement regulation.

QUESTION: Arizona and California?

MR. RANDOLPH: Arizona and California. And I might add that ARizona has an inspection and maintenance program, a mandatory requirement. They're doing what we

say the states have to do in this case. And it's not entirely clear to me why they're a party to this litigation.

QUESTION: Page 439?

MR. RANDOLPH: 439.

QUESTION: And I don't -- nothing --

MR. RANDOLPH: It's 52.23, which the general violation and enforcement.

QUESTION: That was --

MR. RANDOLPH: And that struck down -- the Court held in the 9th Circuit, because it says in there than a governmental entity can be a violator of the --

QUESTION: Right.

MR. RANDOLPH: -- a plan. We think that's absolutely consistent with, for example, Section 307 of the Act, which I didn't get to. Because a citizen can sue any person that violates the plan, including a governmental entity subject to the 11th amendment.

QUESTION: And what's the sanction against the governmental entities?

MR. RANDOLPH: An injunction.

QUESTION: Any other?

MR. RANDOLPH: Well, the Administrator has said that we're not going to use criminal sanctions even if they were available.

QUESTION: In the citizen suit, it's an injunction?

MR. RANDOLPH: In a citizen suit it's an injunction too, yes, sir.

QUESTION: Yes.

QUESTION: And would the injunction be the route by which you would carry out your suggestion that the EPA could close the state highway?

MR. RANDOLPH: I don't want to say that that is going to happen --

QUESTION: No, but if it did.

MR. RANDOLPH: -- but if it had to happen, I would say, yes.

QUESTION: It could happen.

MR. RANDOLPH: Yes, an injunction.

QUESTION: Mr. Randolph, let me be sure I understand this point. I thought the underlying regulation that your question presented in your cert petition to the 9th Circuit judgement attack was the one that imposed a duty on the governmental agency to establish and maintain an inspection program.

MR. RANDOLPH: Well, I was --

QUESTION: So isn't that what's really an issue?

MR. RANDOLPH: I haven't finished my answer.

QUESTION: Oh, I'm sorry.

MR. RANDOLPH: That is the only regulation, Mr. Justice Powell, that was struck down.

QUESTION: In the 9th Circuit.

MR. RANDOLPH: In the 9th Circuit in California and Arizona. Now let's stick to the 9th Circuit for a moment. We petitioned --

QUESTION: That is still an issue here?

MR. RANDOLPH: Oh, yes. That is the statutory question, yes. They struck it down on statutory grounds.

We petitioned, raising the question, number one, whether the EPA could require the state to take action when it owned a pollution source, namely, the highways. First question.

Second question: whether it would be constitutional for EPA to do so in regard to inspection and maintenance programs. The only program that we petitioned on was inspection and maintenance. Now, we did that for a number of reasons. I won't go into them all.

But one of them is, that it's the one program that is specifically mentioned in the statute. The legislative history, we think, is crystal clear that the Congress -- the statements that we quoted -- the Congress said yes, the states must do that. Every governor and every mayor is going to have to do this. It's very tough, but we're very sorry. You're going to have to do it. Because it's the only way that we're going to get air pollution down to the quality that protects human life and welfare.

Now, in the District of Columbia Circuit a number of regulations were upheld. But we made -- we narrowed our case down to the same point. The only thing we petitioned on was inspection and maintenance. So the only regulations that are in issue in the District of Columbia are those in regard to Maryland, the District of Columbia and Virginia that deal with inspection and maintenance.

QUESTION: Equivalent to 52.23?

MR. RANDOLPH: And 52.23, which applies to all programs, also.

With respect to --

QUESTION: And the bus purchase is entirely out of the case?

MR. RANDOLPH: That's out of the case. The only reason the bus purchase -- there are only two other programs that were in issue in this case, and that's a result of the cross-petition by the Commonwealth of Virginia. The -- they put in bus purchases as an issue. They put in bus lanes as an issue. Okay, the bus purchases is out of the case. The bus lanes issue is still in the case, with respect to the District of Columbia. And those regulations are on page -- well, they're all summarized on page 606 of the Appendix.

QUESTION: Are the bikeways still in the case?

MR. RANDOLPH: No, no. I was going to say before

that one thing -- I'm glad you brought that up. They're not in the case because -- not only on constitutional grounds, not even on any statutory grounds. They're not in the case because the District of Columbia Circuit held that they weren't supported by substantial evidence. There was no indication that they would be a substantial device to avoid pollution.

And we have acquiesced in that decision.

Every one of the regulations that the EPA Administrator would impose on a state is subject to the test that always applicable to administrative action: is it arbitrary or capricious? does it meet substantial evidence? And I think the Court can rest assured that when it's a state on the other side claiming that it's sovereignty is somehow infringed by the regulation, that that kind of a test will be administered with great care by the Court, to make sure that what the EPA Administrator is imposing is not something that is arbitrary or capricious. Which may take all the hypotheticals that I've talked about -- wouldn't even reach the question of the constitutional stage if a court said no, we don't think that there's substantial enough evidence to support those regulations.

QUESTION: Mr. Randolph, it's evident that there's been a great deal of shrinkage in this case since the original litigation in the Courts of Appeals. I'm very

interested in the answer to the specific detail and concrete answer to Mr. Justice Powell's question, which perhaps can't be done orally in a short time. But I'm interested in knowing just what's left in this case.

QUESTION: Send a memorandum.

QUESTION: And a memorandum would be very helpful to me.

MR. RANDOLPH: Fine, I'd be happy --

QUESTION: If you and counsel could agree on it.

MR. RANDOLPH: Yes.

QUESTION: Inspection, maintenance and bus lanes you talked about?

MR. RANDOLPH: That's what -- yes. And bus lanes only for the District of Columbia--

QUESTION: Bus lanes only -- yes.

MR. RANDOLPH: That's all. There are bus lanes in, for example, Baltimore and various cities in California. But we don't think the Court gets to that question. Because we didn't petition from the --

QUESTION: That's it?

MR. RANDOLPH: Yes.

QUESTION: It's far from clear to me up to now what is left in this case.

QUESTION: And would your memorandum include the regulations that still remain intact that we would have to

review?

MR. RANDOLPH: Yes. The retrofit, for example, fell out of the case because the cases -- those were required for pre-'68 vehicles, and we've gone now, what? nine years from '68. I mean, there's no use requiring it. They're all -- none of those are on the highway.

QUESTION: The retrofit issue is all gone, isn't it?

MR. RANDOLPH: Yes. They're off the highways.

QUESTION: The problem from reading the briefs here is that it's very difficult to ascertain what is before us today.

MR. RANDOLPH: I understand.

QUESTION: Extremely so.

QUESTION: And it would be particularly helpful if you and your friend agree, so that there isn't any debate left on it.

MR. RANDOLPH: I think we can agree to that. I'm sorry I didn't take less time.

QUESTION: Well, I obviously was overoptimistic on the subject.

Mr. Hawkins.

ORAL ARGUMENT OF DAVID G. HAWKINS, ESO.,

ON BEHALF OF PETITIONERS-INTERVENORS

MR. CHIEF JUSTICE BURGER: I think we all hope

you'll address yourself very early to the statutory problem. We hope everyone will do that.

MR. HAWKINS: Indeed I will, Mr. Chief Justice, and may it please the Court:

QUESTION: We are unanimous on one thing, clean air. So let's focus on the statute.

MR. HAWKINS: Very good.

Now, the citizen groups intervened in the court below in the District of Columbia circuit in support of EPA because of their view, which we're glad to hear the Court shares, that the statute promotes -- for clean air and that the EPA regulations are the only practical way of achieving that important objective.

So to the statutory question: is it reasonable to regard a highway as a source of pollution? And Mr. Justice Stevens put it well in asking, what is the specific statutory authority? What is it that talks about the state's duty as a polluter of the atmosphere?

Well, it is the same section that talks about any source's duty, and that is the section which empowers EPA to promulgate regulations in the event that a state does not submit an adequate plan. That Section is Section 110 (c) of the Act. It is set forth at EPA's brief at page 9a. What it says is that the Administrator shall set forth -- promptly prepare and publish proposed regulations setting

forth an implementation plan. Now, that implementation plan must contain emission limitations which, although it doesn't say so in Section 110 (a), are applicable to pollution sources.

The question then is, is it reasonable to regard a highway as a pollution source? I think the difficulty that many people have had is that the highway is owned by the state, and as such, it is difficult to perceive it as a pollution source. So let's look at some similar types of sources which are owned by private parties.

For example, let us take a garage which performs tuneups on automobiles. Those automobiles are owned by the individuals that bring those cars in. However, the idling emissions may be substantial, especially for very large garages.

Similarly, a private garage which perhaps stores buses, or is a bus terminal. The buses are owned by another party. But the garage itself may collect emissions, concentrate emissions, and allow the problem to be created.

This is what a highway does in that it determines the location of motor vehicle activity. It concentrates that motor vehicle activity to a degree where the problem is created. And --

QUESTION: So you are seeing the highway as a garage?

MR. RANDOLPH: I would take --

QUESTION: I would agree with you.

[Laughter.]

900

MR. RANDOLPH: Mr. Justice Marshall, there's one exception, and that is, the bus lane on Shirley Highway which moves very well. And that's what we're aiming at.

Let's look at some others. Is a shopping center, where people circulate, idling their cars for hours on ends trying to find a parking space during a pre-holiday sale, is that a source of pollution? Or is it fair for the shopping center operator to insist that any community that adjoins the shopping center must go after the individual vehicles that circulate and are collected and are attracted to that shopping center?

QUESTION: Do you suggest that the EPA could order the owner of the shopping center to establish an inspection system on all vehicles coming into the shopping center, and check them for air pollution?

MR. HAWKINS: We believe there are precedents which would establish just that type of responsibility, and I'd like to turn to some of those.

QUESTION: Well, could he abandon his parking lot, could he be required to abandon his parking lot?

MR. HAWKINS: Well --

QUESTION: So as to eliminate this problem?

MR. HAWKINS: What EPA actually did, your honor, was to require that the shopping center develop their parking lots in ways that would not produce pollution problems that were associated with the use.

MR. CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock.

[Whereupon, the Court was recessed until 1:00 o'clock, p.m., on January 12, 1977.]

MR. CHIEF JUSTICE BURGER: Mr. Hawkins, I think you have a few minutes left.

MR. HAWKINS: Thank you, Mr. Chief Justice.

In the remaining moments I'd like to make just two points.

First, it is logical to regard highways as sources of air pollution; and second, Congress intended that they be regarded as highways -- as sources of air pollution.

I'd like to touch on the second point first, Congressional intent. I want to call the Justices attention to the fact that in 1974, after EPA promulgated the regulations here in issue, Congress considered amendments to the Clean Air Act in a comprehensive energy bill. Those amendments were passed in June of 1974, and one pertinent amendment is in the government's brief at page 12A. It amended Section 110 (a) -- pardon me, Section 110 of the Act to address EPA's authority to promulgate the very types of regulations

here in issue, name, bus lanes.

Large paragraph (E) on page 12A specifies that, basically, no regulation relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph, unless there are locally conducted public hearings.

So Congress addressed this issue. It's only concern about bus lanes was not that it was irrational to regard the highway as a source, but simply that there hadn't been adequate public participation in some of the bus lanes that had been promulgated up to that point.

However, Congress didn't even require that those bus lanes regulations be rescinded. Instead, in the conference report -- as is pointed out in the government's brief at page 35 -- the conference report specifically endorsed the existing bus lane regulations, and simply required a procedural safeguard for future bus lane regulations.

QUESTION: Congress did something about parking surcharge regulations, too, in those amendments, didn't they?

MR. HAWKINS: That's right, your honor. Congress addressed a number of areas with respect to EPA's regulation of transportation sources of pollution. In some respects they removed EPA's authority -- that is, parking surcharges. In other cases, they limited it procedurally. But in no case did they question the rationality of regarding the highway

as a source of pollution, nor did they question EPA's specific regulations, which were on the book, available, and indeed, in great issue at that time.

QUESTION: Were they asked to change those regulations?

MR. HAWKINS: Yes. On the floor of the House, in fact, an amendment was introduced to prohibit the implementation of bus lanes. That was passed by the House. However, it was deleted in conference. And the reasons the conferees deleted that provision are stated in the government's brief at page 35 and 36. They said, we do not intend to question EPA's authority to implement these regulations.

QUESTION: How about the enforcement as between the federal and state government?

MR. HAWKINS: That was not addressed. But EPA's regulations were clear. They have been in all the newspapers. And they have been submitted in testimony on the legislation. And the states were raising quite a bit of opposition to it. So Congress knew what the issue was: and as I say, the only thing they did was act to limit EPA's ability to promulgate new bus lanes by requiring some additional public hearings.

So I would also like to point out that this is not post-enactment legislative history. On the same day that the Clean Air Act was passed -- the Clean Air Amendments

of 1970 -- Congress also amended the Federal Aid Highway Act. In 23 U.S.C. Section 109 (j), which is referred to in our reply brief, Congress specified that all federal aid highways had to be consistent with air quality implementation plans.

So, again, there is Congressional recognition that is coincident with the passage of the original amendments. The highway, indeed, can be a source of pollution.

QUESTION: What would be the consequence of a state's failure to comply with that provision in the Highway Act?

MR. HAWKINS: This directed the Secretary of Transportation to promulgate regulations. The Secretary of Transportation has promulgated regulations. We think they are inadequate. The regulations provide that no future highway monies would be available to a state.

Just concluding with the logic of regarding highways or other vehicle facilities as sources. I'd submit that Griggs v. Allegheny County decision of this Court recognizes that an airport is a source of pollution -- noise pollution in that case. The planes were causing the noise pollution. But the airport owner -- which, in fact, was a county -- was held responsible.

In case involving interpretation of the federal

Railroad Safety Appliance Act, a railroad, not as the owner of vehicles but as -- merely as a track owner, was held liable, in U.S. v. Toledo Railroad, which is in our brief at page 8, was held liable for the safety defects in cars owned and hauled by another railroad corporation. And as I say, the basis of liability in that case, and the basis of liability in the statute, was that the -- the person was a track owner.

In this case, the state is also a track owner. It happens to be a concrete track rather than a steel track. And we think there's no constitutional significance in the fact that we have steel on rails, in one case, and rubber on concrete in another.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hawkins.
Mr. Moskowitz.

ORAL ARGUMENT OF JOEL S. MOSKOWITZ, ESQ.,
ON BEHALF OF CALIFORNIA PETITIONERS.

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

The Solicitor General has attempted to persuade this Court that the Administrator of the Environmental Protection Agency has both statutory and constitutional authority to predetermine and control state transportation policies.

Now, to prevail in this case he's going to have to

persuade the Court of the correctness of his position on both these issues.

I'm going to address myself to the statutory issues, and my colleague, Mr. Lord of Maryland, will discuss the constitutional issues.

The Environmental Protection Agency, in its latest position which it takes before this Court, now seems to recognize that it may only regulate polluters. And to justify its attempt to regulate state policies and activities it characterizes the states as polluters because they own and maintain highways which, it is asserted, are indirect sources of pollution.

The notion of an indirect source of pollution, I think, was developed somewhat more in EPA's brief than it was in oral argument. And I think, perhaps, we should give a little more attention to it here, because it is the slim thread upon which this entire statutory scheme is founded, the notion of indirect source. So we ought to step back a little bit and ask where this notion that a highway is an indirect source of pollution, precisely where does that come from.

The first thing you notice about the term, indirect source, is that it is not found anywhere in the statute. Nowhere in the Clean Air Act do we read anything, not only about a highway being an indirect source, but the term

indirect source, is not found in the statute.

The basis for the notion of indirect source at all, in fact, is submitted by EPA to be an essay by the Administrator, as a preamble to some regulations. And this is the only basis we're given in the regulations for the concept of indirect source.

Now interestingly enough there was in the regulations -- in fact there still is -- there is a regulation actually defining indirect source. And you'll find it in the parking regulations, the one that describes the present status of that regulation as, its operation has now been suspended due, of course, to the interposition of Congress.

QUESTION: Well, how far does your argument go along these lines? Is it your claim that there's no power to regulate any indirect source of air pollution?

MR. MOSKOWITZ: Well, indeed there is. What we're trying to show now is the chain of reasoning by which it is established that a highway is an indirect source of pollution.

QUESTION: All right.

MR. MOSKOWITZ: And that state policies with respect to those highways can be the proper subject of legislation. So what I'm demonstrating now is that starting with no concrete anchor in the statute, we are then given the concept of indirect source; and how that concept has been

utilized in this particular test.

QUESTION: Well, now -- but what, then, leads you to concede that there is any power to regulate any indirect source, if there's no statutory authority?

MR. MOSKOWITZ: Well, I don't really have to reach the question of whether there's power to regulate any indirect source.

QUESTION: Well, I think there's some importance here.

MR. MOSKOWITZ: Yes. Well, I haven't really addressed the question of whether there's power to regulate any indirect source. What we're showing is that if there is power to regulate an indirect source, that power does not extend to regulating state transportation policies as an indirect source.

QUESTION: Well, if there is, then one takes a step from that, or doesn't take a step from that. But if there isn't any power whatever to regulate any indirect source, then you don't take the first step.

MR. MOSKOWITZ: I agree.

QUESTION: I think it's quite important in this argument, whether or not you --

MR. MOSKOWITZ: Frankly, your honor, I don't see anywhere in the statute where indirect source is addressed at all. And I'm being cautious on that ground simply because

it's a question the states don't have to reach. I am certainly not conceding anything --

QUESTION: No, it may very well be you do have to reach it. Because as I say, if there is a power on the part of the Administrator of a state plan to reach an indirect source, then we're faced with one kind of a case. If there's no power at all to reach any indirect source, then you have a much easier case.

MR. MOSKOWITZ: I think the short answer, your honor, is that I don't see it in the statute.

QUESTION: Well, isn't your argument -- shouldn't your argument be, perhaps, that assuming that there's power in Congress -- not in EPA, in Congress -- to regulate indirect sources, Congress has not undertaken to exercise it in statutes.

MR. MOSKOWITZ: Oh, we indeed agree on that point.

QUESTION: Well, then you say that Congress, in this statute, has not authorized the Administrator to regulate any indirect source of air pollution. Is that your position?

MR. MOSKOWITZ: It's my position simply because I haven't located the power in the statute.

QUESTION: Well, Mr. Moskowitz, I'm not quite sure how all these letters and numbers go together. But Section 110 (a) (2) (D), which appears on 135 small a of the

petition for writ of certiorari in the District of Columbia case, talks about the contents of plans. And it certainly authorizes regulation of sources. And couldn't the Administrator take the position that I am choosing to define sources broadly, and the indirect sources would be included as well as direct sources?

MR. MOSKOWITZ: It seems to me -- and I agree. Conceivably, he obviously has done that. But I think the question that I would like to proceed with, in order to fully answer your question, is that we have to understand what an indirect source is.

QUESTION: Well, an indirect source --

MR. MOSKOWITZ: In order to define -- well --

QUESTION: Am I right in this, in my concept and understanding of what a typical indirect source would be? It would be a repair garage where -- whose business is repairing carburetors. And private people take their automobiles in there, maybe a hundred automobiles a day are in there with the motors running, and they are adjusting the carburetors, and the gasoline fumes -- the various effluents from carburetors -- arise from this repair shop. That would be -- the repair shop would be an indirect source, would it not be? As a matter of definition?

MR. MOSKOWITZ: It isn't the purest example, because in that particular instance, the owner of the repair

shop would be creating the fumes through manipulating the cars directly, which isn't what the states are doing.

QUESTION: These would be cars privately owned by individual owners who brought them in there to be repaired.

MR. MOSKOWITZ: I think -- I think --

QUESTION: And the cars would be there as permittees or licensees on the premises.

MR. MOSKOWITZ: Rather than give examples, I think the most helpful thing I could do is to tell you what EPA says it is, and maybe using that as -- it's their concept, and rather than us trying to figure out what it could be, we can see what EPA said it is.

And in fact, they have defined it, and defined it in the regulations (which, incidentally, have not been cited by EPA, interestingly). But the regulation defining indirect source -- we can focus very narrowly on what the definition is. It's found at 40 C.F.R., Section 52.22 sub (b), and I'll read it because it's very short.

QUESTION: Has that been the focus here anywhere?

MR. MOSKOWITZ: It has not been cited by EPA, and we have discovered it only belatedly, because as we said, the it was tied to regulation of parking -- new parking structures. It's operation has been suspended, whatever that means. And so we didn't discover it until recently.

QUESTION: Would you repeat the citation?

MR. MOSKOWITZ: Surely. 40 C.F.R., Section 52.22 sub (b).

QUESTION: 52.22?

MR. MOSKOWITZ: 52.22 (b). And what this says -- it's very short -- the term quote, indirect source, close quote, means, a facility, building, structure or installation which attracts or may attract mobile source activity that results in emissions of a pollutant for which there is a national standard. Such indirect sources include but are not limited to -- and then seven examples follow. I think it's worthwhile to pay a little bit of attention to what those examples are.

They include: retail commercial and industrial facilities; recreation, amusement, sports and entertainment facilities; airports; office and governmental buildings; apartment and condominium buildings; education facilities.

What basically EPA is saying is that any place which anyone could ever want to get to for any purpose which is a man-made structure or facility is an indirect source. It includes virtually every man-made object within the jurisdiction of EPA. It is a very, very broad and sweeping concept, and certainly represents an expansive view of EPA's powers.

Now, interestingly, one of the examples given in

this commodious list of what an indirect source -- and as I think I -- the reason I wanted to read that, I think it shows you that it is far more than garages. It is everything. This building is an indirect source. Everything is an indirect source.

But the curious thing is that also included on the list of indirect sources are highways and roads. That, in fact, is interestingly given as the very first example. There's a difference between highways and roads, and all these other indirect sources. As I indicated, the other examples given are destinations, a place to which a person might want to go. He is attracted to those destinations, such as having to go to work. He is attracted to work. And then after work, he is attracted to going back home. He is attracted to the supermarket, and maybe to the ball park.

QUESTION: Well, he's attracted to the superhighway, too.

MR. MOSKOWITZ: Well, the difference between being attracted to the highway and being attracted to his destination is that the highway is the means of going to the indirect source.

QUESTION: Well, let's assume that the Indianapolis Speedway is owned by the City of Indianapolis.

MR. MOSKOWITZ: Indeed.

QUESTION: Does the Administrator have the power

to regulate the --

MR. MOSKOWITZ: The Indianapolis Speedway is, under this definition, clearly an indirect source. The sole point that I'm trying to make here is that unlike the other examples of indirect sources -- unless one is a street dragster, or maybe in the case of the Indianapolis highway, a race car driver -- few people are intrinsically attracted to highways.

So the difference between them -- and I'm only showing this difference to show how there is this drift from the statutory grounding -- the difference is that the highway is -- we could perhaps term it, an indirect indirect source. It enables one to get to an indirect source. It is not an intrinsic attraction. It serves as a means by which one would get to the intrinsic attraction.

QUESTION: Well, how about a sewer? That enables -- that's a conduit for effluents from one place to another.

MR. MOSKOWITZ: Well, of course, the sewer example, you know, we have two dimensions to the sewer example. And I suppose -- they're not trying to regulate that as an indirect source here.

QUESTION: No, because -- that's --

MR. MOSKOWITZ: I suppose the constitutional question as to whether, you know, that analysis would apply here, is properly Mr. Lord's. The point that we're trying to

make here is that the concept of the highway as an indirect source is not statutorily grounded. Whether Congress could have written it in as they wrote in sewers or as the federal common law considered sewers is maybe a question that we don't have to consider now.

But I think -- the point that I've made so far is that highways are, at best, an indirect indirect source. But as the sole authority for EPA's application of its concept of indirect source makes plain, namely, the Administrator, it doesn't stop there with solely saying that the highway is an indirect source. Rather it uses the concept that the highway is a source of pollution as a springboard for its next step.

And the Administrator in his preface says that what he's concerned about is not so much the existence of highways. What he's concerned about is that the, quote, regulatory taxing and investment decisions made at all levels of government which encourage the use of highways by automobiles are also an indirect source. He also says -- he cites as indirect sources particular examples: licensing vehicles and operators; providing a system of traffic laws; as well as not making choices which would have discouraged the use of single passenger automobiles and encouraged the use of mass transit.

So there's a certain shift here from the physical

object which may attract someone to go in a mobile source of pollution, namely, a car, which, as we indicated, includes everything in the known universe. There's a shift to state policies which encourage the use of these automobiles as opposed to mass transit; and state involvement, not only as an owner -- because the owner concept is what's being stressed before this court -- but the focus that's set forth by the Administrator himself when he came up with this idea is not the state as an owner, but the state as a regulatory, taxing and investment maker, a provider of traffic laws.

QUESTION: On that very point, supposing you had a large factory with a large parking lot that would come within the indirect source definition you described. Would it be your view that the Administrator would have the statutory authority to regulate that indirect source by saying, you must adopt a company policy of certain timing of shifts, of certain regulations in the parking lot, or certain -- you can't let anybody use the parking lot unless they have a car with, you know, proper emissions -- that kind of regulation of a private owner? Would that be permissible?

MR. MOSKOWITZ: What we were saying -- of course there was a good deal of dispute, as you recall, before the Congress and the Administrator abandoned the indirect source -- the parking lots as an indirect source, and told

the Administrator not to regulate that. There was a good deal of Constitutional discussion. And it's a position which I don't believe the state ever took a position on. And we don't take one now.

But there's a substantial difference between what the Administrator could do to that owner of the parking lot, and what it's prepared to do vis a vis the state. Because you could tell -- if you were to tell the owner of the parking lot, shut down your parking lot, very different from telling the state, I want you to exercise your police powers to regulate that private individual.

QUESTION: Well, would you answer my question?

MR. MOSKOWITZ: Okay.

QUESTION: Did you understand it?

MR. MOSKOWITZ: The question is, could he --

QUESTION: Does the Administrator have the statutory authority to promulgate a regulation affecting an indirect source such as the one described which would require it to adopt certain affirmative rules adopting -- applying to its own employees, how they use the parking lots and the like, for the purpose of reducing concentrations of air emissions in that parking lot?

MR. MOSKOWITZ: Okay. I think the answer would be that indirect source regulations may be permissible in some circumstances. I frankly --

QUESTION: Well, then, why isn't --

MR. MOSKOWITZ: The question is identical to the one we were asked before: is an indirect source regulation even permissible? And I'm taking -- you know, the position we're taking is that it is. But I'm not sure exactly what the parameters are, because the concept of indirect source we view as a drift from the statutory grounding; but in fact the drift has gone on so far that everything is an indirect source, not solely a parking lot. So I'm concerned with the slippery flow. Because if we accede to the concept that you could ever regulate an indirect source, and the Administrator has made everything an indirect source, then the conclusion we're logically drawn to is that he can regulate everything. And that's a position which the state vehemently does not wish to take.

#386

There may be some activities where the nexus of ownership is so close to the pollution that's generated that one could really say that the owner is causing the pollution in some meaningful way. But we're simply saying that nexus doesn't exist here; that the state is not, in fact, causing this pollution, the private people who are using the highways are causing this pollution; and furthermore, that even if the highways could be regarded as an indirect source of pollution, that this object, the highway as the indirect source of pollution, that the remedy adopted, namely, telling

the states to exercise their police power to regulate not solely access to the highway --

QUESTION: Well, let me stop you right there. If you make the assumption -- and I realize you're very reluctant to agree to anything, I guess, other than that you don't like this particular program -- but if you make the assumption that a parking lot -- privately owned factory and associated parking lot is an indirect source subject to regulation, would you not further agree that on those facts, the owner of those facilities could be compelled affirmatively to adopt certain controls of the use of those properties? Such as times people can enter and leave, how many cars can be parked at any given time, whether they can be of a particular --

MR. MOSKOWITZ: If we make the assumption it's an indirect source, yes, we would agree with that.

QUESTION: Then why can't the government make the states -- I mean, under the statute, what's the difference then?

MR. MOSKOWITZ: The difference is this: we've acceded, as you know, to the incinerator example. The notion that the state owns an incinerator. Private people come. They put their refuse in there. It burns up and violates emission standards. The state -- the federal government could say to the state, like any private incinerator owner,

you cannot let an excess of emissions come from your incinerator.

QUESTION: Where in the statute do you get the Administrator's power to do that?

MR. MOSKOWITZ: Well, frankly, I don't know.

QUESTION: Well, then, why do you concede that he has power to do it?

MR. MOSKOWITZ: Perhaps because I'm being --

QUESTION: Because once you do, your case is much weaker than it otherwise would be, your statutory case.

MR. MOSKOWITZ: I agree, I agree. And all I can say is that I've been very reluctant to concede that, because I don't find it anywhere in the statute. But I'm not that troubled about conceding it, because the incinerator example is so much different from our example. Because the difference is in the remedy. You see, if the Administrator were to say, I want you to attach a scrubber to your incinerator chimney --

QUESTION: Or hire ten more people.

MR. MOSKOWITZ: -- very different from saying --

QUESTION: To operate your incinerator, including all sorts of inspectors and so on.

MR. MOSKOWITZ: -- very different from saying to the private party, I want you to pretreat your garbage under pain of civil and criminal enforcement so that it does not

pollute when you put it in my incinerator, you see. Because it's not only a question of the subject of the regulation, namely, highways, incinerators, sewers, whatever; an important thing to keep in mind is not solely the subject of the regulation, but the contents of the regulation. What is it that was being asked to happen here?

QUESTION: Mr. Moskowitz, getting back to my brother Stevens' question, you've got a steel plant and a huge parking lot. And it's discovered that two thirds of the pollution in that area comes from the plant. You'd have no problem with that, would you?

MR. MOSKOWITZ: No.

QUESTION: What would you do? You'd tell them to clean it up. And one third comes from the parking lot. That you can't touch.

MR. MOSKOWITZ: Well, as I said -- I may appear to be -- I may appear to be waffling on this issue --

QUESTION: Is there any way to take that position? There's no way for you to take that --

MR. MOSKOWITZ: No, I'm not taking that position. I may appear to be waffling, and I don't mean to be. What I'm suggesting --

QUESTION: Well, let's get to another one. What the bus lanes? That is in the control of the state?

MR. MOSKOWITZ: Right, it is. It is.

QUESTION: What's wrong with that?

MR. MOSKOWITZ: The difference between the -- of course the bus lanes, of course you don't get to that question as to whether the bus lanes is a regulation of the highway as opposed to the regulation -- the police power regulation -- until you decide that the highway is an indirect source. So once you've got to the point that the highway is an indirect source, then the question is, is the bus lane a regulation of the highway, or is the bus lane a regulation of the people as private sources of emission?

And I -- you know, that's also -- it's a tougher question than inspection and maintenance.

QUESTION: Well, let's answer it.

MR. MOSKOWITZ: Okay, the answer is --

QUESTION: I mean, that's what we're here for: tough questions.

MR. MOSKOWITZ: The answer is that the --

QUESTION: With a little help.

MR. MOSKOWITZ: -- what the state is being required to do is to use its police powers to keep people in the bus lane and not outside of it. And we would submit that that is not permissible. Because what it really comes down to, is, those people are going to get tickets -- the state is forced to give them tickets under its police power, and to use its criminal laws to enforce particular behavior upon

citizens. It is not -- the prime example of the regulation of a highway not involved in the regulation of citizens under the police power --

QUESTION: Do you agree that the bus lane is a good idea?

MR. MOSKOWITZ: No.

QUESTION: You don't think so?

MR. MOSKOWITZ: As a personal viewpoint, I don't.

In fact, what it's meant to do is to provide --

QUESTION: So you would disagree with EPA. And I thought you did.

MR. MOSKOWITZ: Well, the bus lane idea is not so much, you're going to clean up the air. But it's what they call to provide a disincentive to private traffic.

#464 We had the experience in Los Angeles, you may have read about the diamond lanes. It wasn't so much that the smog was any less. The smog was more. Because the remaining lanes were so clogged with people idling as the bus lane was empty that there was more smog. And the strategy behind the bus lane, really, is that people will become so infuriated at the traffic congestion that they will take buses. So I'm not sure that it's a good idea. And in fact --

QUESTION: Well, not in Los Angeles.

MR. MOSKOWITZ: Certainly not in Los Angeles.

QUESTION: Mr. Moskowitz, what would be your

view of an Administrator's regulation that did not require the state to establish a bus lane, but simply said, no more than x amount of exhaust emissions shall be permitted per given lineal mile of freeway. And if the state wants to do it by putting in a bus lane, fine. If they want to put it by limiting the cars on the highway, fine. Would you view that differently than the bus lane regulation?

MR. MOSKOWITZ: If something were available to the states, such as building a plastic dome over the freeway and somehow not letting that -- those pollutants into the air, but putting it somewhere else to make it somehow more analogous to the sewer example, then perhaps we could say, they could do that.

But the prime evil here is not so much the subject matter of the regulation -- and that's why, you know, we haven't been very hard on the notion, abstractly, of indirect source; that somehow a highway could be regulated. The prime evil, and the one that I wish to stress and leave with this Court, is what EPA's contents of the regulations are, the notion that the state must use its police powers to regulate private conduct, to make not coming in for an inspection a violation, to make not -- after the inspection and after 60 per cent of the cars which are mandated to fail fail, not fixing it up within two weeks, to make that a violation of the state's criminal law, and so on. To make

the governor of the state and the officers of the state liable under the statute to criminal and civil enforcement if they do not propose legislation which is acceptable to the administrator.

The evil is the usurpation and arrogation of the state's police power, not solely making highways the object of regulation.

QUESTION: Well, then -- hasn't the --

MR. MOSKOWITZ: The government has not withdrawn that. What they have said -- and I think it's very plain from footnote 14 of their brief -- they wish now to reword their statutes and their regulations. Rather than saying to a state, state, you must have a law that says x, what they mean now to do is say, state, we want you to achieve the result of a maintenance inspection program somehow happening.

QUESTION: Well, that was Mr. Justice Rehnquist's question. What if the Administrator just said, no more than x amount of emissions per linear foot of expressway.

MR. MOSKOWITZ: And our answer --

QUESTION: And achieve it any way you want to.

MR. MOSKOWITZ: Our answer to that is that if the only ways available are to exercise our police power, then that is not an acceptable solution.

QUESTION: And you think that's equally beyond his authority under the statute?

MR. MOSKOWITZ: If the ways that are available --

QUESTION: Well, it's up to you to find out how to do it, the same as any private polluter.

MR. MOSKOWITZ: Yes. You see, any private polluter -- if the only ways that are available -- and this is why I use the Astrodome over the freeway example -- if the only ways that are available are to use our police power to make certain conduct criminal, then the answer is no.

QUESTION: You simply have more power than a private polluter to do it. You can do it more easily.

MR. MOSKOWITZ: The Administrator has not gone to Justice Rehnquist's position. The Administrator rather presents this Court with a notion that it is going to change the very regulations which are at issue here, and this deals with Mr. Justice Powell's question of what's left in this case. Everything is left in this case upon which certiorari was granted. Because the Administrator not only has not told this Court, I'm going to withdraw these regulations; the case is moot. He hasn't said that. He says, I'm going to give you these exact same regulations back, but the difference in the regulations is going to be the states are going to do exactly the same thing -- physically they're going to do the same things, but the difference is -- that we're going to phrase it slightly

differently. Rather than specifically commanding passage of a state law, we're going to say, achieve this result knowing it requires the passage of a state law. But then you can view that simply as an indirect, unfortunate circumstance.

QUESTION: May I ask you one more question?

MR. MOSKOWITZ: Surely.

QUESTION: Assuming that their regulations said, this is the result we want to achieve. We want vehicles inspected. We want maintenance and all the rest of it. And they define what the results should be. And they said, in substance, if you don't do it, we will do it with federal employees and federal money.

Would you have any objection -- would you agree they had that kind of power?

MR. MOSKOWITZ: Indeed, we do agree they have that kind of power.

QUESTION: So you don't -- so it isn't a question of what may be regulated, but really just the fact that they're asking --

MR. MOSKOWITZ: The manner of --

QUESTION: And the states ironically are asking to have federal people come into the states and do this regulating of their own citizens.

MR. MOSKOWITZ: Well, the federal -- well --

QUESTION: That's really what you're --

MR. MOSKOWITZ: The short answer is, yes, we agree. But you see, the question is not physical intrusion into the states, or having state people on our freeway.

QUESTION: Well, a different sovereign will control the patronage.

MR. MOSKOWITZ: Well, the real issue is whether the state's police power is going to be controllable by the Administrator. And that's the issue in this case. And we submit, that's the question before this Court, not whether highways are a proper subject of federal regulation.

QUESTION: Well, federal officials have intruded into the states since the time of the Whiskey Rebellion.

MR. MOSKOWITZ: Indeed, indeed. And in fact many of the examples given by the Administrator are -- specific constitutional empowerment of the federal government to force the state to do particular kinds of things under the War Powers Act, or Article 3 and various other examples, but no such power exists under the Commerce Clause to force the states to use their police power in any particular manner, and that's our major point in this case.

QUESTION: I take it you would say -- your position is that under the -- under this particular statute, the federal government has no authority to cause to be created or to force to be created a bus lane, et cetera?

MR. MOSKOWITZ: Exactly. Our basic position is that this is a traditional --

QUESTION: Although there is only one person that could -- I guess which you could operate to create a bus lane, and that would be the state, with automobiles --

MR. MOSKOWITZ: Within the statute, you don't find any specific authority, and the presumption is that traditional state functions are not likely to be found to be usurped or regulated by the federal government, and that this statute does not present that specific authority, and that in the absence of that, it should not be surmised, it should not be read into the statute, the presumption should be that traditional state authorities are to be maintained unimpaired by a federal statute unless Congress says differently.

QUESTION: Well, then, is your position also that the constitution -- that under the constitution the federal government has no power to cause the creation of a bus lane.

MR. MOSKOWITZ: Indeed, that's the next one, and I should properly leave that to --

QUESTION: But that -- is that your position?

MR. MOSKOWITZ: No, it's not my position.

QUESTION: Okay.

MR. MOSKOWITZ: Perhaps constitutionally --

QUESTION: I have a question, too, but I'm going

to save it for your colleague, because you're using his time now.

MR. MOSKOWITZ: I know.

QUESTION: Well, I have a question for you, and I'm going to use some of your colleagues time in answering it.

[Laughter.]

Would you take the same position with respect to a privately owned toll road that the federal -- that the Administrator cannot require the creation of a bus lane on a privately owned toll road?

MR. MOSKOWITZ: No, no. And then the short answer is that we're not complaining so much as to the subject matter of regulation, whether it be parking lots or highways or supermarkets or anything of that nature. Now we are not conceding that it's in the statute. And I don't wish to be any more indefinite than I have to be. I'm simply trying not to commit myself on issues I haven't given sufficient thought to. But the question is not the subject matter of regulations, but the contents of regulations. What are they asking states to do? And in this case, what they are asking the states to do is to make particular private conduct criminal. That's the evil here is the arrogation of state police power, not the fact that they've chosen a highway as a subject matter of regulation.

QUESTION: But it still -- a privately owned highway is still an indirect source.

MR. MOSKOWITZ: Indeed.

QUESTION: Well, I thought you just answered --

577

MR. MOSKOWITZ: But anything's an indirect source.

QUESTION: I know, but you just answered Mr. Justice Rehnquist that yes, that would be all right to do that.

MR. MOSKOWITZ: But you see the private operator doesn't have the police power available to him.

QUESTION: I understand that. I thought you said awhile ago that there is no authority to regulate any indirect source.

QUESTION: No, he didn't.

MR. MOSKOWITZ: That was the one that I appeared to be waffling on. I think it was because I haven't explored all the parameters, because once one suggests any indirect source, then one gets into the Administrator's regulation where everything is an indirect source. And I'm not willing to concede that he can regulate everything.

But the difference between a private highway operator doing this and the state doing this is that the private highway operator can't give tickets. He can't use any police power, any criminal sanctions, to force people to stay in their bus lanes. I suppose you can say, don't you come

back here anymore. But uniquely, the state is the one who has to keep people in the bus lanes. And the way they do it is to enforce a system of traffic laws. And when the Administrator tells a state, we demand you use your police power to, quote, enforce our regulations, to make that private conduct criminal under state law, that's the evil we're addressing here, and that's what we're suggesting is nowhere to be found anywhere within the four corners of the Clean Air Act.

MR. CHIEF JUSTICE BURGER: Fine. We'll hear from Mr. Lord now.

MR. MOSKOWITZ: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Moskowitz.

ORAL ARGUMENT OF HENRY R. LORD, ESQ.,

ON BEHALF OF MARYLAND AS RESPONDENT

MR. CHIEF JUSTICE BURGER: Mr. Lord.

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

The constitutional arguments will attempt to track the most recent metamorphoses of the EPA position as reflected in the two briefs and in the argument this morning.

While the shift in position of EPA, contrary to its statement, has been desperate and radical, the outcome has not changed, and the effect upon the states possibly is even more intrusive than with the regulations which were

presented to the Circuit Courts on petitions by the party states.

I think perhaps the way to demonstrate the difference would be to turn to Appendix A of the brief that we describe our sovereign goals, and that's pages 1A through 3A, and we have set out there an illustrative inspection and maintenance program. It happens to be the one that was mandated for the State of Maryland.

Now, bear in mind that in the metropolitan Baltimore intrastate air quality control region there are approximately 1.1 million private vehicles, light, medium and heavy duty vehicles; I suppose the number increases as much as seven fold when you move into the Los Angeles air quality control region.

Now, looking at the regulation, on the first page, when this becomes a federal regulation in all its particulars as described by Mr. Randolph this morning, the essential change on page 1A, in stead of saying the State of Maryland shall establish -- at the bottom of the page -- an inspection and maintenance program, it will say, the State of Maryland shall carry out a federal inspection and mainenance program.

We haven't seen these new regulations, so all we can do is surmise as to what they may contain. But this would seem to be logically following from the positions stated in the briefs and arguments.

At the top of page 2A, in the fourth line, the state will no longer have power to exempt any category of vehicles, and I'm sure that any exemptions that exist would be federal exemptions. The business about the state shall submit within the particular time period legally adopted regulations would no longer be necessary because the federal regulations would speak for themselves.

Now, all the operative provisions, which would be provisions (c) (1) through (6) on 2A, (d) and (e) at the top of page 3A, would become federal regulations. Reading down there you can see that in (2) there is a standard set. That's one of the things that EPA says it has a right to do, set a standard. It doesn't help you very much. It's a little like saying to a first grade teacher, you shall pass only seventy per cent of the students on to the second grade, without telling the teacher what sort of expectations so far as the learning experience, should be instilled in that student. It says that 30 per cent of vehicles shall fail. It happens to be 50 per cent of the vehicles in some of the California districts.

The sanction for the frequency of inspection is stated in (1), and this again would be a new federal regulation. It says that all vehicles, all 1.1 million vehicles, will have to be inspected periodically no more than one year apart. So that's the standard and the frequency.

We also have frequency provision down in (5) at the bottom of the page, that the first inspection cycle shall be in a year that expired during the time that this case was being considered by the courts.

Now, those would be the new federal regulations.

QUESTION: What's going to happen to the provisions under (f) on page 3A?

MR. LORD: Your honor, those provisions I think would be out the same way that the early provisions about the state having to submit within a particular time, at the top of page 2A. Because the state, presumably, if we follow strictly the argument that you've heard from EPA, would not have to adopt any legislation, and would not have to adopt any regulations. These would become the state statutes and regulations, in effect, with no further action of the state required.

QUESTION: What you -- what we're looking at here has now been withdrawn, has it?

MR. LORD: Well, it has not been withdrawn, your honor. The statement has been made by EPA and again made here this morning that they would be withdrawn, and recast in this new way. And I appreciate Justice Powell's problem, but frankly, the states have had the same problem trying to prepare for this case.

Now, as far as sanctions are concerned, I think

we can begin to see the intrusive nature of this new approach. If you look at (3), it says, these shall include-- that would be these provisions -- sanctions against individual owners and repair facilities, retest of sales vehicles following maintenance. And then another sanction is for people who disconnect their devices between the licensing year.

Bear in mind that in Maryland, for example, the licensing year for a vehicle is April of this year to March 31st of the following year. There is no safety inspection program. So this would be a brand new program. The only safety inspection in Maryland, for example, is when a vehicle changes hands. A used car is sold, it has to be inspected.

So for the first time we'd have a new --

QUESTION: Mr. Lord, how many states do not have safety inspections?

MR. LORD: The great majority. It's in EPA's brief. I think --

QUESTION: Well, I thought -- I thought --

MR. LORD: -- EPA says between 5 and 10 states have some sort of annual safety program. I think Virginia does. Maryland does not happen to have one.

And so, it's obvious here that despite what EPA would like to have this Court believe, the sanction here is not merely a licensing sanction on an annual basis,

the theory being, I suppose, that because the state licenses already, it's not really very much to ask the state to conduct its licensing affairs in a different way.

There will have to be interim sanctions against violators. Presumably those will be criminal. If someone has been inspected on a Monday and told that within two weeks he must bring his vehicle into compliance, does not, there has to be an interim sanction there. It could be a de-licensing. I suspect that if what he does the second time is to disconnect the devices he's placed on his car, most likely a criminal sanction.

Where is the source of it? The source is going to have to be this new federal regulation. Because Maryland does not happen to have any legislation on that subject. And at this point has not had any reason to have any legislation on the point.

So I think it's much too seductive an argument to suggest that legislation is not inevitable. This program will be one that will have to be managed by a group of people.

Now, we've had the helpful suggestion from EPA that we could contract this out and maybe even make money on it. I don't know that the states have to adopt the suggestions made by Counsel. Obviously that would have to be considered.

QUESTION: Arizona has done that?

MR. LORD: That's correct, Arizona has done that. And I think that there was a referendum in November in which that program was approved and effective about 12 days ago. But that certainly is an option --

QUESTION: There are several states that have private inspections.

MR. LORD: Certainly.

QUESTION: Several states have that.

MR. LORD: I suppose --

QUESTION: Virginia has that.

MR. LORD: I suppose, your honor, very many governmental programs could be leased out. The whole budget making program, I suppose, could be leased out to an accounting firm. But it seems to me that one of the essences of sovereignty is that the states continue to have the options available to them as to whether this will be done or whether it won't be done. And to suggest that everything is foreclosed to the state except the option of hiring someone to carry out the program, I think by its own terms, is intrusive enough.

Now, when you look at the constitutional framework of this -- and bear in mind we have also had another gracious concession by EPA that despite the clear language of Section 113, this Administrator at least will not seek criminal sanctions against states for violation here, despite

the fact that there's a \$25,000 a day fine, and a 1 year in jail per day fine, or both, that this Administrator has decided he won't seek that against states. Now that's somewhat reassuring, but hardly puts the case to rest.

Obviously, the injunctive remedy here could be very difficult for a state to live with.

Now, this has advanced to this Court as a comprehensive substitute transportation control plan. Indeed, that is the only way in which this program could have any federal authority whatsoever under Section 110. And I'll come later to the significance of this lack of comprehensiveness.

But turning to the --

QUESTION: Mr. Lord, I'm late in asking you this question, but I want to be sure I understand it, even though belatedly.

Your argument is proceeding upon the premise, upon the hypothesis, that the statute does authorize what the Administrator has purported to do, and you're saying that it is unconstitutional. Is that correct?

MR. LORD: That's correct, your honor. I should have said that in advance. I'm assuming that we have lost the statutory argument.

QUESTION: That's my point.

MR. LORD: I don't think we should, but --

QUESTION: But this is a question really not addressed

in the Courts of Appeals. They construed the statute because of various constitutional doubts about any other construction, isn't that correct?

MR. LORD: Well, your honor, if you read the 4th Circuit's opinion and the 9th Circuit's opinion, carefully, it's a little hard to --

QUESTION: I thought I had.

MR. LORD: -- say this precisely --

[Laughter.]

MR. LORD: I should say, your honor, if one read them carefully rather than be as direct.

I got the direct impression that the Court had taken an early look, in fact, discussed in some detail, the constitutional problem, and had followed the doctrine that when the constitutional problem seemed to be overwhelming, that there is a way in which the constitutional issue can be avoided, the Court would do it.

And it is clear that those are based on statutory holdings. But I think it's also clear that both of those Courts, if more had been written, would have found the program as stated then, pre-National League of Cities, by almost a year, both those cases, unconstitutional.

QUESTION: But you -- now your argument is assuming that contrary to the Courts of Appeals that the statute does permit what the Administrator gives you here.

MR. LORD: Correct, your honor.

And turning to that, first of all there is an irony that after describing this new federal program, we find that the only way the federal government has gotten to the point of having the authority to do it, is through the mechanism of a prior finding several years ago that the state didn't have sufficient authority to do this themselves, or they had not presented enough, so the states are told, and were all told, back in 1973, that they had not produced enough authority to carry out the program. That was the exciting cause, if you will, of the intrusion of the federal government.

Now we're told that these regulations have been withdrawn, and that there's been inherent federal authority all along to do this through federal regulations.

Now, the point was brought up by Justice Stevens about a swarm of federal officials coming into the states and perhaps being more intrusive, if not in a constitutional sense, in a governmental sense, than what we are opposing today.

That, I can only say, is a possibility. Apparently, the federal government, from the prohibition experience, has decided that that is not what it wants to do, that it will not take that issue on. We don't know why and we haven't been informed. But our position constitutionally is, that

the federal government has ample authority to take this program over itself. In fact, I would go so far as to say that the federal government could preempt this entire program, carry it out through federal funds and federal employees, and by a notice sometime prior to the licensing expiration period in a state, notify a state that a vehicle is not yet in compliance. And the state would then have to use, in that limited intrusion, lose -- use its licensing functions to not issue a state license.

I happen to feel -- I should say, we happen to feel, that that would not be so intrusive as to be constitutionally violative.

Anything short of that, however, --

QUESTION: The federal government could say -- no car on the highway without a federal sticker on it.

MR. LORD: That's correct.

But then the question comes up, and we've talked about this, as to whether that would require a separate federal registration and licensing, or whether that could be carried out and executed through the state licensing function.

And our conclusion was -- even though it's perhaps a concession that we don't have to make -- that the federal government could use the existing licensing and de-licensing mechanism of the state.

QUESTION: I take it the federal government, under your view, would have to have its own inspection system?

MR. LORD: That's correct.

QUESTION: Well, at that time, they'd either put a sticker on it or they wouldn't.

QUESTION: Yeah.

MR. LORD: Sure, that's right. But it could then say, to the states, if the vehicle coming in for licensing does not have the federal sticker, you cannot give it tags.

QUESTION: What difference would it make to the federal government whether you gave it tags or not? If you gave it a tag, they'd have to take it off the street. If you didn't give it a tag, they'd have to take it off the street.

MR. LORD: There would be the additional sanctions of the state against the vehicle, that's all, your honor. It'd be a coordinate --

QUESTION: So the police could pick a guy up, whereas under the other system perhaps you'd have to wait for the federal --

MR. LORD: Right. And we may have to have the swarm that Justice Stevens was concerned about.

Now, I think it's interesting that EPA has said

to this Court this morning that no constitutional source was cited for this 1973 regulation. And all of these regulations, and this whole theory, was conceived of in the latter half of 1973, within 10 months after EPA lost NRDC v. EPA.

That's simply not the case. In fact, right in the preamble to the Administrator's theories, which have been discussed today at length, is a citation to United States v. California, as the authority for what it is doing. And in fact, U.S. v. California was so appealing to EPA that in its brief in chief United States v. California was cited California was cited four times.

787

The United States v. California decision is really more helpful to the states than it is to EPA. And the reason for that is that in the California case there was a railroad owned by the state of California that connected 45 state owned wharves in San Francisco with a bunch of industrial users some distance away at an interstate railroad. It charged for the service, just like any private railroad would have. And as such, the court found that there was no valid distinction between what California was doing and what a private railroad was doing.

And what we have here is the support for our conclusion that state facilities are in now way exempted from the Clean Air Act. In fact, state facilities are included

But it's not the type of state facility that EPA would urge this court include. It would be if the state did own an incinerator, which it doesn't. That's a traditional municipal function. Or a sewage treatment plant, which it doesn't, again, a traditionally local or municipal function.

Those would be covered. The most obvious example, and the perfect parallel to United States v. California, is the state auto fleet. Every state owns a fleet of vehicles. If those vehicles are polluting, those vehicles can be reached under this Act, and can be constitutionally reached.

Now --

QUESTION: Of course they can be reached. I think everybody here in the audience in agrees on that. But how can they be reached? Can the Administrator tell the state you have to adopt regulations governing your vehicles?

MR. LORD: Yes.

The state as the operator of a state auto fleet can be treated just as a private industrial owned a fleet of vehicles.

QUESTION: And the Administrator can tell a state, you must regulate this, even though it might involve the exercise of the police power.

MR. LORD: But your vehicles -- these vehicles are in violation. Now, once again, I'm passing the statutory argument here. But constitutionally, a state could be told

that those vehicles must be brought into compliance. And the full enforcement power of the federal government --

QUESTION: Whatever it takes to do, you would do.

MR. LORD: -- could be brought against it.

QUESTION: And how is that different from the case before us?

MR. LORD: Well, your honor, without trying to reopen all the argument about --

QUESTION: No, no, constitutionally -- that's your argument.

MR. LORD: All right, constitutionally. Constitutionally, the state there is being regulated itself. It's not told to go regulate someone else.

QUESTION: Yes, it is. It's told to regulate the drivers and the --

MR. LORD: No, your honor --

QUESTION: -- the amount of those cars.

MR. LORD: -- with all due respect, that's not correct. The state owns them, and the state maintains them through state garages. And the simple direction is that the state must take steps to bring its own vehicles into compliance. It's not regulating any third person --

QUESTION: And how constitutionally is that different from saying that the state must take steps to bring its own roads into compliance?

MR. LORD: Well, the difference your honor, is that in this case the state is not being told to bring its own roads into compliance. It's being told to bring the drivers of vehicles which may happen to use state roads into compliance. The federal government has decided that it's not going to enforce the program. I don't know whether the appropriations were not available, or just appropriations were not sought. But that was obviously a conscious government decision.

EPA had to cast around, or Congress, for a police power somewhere to enforce this statute. It spotted the police power of the states. And then it conscripted it to use Justice Rehnquist --

QUESTION: Could I interrupt? I think it's relevant to your colloquy with Justice Stewart. Your analogy to the California case suggests that what you're arguing is something like this: that to the extent that the state is an owner of the road, and therefore has power over it like the owner of the factory parking lot, it may be compelled to do things which other owners might be compelled to do, but it may not be compelled to exercise governmental powers which private owners don't have. It couldn't exercise its criminal sanctions and so forth. Is that the essence of what you're saying?

MR. LORD: That's correct.

QUESTION: Mr. Lord, are you giving away too much in your agreement as to the -- state could help you do something on its own vehicles? Do you include fire and police in there?

MR. LORD: Well, no, your honor --

QUESTION: That the federal government can -- are you going that far?

MR. LORD: No, I'm glad you brought that up. Because I have just drawn a distinction without explaining its significance. Obviously, when you're talking about a municipality or a county or a township, they do not share the 10th and 11th Amendment protections that a state has, and they could not urge on this Court with any degree of success -- at least they've never been able to do so in the past -- the state sovereignty argument available to a state. Fire and police protection have been essentially local matters, and so I don't think they really fall within the example I gave. And I do think that the state audits --

QUESTION: You do have state police, you know.

MR. LORD: Well, those vehicles could be reached.

QUESTION: Police vehicles?

MR. LORD: Under the same -- same theory as my colleagues --

QUESTION: I think you're giving away a little.

MR. LORD: -- Justice Stewart. Well, I may be,

your honor, but I do think that constitutionally that that's correct. And I think --

347

QUESTION: Included in this case immediately you can take it back perhaps on another occasion.

QUESTION: Mr. Lord, following up on Justice Stevens' question for a minute, if the federal government sets out to reach this fleet of motorcars that's operated by the state, as you concede it may, can the Administrator say to the state, you shall fine every driver who doesnot keep his vehicle in compliance with the applicable federal standards not less than \$100?

MR. LORD: I would have a great deal of trouble with that. I think that to the extent that it does require operation on anyone else, even another state employee, in the form of a sanction, I think it's constitutional. Once you get beyond that, it gets into a dangerous area.

Now the arguments that I'm presenting today are hardly novel. In fairness, we have been waiting with baited breath to receive the reply brief from the federal government which we received on Monday, to see if they were at that point able to find a single case that stood for the proposition that they espoused. And they have not. It is clear that there is no case that stands for the proposition that the commerce clause can be used to drag in the police power of a sovereign state.

Now, analogies have been flying around this courtroom, and through the briefs, and as recently as the reply brief, a new --

QUESTION: Well, but this is on the premise, I take it, that the so-called mere enforcement requirement of federal regulations would necessarily involve the police power?

MR. LORD: I think so, in the broader sense, your honor.

QUESTION: Yes.

MR. LORD: Whether it's police power in getting someone out of an exclusive bus lane and telling him that he's got to pull over and be fined or ticketed --

QUESTION: -- for having bad cars?

MR. LORD: Right. Or going back to the Maryland v. Wirtz line and the National League of Cities line, the whole governance of a state, and the decision-making of a state, and the budget-making function, and which program will advance and which will not advance, is part of the exercise of the police power for the benefit of the health, safety and welfare of the population.

QUESTION: Well, let's take the proprietary power; looked at one way at least, it's not unlike the power that the owner of a private turnpike would have to limit the traffic density on his turnpike at the behest of the

Administrator. And he would have that -- the Administrator, concededly, I think from what we've heard, both under the statute and under the constitution, would have the power to regulate the owner of a private turnpike and say no more than so many vehicles a minute on the turnpike. And why couldn't the same thing be said to a state? Because the private operator doesn't have any police power. He just has the proprietary power that comes from owning the turnpike.

MR. LORD: Which means that if he can own it, he can also shut it down or limit access to it.

QUESTION: Or limit access to it.

MR. LORD: Well, I have a great deal of problem with the proposition that the state, could, for example, declare a moratorium on new car registrations in the state, the way it's done for sewer hookups, for example. Because it seems to me you may get into right to travel problems and all sorts of other arbitrary and capricious problems.

I think there are probably other things that the federal government could explore that neither the federal government or the states have thought of. Maybe that's a good thing, but --

QUESTION: Do think there'd be any question about the power of the State of Maryland to hand the card to every car owner when his license is up and say, here are a

list of requirements that you must meet from EPA. And we won't issue a license to you until you meet these requirements, whatever the requirements are. Any question about Maryland's power to impose that duty on its applicants for --

MR. LORD: Well, your honor, I don't think I'm begging the question when I just identify a problem with that. That is a one year program, and when the licenses are issued on the 1st of April, if that card is given to that owner, that means that before he comes back the next March the 31st, he will have had to have done something. And I frankly don't think that this is anything like what EPA had inmind --

QUESTION: Well, I'm just talking about the power.

MR. LORD: Well, I think obviously --

QUESTION: Not whether Maryland wants to do it, or --

MR. LORD: Right.

QUESTION: -- can be required to do it but whether it has the power to do it.

MR. LORD: I think that that comes close to the lesser intrusiveness aspects of my argument earlier. I think you'd have to take a hard look at whether they were interim sanctions that the state would have to impose --

QUESTION: The sanction would be that the state

would not issue the license unless they had established compliance. That would mean you would have to set up an inspection system --

MR. LORD: That's right.

QUESTION: -- since you say you don't have one.

MR. LORD: You'd have to set it up, and you'd also -- if you -- as the inspection program for used cars that are traded is now set up, it would have to be a system of certification of facilities throughout the region, which would meet the standards. So that when the fellow came back with the certification a year later, at least you'd know that that certification was worth something other than the piece of paper that it was written on.

Now the problem with that is that there will have to be an additional sanction against errant inspection stations. Now the only way that can be done is through a whole new program of licensing inspection stations. And no matter what EPA says, that is obviously something that would have to be state legislation. You just can't create that problem in the mind of an Administrator somewhere and expect it to be adequate notice for anybody. There would have to be standards set, and a staff to manage it.

If I could just close by saying, your honor, that the constitutional theory announced by EPA in its most statements attempts to put EPA in the position that the state

of March has been described as being in, entering this case like a lion, and departing like a lamb.

Now, I think the analysis -- the proper analysis -- would indicate that the new theory of EPA is even more pernicious. And to pursue the analogy, more leonine, than the original position which has been abandoned. And I think the states are entitled to have both the statutory and constitutional questions decided in their favor.

Thank you very much.

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

MR. RANDOLPH: May I say one word about the constitutional --

MR. CHIEF JUSTICE BURGER: We'll give you two minutes to have a supplemental rebuttal, then.

REBUTTAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESO.,
ON BEHALF OF THE FEDERAL PARTIES

MR. RANDOLPH: Thank you.

I didn't get much of a chance to talk about that, and I don't want to take the Court's time up. I just want to say one sentence, that interference with the powers of the states is no constitutional criterion of the power of Congress. It's not original with me. James Madison said that. And I would like to refer the Court, since I haven't had much time to develop this, to a brief that

922 was filed by the Solicitor General's office about 30
years ago in a case called Mulford v. Smith, it's No. 505
in the 1938 term.

No. 505 in the 1938 term, Mulford v. Smith.

MR. CHIEF JUSTICE BURGER: If you think it's
important enough, Mr. Randolph, you may see to it that
copies are given to your friends and handed to the Court.

927 MR. RANDOLPH: I have deposited copies with the
clerk. It was written by Solicitor General Jackson,
Thurman Arnold, Hugh B. Cox, and I believe Bob
Stern.

The conclusion of the point that is made there --
let me just read it, and then I'll sit down. It's
this: That we respectfully submit that the argument
which is developed -- this is the first time, incidentally,
after the turmoil of the 1930's, that the government
directly addressed the 10th Amendment question --

MR. CHIEF JUSTICE BURGER: Well, Mr. Randolph,
if it's in the material you've give us, we can get it there.

MR. RANDOLPH: Thank you.

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

[Whereupon, at 2:08 o'clock, p.m., the case in
the above-entitled matter was submitted.]