

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1945
PACIFIC GAS AND ELECTRIC COMPANY ET AL.,
TITLE v. Petitioners
STATE ENERGY RESOURCES CONSERVATION & DEVELOPMENT
PLACE COMMISSION, ET AL.
Washington, D.C.
DATE January 17, 1983
PAGES 1 thru 58



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PACIFIC GAS AND ELECTRIC COMPANY, :

4 ET AL., :

5 :

6 Petitioners :

7 v. :

8 Case No. 81-1945 :

9 STATE ENERGY RESOURCES CONSERVA- :

10 TION & DEVELOPMENT COMMISSION, :

11 ET AL. :

12 - - - - -x

Washington, D.C.

Monday, January 17, 1983

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:43 p.m.

APPEARANCES:

JOHN R. MC DONOUGH, ESQ., Beverly Hills, California; on
behalf of the Petitioners.

17 LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor
General, Department of Justice, Washington, D.C.;
18 as amicus curiae.

19 LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on
behalf of the Respondents.

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

2 CHIEF JUSTICE BURGER: Mr. McDonough, I think
3 you may proceed whenever you're ready.

4 ORAL ARGUMENT OF JOHN R. MC DONOUGH, ESQ.,
5 ON BEHALF OF THE PETITIONERS

6 MR. MC DONOUGH: Mr. Chief Justice, and may it
7 please the Court:

8 There are two substantive issues before the
9 Court in this case. The first is whether California can
10 place a moratorium on the construction of nuclear power
11 plants until the California Energy Commission, the
12 principal respondent here, has determined to its
13 satisfaction that there exists a demonstrated technology
14 or means for the disposal of high-level nuclear waste.

15 The second substantive issue is whether
16 California can refuse to permit a specific nuclear power
17 plant to be built in the state until the Energy
18 Commission finds that there are or will be facilities
19 with adequate capacity to store at any given time the
20 spent nuclear fuel produced by the plant plus all of the
21 fuel loaded into the plant's reactor at that point in
22 time.

23 The first of those issues is raised by the
24 enactment by California in 1976 of Section 25524.2 of
25 the California Public Resources Code, referred to in the

1 briefs as the waste disposal statute; and the second
2 issue is raised by the enactment in that same year of
3 Public Resources Code Section 25524.1(b), referred to as
4 the waste storage statute.

5 Petitioners contend that both of those statutes
6 are invalid as preempted by the Atomic Energy Act of
7 1954, as supplemented by the Nuclear Waste Policy
8 Statute of 1982, which was signed by the President just
9 ten days ago.

10 There are also, however -- there is also,
11 however, before the Court the question of the validity
12 or the -- the question of the justiciability of those
13 issues or the ripeness of those issues for
14 determination. And I shall address the ripeness issue
15 first.

16 QUESTION: Well, could I -- you mentioned a
17 statute that was recently passed.

18 MR. MC DONOUGH: Yes, Your Honor.

19 QUESTION: Now, would that be -- is that
20 statute arguably dispositive for one side or the other?

21 MR. MC DONOUGH: It is in our view. It is
22 supportive of the position that we are taking in this
23 case, Your Honor. The statute --

24 QUESTION: And contrary to the -- contrary to
25 the Court of Appeals.

1 MR. MC DONOUGH: Well, the Court of Appeals
2 had no opportunity to consider --

3 QUESTION: Oh, I no. But it's --

4 MR. MC DONOUGH: Yes.

5 QUESTION: But it's contrary to their judgment.

6 MR. MC DONOUGH: Yes, Your Honor. Yes, Your
7 Honor.

8 Now, that statute was first called to this
9 Court's attention in our reply brief at page 13 when we
10 noted that it had then been enacted by Congress, not yet
11 signed by the President. It was again called to the
12 Court's attention last week by the letter of the
13 Solicitor General informing the Court that this statute
14 had been enacted.

15 QUESTION: Should the case be remanded then to
16 let the California court take a look at that new
17 legislation?

18 MR. MC DONOUGH: Well --

19 QUESTION: In CA 9 --

20 MR. MC DONOUGH: -- Your Honor, it seems to us
21 that the case can be disposed and ought to be disposed
22 of by this Court taking account of that statute as well
23 as the Atomic Energy Act of 1954, as amended; but I take
24 it that would be a question for the Court to decide.

25 We will be making reference to the 1982

1 statute in the course of our argument this afternoon, as
2 I believe indeed the Solicitor General will.

3 QUESTION: Do we have a copy of that in the
4 material you have filed with the Court, Mr. McDonough?

5 MR. MC DONOUGH: A copy of the statute, I'm
6 informed, was sent to the Court by the Solicitor General
7 last week.

8 QUESTION: Yes, it's only 60-some pages long.

9 MR. MC DONOUGH: It is a lengthy statute, Your
10 Honor.

11 (Laughter.)

12 QUESTION: But your position is that you don't
13 need that statute at all, I take it.

14 MR. MC DONOUGH: Well, our position is, Your
15 Honor, that it -- it stands as a reaffirmation of the
16 view of the federal government's responsibility for and
17 willingness to accept responsibility for and deal
18 effectively with the problems both of the disposal of
19 radioactive waste on a schedule set forth in the statute
20 and pursuant to procedures described in the statute, and
21 that it also deals extensively with the question of
22 interim storage of waste --

23 QUESTION: And yet, Mr. McDonough, if the
24 statute had not been enacted, you'd still be here,
25 wouldn't you?

1 MR. MC DONOUGH: Indeed, I would, Your Honor.

2 QUESTION: You'd rely then only on the '54
3 statute.

4 MR. MC DONOUGH: Yes, Your Honor.

5 QUESTION: In a sense you came before it was
6 enacted.

7 MR. MC DONOUGH: Yes, indeed, Your Honor. We
8 were here and all the briefs were filed, except the
9 reply brief by ourselves.

10 The statute was enacted, as I say, signed by
11 the President only on January 7, 1983. But it does --
12 it does -- it represents the facing up, if you will, of
13 the federal government to two problems that are the
14 subject matter of the statutes before this Court; that
15 is to say, how will the nation deal with the problem of
16 the disposal of high-level nuclear waste, and how -- and
17 before that problem can be solved, how will the nation
18 deal with the subject matter of the interim storage of
19 that waste pending its ultimate disposal.

20 And in both of those respects the statute
21 assumes a federal responsibility, sets out procedures to
22 be followed by the federal government, and sets a
23 timetable for the accomplishment of objectives, and
24 specifically defines in each category the role of the
25 states, the precise role which the states are to have in

1 dealing with this problem.

2 QUESTION: But the only role of the states in
3 that statute is in the selection of the permanent
4 disposal site, isn't it? Isn't that all the state
5 participation that's involved there?

6 MR. MC DONOUGH: Yes. Your Honor, what the
7 statute does --

8 QUESTION: That really doesn't have much to do
9 with the issue before us.

10 MR. MC DONOUGH: No, I think it does, Your
11 Honor. The contention here is that the states may deal,
12 as California has, with the problems of final disposal
13 of nuclear waste, on the one hand, and interim storage
14 of nuclear waste --

15 QUESTION: Well, California's just saying we
16 want to wait until we know what the federal solution is.

17 MR. MC DONOUGH: Yes, Your Honor. And I think
18 that the method from the statute is that Congress does
19 not want to wait, wants the subject matter of the
20 continued operation of nuclear plants to proceed, and
21 has set forth in detail the procedures to be followed to
22 that end.

23 QUESTION: And it also made it rather clear
24 that the final federal answer won't be available for
25 several years.

1 MR. MC DONOUGH: Well, the final federal --
2 that's right.

3 QUESTION: And the question here is whether --
4 can the states say we want to wait until that answer is
5 -- I'm not suggesting one way or another, but I don't
6 really see that that bears on the preemption issue that
7 we have before us.

8 MR. MC DONOUGH: Well, Your Honor, what our
9 position is with respect to the disposal of nuclear
10 waste, that the federal government has assumed
11 responsibility for that, has set out a procedure to be
12 followed to reach that end, has set a target date of
13 January 1, 1989 for the licensing of the first disposal
14 facility. The NRC in the meantime has already decided,
15 as we of course pointed out in our brief, that as far as
16 --

17 QUESTION: And the question -- one of the
18 questions here is whether California can say we want to
19 wait until January 1, 1989 before we okay any more of
20 these plants.

21 MR. MC DONOUGH: Yes, Your Honor. As I --

22 QUESTION: That's the question.

23 MR. MC DONOUGH: Well, all right. The NRC has
24 already said in that respect insofar as it is concerned
25 the licensing of nuclear power plants by the NRC need

1 not wait the solution of the long-range disposal problem.

2 We think the statute in dealing with the
3 problem in the way that it has dealt with the problem
4 and does deal with the problem indicates, reaffirms the
5 federal government's view that this is a matter for the
6 federal government to decide, and that it should decide
7 all matters in relation to the problems of the disposal
8 of high-level nuclear waste; further affirms the federal
9 determination to go forward and solve that problem, and
10 therefore buttresses what we say is affirmed and found
11 in the '54 Act, as amended, in any event.

12 It does seem to be a current enactment of
13 considerable relevance to the issues before the Court,
14 and we thought that it ought to be brought before the
15 Court for its consideration.

16 Turning to the issues raised by the
17 respondents as to the justiciability of the questions
18 before the Court this afternoon, respondents have
19 contended that because the Court's writ brings before
20 the Court only the two statutes that I have mentioned
21 and not others, that the Court here really lacks Article
22 III jurisdiction.

23 That contention is based on the fact that the
24 action as filed below challenged the validity of a large
25 number of statutes included in California's

1 Warren-Alquist Act, and in particular challenged the
2 validity of about a dozen statutes which taken together
3 set forth a procedure whereby one wishing to build a
4 nuclear power plant in California must file an
5 application for first a -- a -- what's called a notice
6 of intention and later an application for certification,
7 and then engage upon a procedure in which the California
8 Energy Commission subjects that application to the same
9 kind of inquiries as are made by the NRC in the case of
10 an application for a license to build and later to
11 operate a nuclear power plant.

12 We said all of those statutes, which we
13 describe as the certification system statutes, were also
14 invalid. Those questions are not before the Court for
15 decision, and so the contention is that we are not in a
16 position to get a redress from a decision of this Court;
17 that our injury is not redressable.

18 We have two responses to make to that, the
19 first of which is that a favorable decision by the Court
20 on the two issues before the Court this afternoon would
21 dispose of two discrete injuries to the petitioners
22 arising out of these statutes. It would -- it would --
23 it would strike down the -- the -- the moratorium
24 statute and would as well strike down California's
25 attempt to become involved in the question of deciding

1 how nuclear waste should be stored before it's disposed
2 of.

3 Such a favorable decision would also in -- of
4 necessity set out the rationale of the Court's decision
5 in terms that could well be applicable and would be
6 applicable, we are certain, to the other statutes that
7 are challenged by petitioners or were challenged below.
8 And this particularly with respect to the waste storage
9 statute, because that really is functionally a part of
10 the certification system.

11 QUESTION: I understood respondents'
12 contention to be, Mr. McDonough, that your contentions
13 had been kind of like perhaps Christmas trees in
14 parallel rather than in series; that it was the combined
15 effect of each and every one of these statutes that
16 caused you to be uncertain, your client to be uncertain
17 as to whether he could go ahead and build. And that if
18 you couldn't challenge a part of this combined weight,
19 so to speak, there was no reason to think that just
20 partial relief was going to solve your problem.

21 MR. MC DONOUGH: Yes. Indeed that is his
22 position, Your Honor. My response to it is simply to
23 say first we will have this -- we will have this
24 enlightenment from the Court which will afford an
25 opportunity at that point to reassess the situation of

1 the petitioners to see whether the concerns they felt at
2 the point in time that the action was filed are still
3 sufficiently valid to preclude them from going ahead.

4 The second point we would make in response to
5 this contention is that certain redressability by this
6 Court, its judgment or decision, has not always been an
7 absolute requirement of Article III jurisdiction. In
8 that -- in that respect we refer to the Orr against Orr
9 case decided in 1979 where the Court decided and struck
10 down the Alabama alimony statute because it did not
11 impose an obligation on both husbands and wives to pay
12 alimony, even though it was not certain at that point
13 that the husband petitioner would have relief by reason
14 of this Court's decision, both because there was a
15 possibility that he was bound by contract in any event
16 to pay the alimony, and because the legislature of
17 Alabama might revise the statute to impose a duty on
18 both parties.

19 For those reasons we believe that the first
20 point raised by the respondents as to the ripeness or
21 justiciability of the issues is not well taken.

22 With respect to the ripeness of the moratorium
23 statute itself, we believe there simply that the Court
24 of Appeals was entirely correct. The court said that
25 the challenged statutes stand as an absolute barrier to

1 the construction of the proposed plants, and that that
2 barrier be removed by striking down the statutes. That
3 would satisfy, we feel, the Article III component of
4 ripeness.

5 The court also said that the issue was purely
6 a legal one and that it would not be -- its judgment on
7 that issue would not be helped significantly by delay,
8 and that delay would cause substantial hardship to the
9 utilities. That, we think, was the appropriate decision
10 with respect to ripeness on that particular statute, and
11 that the same reasoning, the same rationale should
12 have been applied by the Court of Appeals to Section
13 25524.1(b) for the same reasons; that is to say, it is
14 one of the statutes that constitutes a barrier. The
15 issue is a legal one.

16 With respect to the issue of preemption
17 itself, in our view when California enacted these two
18 statutes in 1976 it could not have entered a more
19 preempted area of this subject matter of nuclear power
20 plants and their governance.

21 Congress has always accepted responsibility
22 for the -- for the disposition, the storage and
23 disposition of nuclear waste. As I referred to earlier,
24 the NRC has decided that it will not withhold its
25 licensing procedures or withhold a license merely

1 because the long-range disposal problem has not yet been
2 solved.

3 I referred earlier to the 1982 statute. Let
4 me just incorporate that by reference, noting that what
5 it does is to set out with respect to both long-range
6 disposal and interim storage specific procedures whereby
7 the federal government assumes responsibility for
8 solving those problems within a short space of time, and
9 with respect to interim storage particularly, provides
10 that the federal government shall assist the utilities
11 to be certain that there will be ample interim storage
12 available until the depository problem is solved.

13 Mr. Chief Justice, I will reserve the balance
14 of my time until --

15 QUESTION: Mr. McDonough, may I ask you a
16 question before you sit down?

17 Is it your position that under the federal
18 legislation previously existing that the states can
19 determine whether to permit a power plant to be built at
20 all within a state?

21 MR. MC DONOUGH: Yes, Your Honor, in several
22 respects. That is to say, first the state can decide
23 whether there's a need for any kind of a power plant and
24 decide that question negatively. The question, the
25 state can decide whether a particular power plant is too

1 expensive.

2 QUESTION: Can it decide that it wants a
3 nuclear plant or does not want a nuclear plant?

4 MR. MC DONOUGH: No. It cannot decide simply
5 -- the state, in our view, Your Honor, simply could not
6 pass a statute saying we will not have any nuclear power
7 plants in this state. That runs counter to the
8 promoting, encouraging, fostering policy of the federal
9 government and -- and the -- as expressed in the 1954
10 Act.

11 QUESTION: Could it pass a statute saying we
12 will not have any hydroelectric plants in this state;
13 we'll use only coal-fired plants?

14 MR. MC DONOUGH: Yes, Your Honor, I believe it
15 could. The thing that -- that makes the situation here
16 different is the fact that Congress has evinced a strong
17 intention to have nuclear power plants as part of any
18 utility's mix, assuming that there is no -- the states
19 cannot discriminate against nuclear power, let me put it
20 that way.

21 Congress has done this in a variety of ways,
22 Your Honor. First, they have made the nuclear materials
23 available to the private sector. Second, they have made
24 the technology available and have provided research and
25 development to develop that technology. Third, they

1 have priced -- they have passed the Price-Anderson Act
2 which limits liability of the private operator and
3 provides funds to help them meet that financial
4 responsibility. Fourth, they have provided an expert
5 agency to license these plants and to give the public
6 confidence by its licensing process. Fifth, they have
7 just as recently as ten days ago enacted new legislation
8 carrying forth the federal policy that there shall be
9 nuclear power plants.

10 What we say is the states can apply those --
11 can make those decisions normally within its -- its
12 capability of making, applying them in a
13 nondiscriminatory way against nuclear power plants.
14 What the states cannot do is to regulate the
15 construction or operation of nuclear power plants or the
16 interim storage or long-range disposal of nuclear waste.

17 QUESTION: Well, you -- I take it if the state
18 -- if there's an application to the state commission for
19 building a new coal plant --

20 MR. MC DONOUGH: Yes.

21 QUESTION: -- And the commission says sorry,
22 but we don't need any more power plants in this state,
23 the fact that another entity comes in and applies for a
24 state permission to build a nuclear plant, even though
25 it's licensed by the federal authority, the state could

1 still keep that plant out.

2 MR. MC DONOUGH: Yes, sir. If it was making a
3 nondiscriminatory application of a general decision by
4 that state not to have any new power plants --

5 QUESTION: And you say that -- and you say
6 that that kind -- you say that that kind of an economic
7 decision is not involved in this case.

8 MR. MC DONOUGH: Not involved in this case,
9 yes, Your Honor.

10 QUESTION: You say the state's statutes are
11 safety statutes rather than economic statutes, aren't
12 you?

13 MR. MC DONOUGH: What we're saying is whether
14 -- first we say yes, they are safety statutes. And
15 second we say whether or not they're safety statutes,
16 they are statutes that deal with the very subject
17 matters that are regulated by the federal government --
18 the construction and operation of nuclear power plants.

19 QUESTION: Could they say, Mr. McDonough, no,
20 maybe we could use one, maybe we need one, but this is
21 just going to cost too much, and the possible burden on
22 the state's economy is so great that we'll not allow
23 that plant to be built?

24 MR. MC DONOUGH: We say they can do that, Your
25 Honor, if they do it, again, in a nondiscriminatory,

1 evenhanded way. If they say \$3 billion is simply too
2 much and we won't let -- we won't have a coal plant or a
3 hydro plant or a nuclear plant --

4 QUESTION: Well, what if they say well, we
5 think the -- we think they can dispose of nuclear waste
6 safely, but it's going to cost so much and escalate the
7 cost of electricity so much that we're just not going to
8 have a nuclear plant?

9 MR. MC DONOUGH: Well, Your Honor, I think
10 that if they make an -- a fair determination. After
11 all, they're entitled to take into account the cost of a
12 plant, and if they decide that this factor --

13 QUESTION: Well, what did -- did they do more
14 than that here?

15 MR. MC DONOUGH: Well, they -- no, they did
16 not do more than that here. In fact, they didn't do
17 that much here. But in any event, our position -- our
18 position is that they can make that kind of -- that kind
19 of decision. The kind of decision that is preempted is
20 the decision that relates to the construction and
21 operation of nuclear power plants. The kind of -- the
22 very decisions that the NRC makes are the decisions
23 which the state cannot make.

24 Now, that means that there are dividing lines
25 and distinctions to be drawn; but we think those are

1 required by the federal policy expressed in the '54 Act.

2 CHIEF JUSTICE BURGER: Mr. Claiborne.

3 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

4 AS AMICUS CURIAE

5 MR. CLAIBORNE: Mr. Chief Justice, and may it
6 please the Court:

7 First perhaps a word about the relevance of
8 the new statute enacted ten days ago. It may be -- we
9 can't say that it wouldn't -- that it would be wholly
10 inappropriate for this Court to remand to the court
11 below to reconsider the case in light of that statute.
12 We do not urge that course because we are not at the
13 jurisdictional stage. The case has been fully briefed.
14 It's now being argued before this Court. And that
15 statute cuts only one way. It simply strengthens the
16 case for reversal.

17 There is, what is more, an urgency in the
18 matter. One of the petitioners -- the petitioner has
19 spent some \$10 million in developing plans for a plant.
20 That process has been stopped. There is a federal
21 commitment, a national commitment to the construction of
22 further plants. And putting those various
23 considerations together, it seems to us unnecessary for
24 this Court to remand.

25 Now, the relevance of that statute is that it

1 reaffirms the federal responsibility and jurisdiction
2 with respect to this discrete question of storage and
3 disposal of nuclear waste. Some 63 pages of that
4 statute are devoted to no other subject.

5 What is more, it indicates a congressional
6 view, endorsing the view of the Federal Regulatory
7 Commission, that plants will not shut down, as
8 California fears or pretends to fear, because of the
9 storage or disposal problem.

10 Congress has provided that in case there is a
11 storage problem, there will be a federal facility to
12 take the excess. It has furthermore provided through
13 procedures which are lengthy, in which the states are
14 fully consulted, that there will be a final disposal
15 solution.

16 QUESTION: Well, Mr. Claiborne, doesn't that
17 just, in one sense, just mean that the utilities can
18 know when one of the conditions that the state wishes to
19 impose will be met so they can plan on saying well,
20 we'll assume the federal deadlines will be met, so we
21 can target -- we know when we will also meet the state
22 condition, which is there must be permanent storage in
23 existence?

24 MR. CLAIBORNE: Justice Stevens, in the
25 meantime they must wait because they cannot proceed

1 further without certification from the California
2 commission which is not permitted under its law to give
3 that certificate until not merely Congress has indicated
4 that the problem will be solved, but that the problem
5 has been solved.

6 QUESTION: Right.

7 MR. CLAIBORNE: And that the federal
8 commission has approved that solution, and indeed that a
9 site has been selected. And as Your Honor pointed out,
10 those procedures are ten years or seven years in the
11 future. And in the meantime, California has said
12 nothing further may occur. That delay is substantial.

13 Leaving the new statute aside and
14 concentrating on the federal laws that, in our view, at
15 all events control this case so as to require a reversal
16 of the judgment below, we wish to stress that what is
17 present here are two sorts of conflicts.

18 One is an actual present conflict between the
19 policy of the federal government through its nuclear
20 commission and the laws of California. That is most
21 obviously illustrated in that the federal commission
22 continues to license nuclear power plants,
23 notwithstanding that there is as yet no
24 federally-approved final disposal solution, whereas
25 California says we disagree. We will not allow any

1 plant to be certified or built in California until such
2 time as a federally-approved waste disposal system is
3 found. And what is more, our legislature is satisfied
4 with that solution.

5 There is another sort of conflict, equally
6 serious, which is a conflict of jurisdiction: who shall
7 decide these questions of storage and disposal?
8 California says we will determine, our commission must
9 determine whether in our view there is available storage
10 space, whereas the federal commission has determined to
11 license plants without requiring the kind of storage
12 facility that California leaves itself free to require.

13 If any area appears to us to have been wholly
14 preempted -- and this is most evident in Section 274(c)
15 of the '59 Act -- it is the area of construction, design
16 and disposal of waste. California is permitted under
17 that '59 Act, like any other state, to make agreements
18 taking over the jurisdiction of the federal commission
19 with respect to fringe areas but not disposal or storage
20 of high-level nuclear wastes.

21 California, like every other state, is
22 permitted by Section 274(1) to give advice, to be
23 consulted with respect to these matters of storage and
24 disposal. But the commission, the federal commission
25 under the act very clearly retains its jurisdiction, its

1 responsibility with respect to storage and disposal, as
2 is made clear in Section 274(c).

3 Now, the section on which the respondents rely
4 and on which the court below relied was 274(k), an
5 inartfully worded provision which read most generously
6 might be read to suggest that California can regulate
7 any activity respecting the building or operation of a
8 nuclear power plant so long as it does it with a motive
9 other than protection against radiation hazards.

10 We suggest it cannot reasonably be read that
11 way in light of the other provisions of the act which I
12 have sketched, because otherwise it would mean that
13 notwithstanding the federal judgment that there is an
14 adequate means of disposal and an interim storage
15 capability, California could say we will ban all plants,
16 not for fear of radiation but because it's aesthetically
17 displeasing to us, it will, in our view, endanger the
18 environment other than through radiation --

19 QUESTION: Well, can the states just say
20 nuclear power plants cost too much, and therefore we
21 don't want them? And is that what they've done? And
22 maybe they cost too much because of the waste disposal
23 problem. Can a state do that?

24 MR. CLAIBORNE: Justice O'Connor, California
25 has not -- had California said and been able to sustain

1 the proposition that it was, in effect, for the time
2 being banning nuclear plants because they were going to
3 produce rates for their consumers that were too high,
4 there would be no quarrel with that. That is the
5 authority which the states retain over the sale and
6 transmission of electrical power, and they may do that
7 with respect to nuclear plants as with others. And they
8 may determine that the cost of the electricity will
9 simply be too high.

10 QUESTION: Well, the state is --

11 MR. CLAIBORNE: But they've done something
12 quite different.

13 QUESTION: Well, the state is arguing they've
14 done just that, aren't they?

15 MR. CLAIBORNE: No. Even --

16 QUESTION: In subsection (4) in the act?

17 MR. CLAIBORNE: I think the state has to
18 concede that since the moratorium is only effective
19 until such time as a federally-approved disposal system
20 is in existence, they're not concerned that power plants
21 per se produce electricity at too high a rate. The
22 existence of the disposal system isn't going to change
23 the cost of production.

24 They are, say they, concerned that the plant
25 may be required to be shut down and that the reliance on

1 that electricity may put their citizens at risk. That
2 fear involves a second-guessing of the federal judgment
3 that there is no such problem of ultimate disposal, and
4 that fear is therefore not one on which California can
5 properly halt the licensing of nuclear plants.

6 And in this respect the new statute is of
7 special relevance because it says at the federal level
8 it has been determined -- and indeed by Congress itself
9 -- that this problem will be solved. You must,
10 therefore, California, put that out of mind as a pretext
11 for banning nuclear development in your state.

12 We completely agree that if California were to
13 say we need no electric power of any variety, they could
14 bar nuclear as well as any other generating facility.

15 QUESTION: Mr. Claiborne, may I ask you one
16 question about your interpretation of 24.2, the
17 California statute that says that no nuclear fission
18 thermal power plants shall be permitted land use in the
19 state until after the permanent storage condition has
20 been met.

21 What does that mean about "shall be permitted
22 land use in the state?" They cannot construct the plant
23 or cannot operate the plant?

24 MR. CLAIBORNE: I take it neither, Justice
25 Stevens.

1 QUESTION: Neither. Could not even begin
2 construction until the -- the -- the --

3 MR. CLAIBORNE: I think that is so. The
4 statute does go on to say "nor shall a certificate be
5 issued," which is --

6 QUESTION: I understand.

7 MR. CLAIBORNE: -- A prerequisite to building
8 it.

9 CHIEF JUSTICE BURGER: Mr. Tribe.

10 ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.,

11 ON BEHALF OF THE RESPONDENTS

12 MR. TRIBE: Mr. Chief Justice, and may it
13 please the Court:

14 Mr. Claiborne says that the 1982 statute cuts
15 only one way in this case. We agree, but we think it
16 cuts entirely in favor of affirmance, though not
17 terribly strongly. Let me explain why that is when I
18 discuss it in the context of the remaining federal
19 statutory provisions.

20 We think that the issue in this case is quite
21 simple. It is a state's authority to decline the
22 nuclear option simply as too uncertain, too costly, to
23 discontinuous, until the states have been assured by
24 actual federal resolution and not simply by a commitment
25 to resolution, assured by actual federal resolution of

1 the nuclear waste, storage and disposal problem that
2 their current fears will not materialize.

3 Such state authority can be and has been
4 exercised in a variety of forms: by statute in
5 California, Connecticut, Maine and Oregon; by referendum
6 in Massachusetts; by executive order in New York; by an
7 order of the Public Service Commission in Wisconsin.
8 Indeed, similar authority is quite routinely exercised
9 on a plant-by-plant basis in Arizona, Minnesota,
10 Illinois, a couple of dozen other states.

11 On the basis of a judgment that until we know
12 what to do with the waste, and where it will go, and how
13 much it will cost we cannot make a reasonable,
14 economically sound commitment to nuclear power --

15 QUESTION: How long will it be before a plant
16 of this kind in this situation could be completed after
17 the certificate is issued?

18 MR. TRIBE: It could probably take a dozen
19 years, Mr. Chief Justice.

20 QUESTION: Well, then isn't -- doesn't that
21 allow quite a bit of time to resolve some of these
22 problems?

23 MR. TRIBE: You mean how long until a nuclear
24 plant that they seek to build? But the point is they
25 don't want to invest billions of dollars that they will

1 then seek to recover from our ratepayers, leaving them
2 holding the bag, something neither they nor we want,
3 until they have some assurance. In that sense there is
4 a convergence of position between the respondents and
5 petitioners.

6 QUESTION: Well, if they thought -- if the
7 petitioners here can't satisfy the federal regulatory
8 authority on the safety, they'll never have a plant in
9 operation, will they?

10 MR. TRIBE: But the point is, Mr. Chief
11 Justice, that the federal concern is, as you say,
12 precisely safety; and they can satisfy federal
13 authorities who have decided that while the search for a
14 storage and disposal solution goes on, it may be safe to
15 keep licensing plants. And it's for that reason that we
16 say that the questions addressed at the federal and
17 state levels are wholly different.

18 The reason it may be entirely safe to keep
19 licensing plants even when we're not sure whether we
20 will ever find adequate storage and disposal facilities
21 is that when push comes to shove, one can always order
22 them shut down. That is indeed what the Environmental
23 Protection Administration warned California some seven
24 months before these laws were enacted.

25 Now, to shut down is safe, but it leaves us

1 with --

2 QUESTION: Isn't the worst that could happen
3 -- isn't the worst that could happen for the investors
4 of the -- in this kind of an enterprise that they might
5 have a lot of ghost plants on their hands if they can't
6 satisfy the safety requirements?

7 MR. TRIBE: I'm afraid, Mr. Chief Justice, the
8 ghosts will haunt the people of California, not just the
9 investors.

10 QUESTION: How do the people pay for this
11 plant?

12 MR. TRIBE: Through higher rates that are
13 forced upon them for substitute electricity; that is, if
14 it were really assured in advance somehow that only the
15 shareholders in the utilities would end up suffering
16 when cost interruptions -- when service interruptions
17 occur when shutdowns are ordered, we'd have a very
18 different nuclear industry in the United States.

19 It is precisely because investors can count on
20 the utility commissions to pass some of those costs on
21 that the situation is of fundamental concern to the
22 State of California.

23 I think it's important --

24 QUESTION: Well, can't California count on its
25 own state utility commission to follow state policy and

1 to set its face against this passing on of costs?

2 MR. TRIBE: Well, of course, I suppose if the
3 entire system of California were restructured so that it
4 were made bindingly clear in advance that in no
5 circumstances would costs be passed on, we'd have a
6 different case here. But in that case I doubt that the
7 petitioners -- who have not made this argument; it's
8 being made only by the United States -- I doubt then
9 that the utilities would have any real interest in
10 taking these enormous risks.

11 QUESTION: But in California they could do it
12 by referendum very easily, couldn't they?

13 MR. TRIBE: Well, California by referendum, as
14 Massachusetts could do, could say we're waiting until
15 the problem is solved. It doesn't really want to take --

16 QUESTION: But couldn't it by referendum
17 prevent them from passing it on?

18 MR. TRIBE: But -- I suppose it could prevent
19 by referendum at this point from passing it on, but then
20 when they confront bankruptcy and come back to ask for
21 help, we'd face a different situation.

22 It's not just the pass-on of costs that's a
23 problem.

24 QUESTION: But I mean that --

25 MR. TRIBE: We want the electricity.

1 QUESTION: -- The state is not -- the state is
2 not helpless.

3 MR. TRIBE: One of the things that we think
4 the state has a clear right to do is wait until the
5 problem is solved before making the commitment. One of
6 the reasons for that is that if these utilities invest
7 in nuclear power, even if in the end it's a bunch of
8 California shareholders who go broke rather than the
9 ratepayers who pay too much, even if that could be
10 assured, there remains the problem of an interruption of
11 a continuous electrical source.

12 QUESTION: That's a legislative argument.

13 MR. TRIBE: The legislative argument was
14 resolved by the legislature --

15 QUESTION: That's what you -- that's what you
16 --

17 MR. TRIBE: -- In a way we think they had a
18 right to resolve it.

19 QUESTION: Mr. Tribe?

20 MR. TRIBE: Yes, Justice Powell.

21 QUESTION: You do not, I assume, question the
22 authority of the federal government to preempt this
23 field if it specifically did so.

24 MR. TRIBE: Not at all. And we think
25 precisely because they have that authority, they don't

1 need the help of the federal judiciary in finding
2 preemption where it has not been expressly adopted.

3 In the -- in 1982 Congress was asked to
4 preempt the field quite explicitly through something
5 called the McClure amendment, which would have said, as
6 petitioners and the United States seem to think it did
7 say, that we have in fact solved the waste disposal
8 problem or are certain that a solution will be available
9 on time.

10 That language in the Senate version which was
11 passed last year, and similar language which was
12 proposed to the House was expressly deleted. And
13 Representative Ottinger, who played an important role in
14 the drafting the law, said it was deleted to avoid
15 preemption.

16 QUESTION: Well, the bills that Congress
17 didn't pass have really never carried much weight here,
18 have they?

19 MR. TRIBE: No. I think, Justice Rehnquist,
20 certainly they haven't and shouldn't; but the provisions
21 that were specifically deleted in a bill of this kind at
22 least suggest that what the petitioners asked the
23 federal judiciary to do is something that the industry
24 has repeatedly asked Congress to do and Congress has
25 repeatedly refused to do, as in Dames and Moore v.

1 Reagan and in other such cases.

2 It seems quite clear that the significance of
3 congressional inaction may be ambiguous, but in this
4 case it's very clear, and the history leaves no doubt,
5 that Congress omitted the very language that would have
6 suggested there is no waste disposal problem.

7 QUESTION: And, of course, one of the reasons
8 we don't give a great deal of attention to what Congress
9 didn't enact is perhaps some people voted against it
10 because they thought it was already there.

11 MR. TRIBE: If the only issue before them was
12 preemption, that might have been true; but the thing
13 they voted against was a measure that would have
14 specifically declared the waste disposal problem is
15 solved, and any legal requirement that requires its
16 solution as a precondition of licensing more nuclear
17 plants shall be deemed satisfied.

18 That's, of course, what I think that the
19 petitioners and the United States want to make out of
20 this act. But to put that act in context, all it does
21 is say that there shall be some federal backup interim
22 storage which amounts by the year 2000 to about 3
23 percent of the amount of storage space that even the
24 Department of Energy says will be needed. And then it
25 says we're going to get back on track and somehow solve

1 the problem of permanent waste disposal by perhaps the
2 year 1990 or so.

3 Promising it will be solved is very nice, but
4 there are a lot of places that we could go off track. A
5 state could veto it under this bill, could veto a
6 location for a repository; and unless Congress and the
7 President override the veto, we're back to ground zero.
8 And in any event, you cannot mandate by law the solution
9 to a technological problem. California says until you
10 solve that technological problem, this is too risky a
11 gamble for us. And I thought it was --

12 QUESTION: Well, what if a -- what if a state
13 attempted to pass a statute that -- let's assume some
14 newer development in air travel along the lines of the
15 three-hour planes to London and Paris, but that they
16 were thought to be of uncertain safety. Could a state
17 say none of these planes can pass over our state until
18 you're absolutely sure that none of them will ever fall?

19 Let's assume it's an atomic-powered airplane.
20 That might give us an analogy.

21 MR. TRIBE: Well, I would think once the
22 jurisdictional dispute between the FAA and the NRC had
23 been resolved, the state would probably be out of luck,
24 because the safety of an atomic-powered airplane would
25 not be up to California to judge. But if California

1 says we don't want our utilities or our chartered
2 entities, if you can imagine a special industry of this
3 kind, to invest lots of money that may have to come from
4 California pockets in that kind of airplane until
5 they've built some airports for it so that we know where
6 it can land, that would be a reasonable economic
7 judgment California could make.

8 QUESTION: Well, we've already got that with
9 reference to atomic-powered ships, including submarines,
10 have we not?

11 MR. TRIBE: Well, in the military area
12 California makes no claim whatever. The claim here is
13 that with respect to the degree to which a state must
14 depend on nuclear power to meet its energy needs, that
15 at no point has Congress ever decided or the NRC ever
16 decided that that is a judgment for the federal
17 government to make. It's always been a judgment for the
18 state.

19 One can't put need and cost in neat little
20 compartments as though they were not affected by those
21 things that might require the plants to shut down. And
22 the statements that are made by the petitioners and by
23 the United States I think are profoundly misleading in
24 this respect.

25 Congress, they say, is willing to license the

1 plants by betting on the future, even though there may
2 be risk of some shutdown. They don't take that risk so
3 seriously. Therefore, they say, for the State of
4 California to have a different judgment is wrong.

5 The mistake there is that Congress'
6 willingness to license the plants while searching for a
7 solution represents nothing more than a belief that the
8 mandate of the Atomic Energy Act to provide a safe
9 nuclear option can be met even before we've discovered
10 what to do with the waste.

11 QUESTION: Mr. Tribe, you've emphasized the
12 interest of the federal government in safety. If this
13 case had arisen in 1973, what do you think the primary
14 concern of the federal government would have been, in
15 light of the embargo of oil from the Middle East?

16 MR. TRIBE: Well, I suppose in 1973 the
17 federal government's concern might have been that we
18 need to have less dependence on oil, more dependence on
19 nuclear power; and therefore, we might enact a law
20 saying that those who own utilities have got to put
21 nuclear power on the shelf.

22 Notice, Congress didn't pass such a law.

23 QUESTION: Did not pass it.

24 MR. TRIBE: Did'n't pass such a law because
25 those who own nuclear -- those who own

1 electricity-generating utilities, whether they are
2 private companies or whether they are municipalities or
3 states, are left entirely free, even under their
4 interpretation of the Atomic Energy Act, to say this is
5 a bad investment.

6 It is only when there is a separation between
7 those who regulate and those who own, on the theory of
8 the petitioners, that there is some sudden mandate to go
9 nuclear.

10 Now, that makes no sense in terms of
11 independence of oil, in terms of any other coherent
12 federal policy. If the federal government wanted to
13 make a decision that we really have to choose at least
14 20 percent of our energy sources from nuclear, Congress
15 would not be without means of legislating such a
16 choice. But the most consistent pattern in the entire
17 history of legislation in this area is that the choice
18 of technology in light of risks of shutdown, risks of
19 interruption, cost uncertainties, and other factors has
20 been left to the states.

21 Indeed, the comparison with hydroelectric
22 power, in response to your question, Justice Rehnquist,
23 I think is quite instructive, because when the Atomic
24 Energy Act in 1954 was debated and passed, Senator
25 Humphrey proposed that the Atomic Energy Commission's

1 control over nuclear power be as comprehensive, as
2 pervasive as the FPC's control over hydroelectric power;
3 that it should be treated as a national resource to be
4 dealt with in terms of foreign policy and other concerns.

5 That proposal was debated. It was opposed by
6 Senator Hickenlooper on the specific ground that it
7 would be a federal usurpation of state sovereignty to
8 give the Atomic Energy Commission that broad a role.
9 And it was replaced by the much narrower role of federal
10 regulation of radiation hazards, which, of course,
11 California does not challenge.

12 Indeed, all California asserts here is not the
13 right --

14 QUESTION: How did that discussion occur? Was
15 that in the context of the '54 Act or the '59 --

16 MR. TRIBE: Yes. That was the '54 Act.

17 QUESTION: Is that where the preemption of
18 radiation hazards occurs, or is that in the '59 Act?

19 MR. TRIBE: Well, there are two steps, Justice
20 Rehnquist. In 1954 there was a decision to end the
21 federal monopoly over nuclear materials, but there was a
22 very close federal control over those in the private
23 sector who would use them. The states were given no
24 special role except that their preexisting role of
25 regulating the generation of electricity was kept intact

1 in Section 271.

2 QUESTION: Well, pre -- preexisting role with
3 respect to electricity. The states had never had any
4 part in regulating atomic energy. Indeed, there was no
5 civilian regulation right after the war; it was all
6 military.

7 MR. TRIBE: Yes, Justice Rehnquist. Then in
8 1954 neither the states nor the federal government were
9 regulating nuclear power plants because there were
10 none. The first prototype was built in 1957.

11 But the point was it was anticipated, hoped
12 that there would be a nuclear power industry, and the
13 attempt to structure that industry by federal law was
14 rejected. Instead it was said that the regulatory
15 structure in place for generating electricity would be
16 the available one, except that the federal government --

17 QUESTION: You say it was said. It certainly
18 wasn't said in haec verba in the '54 statute, was it?

19 MR. TRIBE: Except in the '54 statute after
20 the debate about the role of the states in the federal
21 government, the language of Section 271 was adopted
22 saying that "nothing in the act shall be construed to
23 affect the authority or regulations of any state with
24 respect to the generation, sale or transmission of
25 electrical power produced through federally-licensed

1 nuclear facilities."

2 QUESTION: Did that -- is that a '54 and not a
3 '59 section?

4 MR. TRIBE: Correct. That's '54. Section 271.

5 Now, in 1959 the decision was made that the
6 Nuclear Regulatory Commission, then the AEC, could
7 relinquish some of its power over radioactive materials
8 under agreements with the states, but not all of its
9 power. That is, there was a reservation in Section
10 274(c) of the NRC's power to protect the public from
11 radiation hazards from certain activities, particularly
12 the operation of nuclear power plants and the disposal
13 of their waste.

14 But even that had an exception, and that is
15 the section that you may be thinking about, Justice
16 Rehnquist, in Section 274(k). That is, Section 274(k)
17 said that even as to nuclear plant and waste regulation
18 -- that is, even as to those activities over which the
19 NRC could not relinquish its authority -- the states
20 would remain free to regulate "for purposes other than
21 protection against radiation hazards." So there are --

22 QUESTION: Well, isn't it true, Mr. Tribe,
23 that you take the position that California has superior
24 expertise over and above the United States as to
25 everything involving radioactivity's --

1 MR. TRIBE: No, no. We -- we --
2 QUESTION: Disposal.
3 MR. TRIBE: We think that as far --
4 QUESTION: Isn't that really what it is?
5 MR. TRIBE: I don't think so, ^{justice} Judge Marshall.
6 QUESTION: Well, why --
7 MR. TRIBE: That is, we trust -- the reason --
8 we do trust their expertise. We trust they'll know when
9 to shut the plants down. But when the plants are shut
10 down, that solution to the safety problem because the
11 cause of our cost and continuity problem. And in
12 particular, it is because of the sharing of expertise,
13 the federal government over radiation --
14 QUESTION: Well, I don't see any --
15 MR. TRIBE: -- With California --
16 QUESTION: I don't see any sharing here at
17 all. You just --
18 MR. TRIBE: Well, the sharing.
19 QUESTION: California says no.
20 MR. TRIBE: It says no because it costs too
21 much.
22 QUESTION: That's not sharing.
23 MR. TRIBE: Well, when they can come up with a
24 solution, we're happy to have them give us a safe one.
25 QUESTION: That's sharing?

1 MR. TRIBE: It's the best we can do, Justice
2 Marshall.

3 And essentially what we are doing is avoiding
4 the creation of what would be quite an astonishing
5 regulatory vacuum. The one thing that has not been
6 denied by the petitioners or the United States is that
7 the NRC's mandate is quite narrow. It is to figure out
8 how best to preserve the national security and the
9 public health and safety from radiation hazards from
10 these nuclear plants and their wastes. That does not
11 include the question of how best to meet the states'
12 energy needs, whether this stuff is too costly and too
13 uncertain.

14 I think it's interesting that the amicus
15 briefs of Connecticut and Oregon point out to this Court
16 that some nine months ago the Nuclear Regulatory
17 Commission repealed its financial qualification
18 requirements for nuclear power plant operators on the
19 ground that economics was a matter for the states to
20 worry about. And the NRC in doing so specifically said
21 that nuclear plant shutdowns need not concern the
22 federal government since they are "not inimical to
23 public health and safety under the Atomic Energy Act."

24 Of course they're not inimical to health and
25 safety. This is not a safety measure. But they are

1 inimical to continuity of service, and unless we
2 recreate a different world for sharing costs, they're
3 inimical to the pocketbooks of the ratepayers.

4 In these circumstances it seems to us quite
5 plain that the federal judiciary could not really grant
6 to petitioners the judgment that they seek here without
7 very substantially expanding the power of federal
8 courts, not only at the expense of the state
9 legislatures, but at the expense of Congress itself; for
10 Congress repeatedly has been confronted with the request
11 to occupy this territory, to take it over, and its
12 rejection of that request, whatever we may usually make
13 of congressional inaction, is significant here because
14 the effect of a victory for the petitioners in this case
15 would be to transfer to the federal government the
16 entire question of deciding whether nuclear power is as
17 suitable a way of meeting a state's energy needs as coal
18 or oil might be.

19 QUESTION: Mr. Tribe --

20 QUESTION: You don't completely ignore Article
21 VI, do you?

22 MR. TRIBE: We think the supremacy clause
23 means that we cannot conflict in any way with what the
24 NRC does. We couldn't tell a nuclear plant that we
25 think a safer way of operating is to run X hours a day,

1 whereas the NRC has concluded, given problems of human
2 fatigue, that it's X plus 5 hours a day. That's not our
3 point.

4 QUESTION: No. I'm only talking about you
5 telling us what we can't do.

6 MR. TRIBE: What -- what the --

7 QUESTION: You were busy telling us what we
8 can't do, and I just thought we were sitting under
9 Article VI.

10 MR. TRIBE: Oh, I -- I have no quarrel with
11 that, Justice Marshall.

12 QUESTION: Mr. Tribe, if your views were to
13 prevail, could a district court, such as Judge Real
14 here, inquire into the motives of the California
15 legislature? You argued a legislative motivating case
16 here last year in the California bus amendment case.

17 MR. TRIBE: Correct, Justice Rehnquist. I
18 think that if our views were to prevail completely, then
19 the motive would be irrelevant, for this reason: under
20 Section 271 of the Atomic Energy Act passed in 1954, as
21 long as a state exercises its historic, traditional
22 power -- and we think the power to say no to a proposed
23 electric generating facility falls in that category --
24 as long as it is not regulating the ongoing operation of
25 a nuclear facility, then there's no preemption at all

1 and motive doesn't matter.

2 It is only if we lose that claim and only if
3 we must rely on Section 274(k) -- that is, if the Court
4 treats what California has done as a regulation of the
5 operation of nuclear power plants or their wastes, only
6 then we must show that we come within 274(k), namely
7 that this is for purposes other than radiation.

8 And as to that I think that the case that I
9 lost in the Crawford case really reflects the Court's
10 fairly general sense that second-guessing the motives of
11 lawmakers is a very difficult thing. But if we lose our
12 claim under 271, there'd be no choice other than to
13 second guess.

14 However, this Court would hardly be the
15 tribunal to do it. The Ninth Circuit has already said
16 that the purposes were economic. The district court
17 made no contrary finding. The record contains not a
18 shred of contrary evidence. That is, the focus of the
19 legislature in California at this time was on several
20 alternative ways of dealing with the nuclear problem.

21 One rather more extreme approach was concerned
22 with safety, and that was rejected by the people
23 ultimately. The other approach focused, as the
24 legislative committee that proposed it stressed in its
25 reassessment report, focused on problems of cost and

1 reliability, not safety. So that if we do have to rely
2 on Section 274(k), then I think it is very clear that
3 this is a properly motivated law.

4 One of the reasons I don't want to have to
5 rely on 274(k) is that I think for institutional reasons
6 it makes a great deal more sense to create a rather
7 clean division between those kinds of activities that
8 states are preempted from and cannot engage in under the
9 Atomic Energy Act and those kinds that are somehow
10 suspect.

11 And it seems to me that a classic example of a
12 nonproblematic state decision is a state decision simply
13 not to have a particular form of power. It is only when
14 the states undertake to regulate in detail how that
15 power will be produced that there could be ongoing
16 conflicts between what the states think is appropriate
17 and what the federal regulators think is appropriate.
18 It's only then that we get into this twilight zone of
19 motive.

20 QUESTION: Well, Mr. -- let me just be sure I
21 understand what you just said.

22 Assuming they made a total decision to have no
23 nuclear plants within the state, you're arguing that
24 that would not be preempted even if it were perfectly
25 clear that the motive was merely they thought they were

1 unsafe?

2 MR. TRIBE: Well, I'm glad we don't have to
3 defend that view, but that is my view.

4 QUESTION: That's what I thought.

5 MR. TRIBE: It's my view that the Atomic
6 Energy Act basically puts nuclear power on the shelf.
7 It says it's the exclusive responsibility of the NRC to
8 decide how those who buy it are to use it so that it
9 will be safe, but it is not a federal decision whether
10 it is appropriate, whether it is needed, whether it is
11 expensive, and indeed, if someone says we just don't
12 want to take the risks, all of the risks, taken as a
13 whole. We believe nothing in the Atomic Energy Act
14 precludes that kind of action.

15 Of course, this case, it's important, I think,
16 to stress, does not require the Court to go nearly so
17 far, because the record in this case is unambiguous that
18 California was not trying in some way to protect its
19 people from radiation hazards. These wastes that we are
20 worrying about, the record makes clear, these wastes are
21 not at the moment targeted in some way for California.
22 There's nothing in the record suggesting that California
23 was afraid that the permanent waste depository would be
24 located there, that they might try to veto it and fail.

25 The concern was entirely what happens to the

1 consumers, the ratepayers, the energy users of
2 California if all of the optimism of the nuclear
3 industry and the federal regulators turns out to have
4 proved somewhat overblown, and if one actually has to
5 shut the plants down to protect the people. And it is
6 at that point that California exercises the kind of
7 traditional judgment that we do not think involves a
8 regulation of nuclear power plants, and therefore
9 doesn't raise the motive issue.

10 Now, arguably there's a problem in that
11 respect with respect to one provision that I think is
12 particularly unripe for resolution here; and that is the
13 provision dealing with full core onsite reserve
14 capacity, so that when a reactor is shut down for
15 repairs you don't have to ship its active core miles
16 away during the repair process but can store the core at
17 the site of the plant.

18 Now, one could say that that is an attempt by
19 the State of California to dictate some detail of
20 nuclear power plant construction, and that to prevail on
21 that claim we really do have to show that the motive
22 under 274(k) is other than radiation control.

23 Even conceding for the sake of argument that
24 in that case we would have to rely on 274(k), this is a
25 provision as to which all parties seem agreed, that the

1 reason has nothing to do with safety, the reason for
2 requiring that the core not have to get shipped miles
3 away.

4 The reason, quite simply -- and the Solicitor
5 General says so in his brief; petitioners say so in
6 their brief -- the reason is that when you have to ship
7 the core away, you close the plant down longer, you have
8 a longer interruption, and it costs more. So even as to
9 that provision I think we prevail.

10 But I say that that provision is unripe, and
11 that, I think, is a point on which I might close. I
12 want the Court to recognize that the provisions dealing
13 with interim storage, as to which the 1982 Act provides
14 some marginal degree of help, do not even become
15 effective in California unless and until the nuclear
16 waste disposal moratorium ends. Until the moratorium
17 ends, the storage law has no operation whatever. And we
18 do think, therefore, it's unripe for decision.

19 As to the waste disposal law, although the
20 Ninth Circuit in ruling in our favor found it ripe for
21 decision, I think Justice Rehnquist's analogy of the
22 Christmas tree lights strung in parallel really was
23 perfect. The point that the petitioners themselves have
24 made -- they didn't have to, but they've said it -- is
25 that it would really not help them at all to have the

1 waste disposal law struck down. It wouldn't help them
2 at all because, they say in their petition for
3 certiorari, that no rational utility would enter the
4 bramble bush, the thicket, whatever their image, of
5 California certification law unless they were assured
6 that the whole thing was blown up.

7 But it seems to me perfectly plain that
8 nothing that could possibly be derived from this Court's
9 preemption decisions could warrant completely ousting
10 the states from a regulatory role with respect to
11 electricity simply because the fuel that's used is
12 nuclear. And unless the Court went that far, I think
13 it's clear from their own concession that they would not
14 be benefited.

15 But if the Court does reach the merits, then I
16 think it important to close by saying that California
17 deeply shares the concern expressed in this Court by
18 over 30 states that a ruling for the utilities would
19 leave a vital sphere of traditional state regulation
20 over electricity in a state of complete disarray,
21 creating a regulatory vacuum that Congress has not
22 filled even during the 1973 oil crisis, and at the same
23 time would quite radically shift power to the federal
24 judiciary, power that the states have relied on the
25 Congress to exercise.

1 Thank you.

2 CHIEF JUSTICE BURGER: Well, Mr. McDonough, do
3 you have anything further?

4 ORAL ARGUMENT OF JOHN R. MC DONOUGH, ESQ.,
5 ON BEHALF OF THE PETITIONERS -- REBUTTAL

6 MR. MC DONOUGH: Yes, if I may, Your Honor.

7 It is said here that the California
8 legislation does not reflect concern about safety, but
9 on its face it does not say that it does not reflect
10 that concern; and the fact of the matter is that these
11 statutes apply only to plants built in California.
12 Should a California utility decide to build a plant
13 outside California, these statutes do not apply, and yet
14 the same problems of the clog in the -- in the fuel
15 cycle and so forth would then -- would then be
16 applicable. So -- and so we don't concede at all that
17 these are not safety-related statutes.

18 Number two, Mr. Tribe has said that the states
19 traditionally have the right to decide what technologies
20 may be used within the state to generate electric
21 power. That is true subject to this particular act.

22 We believe that the principle here, the
23 preemption principle here, is this: that a state
24 statute is preempted which stands as an obstacle to the
25 accomplishment and execution of the full purposes and

1 objectives of Congress, as stated by Mr. Justice
2 Frankfurter back in Hines against Davidovitz.

3 The key to the decision of this case, we
4 think, is for the Court to make its own decision
5 respecting what can be derived from the course of
6 federal legislation and regulation of this activity over
7 the years. What we find there is that Congress did make
8 the decision and has continued to make the decision as
9 recently as 1982 that there shall be a nuclear component
10 in the mix of any state if it possibly can be fitted
11 in. And then the Congress has really in effect divided
12 the decision-making process as to whether it shall go in
13 into two components.

14 Certain matters are for the states to decide.
15 We've never challenged it. Need, cost, whether it goes
16 into the rate base, how much goes into the rate base are
17 for the states to decide, condedely; but there are
18 questions that the federal government has decided it
19 will decide. It will decide the question of whether it
20 should -- you should not have a plant because of concern
21 about interim storage. The federal government will
22 decide whether you shall not have a plant because of
23 concern about ultimate waste disposal. The federal
24 government will decide how a plant should be designed,
25 how it should be constructed, and how it should be

1 operated.

2 QUESTION: Well, Mr. McDonough, that suggests
3 that the federal government has given nuclear power a
4 kind of preferred position over coal generation and
5 hydroelectric.

6 MR. MC DONOUGH: I think what it has done is
7 to -- Congress, it seems to me, Mr. Justice Rehnquist,
8 very clearly said back in 1954 and has continued to say
9 we believe that the best interest of this country in the
10 long range will be served by having nuclear power in
11 this country, and we are going to do everything we can
12 do to bring it about, do everything we can do to
13 encourage the private sector to get in and stay in.
14 That's why they enacted the Price-Anderson Act. That's
15 why they -- they have -- they gave the technology to the
16 private sector.

17 Congress has decided this is wisdom for this
18 country to have the nuclear option. Now, that doesn't
19 mean that Congress has said the states must have it at
20 any cost, economic or otherwise. Congress has said we
21 will take the responsibility for design, for
22 construction, for operation. We will take
23 responsibility for safety and the disposal of the spent
24 fuel. And -- and we -- we -- when we have decided those
25 things, they are decided for everybody, for all the

1 states, for the whole nation. Congress takes that much
2 responsibility but does not purport to preempt the
3 states from making the kinds of judgments which Congress
4 is not trying to force it down anybody's throat but
5 trying to say we will take certain responsibility; you
6 take certain responsibility; together we will work it
7 out. We will have nuclear power. That is the federal
8 policy --

9 QUESTION: Well, that certainly -- that
10 certainly is forcing to a certain extent down somebody's
11 throat, isn't it -- together we will have

12 MR. MC DONOUGH: Yes.

13 QUESTION: -- Nuclear power.

14 MR. MC DONOUGH: I think it's clear --

15 (Laughter.)

16 QUESTION: Who takes the responsibility for --
17 who takes the responsibility for shutdowns?

18 MR. MC DONOUGH: I beg your pardon?

19 QUESTION: Who takes the responsibility for
20 shutdowns?

21 MR. MC DONOUGH: Of the nuclear plant? The
22 federal government. The NRC, the NRC, yes, sir.

23 QUESTION: In -- in sort of an indemnity
24 agreement, or how do they do that?

25 MR. MC DONOUGH: Well, you mean respecting

1 whether a particular plant should be shut down at a
2 particular point in time?

3 QUESTION: And say there's a very substantial
4 business interruption cost as a result of it. Who bears
5 the loss?

6 MR. MC DONOUGH: Well, I take it either the
7 shareholders or the ratepayers or both bear the cost.

8 QUESTION: But not the federal government.

9 MR. MC DONOUGH: Not the federal government,
10 no. The federal government has assumed a substantial
11 amount of responsibility, financial responsibility, for
12 the possibility of a nuclear incident, as you know,
13 under the Price-Anderson Act. The federal government
14 has manifested a continuing policy of wishing there to
15 be nuclear power plants and going out of its way in
16 every respect to see that eventuality comes --

17 QUESTION: But it takes none of the investment
18 risk.

19 MR. MC DONOUGH: It doesn't take the
20 investment risk, no, Your Honor. It doesn't take that
21 risk. But -- and it doesn't insist that the states
22 invest more money than they would normally invest in a
23 plant.

24 But with respect to the question of if there
25 is a risk of shutdown, it seems to me the federal

1 government has said that's a risk we must all assume.

2 QUESTION: Well, Mr. McDonough, hasn't the
3 Ninth Circuit looked at the California law and said --
4 said as we understand this law, California has economic
5 concerns about nuclear power?

6 MR. MC DONOUGH: Yes, I believe the Ninth
7 Circuit has. I think that that, however --

8 QUESTION: Well, do we know more about the
9 California law than they do, or must we act like we do,
10 or what?

11 MR. MC DONOUGH: Well, I think that we have
12 brought the question here, and it seems to me now that
13 the case is here on writ of certiorari, the question now
14 is for this Court to decide whether it agrees with the
15 Ninth Circuit.

16 QUESTION: About California law.

17 MR. MC DONOUGH: Well, yes, sir. About the --
18 about the policy reflected in the California law. And
19 it seems reasonable that the Court now would take its
20 own look at this and decide whether the case -- whether
21 this law is safety-oriented or not. I think that a fair
22 reading of the statute in context would suggest that
23 that's exactly what it is.

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

1 (Whereupon, at 2:50 p.m., the case in the
2 above-entitled matter was submitted.)

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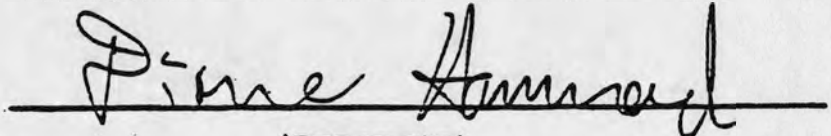
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