

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-920

TITLE ALASKA AIRLINES, INC., ET AL., Petitioners V.  
WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

PLACE Washington, D. C.

DATE December 1, 1986

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 ALASKA AIRLINES, INC., ET AL., :

4 Petitioners :

5 v : No. 85-920

6 WILLIAM E. BROCK, SECRETARY OF :

7 LABOR, ET AL. :  
8 -----x

9 Washington, D.C.

10 Monday, December 1, 1986

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 1:54 p.m.

14 APPEARANCES:

15 WILLIAM T. COLEMAN, JR., ESQ., Washington, D.C.;

16 on behalf of the Petitioners.

17 LOUIS R. COHEN, Deputy Solicitor General, Department  
18 of Justice, Washington, D.C.; on behalf  
19 of the Respondents.  
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21  
22  
23  
24  
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C O N T E N T S

ORAL ARGUMENT OF: PAGE

WILLIAM T. COLEMAN, JR., ESQ., 3

on behalf of the petitioners

LOUIS R. COHEN, ESQ., 21

on behalf of the respondents

REBUTTAL ARGUMENT OF:

WILLIAM T. COLEMAN, JR., ESQ., 43

on behalf of the petitioners

The issue here is would Congress have enacted the remaining provisions of the Section 43 Employee Protection Program in the broad language it did if it had known that the one-house legislative veto provision, exclusively applicable thereto, set forth in the same section, was unconstitutional.

First, the relevant facts.

Having made new entry and additional air service possible by replacing economic regulation with competition, Congress recognized that the Airline Deregulation Act of 1978 would expand airline employment.

The CAB and now the Department of Transportation already have authority to impose labor protective provisions as a condition of government approved private transactions.

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1           Nevertheless, late in the legislative process,  
2 Congress added Section 43 to provide a single integrated  
3 employee protection program.

4           The House and Senate had each passed bills  
5 providing for government assistance, money paid by the  
6 government to airline employees who lost their job  
7 because of deregulation.

8           The House bill, in the traditional form of  
9 employee protection, conditioned the exercise of  
10 authority under the Deregulation Act, for example merger  
11 authority, on certification by the Secretary of Labor of  
12 protective arrangements similar to those set forth in  
13 Section 5(2)(f) of the Interstate Commerce Act.

14           Benefits paid by the airline would be  
15 reimbursed by the Government.

16           The Senate bill involved a completely new  
17 concept of employee protection. If an airline went  
18 bankrupt or had a 15 percent workforce reduction caused  
19 by deregulation, its employees would be entitled to  
20 Government financial assistance, and, solely to offset  
21 the Government's cost, the right of first hire by other  
22 pre-1978 certificated carriers; the same Section  
23 authorized the Secretary of Labor to issue regulations  
24 to effectuate the existence program and the duty-to-hire  
25 program.

1 All regulations were subject to one-house  
2 veto. In reaching a compromise, the conference  
3 committee deferred several important basic policy  
4 decisions relating to benefit levels and eligibility for  
5 assistance in hiring preference.

6 Instead, it directed the Secretary of Labor to  
7 adopt, within six months of October 24, 1978 -- and that  
8 date appears in the statute, Your Honor -- all  
9 regulations necessary to provide financial benefits and  
10 hiring preferences.

11 That delegation was subject to a unique set of  
12 procedural and time restraints that ensured Congress'  
13 active involvement in the program's development.

14 Congress reserved ultimate regulatory  
15 authority through the right of either House to exercise  
16 the legislative veto.

17 Section 43, nor anywhere else in the  
18 Deregulation Act, is there a severability clause. In  
19 1979, the Secretary of Labor proposed regulations to  
20 implement both the financial assistance and the hiring  
21 preference aspects of the program.

22 Final regulations were submitted to Congress  
23 on January 18th, 1981, but withdrawn 14 days later,  
24 which is long before the 60 day legislative period that  
25 they were to lay before the Congress.

1           For several years thereafter, there were no  
2 regulations; there was no employment protection program.

3           Then on June 23rd, 1983, this Court held  
4 legislative veto provisions unconstitutional. Only  
5 thereafter were the regulations promulgated. And they  
6 attempt to effectuate only the hiring preference.

7           Fourteen covered airlines challenged the  
8 regulations --

9           QUESTION: Mr. Coleman, could I interrupt you  
10 right there, because it's something I'm not clear about  
11 in the statute.

12           During this four or five year period between  
13 the enactment of the statute and the finally -- 1983,  
14 when they did promulgate regulations, did the statute  
15 have any effect at all?

16           MR. COLEMAN: We don't think it had any effect  
17 at all, Your Honor. But to answer you completely, there  
18 is one case in the Southern District of New York where a  
19 plaintiff has claimed that the statute does have effect  
20 with respect to the right of first hire.

21           QUESTION: The first hire provision?

22           MR. COLEMAN: It's not spelled out in the  
23 statute, and this raises a question that you get from  
24 time to time, where there's a statutory provision which  
25 doesn't say you have a private cause of action; do you?

1 And that's on litigation.

2 But other than that, I know of no instances.  
3 It's the position of the airlines that the statute has  
4 no effect. Certainly it's the position of the airlines  
5 that the regulations completely change whatever effect  
6 the statute --

7 QUESTION: Well, I understand that. I mean,  
8 they spell out -- they give lists of employees and  
9 things like that, too.

10 MR. COLEMAN: Yes, yes.

11 QUESTION: But your position is that until the  
12 regulations were promulgated, the statute was basically  
13 a nullity?

14 MR. COLEMAN: That's our position, Your Honor.

15 And also, in that connection, I'd like to call  
16 your attention in the petition, in the appendix to the  
17 petition for cert, which is -- which is the record in  
18 this case, on page 49, with respect to the regulations,  
19 it's stated that the regulations would issue to  
20 effectuate the section which deals with the right of  
21 first hire.

22 In other words, that certainly the  
23 Administrator thought that he needed these regulations  
24 to effectuate the purpose of the statute.

25 QUESTION: Well, at least to completely



1       effectuate it. At least it would be arguable.

2               MR. COLEMAN: It says, effectuate it.

3               QUESTION: It might be arguable that even  
4       without the regulations, there were some employee rights  
5       that were --

6               MR. COLEMAN: But not clearly these  
7       regulations. It's these regulations that we're trying  
8       to upset.

9               QUESTION: Right.

10              MR. COLEMAN: And also, since you also have  
11       before you the record, I'd like you to look at page 46A,  
12       where you see -- where the Administrator says, his  
13       authority that he's acting under is Section 43(f), and  
14       that's the section that has the one-house veto in it.

15              QUESTION: Mr. Coleman, do you disagree with  
16       the argument that the -- that what the legislative veto  
17       was mainly directed at, what consisted of the main  
18       degree of discretion here, was not the issuance of  
19       regulations dealing with the right of first hire, but  
20       rather, the regulations dealing with the obtaining of  
21       Federal assistance, that that's what the Congress was  
22       worried that the Secretary was going to do something --

23              MR. COLEMAN: We disagree 100 percent, Your  
24       Honor. When you read every page that the Government  
25       cites in this book here, you will find that what is

1       being described is the employee protection program.

2               There is one program. And that program  
3 consisted of both parts.

4               Another evidence of that fact, and the  
5 Government calls your attention to the Zorinsky  
6 amendment, where he said that he wanted to exclude the  
7 financial payment part, but he wanted to have the right  
8 to hire part.

9               They don't tell you that when you look at the  
10 amendment you will find that with respect to the right  
11 to hire part, he still had the veto provision.

12              And so we say, it goes to both. Because when  
13 you read the statute, when you reread the statute, you  
14 will find that it's impossible to work out the program  
15 that's in the regulation without having the regulation.

16              When this was before Judge Gesell, he  
17 determined that the legislative veto provision of  
18 Section 483 was inextricably bound with the remainder of  
19 that Section, and that Congress would not have enacted  
20 the remainder of the Section 43 in its absence.

21              He therefore declared the entire Section 43  
22 unconstitutional. The Court of Appeals reversed.

23              The language and structure of Section 43, as  
24 it emerged from the conference, House conference, Senate  
25 conference, showed that the legislative veto was

1 essential in the unique legislative-executive  
2 partnership established in Section 43 to develop a  
3 single integrated employment program for protection.

4 Respondents ignore the veto's importance in  
5 the structure of Section 43, relying mainly on the lack  
6 of a big floor debate, espousing the virtues of  
7 legislative vetoes.

8 But this Court has said, on many occasions,  
9 the statute itself is the most important aspect of  
10 Congressional intent. And as Dean Griswold said in that  
11 wonderful casebook on tax, don't think great thoughts  
12 about the Internal Revenue Code; read the statute.

13 And so therefore, I would ask the Court to  
14 look at the statute. It appears beginning on page 38A  
15 in the appendix.

16 The heart is Section 43(f), which provides  
17 elaborate and detailed constraints on whatever regulatory  
18 authority was granted the Secretary, who incidentally,  
19 was the head of an agency not otherwise involved in air  
20 deregulation or subject to the aviation committee of  
21 Congress.

22 Look at Section 43. It contains four  
23 interrelated provisions.

24 QUESTION: Section 43(f).

25 MR. COLEMAN: 43(f), yes, sir, which is on

1 page 42A.

2 The regulations to be issued are those, quote,  
3 necessary for the administration of, and, quote, to  
4 carry out Section 43.

5 All regulations must be promulgated within six  
6 months after October 24, 1978. All proposed regulations  
7 must be submitted to the aviation committee for 30  
8 legislative days.

9 All final regulations must be submitted to  
10 Congress for 60 legislative days, during which period  
11 either House may disapprove them.

12 These four interrelated constraints on the  
13 Secretary's authority was exclusively applied to Section  
14 43 to ensure active Congressional participation in  
15 adopting and EPP program by many of the same committee  
16 members who drafted the Act.

17 It is quite significant in establishing the  
18 tight time restraints, Congress reserved to itself a  
19 substantial amount of time for this  
20 legislative-executive collaboration.

21 And that, I call your attention to Section  
22 43(f)(4). It is also significant that of the four  
23 interrelated constraints, two were added by the  
24 conference committee.

25 The legislative veto has always been a part of



1 the controversial Senate EPP proposal. But in reaching  
2 the compromise, Congress decided to defer certain basic  
3 policy questions dealing with the scope of the program.

4 It therefore made the veto substantially more  
5 effective by strengthening the collaborative process; by  
6 retaining ultimate authority over the Secretary's  
7 regulations, both Houses of Congress, who each had --  
8 incidentally, had different viewpoints with respect to  
9 labor protection --

10 QUESTION: Mr. Coleman, I presume all of this  
11 goes to formulating the answer which you think we should  
12 come to to the proper question.

13 MR. COLEMAN: Yes.

14 QUESTION: Now what is the question we should  
15 ask?

16 MR. COLEMAN: The question you should ask is,  
17 whether, when you read this statute, would Congress have  
18 enacted the statute in the form it did if it did not  
19 have the legislative veto?

20 If you conclude that they would not have, then  
21 you at that point, you determine that the Section is  
22 unconstitutional.

23 QUESTION: What if we are in equipoise? We  
24 can't really figure out either way?

25 MR. COLEMAN: Judge -- Mr. Justice, that would

1 be very unfamiliar to almost anybody on this Court to be  
2 in equipoise. You all do come down one way or the  
3 other. But leaving that aside --

4 QUESTION: Just imagine.

5 MR. COLEMAN: Pardon?

6 QUESTION: If we really -- you know, we're  
7 very honest, and we say, I really can't tell what  
8 Congress would have done. And suppose we say that.

9 MR. COLEMAN: Well, you then should say, the  
10 one thing --

11 QUESTION: Then who wins? Does it stay or go?

12 MR. COLEMAN: -- the one thing that's clear,  
13 you should say at that point, how can I let them issue  
14 regulations which clearly were subject to be rewritten  
15 by the Congress, and let those regulations stand.

16 QUESTION: So you're saying, unless we can  
17 find that they would have adopted it in this form  
18 without this provision, we should strike down the whole  
19 thing?

20 MR. COLEMAN: You strike down the whole thing.

21 QUESTION: And the burden is on those who want  
22 to retain the provision without the legislative veto to  
23 show that that is --

24 MR. COLEMAN: Yes, that one ought not to be  
25 able to come in and say, I have authority to do

1 something, but the person who gave me authority also put  
2 a restriction on it. The restriction is bad, but I  
3 still have the authority.

4 And that's, it seems to me, is the issue that  
5 you have before you.

6 QUESTION: Put another way, perhaps, the  
7 question is, would the principal have given the agent  
8 that authority knowing that he could not restrict it?

9 MR. COLEMAN: That's right, yes, sir.

10 QUESTION: Of course, this principal could  
11 have restricted it any time after the Chadha decision by  
12 simply repealing this Section of the Act, couldn't it?

13 MR. COLEMAN: It could have restricted it --  
14 well, but that's a whole new legislative process.

15 QUESTION: It requires two Houses of Congress  
16 instead of one.

17 MR. COLEMAN: Oh, not only that.

18 QUESTION: And the President has to --

19 MR. COLEMAN: It also requires the action by  
20 the President. And even if he vetoes it, then there has  
21 to be a two-House overrule.

22 And this is completely different here, because  
23 it's clear here that what happened -- and this is very  
24 dramatic; I've asked you to examine the evidence as to  
25 what happened as long as the legislative veto was out

1       there.

2               QUESTION: No, but my question is directed to  
3       the period after the legislative veto was clearly no  
4       longer out there.

5               Did anybody in Congress say, hey, we better  
6       repeal this provision, because otherwise somebody might  
7       go ahead and issue some regulations?

8               MR. COLEMAN: No, nobody -- nobody -- nobody  
9       said that, because, frankly, we had a legislative  
10      situation which has existed, that on the one hand, the  
11      unions wanted much more money.

12              On the other hand, the airlines felt that the  
13      program should be limited only to the airline that was  
14      the cause of the loss, or at most, only in those  
15      instances where the Act caused the unemployment.

16              When this was before President Carter, and he  
17      finally submitted a program which had both parts, it  
18      never moved through the Congress, either way, because  
19      the unions thought there should be more money, and the  
20      airlines thought the coverage of the regulation was too  
21      broad.

22              And so nothing happened until after the  
23      election, and one day before the change of  
24      administration, final regulations were published.  
25      Fourteen days later they were withdrawn.



1           Thereafter, the new administration published  
2 proposed regulations. The legislative veto is still in  
3 effect; I mean, at least you haven't declared it  
4 unconstitutional yet.

5           The new administration would not send those  
6 regulations up to the Hill for the 30-day legislative  
7 period. It was only after the Court declared the veto  
8 unconstitutional that the legislation -- I mean, the  
9 regulations were sent up.

10           And then, because one who wanted to change the  
11 situation either way, no longer had the effective power  
12 over the executive to bring about those changes. Now,  
13 that's the reason why you -- the majority of your in  
14 Chadha said that you can't have that separation of  
15 power.

16           I'm not going to stand here and agree whether  
17 you were right or wrong, because that's already been  
18 decided.

19           But once you decide that, I just ask you that  
20 if there's been a legislative process, and on the tough  
21 issues both sides stood down and said, let's wait for  
22 the regulation and we will have this additional activity  
23 before they become effective, and then that is  
24 destroyed, can you in good conscience say that that's  
25 what Congress intended.

1           Now, this legislative veto is different from  
2       those in a lot of other statutes. This is not a case  
3       where you have a broad, big statute, and you have a lot  
4       of different provisions for issuing regulations, and  
5       then someplace in the statute, there's a veto provision.

6           In fact, in the Deregulation Act, there are 25  
7       regulatory delegations, but only one is subject to the  
8       one-house veto, and that's the one in Section 43, and it  
9       applies exclusively to the employee protection program.

10          In fact the conference committee rejected the  
11       only other legislative veto provision from the Senate  
12       passed bill at the same time it was strengthening this  
13       particular provision.

14          Now, as I read the respondents' brief, they  
15       concede that the veto was an important Congressional  
16       constraint on the financial assistance part of the EPP.  
17       But they then search the legislative history in vain to  
18       support their argument that the legislative veto was  
19       only essential to a check on the financial guidelines.

20          And that's where they point to Senator -- or  
21       Zorinsky, and as I indicated, when he made the  
22       amendment, he kept the one-house veto.

23          But I'd like, more to the point, to take you  
24       to the language in the structure of Section 43. There's  
25       nothing in there where Congress limits the veto to

1 regulations implementing Section 43(a)(1), which is the  
2 financial assistance subsection.

3 Section 43 expressly applies the elaborate  
4 legislative oversight provisions to all regulations  
5 issued pursuant to Section 43.

6 In fact, as I said, the Secretary here claims  
7 that any authority he has comes from Section 43(f).

8 When you look at the structure of Section 43,  
9 you realize that the Congress was talking about one  
10 program. If you have any doubt about that, look at  
11 Section 22 of the Senate bill, from which Section 43  
12 emerged.

13 In that bill, both the hiring preference and  
14 the financial payments were triggered by the same 15  
15 percent reduction in workforce, or bankruptcy, and in  
16 both cases, there was a legislative veto.

17 Then look at Section 43 itself. On page 38A,  
18 the title, Employee Protection Program. And look at the  
19 definition section. And then look at the section which  
20 is on page 44A, which is (j), the termination.

21 And it says that "the provisions of this  
22 section" -- and that's both the financial payments and  
23 the duty to hire -- "terminate on th last day the  
24 Secretary if required to make" the payment.

25 So it seems to us, Your Honor, that once you

1 say that the legislative veto is bad, that certainly  
2 thereafter you cannot put the parties in the place where  
3 they would be.

4 It is no longer possible to have a committee  
5 involved in the rewriting of this provision. And under  
6 those circumstances --

7 QUESTION: Mr. Coleman, can I ask you one  
8 other question?

9 MR. COLEMAN: Yes.

10 QUESTION: How do you respond to Judge Starr's  
11 argument that one thing is fairly clear, and that is,  
12 that after the Congress compromised -- he didn't use  
13 these words -- between the union position and the  
14 employer position, they at least decided this much, that  
15 there should be some form of employee protection.

16 And if you sustain your position here,  
17 there'll be no employee protection, which would really  
18 give the airlines even greater relief than if they'd won  
19 the legislative battle about how much the benefit should  
20 be?

21 MR. COLEMAN: Well, number one, I think when  
22 you reread the battle that went on, you realize that  
23 most of the certificated airline did not want the  
24 deregulation. So you start with a false premise.

25 QUESTION: No, but --



1 MR. COLEMAN: This is not something that the  
2 airlines wanted.

3 But taking yours --

4 QUESTION: I mean -- I mean -- I'm just  
5 directing my remarks to employee protection.

6 MR. COLEMAN: Yes.

7 QUESTION: They didn't want employee  
8 protection. Or at least this much.

9 MR. COLEMAN: Well, what I say to that is,  
10 Your Honor, when you reread that legislative history,  
11 you will find what the unions really, really wanted was  
12 the financial payments by the government.

13 QUESTION: Which they're not getting.

14 MR. COLEMAN: That they don't get. Now I  
15 really think --

16 QUESTION: Now they don't even get their  
17 second choice.

18 MR. COLEMAN: Now I really think -- I really  
19 think it's unfair for the Government to be here saying  
20 that even though Section 43(a)(1) says, there should be  
21 financial payments, and if you look at the -- if you  
22 look at the provision that they say is the determination  
23 was, that this changed the public should pay for,  
24 they're not going to pay for a penny.

25 But yet, they have passed regulations which

1 are far beyond the statute. But if you just say the  
2 regulations are bad, I'll take my chances on the  
3 statute. Because they cannot get out of the statute  
4 what they got out of the regulation.

5 Now it just seems to me that under those  
6 circumstances, if -- until -- and as long as that  
7 happened, the process worked. As long as the Government  
8 was willing to come up and take care of its financial  
9 contribution, the Congressional process was working.

10 It was only when they split the program -- and  
11 I think we've demonstrated that you can't split the  
12 program; it's supposed to be one program.

13 I think I'll reserve the rest of my time for  
14 rebuttal.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
16 Coleman.

17 We'll hear now from you, Mr. Cohen.

18 ORAL ARGUMENT OF LOUIS R. COHEN, ESQ.,

19 ON BEHALF OF THE RESPONDENTS

20 MR. COHEN: Mr. Chief Justice, and may it  
21 please the Court:

22 I propose to argue two propositions. First,  
23 the Court of Appeals chose the proper rule for  
24 determining whether an otherwise valid part of a statute  
25 must be invalidated along with an unconstitutional part.

1           And second, in this case, the evidence against  
2           throwing the employee protection baby out with the  
3           legislative veto bathwater was, as the Court of Appeals  
4           said, overwhelming.

5           The Court of Appeals said it was following the  
6           rule articulated in Chadha. The invalid portions of a  
7           statute are to be severed, and the balance sustained,  
8           unless it is evident that the legislature would not have  
9           enacted those provisions which are in its power  
10          independently of that which is not.

11          QUESTION: (Inaudible.)

12          MR. COHEN: Yes.

13          QUESTION: That makes a big difference, don't  
14          you think?

15          MR. COHEN: But what the Court said in Chadha

16          --

17          QUESTION: I mean, there Congress told us what  
18          to do; that basically, it wants us to salvage as much as  
19          we can.

20          MR. COHEN: That's correct. And after stating  
21          the test, which the Court had stated in previous cases,  
22          the Court said in Chadha, we need not make that -- I  
23          think the words were -- elusive inquiry here, because  
24          Congress has told us the answer.

25          It is correct that in this case the inquiry

1 must be made, as the Court of Appeals made it. But the  
2 test, as stated in Chadha, is -- and I believe the  
3 parties are in agreement on this -- whether it is  
4 evident that Congress would not have enacted the  
5 provision that is before us, the duty-to-hire provisions  
6 --

7 QUESTION: Well, are you suggesting that the  
8 task is the same regardless of whether or not there's a  
9 severability clause, Mr. Cohen?

10 MR. COHEN: Yes, I'm suggesting that it is  
11 perhaps easier to satisfy the test when there is a  
12 severability clause in which Congress has told you what  
13 its intent is. But the question, in each case, is  
14 whether, based on an assessment of Congressional intent,  
15 you conclude that Congress -- that it is evident that  
16 Congress would not have enacted the --

17 QUESTION: You would factor in the existence  
18 of a severability clause, then, as simply -- as weighing  
19 evidence of what Congress wanted?

20 MR. COHEN: As Congress' direct statement of  
21 its intention, yes.

22 QUESTION: Mr. Cohen, do you think there's a  
23 presumption of severability in the absence of a  
24 severability clause?

25 MR. COHEN: Well, I think that when the Court

1 stated the test as being whether it is evident that  
2 Congrss would not have enacted the otherwise valid  
3 portion in the absence of the unconstitutional part, it  
4 was certainly suggesting a presumption or suggesting  
5 that the burden of proof must be on those who would  
6 strike down more of the legislation than Congress --  
7 than the Constitution requires.

8 QUESTION: Mr. Cohen, while you're  
9 interrupted, what is the present status of the monthly  
10 assistance clause?

11 MR. COHEN: First, it is dormant, and will  
12 remain dormant unless and until Congress --

13 QUESTION: Appropriates --

14 MR. COHEN: -- appropriates funds.

15 Its status in this case, I think, is this: It  
16 was not challenged by petitioners in their complaint.  
17 The District Court, nevertheless, said that the -- that  
18 all of the remaining provisions of Section 43 would have  
19 to be invalidated along with the legislative veto.

20 The Court of Appeals reversed, saying the  
21 financial assistance provisions are not before us; but  
22 saying later in the opinion that all of the remaining  
23 provisions are severable.

24 So I think the financial assistance provisions  
25 are not -- are not before you.



1 QUESTION: Do you think it ever will be made  
2 undormant, if there is such a word?

3 MR. COHEN: I have no reason to believe that  
4 it will.

5 QUESTION: Do you also -- well, I'll ask you:  
6 Could we come out with one answer about severability  
7 with respect to the monthly assistance provision and  
8 another answer with respect to the hire provision?

9 MR. COHEN: I think there would be no occasion  
10 to reach the first of those questions in this case. But  
11 I think that it would theoretically be possible for the  
12 Court, were both questions before it, to conclude that  
13 the financial assistance provision must be invalidated  
14 along with the legislative veto.

15 And that would not invalidate the duty-to-hire  
16 provisions.

17 QUESTION: Mr. Cohen, I'd like to come back to  
18 the difference between statutes that contain a  
19 severability clause and those that don't.

20 I mean, Congress thinks these things mean  
21 something, because they have a regular practice of  
22 putting them in sometimes, and not putting them in other  
23 times, and they think there's a difference.

24 Now, what do you assert that difference is? I  
25 thought you said at first that there's no difference at

1 all, but then in response to Justice O'Connor, I thought  
2 you said there was a difference.

3 MR. COHEN: I think that the presence of a  
4 severability clause does not change the test; it changes  
5 the task of the Court, which is applying the test.

6 It means that the Court has to look at the  
7 structure of the statute, and the legislative history,  
8 to determine Congressional intent without the guide that  
9 the severability clause may provide.

10 QUESTION: What guide is the -- I don't -- you  
11 say it, but I don't understand it. What guide does the  
12 severability clause provide?

13 MR. COHEN: What the Court said in Chadha  
14 was, that the severability clause told the Court that it  
15 was Congress' intention that one of the -- that the  
16 substantive provision in that case should survive not  
17 withstanding the demise of the veto.

18 QUESTION: Well, then, that's a different  
19 test, I would say. And I would say that when there's a  
20 severability clause, you're asserting that so long as  
21 the things can mechanically work without the legislative  
22 veto, Congress is telling us, apply it.

23 And whether it can mechanically work is quite  
24 a different test from whether -- whether Congress would  
25 have enacted the one without the other.

1 I mean, I'm very reluctant to come to a  
2 decision in this case that's going to, you know, make no  
3 difference between this and cases in which there is a  
4 severability clause.

5 MR. COHEN: I think that you can come to a  
6 conclusion in this case based on the evidence derived  
7 from the structure and the legislative history of this  
8 statute.

9 I think that even in a case where there is a  
10 severability clause, there can be an open question as to  
11 whether the effect of the invalidation of one provision  
12 is to change the rest of the statute into something  
13 other than Congress intended and enacted.

14 And -- but I think that if the effect of  
15 invalidation of one provision is to leave an operative  
16 balance of the statute, then the existence of a  
17 severability clause, as the Court thought it did in  
18 Chadha, pretty much ends the inquiry.

19 QUESTION: Well, may I just pursue that a  
20 moment?

21 In this case, the question isn't whether there  
22 shall be any severability. It's -- the question is how  
23 much you sever. Because even Judge Gesell severed 43  
24 from the rest of the statute.

25 And you're saying we should only sever the

1 veto from the rest of the statute.

2 MR. COHEN: Yes. It seems to me that one of  
3 the reasons why there should be -- I think there are two  
4 reasons why there ought to be a presumption in favor of  
5 severability, and in favor of saving what the  
6 Constitution does not itself invalidate.

7 One of those reasons is that courts have no  
8 power to invalidate statutes except the command of the  
9 Constitution or the state or inferred intent of  
10 Congress.

11 And the best evidence of what Congress wanted  
12 is what it wrote. And the court should not, I suggest,  
13 infer a contrary intent unless the evidence supporting  
14 the inference is clear.

15 But second, if a court doesn't demand a  
16 convincing showing before it invalidates a statute --  
17 before it invalidates more of a statute than the  
18 Constitution requires -- there's no stopping place. And  
19 some very large horses will be lost over some very small  
20 nails.

21 In this case, for example, the parties agree  
22 that the legislative veto must go. The question is:  
23 How much more must go with it?

24 Petitioners would cut all of Section 43, but  
25 that would leave airline deregulation with no employee



1 protection. And as we and others, particularly the  
2 Airlines Pilots Association and the AFL-CIO, demonstrate  
3 in the briefs, there is a good deal of evidence that  
4 Congress might not have enacted airline deregulation  
5 without employee protection.

6 I think to get a stopping place, one must  
7 apply the test as it was formulated in Chadha, and ask,  
8 is it evident that Congress would not have enacted a  
9 part of the statute that is not in and of itself  
10 unconstitutional if it had known --

11 QUESTION: Mr. Cohen, how does Congress know  
12 how we're going to come out on this thing? I mean, the  
13 people in one House don't know what the people in the  
14 other House are saying, or will say, if the other House  
15 is going to act later.

16 It seems to me there's going to be a constant  
17 game of legislative chicken with some lawmakers putting  
18 in provisions that are arguably unconstitutional; some  
19 legislators may vote for them, thinking they'll be  
20 stricken and the rest will stand; and others may vote  
21 for them thinking they'll be stricken and the rest will  
22 fall.

23 It creates chaos. Wouldn't be better off to  
24 adopt a clear -- a clear line that the members of  
25 Congress, when they vote on provisions of dubious



1       Constitutionality, will know what the result will be if  
2       it falls down?

3               And what you're proposing is not a clear line  
4       at all. Now, you could adopt a line that says if  
5       there's a severability clause, the matter will stand, so  
6       long as you can mechanically implement it. When  
7       there's no severability clause, the entire provision to  
8       which the legislative veto, for example, is attached,  
9       will fall.

10              MR. COHEN: I don't think that works. And I  
11       don't think it works for two reasons. One, obviously,  
12       Congress doesn't always know when it is adopting  
13       something that will create Constitutional trouble later  
14       on.

15              But second, the question of severability does  
16       not and cannot disappear merely because there is a  
17       severability clause, as the -- because it doesn't tell  
18       you the answer to the question which is in fact the  
19       question presented in this case, where do you cut?

20              If you -- the debate between the -- between  
21       the plurality and Justice Brennan on the question of  
22       severability in *Regan v. Time, Inc.*, was a debate about  
23       whether the effect of a -- the excision of some words in  
24       a statute changed the meaning of the statute.

25              I don't think a severability clause would have

1 resolved that issue.

2 I think the Court was right when it said in  
3 the Jackson case that the presence or absence of a  
4 severability clause will rarely determine the issue, and  
5 the question is, is the Court going to seek to preserve  
6 the balance of what Congress enacted whenever it can.

7 QUESTION: I have some doubt as to the  
8 correctness -- perhaps the Court did say this in Jackson  
9 -- that the presence or absence of a severability clause  
10 should never -- should seldom make any difference.

11 That's the best expression we have from  
12 Congress addressing to the situation where some part of  
13 the statute is held unconstitutional.

14 MR. COHEN: I think that you have in this  
15 case, also from Congress, the adoption of the remaining  
16 portion of the statute as an indication of what it  
17 wanted done.

18 And, again, the problem of where do you cut is  
19 the hard -- is the hard problem. The -- if -- if the  
20 doctrine were that in the absence of a severability  
21 clause, everything that might be thought to have been  
22 part of a package in any Congressman's mind, with the  
23 unconstitutional provision might go, I don't know how you  
24 stop short of the work of an entire session of Congress.

25 QUESTION: Well, at least with the legislative

1 veto provision, which -- and there are a lot of them out  
2 there. How many are remaining in existing statutes that  
3 have to be determined sooner or later?

4 MR. COHEN: The only number I know is Justice  
5 White's 200.

6 QUESTION: Yes, but some of those may have --  
7 I mean the legislation may have lapsed since then, I  
8 don't know.

9 MR. COHEN: And this Court, of course, has  
10 affirmed the severance of several.

11 QUESTION: But at least as to the legislative  
12 veto provision, you could say that the entire regulation  
13 provision to which the veto is attached falls if there  
14 is no severability clause, and it doesn't fall, so long  
15 as it can mechanically work, if there is one.

16 That's quick and easy and clear. And it  
17 eliminates a lot of litigation.

18 MR. COHEN: First of all, even if that were  
19 said in this case, the duty-to-hire program would not, I  
20 suggest, fall with the legislative veto.

21 And let me turn to that. The Court of  
22 Appeals, I think, was correct when it said that there's  
23 ample evidence that the employee protection program was  
24 deemed by Congress to be an important aspect of the Act,  
25 and not a shred of evidence that the legislative veto

1 was deemed by --

2 The briefs list the evidence that employee  
3 protection was an important part of this complex  
4 legislative bargain. Petitioners only response is that  
5 there were also expectations that deregulation would  
6 lead to increased employment in the industry.

7 But of course, this was an insurance program,  
8 important even if the patient stayed healthy. And  
9 beside that, as the Senate report makes clear, the  
10 Senate feared that some airlines might contract while  
11 the rest of the industry was growing, and the duty of  
12 growing airlines to give a hiring preference to  
13 displaced employees of the shrinking ones --

14 QUESTION: Mr. Cohen, can I interrupt, because  
15 I just realized, I'm not sure I know what the issue is  
16 here.

17 Are they contending that Section 43(f) is  
18 invalid, or that Section 43 in its entirety is invalid?

19 MR. COHEN: I think they are contending that  
20 Section 43(f) and Section 43(d) --

21 QUESTION: "D"?

22 MR. COHEN: -- are invalid.

23 QUESTION: But the -- but using Justice  
24 Scalia's test, only Section 43(f) would fall, and  
25 Section 43(d) would survive, because there's no

1 legislative veto with regard to 43(d); is that right?

2 MR. COHEN: Well, the answer to that is that  
3 there are two different parts of 43(d).

4 QUESTION: Right, but one of them deals with  
5 the preferential hiring; one of the two.

6 MR. COHEN: Section 43(d)(1) imposes a duty to  
7 hire as a direct obligation.

8 QUESTION: That's right.

9 MR. COHEN: That is not subject to any veto or  
10 any other contingency. It confers --

11 QUESTION: And my question is whether that  
12 section -- I should have said, not just (d), but  
13 (d)(1). Is that being challenged in this litigation? I  
14 think it is.

15 MR. COHEN: I think it is.

16 QUESTION: I thought -- I thought Mr. Coleman  
17 said he'd be willing to take his chances with the  
18 statute; that it's only the regulations that give him  
19 trouble.

20 I'm sure he'd like to see (d) go as well, but  
21 I think he -- he's willing to --

22 MR. COHEN: Well, I'm very happy if he's  
23 conceded that Section 43(d)(1) --

24 QUESTION: Well, that's what I thought he  
25 said. I guess he'll have time to respond later.



1 MR. COHEN: -- that Section 43(d)(1) is valid,  
2 because it imposes a duty to hire --

3 QUESTION: And it's your view, I take it --

4 MR. COHEN: -- a well defined on, directly on  
5 a well defined class of carriers, and it confers a right  
6 of first hire directly on --

7 QUESTION: And it's your view that that duty  
8 existed during the period before the promulgation of the  
9 regulations?

10 MR. COHEN: Yes, and that, by the way, to  
11 answer something that Mr. Coleman said, is also the  
12 Secretary's view of the regulations, say, at page 47A,  
13 nothing in these regulations shall preclude the exercise  
14 of statutory rights and duties between October 24, 1978,  
15 and the effective date of these regulations.

16 QUESTION: Certainly (d)(1) doesn't appear to  
17 depend for its efficacy on the issuance of regulations.

18 MR. COHEN: I think it does not.

19 Now, the regulations we are talking about are,  
20 in part, provided for in Section 43(d)(2), a separate  
21 subsection, which gives the Secretary of Labor some  
22 assignments, but it gives him, I suggest, no assignments  
23 that there's any reason to think Congress would not have  
24 given him if it had known it could not have a  
25 legislative veto.

1           It just doesn't delegate any responsibility  
2       that there's any reason to think Congress wouldn't have  
3       been willing to delegate unconditionally.

4           It directs the Secretary to maintain and  
5       publish lists of available jobs; it authorizes the  
6       Secretary to require carriers to provide the necessary  
7       information; it directs him to make every effort to  
8       assist an eligible protected employee in finding other  
9       employment; and then finally, subsection (f)(1) says  
10      that the Secretary may issue such rules as may be  
11      necessary for the administration of the section.

12           And if we are to apply the test of whether it  
13      is evident, or indeed, whether there is any significant  
14      likelihood at all that Congress would have been  
15      unwilling to give the Secretary of Labor those  
16      assignments if it had known it could not have a  
17      legislative veto, the answer is that there is not.

18           Mr. Coleman implies that the statute leaves  
19      gaps to be filled in by regulation. His principal one  
20      is that there is some question, he says, whether an  
21      employee was meant to be protected if his unemployment  
22      is not demonstrably due to regulation.

23           He made that argument to Judge Gesell who  
24      pointed out that there is nothing in the statute to  
25      support it, and rejected it as without merit.

1           Now, while there's nothing in the Secretary's  
2 assignment in connection with the duty to hire that  
3 there's any reason to think that any Member of Congress  
4 might have wanted to veto, there is an evident reason  
5 for the legislative veto, and that is, that the  
6 committees did want to have a second look at the levels  
7 of assistance that were to be set by the Secretary under  
8 the now inoperative financial assistance program.

9           That was the hot issue, and indeed, the only  
10 mention of the legislative veto in the committee  
11 reports, and one of the two mentions of it in the entire  
12 legislative history, appears in the Senate report where  
13 the Senate committee says, the amount of such payments  
14 would be determined by regulations promulgated by the  
15 Department of Labor. These regulations will be subject  
16 to Congressional review.

17           Petitioners response to this is that the duty  
18 to hire and the financial assistance were supposed to  
19 operate in tandem. But that is true only in the sense  
20 that the duty to hire was the primary remedy expected to  
21 reduce the financial burden on the Government from the  
22 fallback -- from the Government's fallback remedy of  
23 financial assistance.

24           The statute itself provided for financial  
25 assistance only until the recipient obtains other

1 employment.

2           There isn't any reason to assume that someone  
3 who wanted to veto the financial assistance would have  
4 wanted to veto requiring an airline that was otherwise  
5 hiring to give first preference, on whatever conditions  
6 the airline prescribes, to displaced employees.

7           And the -- there's nothing whatever to support  
8 petitioners' suggestion that the continuation of their  
9 duty to hire, notwithstanding the dormancy of the  
10 financial assistance program, is either unfair to them  
11 or contrary to the intent of Congress.

12           Their argument that the Congress would not  
13 have enacted the duty to hire if it could not have a  
14 legislative veto is based on what the Court of Appeals  
15 called circumstantial evidence.

16           They point out that this is the only section  
17 in the statute that contains a veto. But the absence of  
18 a veto provision in other sections tells us nothing  
19 whatever about whether this veto is an important  
20 provision or an unimportant provision.

21           And in this particular case, the presence of  
22 the veto is explained by the financial assistance  
23 program, which is not before the Court; and the absence  
24 of the veto in other sections is explained by the fact  
25 that this is primarily a deregulatory statute.



1           Mr. Coleman says that there are 25 other  
2 regulatory provisions. He has only listed four of them  
3 in his brief. And I think that we adequately  
4 demonstrate that each of the four was a minor and  
5 technical one.

6           Petitioners argue that two other legislative  
7 oversight features -- the six-month provision and the  
8 report and wait provision -- show the special importance  
9 of this legislative veto.

10          But apart from the fact that these provisions,  
11 too, relate primarily to financial assistance -- indeed,  
12 the six-month requirement for the promulgation of  
13 regulations is directly linked to that in the statute --  
14 both provisions make it less likely; both the six-month  
15 provision and the duty-to-hire provision make it less  
16 likely that Congress, if it had been told, you can't  
17 have a legislative veto, would have scrapped the  
18 duty-to-hire program.

19          The six-month provision shows that Congress  
20 was sufficiently concerned about labor protection to  
21 want to be sure regulations were in place promptly.

22          The report and wait provision gave Congress a  
23 valid method of oversight; that is, the Court observed  
24 in Chadha, made the veto even less important.

25          Petitioners suggestion that the legislative



1 veto was part of a deliberate trade at conference is, I  
2 have to say, a figment of their imagination.

3 The statute itself, the conference report, and  
4 the postconference debate, contain no evidence that  
5 there was any bargaining that related in anyway to the  
6 veto.

7 Certainly there is no suggestion that the  
8 House, which had a bill providing more protection and  
9 much more discretion, which did not contain a  
10 legislative veto, demanded a legislative veto as the  
11 price of accepting the Senate bill.

12 In sum, if, as I think you should, you assume  
13 that even in the absence of a severability clause, which  
14 the Court told Congress would rarely make a difference,  
15 if you assume that even in the absence of a severability  
16 clause, the Court's job is to see whether there is  
17 evidence in the structure and history of the statute  
18 that Congress would not have enacted a particular  
19 provision if it had known it could not have another  
20 provision, the answer as to both the statutory duty  
21 under Section 43(d)(1), and the authorization to write  
22 regulations that were incidental that duty, would  
23 clearly, I think in this case, have been enacted in any  
24 event.

25 QUESTION: Am I correct that the only

1 regulations that are required to be issued under the Act  
2 are the guidelines under (b)(1), the financial  
3 assistance guidelines? Are they the only ones that are  
4 required to be issued?

5 MR. COHEN: Yes.

6 QUESTION: So everything else, in implementing  
7 that chapter, the Secretary could have done by  
8 adjudication instead of -- instead of by rule, right?

9 MR. COHEN: Well, let me qualify it to say  
10 that the Secretary's own assignments, the assignments to  
11 prepare and maintain and publish lists of available  
12 jobs, and to obtain information from the airlines for  
13 that purpose, are assignments that presumably called for  
14 him to issue regulations.

15 QUESTION: Really? You think that's a  
16 regulation, publishing -- periodically publishing a  
17 comprehensive list of jobs available?

18 MR. COHEN: No.

19 QUESTION: That's not a regulation.

20 MR. COHEN: No, no, no. Publishing, the  
21 mechanics for that process, publishing regulations;  
22 which is what these regulations do, which say that  
23 airlines shall file information about available jobs  
24 with the Secretary and so forth.

25 QUESTION: I'm not sure. I'm not sure you

1 would need regulations for the Secretary to do anything  
2 else under this Act, except the financial assistance  
3 portion.

4 So in requiring the approval of Congress,  
5 really the only thing for which the approval of Congress  
6 was unquestionably required was the establishment of the  
7 guidelines for the monthly assistance payments. And the  
8 rest could conceivably have been done without regulation  
9 anyway, and could have been beyond the control of  
10 Congress.

11 MR. COHEN: Well, I think it's correct that  
12 Congress not only -- that Congress did not -- not only  
13 didn't expect to veto any regulations with respect to  
14 the duty to hire, but that there's no sign that they had  
15 any affirmative expectation that that whole provision,  
16 which is the only thing before us, would involve the  
17 issuance of regulations at all.

18 QUESTION: There's no requirement there that  
19 he issue any regulations. Whereas there is for the  
20 monthly assistance computation. He's mandated,  
21 guidelines are mandated.

22 MR. COHEN: That's correct. And when Congress  
23 goes to say, regulations shall be sent up to us within  
24 six months, it says, the regulations under subsection  
25 (b) relating to the financial assistance program, and

1 such other regulations as the Secretary may wish -- may  
2 wish to promulgate. And that's what the statute says.

3 If the Court has no further questions, I would  
4 ask it to affirm.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
6 Cohen.

7 Mr. Coleman, you have four minutes remaining.

8 REBUTTAL ARGUMENT OF WILLIAM T. COLEMAN, JR., ESQ.,

9 ON BEHALF OF THE PETITIONERS

10 MR. COLEMAN: Justice Scalia, your question,  
11 that's the reason why I called your attention to 46A of  
12 the record.

13 The Secretary says that his authority that  
14 he's exercising to issue these regulations is that  
15 authority contained in Section 43(f). He cites no other  
16 authority.

17 QUESTION: This is on page 46A of --

18 MR. COLEMAN: Of the appendix, which is the  
19 record in the case.

20 QUESTION: Right, right.

21 MR. COLEMAN: He says --

22 QUESTION: Oh, authority, Section 43(f) of the  
23 Airline Deregulation Act.

24 MR. COLEMAN: That's what he says he's acting  
25 under.

1           Now, our position is that the entire Section  
2   43 is null and void. I would just urge you to read the  
3   legislative history --

4           QUESTION: Oh, but that's not the point. I  
5   don't doubt that he's acting under 43(f).

6           MR. COLEMAN: Yes.

7           QUESTION: What I doubt is that he had to be  
8   -- he had to act under -- he had to issue any rules and  
9   regulations under 43(f).

10          MR. COLEMAN: Well --

11          QUESTION: You see, by reason of -- by reason  
12   of 43(d) -- I'm sorry, (b)(1), he had to proceed by  
13   regulation with respect to financial assistance.

14          But I see nothing in there that required him  
15   to proceed by regulation with regard to employee hiring.

16          MR. COLEMAN: Well, I'd like to disagree with  
17   you, Your Honor, because --

18          QUESTION: I mean, he might do it. He's  
19   authorized to issue regulations. But --

20          MR. COLEMAN: -- if you go on and read that --  
21   if you go on and read the rest of the section, that he's  
22   also required to issue the other rules and regulations  
23   which the Secretary deems necessary to carry out this  
24   Section.

25          QUESTION: Where are you reading from?



1 MR. COLEMAN: I'm reading the same Section  
2 you're reading from, from (f)(2). It says, he's  
3 supposed to issue the guidelines with respect to the  
4 money, but also, any other regulations which he deems  
5 necessary to carry out this section.

6 QUESTION: If he wants to. He has to do it  
7 within six months.

8 MR. COLEMAN: That's right.

9 QUESTION: But there's nothing that says he  
10 has to issue any regulations. If he issues them, they  
11 have to be issued within six months.

12 MR. COLEMAN: But the one issue he had to  
13 issue was the financial regulation; he's never done it.

14 QUESTION: Well, that's right. And that one --

15 MR. COLEMAN: And it seems to me that if you  
16 have a statute where the one thing it's clear that he  
17 was supposed to do, he hasn't done, I don't think you  
18 then say, well, I'm going to save another part of the  
19 statute where it's clear that the regulations that he's  
20 trying to issue is to enforce the second part of that  
21 statute.

22 QUESTION: I have no doubt he's proceeding  
23 under (f). But my point is, he didn't have to proceed  
24 under (f). He could have done it without the issuance  
25 of regulations.

1 MR. COLEMAN: I mean, if he moved on another  
2 -- if he cited some other authority, I may not be in  
3 Court. But it seems to me, when the Secretary says, I'm  
4 proceeding under this Section, he's got to defend his  
5 authority under that Section.

6 I'm not saying he may not have another  
7 section.

8 And what I'd like to say just in closing --

9 QUESTION: I'm not sure you understand why I  
10 think it important, Mr. Coleman. I think it important  
11 because there is no way, as this statute is set up, for  
12 the Congress -- for the Secretary to do an end run  
13 around the legislative veto as far as financial  
14 assistance is concerned.

15 The only way he can get financial assistance  
16 out there is by issuing regulations. He is mandated to  
17 do it by regulation.

18 He could have done an end run around the  
19 legislative veto on the remaining portion, because --

20 MR. COLEMAN: He could not. He could not,  
21 sir. Because if he'd done what he was supposed to have  
22 done under the statute, he would have had both up there,  
23 because he was supposed to have one program.

24 In conclusion, may I say, as I understand your  
25 cases, you really have two sets of cases.

1           One set says, if Congress does four different  
2 things exercising four different powers, and you  
3 determine that one of the four is invalid, does that  
4 mean that the other three are also invalid?

5           It seems to me that's the El Paso Railroad  
6 Case; that's Carter Coal Company; and all those cases.

7           A separate and distinct set of cases is where  
8 Congress exercises one power and puts a condition on  
9 that power, can you say that the condition is invalid,  
10 but you leave the executive with the power?

11           And it seems to --

12           CHIEF JUSTICE REHNQUIST: Your time has  
13 expired, Mr. Coleman.

14           The case is submitted.

15           (Whereupon, at 2:54 p.m., the case is the  
16 above-entitled matter was submitted.)  
17  
18  
19  
20  
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23  
24  
25

**CERTIFICATION**

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-920 - ALASKA AIRLINES, INC., ET AL., Petitioners V. WILLIAM E. BROCK,

SECRETARY OF LABOR, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)



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