

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-260

TITLE SOUTH DAKOTA, Petitioner V. ELIZABETH H. DOLE,
SECRETARY, UNITED STATES DEPARTMENT OF
TRANSPORTATION

PLACE Washington, D. C.

DATE April 28, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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SOUTH DAKOTA, ;
Petitioner, ;
V. ; No. 86-260
ELIZABETH H. DOLE, SECRETARY, ;
UNITED STATES DEPARTMENT OF ;
TRANSPORTATION ;

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Washington, D.C.
Tuesday, April 28, 1987

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:53 o'clock a.m.

APPEARANCES:

ROGER A. TELLINGHUISEN, ESQ., Attorney General of
South Dakota, Pierre, South Dakota; on behalf of
the petitioner.

LOUIS R. COHEN, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on
behalf of the respondent.

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

2 CHIEF JUSTICE REHNQUIST: We will hear
3 arguments next in South Dakota against Elizabeth H.
4 Dole, Secretary, United States Department of
5 Transportation.

6 Mr. Tellinghuisen, you may proceed whenever
7 you are ready.

8 ORAL ARGUMENT BY ROGER A. TELLINGHUISEN, ESQ.,
9 ON BEHALF OF THE PETITIONER

10 MR. TELLINGHUISEN: Mr. Chief Justice, and may
11 it please the Court, the issue in this case is whether
12 or not Congress may condition the receipt of highway
13 funds upon a state having in effect the 21-year-old
14 drinking age. In 1984 Congress enacted 23 USC Section
15 158. Section 158 of that Act conditions a receipt of
16 highway funds upon a state having in effect a
17 21-year-old drinking age for all alcoholic beverages.
18 The Act prohibits or mandates that the Secretary of
19 Transportation shall not distribute 5 percent of a
20 state's highway funds if it is not in compliance for
21 Fiscal Year 1987, and it further mandates that the
22 Secretary will withhold 10 percent of those funds for
23 each and every year thereafter that the state has failed
24 to comply.

25 South Dakota, like every other state in the

1 nation, is a recipient of Federal highway funds under
2 the programs referred to in Section 158.

3 QUESTION: General Tellinghuisen, would you
4 explain whether you think this case might be moot now?
5 South Dakota has changed the law, as I understand it.

6 MR. TELLINGHUISEN: That's correct, Your
7 Honor. What I would point out to the Court is that in
8 the last legislative session, recognizing that South
9 Dakota, not unlike any other state in the Union, is
10 dependent upon these funds, adopted a 21-year-old
11 drinking age that will not go into effect until April
12 1st of 1988.

13 QUESTION: So it still has a year or so to
14 run, a year to run?

15 MR. TELLINGHUISEN: That's correct.

16 QUESTION: Under the old system.

17 MR. TELLINGHUISEN: Yes. Right now South
18 Dakota still permits 19 and 20-year-olds to consume low
19 point beer.

20 QUESTION: And there are Federal funds at
21 issue, so it is saved from mootness.

22 MR. TELLINGHUISEN: That's correct, Your
23 Honor.

24 QUESTION: Then am I not correct the statute
25 doesn't go into effect at all if you prevail here?

1 MR. TELLINGHUISEN: That's correct. The
2 legislature in enacting the law that it passed this
3 legislative session specifically provided within the
4 statute itself that the legislation would repeal itself
5 upon either a favorable decision from this Court or upon
6 Congressional action repealing the mandatory withholding
7 provisions of Section 158.

8 QUESTION: We know how to do things out in the
9 upper midwest.

10 MR. TELLINGHUISEN: That's correct. For the
11 past 48 years South Dakota has allowed persons younger
12 than age 21 to consume low point beer, ever since South
13 Dakota has adopted an approach that not only recognizes
14 the social concerns over alcohol but has gradually
15 introduced its young people to alcoholic beverages.
16 Twice since 1939 we have raised our minimum drinking age
17 for low point beer from 18 to 19, and since the repeal
18 of state prohibition in 1934 we have required all
19 persons to be at least 21 years old before they would be
20 allowed to consume alcoholic beverages other than low
21 point beer.

22 South Dakota has likewise enacted and strictly
23 enforced drinking driver statutes, and over the course
24 of the last few years through the strict enforcement of
25 those statutes we have effectuated a 30 percent

1 reduction in the number of drinking-related fatalities
2 on our highways.

3 In September of 1984 we filed a complaint in
4 District Court, seeking a declaration that Section 158
5 was unconstitutional and further requesting an
6 injunction prohibiting the Secretary of Transportation
7 from enforcing the provisions of that statute. The
8 District Court dismissed and the Court of Appeals
9 affirmed on the basis that South Dakota's complaint
10 failed to state a claim upon which relief can be
11 granted.

12 Just by procedural -- or just by a little bit
13 of history, as this Court is aware, in 1933 this nation
14 adopted the Twenty-First Amendment, thereby repealing 16
15 years of national prohibition and reserving to the
16 states the power of choice as to whether or not to allow
17 the importation of alcoholic beverages within their own
18 states.

19 This Court has also recognized that a state
20 has the absolute power to prohibit totally the sale of
21 alcohol within its own borders pursuant to the
22 Twenty-First Amendment, and this Court has equally
23 recognized that a state has broad power under the
24 Twenty-First Amendment to regulate the times, places,
25 and circumstances under which alcohol may be sold. As

1 this Court stated in New York State Liquor Authority
2 versus Ballanca, "It is equally well recognized that a
3 state has broad power under the Twenty-First Amendment
4 to regulate the times, places, and circumstances under
5 which liquor may be sold."

6 Put another way, this Court stated in
7 California Liquor Dealers v. Midcal that the
8 Twenty-First Amendment grants the states virtually
9 complete control over whether to permit importation or
10 sale of liquor and how to structure the liquor
11 distribution system.

12 In resolving conflicts between state alcohol
13 regulations and Federal policies, the Court has first
14 sought to determine whether the state regulation that
15 was involved implicates what this Court has generally
16 characterized as a Section 2 core power. The Court has
17 suggested that when a state has attempted to directly
18 regulate a Section 2 core power under the Twenty-First
19 Amendment that it will prevail irrespective of its
20 conflict with a contrary Federal policy.

21 The state would submit to the Court,
22 recognizing that this Court has never formally offered a
23 clear delineation of what constitutes a Section 2 core
24 power, that the ability of a state to determine for its
25 own inhabitants or for its own -- the people found

1 within its borders, the age at which a person will be
2 allowed to consume an alcoholic beverage is central to
3 the power reserved to the states under the Twenty-First
4 Amendment.

5 This Court, as I indicated earlier, recognized
6 that a state has the absolute power of prohibition --

7 QUESTION: Of course, South Dakota can still
8 continue to do that, can't it?

9 MR. TELLINGHUISEN: That's correct, Your
10 Honor. However, the Constitutionally impermissible part
11 of Congress's plan is that it forces South Dakota to
12 make a choice of whether or not it will freely exercise
13 the powers given to it under the Twenty-First Amendment
14 or whether it will suffer --

15 CHIEF JUSTICE REHNQUIST: You can finish your
16 answer at 1:00 o'clock, Mr. Tellinghuisen.

17 MR. TELLINGHUISEN: Thank you, Your Honor.

18 (Whereupon, at 12:00 o'clock p.m., the Court
19 was recessed, to reconvene at 1:00 o'clock p.m. of the
20 same day.)
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AFIERNQON_SESSION

(12:59 P.M.)

CHIEF JUSTICE REHNQUIST: Please proceed, Mr. Tellinghulsen.

ORAL ARGUMENT OF ROGER A. TELLINGHUISEN, ESQ.,
ON BEHALF OF THE PETITIONER - RESUMED

MR. TELLINGHUISEN: Mr. Chief Justice, and may it please the Court, in direct response to Justice Blackmun's question concerning the ability of the states to still have a choice even in the face of Section 158, I would submit to the Court that that is erroneous or that assumption is in error for two reasons.

One, it presupposes that the Federal Government has the ability to regulate in the face of the Twenty-First Amendment the age at which a state such as South Dakota sets its minimum drinking age, and secondly, it is in direct contradiction to the legislative history that surrounds the original amendment in its debate over what was then contained as a Section 3 to the amendment, which would have given Congress concurrent power to regulate or prohibit the sale of intoxicating liquors where those liquors were to be drunk on the premises sold. At that time, unlike the inconsistencies that were present in the debate over Section 2, there was no inconsistency in that regard.

1 It was the Intent of Congress by deletion of Section 3
2 to remove the Federal Government from the area of
3 alcohol regulation within a state from which it had in
4 the opinion of Congress and in the opinion of this Court
5 had trespassed.

6 QUESTION: Well, Mr. Tellinghuisen, you think
7 the Twenty-First Amendment went further than just to
8 deal with the commerce power of Congress then?

9 MR. TELLINGHUISEN: Yes, I do, Your Honor, and
10 I rely on this Court's decisions in addressing the
11 Twenty-First Amendment when this Court has said that the
12 Twenty-First Amendment, while it is transparently clear
13 that it operated as a limitation upon the commerce
14 clause, it equally recognized that the Twenty-First
15 Amendment gave to the states broad powers to regulate in
16 the area of the times or places or even the sale of
17 liquor, in other words, the liquor distribution system
18 within that state.

19 QUESTION: Well, don't you think they would
20 have had that just under traditional reserve power of
21 states?

22 MR. TELLINGHUISEN: well, I would certainly
23 maintain that, Your Honor. I recognize, however, this
24 Court's decisions in regards to the commerce clause in
25 the face of the Tenth Amendment, and that the Tenth

1 Amendment does not in and of itself operate as a
2 limitation on Congress's power. I think the distinction
3 here is that in the face of the Twenty-First Amendment
4 Congress intended and the states upon ratification of
5 the Amendment assumed that they were going to be given
6 the power to first off determine whether they would
7 permit the sale of alcohol at all, and if they chose to,
8 to enforce the regulations surrounding the sale of that
9 alcohol.

10 QUESTION: And here you say that because
11 Congress is cutting off 5 percent of South Dakota's
12 highway fund money, South Dakota is not able to do what
13 it wants?

14 MR. TELLINGHUISEN: That's correct, and I am
15 suggesting -- what I am suggesting to the Court is that
16 the presentation of the choice irrespective of the
17 amount of money involved is what -- is the impermissible
18 derogation of the state's powers under the Twenty-First
19 Amendment.

20 QUESTION: There are a lot of cases that have
21 sustained the Congress's spending power, Steward Machine
22 Company, a long line of cases.

23 MR. TELLINGHUISEN: That is correct, Your
24 Honor. We are certainly not unmindful of those cases,
25 and for the Court to rule in the state's favor on this

1 case would not require this Court to overrule any of
2 those prior cases concerning limitations or claimed
3 limitations on Congress's power under the spending
4 clause. In the Steward Machine case, for instance --

5 QUESTION: You mean provided we gave the
6 Twenty-First Amendment the broader preemption that you
7 would argue should be given. What if we think that the
8 Twenty-First Amendment only took away Congress's power
9 under the commerce laws?

10 MR. TELLINGHUISEN: I would say, Your Honor,
11 that if the Court were to find that the operation of the
12 Twenty-First Amendment only prevented Congress from
13 interfering with a state's right to allow into the state
14 the importation of alcohol, that certainly would put us
15 in a more difficult position, but that is not what this
16 Court has recognized in, for instance, Capital Cities
17 Cable versus Crisp. The Court in that case, if I may
18 just briefly recite from that opinion, the Court stated,
19 "In contrast to state regulation governing the
20 conditions under which liquor may be imported or sold
21 within the state, the application of Oklahoma's
22 advertising ban to the importation to distant signals by
23 cable television operators engages only indirectly the
24 central power reserved by the Twenty-First Amendment,
25 that of exercising control over whether to permit

1 importation or sale of liquor and how to structure the
2 liquor distribution system."

3 Following that line of reasoning that this
4 Court has adopted not only in Capital Cities Cable v.
5 Crisp but in Midcal and again referred to in this
6 Court's most recent decision dealing with the
7 Twenty-First Amendment, 324 Liquor versus Duffy. The
8 states are given this broad power in areas not only
9 related exclusively to the decision of whether or not to
10 permit importation but they are given the power to
11 regulate the very liquor that it allows under its
12 ability to allow importation.

13 QUESTION: It didn't say that. It said to
14 structure the distribution system.

15 MR. TELLINGHUISEN: I'm sorry.

16 QUESTION: That is not quite what the quote
17 you read said. It said the state's power to structure
18 the distribution system, which is much more closely tied
19 to the importation. One imports and one distributes.
20 It is very easy to say that the structure of the
21 distribution system has a very close tie to the
22 importation, which is what the Twenty-First Amendment
23 specifically addresses.

24 MR. TELLINGHUISEN: Your Honor, what I would
25 also --

1 QUESTION: This has nothing to do with the
2 distribution system.

3 MR. TELLINGHUISEN: Well, in effect it does,
4 Your Honor. I guess I would argue that point in that
5 the distribution system of alcohol is certainly directly
6 related to or is one and the same of determining how it
7 can be sold or distributed within the state, and the
8 setting of a minimum drinking age is basic to that
9 consideration.

10 QUESTION: You think the setting of -- well,
11 all right. You are going to be arguing later when you
12 address the scope of the Federal Government's commerce
13 power that one can't stretch things to infinity, and it
14 seems to me you are arguing a very broad notion of what
15 importation includes and distribution includes. It
16 includes even fixing the qualifications for purchasing.

17 MR. TELLINGHUISEN: Yes, I would argue that,
18 and in part our reliance, Your Honor, is based upon this
19 Court's decision in New York State Liquor Authority
20 versus Ballanca, where the Court stated, "It is equally
21 well recognized that a state has broad power under the
22 Twenty-First Amendment to regulate the times, places,
23 and circumstances under which liquor may be sold." The
24 Congressional --

25 QUESTION: You think the Federal Government

1 could keep you from selling liquor to a certain defined
2 group of people like Indians?

3 MR. TELLINGHUISEN: No, I don't believe they
4 could, Your Honor. I am not sure I understand the
5 question correctly. Could the Federal Government
6 require us not to sell to a specific group of people?

7 QUESTION: Like the Indians. Um-hm.

8 MR. TELLINGHUISEN: I would say that, no, it
9 could not.

10 QUESTION: And so therefore using the spending
11 power for that purpose is just as illegal. Is that it?

12 MR. TELLINGHUISEN: I would suggest that that
13 is the case.

14 QUESTION: Under the Twenty-First Amendment.

15 MR. TELLINGHUISEN: Yes, sir. Going back to
16 the Congressional intent behind the adoption of the
17 Twenty-First Amendment, it was well recognized in 1933
18 as well as now the national prohibition, the national
19 policy of --

20 QUESTION: Well, do you think the Federal
21 Government could keep you from -- a state-operated
22 liquor store, for example, selling on military
23 reservations?

24 MR. TELLINGHUISEN: I think this Court's
25 holdings, for instance, in the Collins v. Yosemite --

1 Yosemite -- excuse me -- case would suggest just that,
2 and I don't have a problem with that.

3 QUESTION: But you think they couldn't -- the
4 Federal Government couldn't keep -- couldn't forbid
5 sales to servicemen off the base?

6 MR. TELLINGHUISEN: Yes, I would maintain
7 that. And the point, the distinguishing factor, Your
8 Honor, between the example that you cite and the premise
9 that we are advocating is that in the context of a
10 military reservation the state cannot impose its will
11 upon an area that is not under its jurisdiction.

12 QUESTION: (Inaudible) for Federal money.

13 MR. TELLINGHUISEN: I would concede that. I
14 would concede that, and that brings us to the point, the
15 question has often been stated in another way. Could
16 Congress just refuse to just give this money to the
17 states in the first instance, and that is -- the answer
18 to that must be yes. We have no actual entitlement to
19 money in the first instance.

20 QUESTION: Mr. Attorney General, could I go --
21 I want to be sure I understood your answer correctly. I
22 think Justice White asked you -- maybe this is a
23 variation of the question. You say Congress passed a
24 statute saying it shall be unlawful for any purveyor of
25 liquor, either in a bar or so forth, to sell liquor to a

1 uniformed soldier. You say that would be
2 unconstitutional.

3 QUESTION: That's what you said. You can
4 think it over if you want to.

5 (General laughter.)

6 MR. TELLINGHUISEN: Well, okay.

7 QUESTION: And I was going to -- Let me give
8 you another one that is similar. Supposing they
9 required all interstate truck drivers and bus drivers to
10 wear some kind of an identifying cap or uniform of some
11 kind and they said, you may not sell liquor to any of
12 those drivers of interstate vehicles. Would that be
13 unconstitutional?

14 MR. TELLINGHUISEN: Are we assuming that
15 Congress is going to condition the receipt of money
16 on --

17 QUESTION: No, just say flatly, it is against
18 a Federal statute enacted for the purpose of protecting
19 safety on the highways to sell liquor to any uniformed
20 driver of a truck or a bus.

21 MR. TELLINGHUISEN: I would submit that it
22 would be unlawful.

23 QUESTION: It would be unconstitutional?

24 MR. TELLINGHUISEN: Yes, because again, Your
25 Honor, it goes to the very heart of the Twenty-First

1 Amendment.

2 QUESTION: And you would have to say the same
3 about the soldier.

4 MR. TELLINGHUISEN: Yes, I would, Your Honor.

5 QUESTION: If you lose on that, you lose on
6 the one in the case you are arguing?

7 MR. TELLINGHUISEN: No, I don't believe so,
8 because our case that we are arguing is much more
9 narrowly defined. You know, as this Court has noted in
10 many of its opinions there will be time enough to
11 address those types of questions. We are suggesting
12 that the blanket provision requiring the states to adopt
13 a uniform drinking age in the face of the Twenty-First
14 Amendment takes away from the state the ability to make
15 those decisions for itself. And that was what Congress
16 and this nation was addressing when it adopted -- or
17 repealed prohibition.

18 QUESTION: Let me take it one step further.
19 What about airline pilots in uniform? The Federal
20 Government couldn't even prevent sale of liquor to
21 them?

22 MR. TELLINGHUISEN: I would have to
23 steadfastly maintain that they could not, Your Honor.

24 QUESTION: You are consistent.

25 QUESTION: Of course I take it you argue that

1 you should win even if there were no Twenty-First
2 Amendment.

3 MR. TELLINGHUISEN: I am not going to go so
4 far as to say that, Your Honor. I think that it could
5 be suggested that Congress under its commerce clause
6 powers could impose a regulation upon the states which
7 it otherwise could not do in the face of the
8 Twenty-First Amendment.

9 QUESTION: I thought you were arguing that
10 these conditions on receipt of Federal money were
11 invalid in themselves.

12 MR. TELLINGHUISEN: I am arguing --

13 QUESTION: Wholly aside from the Twenty-First
14 Amendment. Don't you argue that?

15 MR. TELLINGHUISEN: No, I don't. I suggest in
16 our brief that the conditions are invalid outside the
17 context of the Twenty-First Amendment from the
18 standpoint that they are coercive.

19 QUESTION: Well, do you disavow the argument
20 then submitted by the National Conference of State
21 Legislatures in their amicus brief to the effect that
22 there has to be a substantial relationship between the
23 condition imposed on a grant and the spending of Federal
24 money?

25 MR. TELLINGHUISEN: Your Honor, I am not in a

1 position to suggest to this Court that I disagree with
2 that proposition.

3 QUESTION: Well, you certainly are. You can
4 say it is right or it is wrong.

5 QUESTION: You just did a while ago.

6 MR. TELLINGHUISEN: What I am suggesting is
7 that I am not prepared to address that issue in light of
8 the fact that we have the Twenty-First Amendment. I
9 think it would be --

10 QUESTION: What if you lose on that, and this
11 Court is having to grapple with it? Is that an argument
12 you make or is it not?

13 MR. TELLINGHUISEN: It is from the standpoint
14 that Congress's power under the commerce clause is not
15 without limitations, as this Court has noted, for
16 instance, in *Lawrence County v. Lead-Deadwood School*
17 *District*. And we would submit to the Court that the
18 Tenth Amendment would operate as a bar upon Congress to
19 impose these types of conditions which in effect are
20 coercive upon the states, and that are being used -- is
21 being attached for a purpose not related to --

22 QUESTION: That is the same argument.

23 QUESTION: Well, the argument made in that
24 amicus brief is not one of coercion at all. That is not
25 the thrust of it.

1 MR. TELLINGHUISEN: The argument that is made
2 in the amicus brief is one that the purpose for which
3 the condition is attached is not proper, and I guess I
4 would just have to maintain that I am not prepared to
5 argue that particular fine point at this time because we
6 are not dealing outside the scope of the Twenty-First
7 Amendment.

8 QUESTION: (Inaudible) suggest then, Mr.
9 Attorney General, that the Tenth Amendment at least is
10 not as much of an inhibitor on Federal regulation as
11 would be the Twenty-First?

12 MR. TELLINGHUISEN: I think that would
13 certainly be in keeping with this Court's prior
14 decisions.

15 QUESTION: And that is your position?

16 MR. TELLINGHUISEN: It may not be a position
17 that I like to advocate, but it is certainly one that I
18 recognize.

19 QUESTION: It sounds like if you lost on the
20 Twenty-First then you would a fortiori lose on the
21 Tenth.

22 MR. TELLINGHUISEN: Well, I guess I can sum it
23 up, Your Honor, by just suggesting that if we lose on
24 the Twenty-First Amendment I recognize we are in trouble
25 on the Tenth Amendment.

1 Your Honor, I would like to reserve the
2 remainder of my time, if I might, for rebuttal.

3 QUESTION: Thank you, Mr. Tellinghuisen.

4 We will hear now from you, Mr. Cohen.

5 ORAL ARGUMENT BY LOUIS R. COHEN, ESQ.,

6 ON BEHALF OF THE RESPONDENT

7 MR. COHEN: Mr. Chief Justice, and may it
8 please the Court, I propose to argue two points. First,
9 that Section 2 of the Twenty-First Amendment does not
10 reach this case at all because it does not say that
11 Congress may not in the valid exercise of its own powers
12 bar or encourage states to bar sales of alcoholic
13 beverages that a state might prefer to permit, and
14 second, that Section 158 is a judicious and proper use
15 of the Federal spending power that does not violate
16 either the Tenth Amendment or, if it is applicable at
17 all, the Twenty-First Amendment.

18 Section 2 of the Twenty-First Amendment
19 prohibits transportation or importation of alcoholic
20 beverages for delivery or use in violation of state law.
21 It thus broadly confirms state power to restrict those
22 activities, notwithstanding obstacles to state
23 regulation that would otherwise be imposed by the
24 commerce clause and sometimes other provisions of the
25 Constitution.

1 Section 2 may also in some situations prevent
2 Congress from legislating to require or permit
3 activities that violate state law although in every
4 actual case -- I think of Crisp and Midcal and 324
5 Liquor -- the Federal statute prevailed. But Section 2
6 speaks only of activities in violation of state law. I
7 suggest that the words simply cannot be read to prohibit
8 Congress from imposing restrictions of its own or
9 encouraging states to impose additional restrictions on
10 alcohol transactions.

11 QUESTION: Do you think that Congress could
12 bring back prohibition under your view, under the
13 spending power?

14 MR. COHEN: I don't think that Section 2
15 answers that question. The Court gave a partial answer
16 to that question back in 1917 in the Clark Distilling
17 case -- this is before Prohibition -- when the Court
18 said -- this is 242 US at 325 -- "It is not in the
19 slightest degree disputed that if Congress had
20 prohibited the shipment of all intoxicants in the
21 channels of interstate commerce and therefore had
22 prevented all movement between the several states, such
23 action would have been lawful because within the power
24 to regulate which the Constitution conferred."

25 QUESTION: That was before the Twenty-First

1 Amendment.

2 MR. COHEN: Yes, it was, but it seems to me
3 that if you take the Twenty-First Amendment in its two
4 parts, the passage and later repeal of Prohibition
5 didn't change that, and it seems to me that the plain
6 words of Section 2 don't change that either, because if
7 the Congress were today -- I don't suggest that it is
8 politically likely -- to adopt the statute that was
9 envisioned in Clark Distilling, that statute would not
10 involve any transportation, importation, delivery, or
11 use of alcoholic beverages in violation of state law and
12 therefore would not be prohibited by Section 2 of the
13 Twenty-First Amendment.

14 QUESTION: What if you take the converse of
15 that situation? Congress decides it has been a bad year
16 for the distilleries and therefore it requires that any
17 state accept shipments even though the state may be dry
18 by choice. It says it is the policy of the Federal
19 Government to require freedom of movement in interstate
20 commerce of hard liquor.

21 MR. COHEN: I am drawing a distinction between
22 a prohibition and a protection of transactions in
23 alcoholic beverages that it seems to me Section 2
24 draws. Congress may well be, although the Court has
25 never actually said so, may well be prohibited from

1 legislating in a way that requires the state to accept
2 or allow alcoholic beverages or alcoholic beverage
3 transactions that the state chooses to prohibit because
4 Section 2 --

5 QUESTION: You are using the word "may" and it
6 sounds as though that sort of requires a little
7 construction of the amendment, too, doesn't it? It is
8 not quite a plain language.

9 MR. COHEN: Well, I am not trying to make just
10 a wooden plain language argument. What I am suggesting
11 is that the text of the amendment demonstrates an
12 intention to protect the right of the states to restrict
13 or prohibit or tax or burden the delivery or use of
14 alcoholic beverages. It does not by its text, and I
15 think it should not be interpreted to, bar Congress from
16 imposing additional restrictions that don't require
17 transactions the state is trying to prohibit. The
18 text --

19 QUESTION: How does that tie in with this
20 case?

21 MR. COHEN: In this case what Congress has
22 done is to pass a statute which encourages the state to
23 prohibit alcoholic beverage transactions that the state
24 chooses not to prohibit, sales to 19 and 20-year-olds.
25 The objection is that the state has some sort of right

1 under the Twenty-First Amendment to allow those
2 transactions to take place. I am suggesting that if you
3 read Section 2 it doesn't say that.

4 I further suggest that the source from which
5 that text was drawn, the pre-Prohibition Webb Kenyon
6 Act, which -- whose -- further illustrates the point.
7 The purpose of that Act, which was clear from its text
8 and its legislative history and this Court's explanation
9 of that Act in the Clark Distilling case, was to
10 withdraw the protection of the commerce clause so that
11 states could regulate alcoholic beverages in ways that
12 might be -- might otherwise be objectionable
13 obstructions of commerce.

14 As this Court explained in Craig against
15 Boren, the purpose of Section 2 was to constitutionalize
16 that framework. It was not --

17 QUESTION: Is 324 Liquor Corporation
18 consistent with that view?

19 MR. COHEN: I think so. I think that what 324
20 Liquor suggests is that there are occasions when Federal
21 law may conflict with state efforts to restrict or
22 impose rules on transactions in alcoholic beverages
23 where Federal law nevertheless prevails. But the
24 Twenty-First Amendment was properly involved in the 325
25 Liquor case because you had a state activity, namely

1 state pricing regulations restricting transactions that
2 is protected by the amendment. In this case we have no
3 transportation, importation, delivery, or use in
4 violation of state law.

5 Let me illustrate with an example.

6 QUESTION: So, I mean, you think the states
7 have no power derived from the Twenty-First Amendment to
8 set limits on the age of drinking at all.

9 MR. COHEN: No, that is not what I am saying.
10 First, I think the states have power to set a drinking
11 age -- police power to set a drinking age wherever they
12 like.

13 QUESTION: Power under the -- derived from the
14 Twenty-First Amendment.

15 MR. COHEN: I don't think the states' power --

16 QUESTION: -- to set drinking ages.

17 MR. COHEN: I don't think the states' power
18 derives from the Twenty-First Amendment at all, but I
19 think the states' power is protected by the Twenty-First
20 Amendment in one direction --

21 QUESTION: Do you think that might come as a
22 little bit of a surprise to the drafters of the
23 Twenty-First Amendment?

24 MR. COHEN: No, because Congress and this
25 Court promptly demonstrated their understanding that the

1 Twenty-First Amendment was not intended to restrict the
2 otherwise valid exercise of Congressional power to
3 impose burdens on or additional restrictions on
4 alcoholic beverage transactions in ways that do not
5 require a violation of state law.

6 Congress enacted the Federal Alcohol
7 Administration Act in 1935 which extensively regulates
8 importation and manufacture and wholesaling and labeling
9 of alcoholic beverages. That statute was challenged in
10 this Court in the William Jameson case in 1939 on the
11 ground that the Twenty-First Amendment turned the whole
12 subject over to the states, and the Court said per
13 curiam, summarily, we see no substance in that
14 contention.

15 I suggest that what would have startled the
16 1935 Congress and the 1939 Court would have been a
17 suggestion that states cannot only require, say,
18 wholesalers to get state permits and apply
19 state-approved labels, but can also insist on permitting
20 wholesalers to operate without Federal permits, and on
21 permitting beverages to be sold locally without Federal
22 labels. That, it seems to me, is the parallel here.
23 Maybe I make it clearer if I say that I think that if
24 Congress were attempting to encourage the states to
25 lower their drinking ages, there would be a Twenty-First

1 Amendment problem, and the argument that I am now making
2 would not be applicable, because Congress would be -- I
3 am not necessarily suggesting that a use of the spending
4 clause would be invalid for that reason, but Congress
5 would be encouraging a transaction that violates the
6 state law as it now stands.

7 What we have here is something --

8 QUESTION: (Inaudible) need to have a
9 different law. That is all.

10 MR. COHEN: Yes. Yes.

11 QUESTION: Mr. Cohen, apart from whether it
12 can contravene the state law, where does Congress get
13 the power to do this?

14 MR. COHEN: Congress gets the power, I think,
15 under the spending clause, and our only claim is that
16 they have the power under the spending clause.

17 QUESTION: What is the the spending clause
18 case that you think is closest to this one in the
19 relationship between the purpose of the expenditure and
20 the condition that is imposed upon receipt of the
21 funds? The purpose of the expenditure here is what,
22 improve highways?

23 MR. COHEN: Let me interject, because I want
24 to, that I think that the -- I think that that question
25 is not before the Court, and I want at least to note

1 that, although I am going to respond, I am going to
2 respond to the question. The -- it was discussed below,
3 but the state didn't raise this question in the Court of
4 Appeals, and it is not, I think, comprehended within
5 either of the questions presented, and I note that the
6 state says in its brief that it has never contended that
7 the Congressional action was unreasonable or unrelated
8 to an national concern in the absence of the
9 Twenty-First Amendment.

10 If the question is before the Court, it seems
11 to me that the answer is first that the expenditure is
12 plainly within Congress's power under the general
13 welfare clause and second, that the condition attached
14 to that expenditure is within Congress's power under the
15 necessary and proper clause because it is sufficiently
16 germane to the purpose of the expenditure.

17 One of the express purposes of Federal highway
18 assistance is to promote safe travel. Nevertheless, one
19 of the consequences of this expenditure and the
20 resulting improvement in our highway system is to
21 exacerbate the problem of what President Reagan called
22 blood borders between states. Section 158 is a measure
23 to help achieve the safety purpose and combat the blood
24 border problems. It seems to me that it is open to
25 Congress to decide that it doesn't want to provide full

1 Federal funding for highways in states where those
2 highways may be used by young persons in lawful quest of
3 alcohol.

4 QUESTION: Is there some limit then on
5 Congress spending power of a requirement of germaneness
6 or relatedness? Could Congress enact this same kind of
7 a grant attached to -- this same kind of condition
8 attached to a grant for school lunch money, for
9 example?

10 MR. COHEN: The answer is that the Court has
11 frequently said there is some kind of a limit attached
12 to the spending power, and to my knowledge has never
13 said what that limit is. I think there is and I think
14 there should be such a limit. I would hope Congress
15 would recognize such a limit on its own. I think it is
16 a very hard line to draw. But I think it is appropriate
17 for the Court to draw a germaneness line.

18 QUESTION: Germane to what?

19 QUESTION: Mr. Cohen, could you answer my
20 question? You still haven't given me the case that you
21 think is -- I don't find that a terribly proximate
22 relationship. We are building highways in order -- I
23 guess partly to increase safety of travel, and one of
24 the things that impairs the safety of travel is kids
25 driving somewhere else to buy liquor. I mean, what

1 about heart attacks? You could say the same thing about
2 heart attacks, so a condition could be, the states have
3 to have some --

4 MR. COHEN: I will give you Lau against
5 Nichols, where the Court -- where Congress says the
6 recipient of any Federal grant has got to comply with
7 the civil rights laws, and that ends up being
8 interpreted to mean that the city of San Francisco must
9 provide some means for educating its Chinese-speaking
10 children.

11 QUESTION: But Congress has independent powers
12 to enact civil rights laws. You don't say that Congress
13 has independent power to prescribe drinking age?

14 MR. COHEN: I am not sure that it has an
15 independent power. I don't know whether it would have
16 had and it certainly wasn't justified in that case on
17 the basis of its having an independent power to impose
18 those particular requirements other than as a condition
19 of the grant of funds, but I will give you Oklahoma
20 against Civil Service Commission, the classic case in
21 this area. Congress provides that any state officer or
22 employee whose employment is primarily in connection
23 with any project that is funded in whole or in part by
24 Federal funds must satisfy the Hatch Act's requirements
25 with respect to political activity. This Court --

1 QUESTION: But that has to do with the
2 efficient expenditure of the funds. You don't want the
3 funds being expended by political hacks. You want them
4 being expended by what the Federal Government regards as
5 responsible civil service. That is closely connected to
6 the use of the funds. This condition isn't.

7 MR. COHEN: I don't think that the connection
8 is close. There is no perfect analogy to this case --

9 QUESTION: I don't even think there is a close
10 one.

11 MR. COHEN: -- to this case, of course, but in
12 Civil Service Commission the Court pointed out that the
13 United States has no power to regulate the local
14 political activities as such of state officials. It
15 does have the power, said the Court, to fix the terms on
16 which its money allotments to states shall be
17 dispersed. There is no evidence in that case that the
18 particular official had any control over the use of the
19 funds or that the basis on which that condition is
20 sustained is that it applies only to the state --
21 certainly the statute doesn't say so -- applies only to
22 the state officials who have it.

23 QUESTION: When you speak of the word
24 "germane," how is that being used as a term? To what
25 does the requirement have to be germane?

1 MR. COHEN: What I am suggesting and this is,
2 I think, not a particularly well developed area of our
3 jurisprudence, because the Court has never, I think, had
4 occasion to strike down a condition, but what I am
5 suggesting is that the condition must be germane, and I
6 guess I mean within the necessary and proper penumbra of
7 the -- germane to the purpose for which the Federal
8 funds are being expended, and I am suggesting --

9 QUESTION: Let me, since you can spend federal
10 funds for any purpose that involves the general welfare,
11 that expands the Federal powers into anything at all so
12 long as you -- the Federal Government can spend money
13 for art and suddenly it can begin conditioning those
14 grants to get the states to do things in the field of
15 art that it would have no independent power to achieve.

16 MR. COHEN: It is certainly correct that the
17 Federal Government can spend money for art and that it
18 can -- and does, and that it can do that in order -- in
19 order, among other things, to get the states to do
20 things that it would have no independent power to
21 achieve, such as by requiring matching grants, such as
22 by requiring that money provided for art be apportioned
23 so that members of minorities or handicapped people or
24 whatever get a share of that money.

25 QUESTION: That relates to the expenditure of

1 the money. Obviously any condition relating to the
2 expenditure of the money is okay. But this is not a
3 condition relating to the expenditure of the money.

4 MR. COHEN: Yes, it is. It's a condition that
5 says we don't want to spend Federal money to improve
6 highways that the states permit to be used by teenagers
7 in quest of alcohol, just as Congress could say we don't
8 want to spend Federal money on a school district that
9 doesn't adequately educate one group of its children
10 without regard to whether -- back at Lau against
11 Nichols -- without regard to whether the particular
12 Federal money was earmarked for that purpose or indeed
13 whether any Federal money at all was being used, but to
14 do the things that this Court ended up ordering the San
15 Francisco School District to do.

16 QUESTION: Mr. Cohen, as I understand your
17 argument, you would agree, would you not, that they
18 could not attach an unconstitutional condition to the
19 acceptance of the grant? For example, they couldn't say
20 you may have the money provided you employ nothing but
21 Republican people, Republicans to build the road, or
22 something like that.

23 MR. COHEN: Oh, certainly.

24 QUESTION: Or only Republican (inaudible).

25 MR. COHEN: Oh, certainly.

1 QUESTION: So there is a limit to the
2 expenditure grant based on whether the condition would
3 be otherwise illegal, I suppose.

4 MR. COHEN: There is.

5 QUESTION: So if this condition should violate
6 the Twenty-First Amendment, you might be in trouble.

7 MR. COHEN: I would agree that there are other
8 Constitutional restrictions, and that if the
9 Twenty-First Amendment is thought to bar this --

10 QUESTION: For example, if the condition in
11 this grant were to a state that had Prohibition, they
12 say, we will give you the money provided you repeal your
13 Prohibition law, I think you would probably say that was
14 invalid.

15 MR. COHEN: Well, first, I think that doing
16 that, that is, moving --

17 QUESTION: For two reasons. One, it wouldn't
18 make much sense. And secondly, it would also fly right
19 in the teeth of the wooden reading of Section 2 of the
20 Twenty-First Amendment.

21 MR. COHEN: I guess I don't --

22 QUESTION: Do you get my hypothetical? I
23 mean, the condition is that the state now has total
24 Prohibition. You can have the money if you repeal your
25 Prohibition laws, if you increase the drinking age,

1 something like that. I think you would agree that that
2 would be --

3 MR. COHEN: I would agree that that one --

4 QUESTION: -- your argument at least would
5 prohibit that.

6 MR. COHEN: I would agree that that creates --
7 raises a Twenty-First Amendment question. It differs
8 from this case because there the state is seeking to
9 prohibit transactions in alcoholic beverages.

10 QUESTION: I understand. I did that
11 deliberately. But I am suggesting if you attach a
12 condition that does violate the Twenty-First Amendment,
13 do you not have a serious issue under the --

14 MR. COHEN: If you say it doesn't violate it,
15 yes, then you have an issue. I don't think that the
16 question --

17 QUESTION: Which would violate it if it were a
18 direct statute, is what I am saying.

19 MR. COHEN: Okay. I don't think that the
20 question is the same as the question whether you can
21 attach a condition to Federal funding that somebody
22 sacrifice individual rights. I don't think that the
23 reserved right --

24 QUESTION: Why not. What is the difference?
25 Both of them are unconstitutional. Both of them are

1 things that the Constitution would prohibit the Federal
2 Government from doing directly. Can they do those
3 things indirectly by conditioning the grant of funds on
4 compliance with what would otherwise be an
5 unconstitutional requirement?

6 MR. COHEN: It seems to me that all of this
7 Court's cases holding that powers reserved to the state
8 under the Tenth Amendment may be waived by the state if
9 it chooses to comply with the condition and that a
10 condition that may encourage a state not to exercise a
11 power that it had under the Tenth Amendment is --

12 QUESTION: You are switching to the Tenth
13 Amendment. You are switching my -- my argument is, my
14 hypothesis is the requirement that is imposed in order
15 to accept the money is that you do something which the
16 Federal Government could not directly require you to do,
17 such as limit the distribution to people of one
18 political party, or two, to require the enactment of a
19 statute that the Twenty-First Amendment prohibits the
20 Federal Government from requiring to be enacted.

21 MR. COHEN: I am suggesting that there is a
22 difference between the protection of individual rights,
23 as I think you have eloquently suggested on occasion,
24 between the protection of individual rights from being
25 bargained away by conditional state --

1 QUESTION: I have suggested that in cases
2 where the Court has said there is no hierarchy of
3 constitutional values. We are on a slippery slope when
4 we start drawing distinctions like that.

5 MR. COHEN: The Twenty-First Amendment
6 protects primarily against the operation of other
7 clauses of the Constitution, the state's power which it
8 otherwise would have given up under the commerce clause
9 and so forth, to restrict transactions in alcoholic
10 beverages. In the case that you suppose it seems to me
11 that the position that the state is in is not dissimilar
12 from the position the state is in exercising a Tenth
13 Amendment power which it has in which the Federal
14 Government presumably cannot directly constitutionally
15 take away from it but which the Federal Government can
16 urge it to exercise in a particular way by conditioning
17 a Federal grant.

18 QUESTION: You could even condition the grant
19 on every state that adopts a unicameral legislature.
20 That is not a personal right, individual right, so that
21 is okay, you can condition grants on that so long as it
22 is as germane to the object of the grant as this one is
23 germane.

24 MR. COHEN: I would hope that the Court would
25 find a way to say that that one wasn't germane.

1 QUESTION: Me, too. But if we couldn't it
2 would be okay.

3 MR. COHEN: I think that there is in the
4 germaneness test the possibility of saying, look, a very
5 large and very central state interest can't be germane
6 to a very small Federal interest, but in the
7 Lead-Deadwood case, the Court did at least observe that
8 it appeared to be constitutional for Congress to grant
9 money on the condition that a state let the county that
10 was the recipient of that money decide how to spend it
11 for any governmental purpose.

12 In Oklahoma Civil Service Commission the Court
13 did say we are entitled to decide about -- say that
14 Congress was entitled to require Hatch Act observance by
15 state officials. Those are, I think, Federal statutes
16 that use the spending power in a way that is at least as
17 intrusive upon core state governmental interests as the
18 interest that the State of South Dakota has in
19 permitting 19-year-olds from its own state and from
20 neighboring states to drink beer. The state does
21 have --

22 QUESTION: What is the source of the
23 government's power to put the 65 -- to put the recently
24 gone 65-mile-an-hour speed limit -- 55?

25 MR. COHEN: Well, that is also a condition

1 attached to the grant of Federal funds for highway
2 construction.

3 QUESTION: Do you think the Federal Government
4 had power directly to put that speed limit on, on the
5 interstate highway system?

6 MR. COHEN: It might. We don't -- but we
7 don't make any such argument as that in this case.

8 QUESTION: You don't argue that the government
9 directly could say no one who is using alcohol could
10 drive on the Interstate highways?

11 MR. COHEN: No, we don't argue that the
12 government could directly say that each state must adopt
13 a minimum drinking age --

14 QUESTION: No, no, they just have a national --

15 MR. COHEN: -- and that is what the government
16 did do.

17 QUESTION: They just have a national -- no
18 drunk driving law related to interstate highways.

19 MR. COHEN: I would think that some power to
20 police Interstate highways is probably implicit in the
21 commerce clause, yes.

22 QUESTION: Mr. Cohen, while we are asking
23 hypotheticals, could Congress prescribe the driving age
24 both on the low side and the high side for all the
25 states? In other words, say no person under 18 may

1 drive on a Federal highway, no person over 80 may
2 drive?

3 MR. COHEN: I would have thought that should
4 Congress choose to do so the Court would sustain that as
5 a valid exercise of the commerce clause.

6 QUESTION: You say you would not have thought
7 it?

8 MR. COHEN: I'm sorry?

9 QUESTION: You would not think Congress had
10 the power to do that?

11 MR. COHEN: No, I would.

12 QUESTION: You would think so.

13 MR. COHEN: I would think the Court would
14 sustain that as an exercise of the commerce --

15 QUESTION: Congress would have the same safety
16 interest that you --

17 QUESTION: We couldn't get a quorum to hear
18 that case.

19 (General laughter.)

20 MR. COHEN: Let me finish by saying I think
21 President Reagan was right in this case when he said
22 that Section 158 is a judicious use of Federal power.
23 There is an important and inherently Federal interest in
24 eliminating the incentive to drink and drive that is
25 created by differing minimum drinking ages between

1 states.

2 Thank you.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cohen.

4 Mr. Tellinghuisen, you have seven minutes
5 remaining.

6 ORAL ARGUMENT BY ROGER A. TELLINGHUISEN, ESQ.,

7 ON BEHALF OF THE PETITIONER - REBUTTAL

8 MR. TELLINGHUISEN: I would like to take up
9 where Mr. Cohen has just left off, and that is the
10 Federal interest that has been in essence the
11 cornerstone of this regulation or this condition that
12 the Congress has imposed under Section 158. The problem
13 with standing up and suggesting that this is an
14 inherently Federal interest ignores the very basic
15 realities that each and every state is just as concerned
16 about its kids as the Federal Government, but we in
17 South Dakota have chose a different way of addressing
18 and preserving and attempting to reduce the incident of
19 teenage alcohol and driving-related fatalities, and that
20 is through the enforcement of stricter drinking and
21 driving laws, additionally through education. There is
22 a wide variety --

23 QUESTION: How can you say that allowing
24 drinking up to the age of 21 is stricter than allowing
25 it up to the age -- I mean up to the age of 19 is

1 stricter than allowing it up to 21?

2 MR. TELLINGHUISEN: I am sorry, Your Honor.

3 QUESTION: You say you are enforcing stricter
4 laws, but as I understand it you are trying to defend a
5 law that is less strict.

6 MR. TELLINGHUISEN: That is true.

7 QUESTION: It allows drinking by people under
8 21. That is less strict than --

9 MR. TELLINGHUISEN: That is absolutely true.
10 Two things I would like to point out very quickly, and
11 that is, in South Dakota, with our 19-year-old age at
12 which people can consume 3.2 beer, these establishments,
13 the 3.2 beer licensed establishments are separate and
14 distinct from a regular alcohol establishment.

15 The other thing is, though, it underscores --

16 QUESTION: What do you make out of that?

17 MR. TELLINGHUISEN: Well, I just -- I wanted
18 to throw that out more for informational purposes than
19 for -- I just want to suggest that we recognize the
20 special place --

21 QUESTION: It is still less strict to allow
22 you to drink 3.2 beer at age 20 than to allow you to
23 drink no alcohol at age 20.

24 MR. TELLINGHUISEN: That's correct, and the
25 point I was going to make is that that underscores,

1 however, South Dakota's attempt, or a recognition of not
2 only a problem but making a sincere attempt at
3 addressing that problem in a way that is different from
4 the other states. We are suggesting that the gradual
5 introduction of alcohol in a person's life is better
6 than when they reach 21 just shoving them through the
7 door. And that is the philosophy that is underscored by
8 the --

9 QUESTION: (Inaudible) people who drink 3.2
10 beer are unaffected by it.

11 MR. TELLINGHUISEN: Oh, absolutely not, Your
12 Honor.

13 QUESTION: And that under your law it may well
14 be that there will be more young people on the roads who
15 have been drinking and affected by it than would be the
16 case if no one could drink until he is 21.

17 MR. TELLINGHUISEN: I would say that the
18 incidence --

19 QUESTION: Isn't that right?

20 MR. TELLINGHUISEN: Well, that is one analysis
21 that could be made, and in fact that is the analysis
22 that --

23 QUESTION: Well, is there something wrong with
24 it?

25 MR. TELLINGHUISEN: Well, I just want to

1 clarify, Your Honor, that there are parts of that
2 assumption that don't necessarily follow, and there are
3 other parts of it that are left outside of the
4 consideration. First off --

5 QUESTION: You don't think that even -- there
6 might even under your law as compared with what the
7 Federal Government wants to achieve that there wouldn't
8 at least be ten drivers a year on the road who had been
9 drinking?

10 MR. TELLINGHUISEN: Your Honor, given my
11 experience as a state's attorney, I can assure you that
12 there will probably be more than ten.

13 QUESTION: Yes, so the answer to my previous
14 question is yes.

15 MR. TELLINGHUISEN: Yes, but what I would like
16 to point out, Your Honor, is that if we impose a 21
17 drinking age in South Dakota, we could equally find that
18 we are driving 18, 19, and 20-year-olds out into the
19 countryside to consume alcoholic beverages, not only
20 restricted to 3.2 beer, and that in and of itself puts
21 them behind the wheel of a car. The very problem that
22 Congress was trying to circumvent or remove --

23 QUESTION: Well, are we to decide this case on
24 whether 19 or 21 years is the proper age?

25 MR. TELLINGHUISEN: That's absolutely correct,

1 Your Honor.

2 QUESTION: We are not going to decide on that?

3 MR. TELLINGHUISEN: No, no. The issue in this
4 case is not what the drinking age should be. The issue
5 is who should be able to determine for each individual
6 state what that drinking age should be, and again I
7 would just submit that this Court's --

8 QUESTION: May I give you one other
9 hypothetical I have been thinking about in view of your
10 reliance on the states' power under the Twenty-First
11 Amendment? Supposing as a condition of a grant to build
12 interstate limited access highways they require you to
13 set up so many gas stations at intervals where the
14 people can stop without getting off the highway, and
15 they further provide that no liquor may be sold in any
16 of those. I take it you would say that was an --
17 exceeded Congress's power.

18 MR. TELLINGHUISEN: Yes, sir. I would. I
19 just would like to conclude by saying that the history
20 behind the Twenty-First Amendment in some respects, as
21 this Court has acknowledged in its prior holdings, is at
22 best inconsistent, but there is one consistency that
23 prevails throughout, and that is that it was Congress's
24 intent upon adopting the resolution which ultimately
25 became the Twenty-First Amendment to remove Congress

1 from the local regulation of what was considered to be a
2 local problem, and that is alcohol.

3 Thank you very much.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Tellinghuisen. The case is submitted.

6 (Whereupon, at 1:50 o'clock p.m., the case in
7 the above-entitled matter was submitted.)
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CERTIFICATION

erson Reporting Company, Inc., hereby certifies that the
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electronic sound recording of the oral argument before the
preme Court of The United States in the Matter of:

#86-260 - SOUTH DAKOTA, Petitioner V. ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION

nd that these attached pages constitutes the original
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BY Paul A. Richardson

(REPORTER)