ORIGINAL

# SUPREME COURT OF THE UNITED STATES



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In the Matter of:

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, ET AL.,

Petitioners,

v.

ISLA PETROLEUM CORPORATION, ET AL.

No. 86-1406

Pages: 1 through 42

Place: Washington, D.C.

Date: February 29, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, ET AL., Petitioners, v. ISLA PETROLEUM CORPORATION ET AL. : No. 86-1406

Washington, D.C.

Monday, February 29, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:46 p.m.

APPEARANCES:

LYNN R. COLEMAN, ESQ., Washington, D.C.;
on behalf of the Petitioners.

JOHN C. HARRISON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.;
as amicus curiae, supporting Petitioners.

MARK L. EVANS, ESQ., Washington, D.C.;
on behalf of the Respondents.

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PROCEEDINGS

(2:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 86-1406, Puerto Rico Department of Consumer Affairs versus Isla Petroleum Corporation.

Mr. Coleman, you may proceed whenever you're ready.

ORAL ARGUMENT OF LYNN R. COLEMAN, ESQ.

ON BEHALF OF PETITIONERS

MR. COLEMAN: Chief Justice Rehnquist, and may it please the Court:

This is a preemption case, the issue being whether Puerto Rico's regulation of gasoline marketing is preempted by an alleged congressional purpose to create a completely free market for petroleum products.

The temporary emergency Court of Appeals found that such a purpose was exhibited in Congress' termination of federal controls, and that such purpose banned state actions, and accordingly affirmed the District Court judgment which had preempted Puerto Rico's regulations.

Now there are a few points which I do not believe are in dispute which I think should be mentioned at the outset by way of background. First, no commerce clause issue has been raised. The regulation that we are concerned with is internal economic regulation in Puerto Rico which is at the end of the supply distribution chain.

Now before passage of the Emergency Petroleum Allocation Act in 1973, I think that it was perfectly clear that the states could engage in regulation of this type. It would be within the historic police powers reserved to the states. And in fact, Puerto Rico did so for about twenty years in a form quite similar in general terms at least to that which was attempted here.

Now under the EPAA, as I say was passed in 1973 in response to the Arab embargo, a temporary statute, there was preemption of conflicting state laws, and certainly Puerto Rico's own regulations were preempted at that time. But I do not think that anyone contends that if that statute had expired on its planned expiration date that there would have been any carry-over preemption thereafter.

So we are focusing here today on what happened in 1975 when Congress in the Energy Policy and Conservation Act or the EPCA, as we call it, amended the EPAA in Title IV of the EPCA.

Now this question has previously been before this Court in the Tully case in 1981 and 1982, and this Court held in an order vacating a TECA opinion that there after the expiration of federal authority on September 30, 1981 that there would be no preemption.

TECA, however, decided that it could depart from Tully here, which it acknowledged would otherwise be

controlling, because it decided that the issue had not been fully considered by this Court, and because it felt that it had received contrary instructions in the subsequent Transco opinion, which it decided was applicable here, because the EPCA revision of the EPAA involved a deregulatory statute similar to what it considered had been done in the Natural Gas Policy Act which revised the Natural Gas Act, which was considered in the Transco opinion.

Our position is that the two statutes involved in Transco and this case are completely different. As a consequence, Transco is distinguishable. And I will discuss the statutory point more in a moment.

And secondly, we think that TECA misread this Court's application of preemption concepts in Transco. And principally, I think that this occurs because the Court ignored the fact that in the Northern Natural case decided some twenty years earlier, this Court had held that Congress preempted the field, occupied the field, in natural gas regulation through passage of the Natural Gas Act.

Now TECA was obviously influenced by the way that this Court asked the question as to what was before it in Transco. It said in revising a comprehensive statute to give market forces a more important role, did the Congress intend to allow the states to step in and act. And TECA decided that it should ask a similar question here, and look for evidence that

the Congress had actually intended to allow the states to act after the federal controls expired.

But as I said, in Transco, this Court had before it a statute which had been held to occupy the field. Now it has been made clear in a number of cases that where Congress occupies the field that within the boundaries of that occupation that it is presumed that the states will not be able to act unless Congress has told them that they can act. I mean I think that is clear from a number of cases.

But where you do not have that kind of situation, which is what we have got here. I mean the allegation here is that there is a conflict with a congressional purpose, not that Congress occupied the field in the EPAA. It is far from it. There was an express preemption clause that said you preempt in the case of conflict.

So do not think that the preemption analysis that this Court utilized when it asked that question that TECA was so influenced by that that is applicable to this kind of case. To the contrary, I think that this Court's usual rule, which it has applied when it is making the initial determination of preemption, that applies either in an occupation case or a conflict case, that you start with the assumption that the historic police powers were not to be superceded unless that was the clear and manifest purpose of Congress.

That was a quotation from Rice v. Santa Fe in 1947,

and it has been referred to any number of times subsequently, as recently as International Paper decided in the last term where it was referred to as a presumption that the state law was valid, if it was an area traditionally reserved to the states.

Our position is that congressional silence of ambiguity should be resolved in favor of state law and not against it. I think that TECA erred in doing exactly the opposite.

Now if you look at what Congress did in the EPCA amendment, I do not think that there is support for the conclusion that TECA reached. And specifically, we think that TECA erred in its reading of the legislative history and certain inferences that it drew therefrom. And it concluded that Congress in allowing a statute to expire or more precisely providing for its expiration after time intended to create a completely free market that would bind the states thereafter and prevent any state regulation of petroleum prices.

If you look at the context in which the EPCA amendment occurred, you find President Ford wanting the EPAA expire. And he asked for new standby authority which he can invoke in the case of an emergency, but otherwise not. I do not think that anybody would argue that if President Ford's wishes had been granted and the EPAA had been allowed to expire that there would be any preemption as a result of that at all.

The House wanted long-term or permanent regulations, they said. They would keep the EPAA with some modifications for ten years, and then convert to standby emergency authority. The Senate pretty well agreed with the President, and wanted to remove the mandatory controls promptly followed by a short period of standby authority.

Now it is interesting to note that none of the participants in this compromise negotiation which occurred were asking for a completely free market or were asking for state preemption after the EPAA authority expired. There is just not a word to support that, and the context is the contrary.

Secondly, the state preemption after EPAA expiration was never mentioned in the hearings. This was a subject examined extensively. And not in the debates, and not in any of the reports of the committees of the House and the Senate, and certainly not in the conference report.

And if you look at the amendment, the EPCA amendment, there is certainly no statutory provision. They either expressly or by implication require preemption.

I think that TECA focused on the structure of the EPCA amendment, and found some evidence to support its conclusion there. Now what was done in the EPCA amendment was to take the mandatory controls which had been required in the EPAA and continue them for a period of 40 months. Those would then be converted to a standby status for a period of 28

months, and that gets you to September 30, 1981 when the statute in Section 18 plainly provides that all regulatory authority expires.

Now the President had the authority under that scheme to remove on a product by product basis individual petroleum products from controls during the first 40 month period. And during the standby period, he could remove controls or reimpose them at will; in other words, pursuant to his own discretion.

Now TECA found in its work that it was inconceivable that Congress would go to the trouble of phasing out federal controls with the intention that the states could step in. Now they do not cite anything to support that inference. But it seems to us, to borrow a phrase from the Court's opinion on the Pacific Gas & Electric case --

QUESTION: You conceive of it, that is enough, right?

MR. COLEMAN: What is that?

QUESTION: You conceive of it anyway, so it is not inconceivable.

MR. COLEMAN: Yes. This Court said in that case that it was inconceivable that Congress would intend to create a regulatory vacuum, certainly without addressing it at all. As a matter of fact, it seems to me that that raises a question whether you can really have preemptive effect from a congressional intent or a congressional purpose which is not either embodied in the statute or flows from the construction

of a statute. And frankly, we have neither here. I am not aware of another case where that has ever been held.

Now the EPCA conference report was a very carefully worded compromise. I think that the Court should be cautious about reading other things into it. And if you look at the purpose clause, it does not say a word about creating a free market and nothing about state preemption.

If you look at the summary of what was to be done in Title IV, the EPCA amendment, there is nothing in there about free market or carry-over preemption. If you look at the section dealing with conversion of mandatory authority to stand-by authority, there are two isolated references to an unregulated market.

Now the first of these, the conferees said that we still have a problem in this country, but it is different. It is not like it was in 1973. Indeed, supplies had returned to conditions as they were in 1972. There was a sufficiency of supplies, but they thought that it would be a bad idea to move to prompt decontrol.

And they said, "A gradual return to an unregulated market is preferable to sudden decontrol." The context is saying that gradual is better than sudden. But if you focus on the phrase "return to an unregulated market", it certainly does not indicate any dissatisfaction with the state of the law before the EPAA was passed.

The other phrase appears on the next page. And the Congress said that we still have a problem, that we remain vulnerable to interruptions. And that it is possible that if we had another embargo that we would have a serious problem. And they noted that the President had asked for standby emergency authority. And they said, "Better that we should convert the EPAA to standby authority than to write a new bill," is what they said.

So you have this second reference that TECA found significant which says that, "Extension of the EPAA and its conversion to a standby authority offers in addition the potential for a smooth transition of petroleum markets from a closely regulated state to a largely unregulated status subject to standby pricing and allocation authority."

Now the context is clearly talking about the situation before controls expire in 1981 rather than thereafter. Because when it says "largely unregulated status," it is one that is subject to standby authority, and not any standby authority after September 30, 1981.

But I would submit that the phrase "largely unregulated" is not inconsistent with there being a removal of federal controls and some state regulation. It certainly does not say that there is going to be a completely free market. And in the face of evidence like this, I would urge the Court to be guided by what it said in cases like

Commonwealth Edison v. Montana, and Exxon v. Governor of Maryland which is cited in our brief, where it said that you cannot rely on general expressions of national policy. That instead you must look for something specific in the statute or the legislative history.

Now the Respondents argue, well, admittedly the EPAA has expired, that there is no authority there for preemption. But that EPCA amendment was part of a larger statute, and some of those titles are still in effect.

Under Title I of EPCA, it created the strategic reserve. It is not related to general price and allocation controls under the EPAA. In Title II, the President is given some authority to deal with international emergency through participation in the international energy plan, rationing, conservation, and the like.

One thing that strikes you is that these other provisions of EPCA are regulatory in nature. They do not say a word about creating a completely free market, nor in any respect do they require a free market for their operation.

And if you look at Title V of EPCA, it had a clause which dealt with the effect of state laws under Titles I and II, which clearly indicated that the Congress when it was concerned with preemption that it addressed the subject specifically.

If there are no other questions, I will reserve the

balance of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Coleman.

We will hear now from you, Mr. Harrison.

ORAL ARGUMENT OF JOHN H. HARRISON, ESQ.

AS AMICUS CURIAE, SUPPORT PETITIONERS

MR. HARRISON: Thank you, Chief Justice Rehnquist, and may it please the Court:

The temporary emergency Court of Appeals concluded that in the Emergency Petroleum Allocation Act of 1973 as amended that Congress exercised its power to displace the normal system of dual government, and the authorities of the states and the Commonwealth of Puerto Rico in a field traditionally subject to their authority.

That conclusion was made despite the presumption that normally Congress does not exercise that authority that it unquestionably has, and it finds no support in the structure of history of the Emergency Petroleum Allocation Act or in this Court's cases.

The Act, the EPAA, has a preemption clause that clearly does not apply to Puerto Rico's regulation that is at issue here. Moreover, there is no substantive provision of the EPAA that would said to imply preemption in the sense that this Court has used that concept whenever it has found implied preemption, that is that there is no regulatory scheme of the federal government that can be said to displace either

completely or in certain circumstances regulations by the states of the Commonwealth of Puerto Rico.

The cases in which this Court has found such displacement have involved fairly careful inquiries into the nature and content of the federal regulation, and there is nothing like that left in the EPAA. It now provides no substantive rule at all.

Moreover, the circumstances surrounding the final revision of the EPAA in 1975, the EPCA, negate any inference of preemption. There was no mention of ongoing preemption by the EPAA. Indeed, the context makes it quite clear that what Congress thought that it was doing with the EPAA was phasing it out, instead of just letting it expire immediately. And if it had expired immediately, there was no suggestion that there would have been preemption, and the expiration would have needed to take more time than that to run ultimately through 1981.

But no one suggested that after 1981 when the statute's effects came to an end and when the President's power was no longer available under the statute that there might have been preemption. This is particularly striking given that, as Mr. Coleman noted, every other part of the EPCA, the 1975 legislation, deals with preemption explicitly.

In Title V of the EPCA, there is a presumption clause dealing with Titles I and II. Title III, both parts of that

have their preemption clauses. And Title IV, which amends the EPAA, amends the statute that has its own preemption clause, and it does not preempt explicitly.

So it is not as if Congress had come to think of this field as naturally exclusively federal. Congress was well aware in 1975 that the area was still subject, unless it displaced the traditional police powers of the states and the Commonwealth of Puerto Rico. And nevertheless, no one suggested that the extraordinary result of preemption in the absence of any substantive federal rule or any explicit discussion of preemption had been achieved. This did not occur to anyone.

And the only possible inference from that is that no one thought that there was going to be ongoing preemption, that they thought that the EPAA as amended meant what this Court thought that it meant in Tully after reading it, that the statute was over. And that if Congress wanted to revisit the question, that it could do as if often does when sunsets a piece of legislation come back after the legislation has come to an end.

TECA went astray because of its misunderstanding of this Court's opinion in Transco, and in particular its misunderstanding of the context of the discussion of this Court on which it drew. Transco followed Northern Natural. Northern Natural held that Congress had occupied the field of wholesale

natural gas sales and pricing.

In Transco, Congress had withdrawn FERC's regulatory authority over certain categories of natural gas. The Court in Transco began by noting that after the Natural Gas Policy Act, the Natural Gas Act and the Natural Gas Policy Act together, remained comprehensive federal regulation of this field. That is to say the field was still occupied. And hence, unless Congress said otherwise that there would be no regulation by the states.

The Court then inquired whether the withdrawal of FERC's regulatory authority indicated that Congress had ceased to occupy the field that the Court had found that it occupied in Northern Natural. The Court's answer in Transco was that the withdrawal of authority was not to that purpose, but it was in order to create an open space within the area that Congress continued to be occupying.

Now when Congress occupies a field, what it does in effect is make itself into the sole legislature on that subject matter. That is it displaces the normal system of dual government where both Congress and the states and Commonwealth can form their own policy and says that only Congress makes policy in this area, and only Congress makes the law in this area.

Once that is done, it naturally follows that if Congress decides not to regulate something, then of course it

is not going to be regulated at all. But outside the context of occupation of the field, there is no such suggestion and there is no such suggestion of that sort in Transco. Transco simply found that Congress had not deoccupied those areas of the field that it had deregulated.

There is also the suggestion from Respondents that the role that it has played in Transco by the Natural Gas Act and the Natural Gas Policy Act might be filled in this case by the other titles of the general policy of the EPCA. But as Mr. Coleman noted, this Court has made it very clear that general congressional policy at the level of abstraction that it has found in the EPCA does not overcome the presumption of preemption. And indeed, Commonwealth Edison v. Montana addressed the specific policy of the EPCA, of one of the EPCA's substantive provisions, having to do with the use of coal.

And what the Court found was yes, in the EPCA, Congress took certain steps in favor of coal. And yes, the Montana severance tax could raise the price of coal. But that is not the kind of clash of policies that will lead the Court to infer preemption, to infer that Congress has exercised its authority to move aside the states.

Rather the Court inferred in Commonwealth Edison and should infer here that unless it has made it clear, Congress has left in place the normal relationship between the levels of government. Congress is still formulating national policy, and

the states and the Commonwealth of Puerto Rico are free to formulate their own policy.

There is no suggestion to the contrary anywhere in the EPAA. And therefore, the judgment of the Court of Appeals should be reversed. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Harrison.

We will hear now from you, Mr. Evans.

ORAL ARGUMENT OF MARK L. EVANS, ESQ.

ON BEHALF OF RESPONDENTS

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

It will come as no surprise to you that we see the case somewhat differently from the way that my colleagues have presented it. The points of disagreement, I think, are numerous, but I think that they reduce in the end to two. One deals with the right question to be asked here. My colleagues believe that the question is whether Congress intended in 1975 to preempt state petroleum regulation after 1981.

We think that the question is whether Congress in 1975 intended to create a market free of government regulation after 1981. And if so, the interference of Puerto Rico here ought to be preempted.

QUESTION: Who do those two questions differ so?

MR. EVANS: Well, I have not gotten to the second question yet.

QUESTION: All right.

MR. EVANS: The second question, Mr. Chief Justice, is what Congress' purpose was in 1975. My colleagues see --

QUESTION: You propose kind of a dichotomy in your first question.

Should the question be did the Congress intend to create a free market in petroleum after 1981, and then the alternative is did it intend to preempt state regulation after 1981, and what is the difference between those two questions?

MR. EVANS: Well, the difference is illustrated, Mr. Chief Justice, by the definition of intention to preempt that is given in this case, which is really central to the analysis of the Petitioners and the Solicitor General. And that definition is stated most clearly at page 9 of the reply brief, where the Petitioners say that what must be shown is an indication that Congress, and these are the words, "had in mind the preemption of state law once federal controls expired."

Well, even if intent to preempt is the right standard, just last month in the Thompson case, the Parental Kidnapping Act case, the Court rejected precisely that kind of an approach to a question of congressional intent. It said in connection with the implication and the finding of an implied cause of action under that statute that while congressional intent is the right issue, we do not look to see whether

Congress had consciously in mind, in fact that was the exact same phrase that it used, that the Court used, at the time that it was acting. What you look for is the substantive purposes that Congress had in mind.

Now under our analysis, Mr. Chief Justice, what guides the Court here and what guides the parties is the supremacy clause. The supremacy clause makes clear how you meld state and federal laws where there is no expression of congressional intent to preempt.

You look at the congressional act and its substantive purposes, and you then look at the state law or the state regulation. And if its effect is to frustrate the purposes sought to be achieved by Congress, it is preempted, because it is contrary to the supreme law of the land.

QUESTION: Even though Congress may have had in mind at the time that it legislated the necessity to preempt those laws?

MR. EVANS: That is exactly right. And I think that the framers probably recognized what we all know, which is that Congress when it is embroiled in debates over significant national policy does not always pause to think what effect it has.

QUESTION: Well, the framers have never seen Congress the way that we have.

MR. EVANS: That is for sure. But they might have

been able to guess. And it is for that reason that the Court has always since Gibbons v. Ogden and continuing most recently in a number of cases, but in Perex v. Campbell, dealing specifically with the question of whether purpose is relevant. The only purpose that is relevant is the substantive purpose, as we see it.

QUESTION: How do you apply that kind of analysis to the Sherman Act, for example, where we have just had a case argued a few days ago about the Sherman Act preemption, how can you tell when Congress wants to create a free market to eliminate restraints on competition?

MR. EVANS: Justice Scalia, I do not think that this case is like Commonwealth Edison or Exxon v. Maryland which has been cited, which may be the case that was argued the other day, I do not know.

QUESTION: I am talking about Brown, where we have said, well, the Sherman Act really just intended to set forth a federal policy, and we do not read it as meaning the states cannot do what we have said at the federal level that we do not want done.

MR. EVANS: The question, Justice Scalia, is when Congress enacted in this case the EPCA in 1975, what had it set its sights on and what means did it choose to get there. What it set its sights on was not a judgment that the federal government was not doing as good a job as the states could do.

It was not a judgment that we have lost interest in the area of energy, but quite the contrary. It was a burning issue. It was the major political debate of the year.

And what Congress had in mind was achieving articulated goals, goals that were set forth clearly in the conference report, that dealt with national security, preserving our independent from unstable foreign oil supplies, efficient utilization of scarce resources, and ensuring availability of energy resources domestically produced at reasonable prices.

Those were the goals. Now what was the mechanism that it chose to get there. The principal mechanism which was central to the entire debate, and which was clearly underlying President Fords' insistence upon his position and the Congress' ultimate acquiescence to it was an uncontrolled and unregulated market.

The whole judgment that brought the issue to the fore was the conclusion that controls were doing just the opposite. Controls were keeping prices low, which meant that consumption went up. They were also keeping prices low, which meant production went down. You had low production and high consumption, and the balance was made up by imported oil which was exactly contrary to what the national policy ought to have been.

QUESTION: Why is it different from the Sherman Act?

MR. EVANS: Well, I do not know that I can speak conversantly with the Sherman Act.

QUESTION: Well, you know the Sherman Act. The policy was simply that we do not want unreasonable restraints in trade. Yet we have always interpreted that not to preclude states from allowing private organizations to impose restrictions, as long as the states adequately supervise them. And for the states themselves to create all sorts of distortions to the competitive market.

Now were those cases wrongly decided; and if not, why is that different from what you are urging on us here?

MR. EVANS: I wish that I were better prepared to respond to the Sherman Act. I just do not have a feel for the cases and what analysis led the Court to those conclusions, nor do I really have a feel for the underlying purposes that may have been exhibited in the legislative history.

I do think that the closer analogy here is the decision in the natural gas area, Transco which has been referred to. We think that really this case is Transco with two changes to it. Number one, this is total deregulation rather than partial. And number two, the conflict here with the free market is a direct one and not a remote one.

QUESTION: But I think that you have to deal with some of the contentions that the Petitioner makes, that the Northern Natural Gas case in 1963 had held the whole area

preempted. And then when Congress backs off of one limited section, does that mean that the states are now free to come in. It strikes me that that is quite different than Congress backing off entirely the way that it did here.

MR. EVANS: I think, Mr. Chief Justice, that there is that element of Transco. It is unquestionable that there was a blend in the decision, the majority decision, of what I am referring to as conflict preemption principles, the question of whether state laws stands as an obstacle to the accomplishment of the federal purposes, and field preemption principles under which Congress basically must require explicitly assignment of regulatory jurisdiction exclusively to itself.

There is both of that. And it is true that the context was Northern Natural, which was probably a field preemption case, although there was also some conflict analysis in that. But the conflict analysis in Transco stands on its own. The only question was whether the rateable take order which was not a well head price regulation measure directly anyway was in fact a conflict with the free market objectives that Congress had.

Now the majority of the Court felt that it was. But it obviously reinforced that judgment with the notion that even if it was not, that is even it was harmonious with the federal law, this was a kind of field preemption which excludes not only conflicting state law but also harmonious state law.

I think that there was a blend there, but I think that had the case been different, had the case been a complete deregulation case, had Congress instead of just picking out certain categories of natural gas had deregulated all natural gas, notwithstanding the background of Northern Natural, and had the case been a direct well head price regulation, the result would have been exactly the same. And it would have been unanimous, if I understand the opinions.

QUESTION: May I ask one question. If I understood your opening comments, you said that the question was whether in 1975 Congress intended that there be a free market after 1981.

Does that mean contrary to what your opponents said that you would really contend that there was preemption even if the statute had expired by its terms?

MR. EVANS: No.

QUESTION: Then you are really arguing that preemption occurred at the time of the repeal or the amendment?

MR. EVANS: That is absolutely correct, Justice Stevens. Our view is that there must be, and we do not contest this, that there must be a statute enacted by Congress that embodies what we have characterized as a deregulatory purpose. We cannot apply the supremacy clause to foreclose state law in the absence of a federal statute, but there was a federal statute. Had there been none, had the debate gone forward in

1975 and resulted in nothing.

QUESTION: No, no, I did not say if there had been nothing. I just said that if they had enacted the statute in 1975 and then let it expire by its term.

MR. EVANS: Well, that is what was happening in 1975. There had been a statute enacted in 1973, and the question was what was going to happen after now the emergency has passed. We are now in 1975, and the embargo is behind us. The problems are gone. Now we are deciding what is going to be the future.

And the Congress in 1975 decided that the future was going to be deregulation. We are going to have unregulated markets where the price mechanism is going to send the right signals to consumers and producers. But we cannot do it overnight. We are too tied to the controls that we are now living with. We have to do it in a gradual way.

The ultimate compromise which was a difficult and hard fought one with vetoes flying back and forth across Pennsylvania Avenue was that Congress got what it most desired which was temperance, let us do this in a calm measured way, let us deregulate gradually so that the economy can adjust. The nation was just recovering from a deep recession, and the Congress was very concerned for obvious reasons about the impact of sudden decontrol.

What the President got though was what he most prized, which was a firm commitment by Congress to ultimate

deregulation, so that the price mechanism would work, and that the economy would get back to where it ought to be, and the petroleum markets would get back to where they need to be.

Now my colleagues have said, both of them, that TECA has gone astray and misapplied Transco's analysis presuming rather than inquiring that Congress intended a free market. Not so. I think that it is quite unfair to read TECA's opinion that way. What TECA held was, and recognized correctly I think, that what this Court found in Transco was that a purpose to deregulate or a decision to remove federal regulation with an eye towards creating a free market environment will preempt state laws that interfere with market forces. It defeats the congressional purpose.

And it then went on without the aid of any presumption and looked closely at the legislative history of the EPCA in 1975 and found, as this Court had found, in Transco that Congress in fact intended markets to operate freely, that that was the heart of the whole debate. And it further found, as this Court found in Transco, that the Puerto Rico regulation, a direct price fixing regulation, plainly conflicts with the congressional purpose.

So although it did ask the same question in the course of its opinion that this Court suggested was appropriate, the question being did Congress intend to give the states any authority that it had withdrawn from the federal

government, we think that the question properly understood was whether notwithstanding the purpose of deregulation, notwithstanding the purpose to create a free market, did Congress intend to leave the states free to interfere with the state market, and the answer to that question was plainly no.

The burden ought to be once a free market purpose is found on those who would like state regulation to survive to show that Congress would have anticipated state regulation notwithstanding the apparent conflict. And the Court has occasionally asked that question and found that kind of an answer.

QUESTION: Of course, all of the legislative history that you point to could be just as well explained by a Congress that really was not averting to state regulation at all, because it never conceived that state regulation would at all be feasible to destroy a free market.

Perhaps in a place like Puerto Rico or maybe Alaska and maybe Hawaii, but certainly in the Continental United States, do you think that you can have local state regulation that could possible be effective given that the interstate channels are deregulated?

MR. EVANS: I do not think, Justice Scalia, that the purposes that Congress articulated could be squared with sporadic regulation in certain parts of the country any more than a national regulation.

QUESTION: I mean they may not have worried about it.

MR. EVANS: I think that is correct.

QUESTION: They assumed that when they passed this federal statute that that was going to be the end of it. Because as a practical matter, there is no way that New Jersey could regulate gasoline unless New York, and Pennsylvania, and neighboring states were subject to the same regulation.

MR. EVANS: I think that is probably right. I do not think that Congress really thought about the states. It was not an issue. And one of the reasons that it probably was not an issue is that the states had not been actively regulating petroleum markets before 1973 when the EPAA was first enacted. But the fact that Congress --

QUESTION: But Puerto Rico had, had it not?

MR. EVANS: Puerto Rico had. But I am not sure that Congress focused on that, or it might well have addressed the issue explicitly. I think that it is misguided to look for evidence that the members of Congress voting on a national policy thought about the states when they acted to establish that policy. I think that the Court's decision was made clear under the Hines v. Davidowitz standard that you look to see what the policy was, and then you seen whether state regulation does in fact conflict with it.

The same could be said, in fact I think with greater vigor, with respect to the congressional decision in the NGPA

that was at issue in Transco. There was far less evidence of an intent to create a free market which was the heart of that analysis in that case. There was a snippet from one of the legislative reports and virtually no explanation of how the Congress expressed a deregulatory purpose.

In fact, the statute itself that was construed simply said that FERC jurisdiction shall not apply after a certain date with respect to one category of natural gas.

QUESTION: You sound as though you think that the case should have come out the other way.

MR. EVANS: Well, no. I think that on that issue that all nine Justices agreed. All nine Justices read the congressional purpose exactly the same way. Whereas in our case, I think that we have a far stronger showing of what Congress had in mind. And the debates which we have laid out really in summary fashion that goes on for a whole year in 1975 starting with President Ford's state of the union message, which really is a significant element of his entire presentation to the nation.

He felt that it was critical to the country to move to deregulated markets. There was a debate, and Congress resisted principally on the ground that it was not a good idea to do it rapidly. But there were also some reservations about whether there really was a free market with the OPEC cartel and so forth, and it was a major dispute.

Ford initially sensed some resistance, and suggested that maybe the thing to do is to phase it out, and deal with the congressional concerns about the timing. And he offered two years as a phase-out period. Congress resisted and rejected that, and said that it needed to be at least five years.

But at that point, the debate shifted from the question of whether there was to be decontrol, whether markets would operate freely, to the question of when they were going to operate freely. It became a question of timing.

And the debate raged, and Congress passed a bill that would have extended and exacerbated in President Ford's mind the controls that were already on the books. President Ford vetoed that, and offered up a compromise of a 30 month rather than a two year deferral of decontrol or phase-out. That was vetoed by the House, by the Congress in a one house veto.

Ford came back with another proposal of 39 months. That again was vetoed. At this point, the EPAA on its own terms having been extended a few times temporarily comes to an end on August 31, 1975. And there is suddenly nothing on the books.

Congress immediately puts forward a retroactive revival and extension for a short period of time of the Act, and President Ford vetoes that. But he says, I do not want to establish policy by inaction, this is too important an area. I

want a comprehensive national energy policy for the long term, and I want a responsible approach to the question of decontrol, and I am prepared to compromise. I will accept a 45 day extension of these controls retroactively revived on the assurance that you are all going to meet with me to compromise on it.

And that in fact is exactly what happened. His veto was sustained narrowly by the Senate. A compromise was struck through the auspices of a conference committee. And what emerged was a statute which has many pieces of it, and most of them are not particularly relevant to the question of decontrol. But decontrol was the centerpiece of it. And what Congress said was we will take, although we are going to postpone, we will take your point that there needs to be decontrols. But we are going to do it in the course of three steps.

And this was basically the significant section of the statute which Congress enacted with respect to the decontrol provision. I believe that it is on page 28 of the footnote of our brief. The section divides the phaseout into three pieces. The first piece starts right away, and it lasts about 40 months. And during that period, Congress maintains full control over the question of petroleum regulation. It is on page 28 in footnote 8.

For the first 40 months, the President must maintain

mandatory price and allocation controls on petroleum products. During that time, he is authorized to exempt certain products from regulation, but the Congress has a one House veto. This is not necessarily all shown in this section. There are other pieces of statute which add a bit to this.

At the end of the 40 month period, the President's obligation to maintain regulation evaporates. And the regulation becomes entirely discretionary with the President, and the Congress forsakes control with respect to the one House veto. At the end then of another 30 months, basically after six years after enactment of the EPCA, all presidential authority expires, and presumably regulation is gone.

Now one thing that I think that it is important to keep in mind is that first of all, the statute itself while it is belittled by my colleagues, the statute itself clearly had a direction in it. The section that we are talking about moves from regulation to deregulation in a phased group. There is something going on there, and there is a target. The target is no regulation.

QUESTION: No federal regulation anyway.

MR. EVANS: No federal regulation. Now that is what my colleagues see here, nothing but the withdrawal of federal regulation. But as we have discussed a few moments ago, the same argument was really made and accepted by the Mississippi Supreme Court in Transco. That was exactly the argument that

the state made there.

All that happened in Transco was that Congress removed federal controls over well head regulation. Now why should that prevent the state from stepping in and doing whatever it is doing, whatever it wants to do.

And the response that the Court gave in Transco is exactly the right response. And it fits whether we are talking about field preemption or conflict preemption. What the Court said, and it had a conflict flavor, was that what the federal government was doing was removing the distorting effects of price controls. The Court's words may have been artificially formalistic to assume, those were the Court's words I believe, that Congress expected that the states would then step in and start doing the same thing. It would have defeated the entire purpose.

QUESTION: This scheme in which the Congress was remaining involved in other areas of regulation.

THE WITNESS: Well, I do not think that part of the analysis, Justice Scalia, is pegged to the field preemption notion. It really was a conflict preemption notion, and it works here too. Why is it appropriate that Congress has in mind allowing the price of product to send the right signals all the way through the market, and why is it appropriate for the states to interfere with those signals. I do not think that it is. I think that the Court's decisions make it clear

that it ought not be. The other suggestion --

QUESTION: Of course, how do I know that that is what Congress has in mind, to sweep the field and leave it to free competition? It is not in the statute. There is nothing there but a repeal over a period of time of federal intervention. So I have to read state of the union addresses and letters from the President to various Senators and so forth.

Suppose that I do not want to do that. Suppose I think that the preemption of state authority is a significant enough matter that it ought to be in the statute, and I want to adopt some rule that would let the Congress know what they have to do.

Do you think that it would be better to have a rule that says when you have been a field and get out that you have to say moreover we want the states to say out too; or would it make more sense to say when you are in a field and get out and if you say nothing, we will assume that the states get back in, where should the presumption be?

MR. EVANS: I do not think that it is in either place. I think that the Court --

QUESTION: You want me to read state of the union addresses.

MR. EVANS: Well, I would hate to suggest that every piece of legislative interpretation requires a resort to the state of the union addresses. It just happens to be that this

Act was the product of debate, vigorous debate between the President on the one side and the Congress on the other all through the year. That is where the whole process started.

QUESTION: The only place where you find support for your position is not in the Act, but in the debate.

MR. EVANS: No, it is in the Act too, Mr. Chief Justice. We see it in the Act. We do not see the expression that the states are foreclosed, but that has never been required in the context of conflict preemption. Unless the Court is prepared to say that conflict preemption has no place in the context of deregulation, then I think that the principles that have been established in connection with regulation apply here as well.

QUESTION: But here Congress got into the business of regulating gas prices on 1973. Before that time, everybody agrees that the states would have been free to regulate. They got out of the business in 1981.

Why should it not revert to the status quo, insofar as anything that Congress ever enacted?

MR. EVANS: Well, let us look if I can, Mr. Chief Justice, at some part of what as said in the course of the legislative history leading to the 1975 legislation.

QUESTION: You have some of that to support you, but that seems extremely weak when you do not have a single sentence of an enacted law.

MR. EVANS: Well, there are many cases in which this Court has applied a Hines v. Davidowitz kind of preemption analysis.

QUESTION: A law that repealed all congressional involvement in the area?

MR. EVANS: No, this is the only case in which we have complete deregulation. And the question, I think, is properly framed. Whether the standard that has been applied in connection with regulatory statutes should shift when you have a regulatory statute. It does not matter. In Transco, does it matter how much regulation there was, would it have changed the result. I do not think that it would have had there been complete deregulation of natural gas prices. I think that the result would have been the same, because the purpose would have been the same.

And this Court's obligation under the supremacy clause is to apply the congressional purpose. Sometimes it is clear in the statute. Sometimes Congress goes out of its way to assign and to allocate responsibility under the commerce clause. It has not done it in many cases. And in those cases, the Court has to carry the burden of looking to the congressional purpose. Sometimes you have to look harder than other times. This is a pretty easy one.

Now one other point that I think is important to stress is that the result of preemption here is not the blanket

immunity that my colleagues suggest. It is very closely confined. The only thing that the District Court preempted was price controls. And this case would not lead to a preemption, for example, of a rateable take order in the crude oil area. It just would not happen.

What we have here, I think, is a crystal clear framing of the limits of preemption. And it is consistent with what we think is the right principle, which is that when you are trying to find out whether a particular state regulation is or is not preempted under the Hines standard deregulation context, you look to see what was removed by Congress, what was it focusing on, what was the mechanism that it chose to get where it wanted to go.

What Congress removed here were price regulations and allocation regulations of petroleum and petroleum products. That is what is preempted and ought to be preempted. Beyond that, we do not suggest nor do the courts below suggest that the supremacy clause goes.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Evans.

Mr. Coleman, you have four minutes remaining.

ORAL ARGUMENT BY LYNN R. COLEMAN, ESQ.

ON BEHALF OF PETITIONERS - REBUTTAL

MR. COLEMAN: Thank you.

Counsel for the Respondents concedes that there is no

clear evidence of an attempt to preempt state regulation as such, but argues that that is really beside the point, if there is clear evidence of an intent to create a completely free market, which as a consequence would have the effect of preempting.

Now let us focus on his contention that there is such a purpose to create a completely free market. I submit that he spent most of his time talking about that it could be that if Congress had such a purpose that it would follow the preemption would occur.

I suggest, however, that he has given you very little evidence in briefs or in argument of anywhere in this entire debate that you can find that Congress intended to have a completely free market following the end of federal controls. It is certainly not on the face of the statute, and it is not in the purpose clause, and I cannot see it in the structure of the statute. It was never mentioned in the debates that we can find.

And they talk about President Ford's objective. President Ford sent to the Congress a stand-by emergency measure, Title XXII of his own bill, which would have called for stand-by authority for ten years. And it had a preemption clause in it that said in Section 1320 in essence that if we invoke that authority that we would preempt, but that we would not preempt otherwise.

Now if that was what the President wanted, that he wanted some stand-by authority, and he wanted merely to allow the EPAA to expire, it does not seem to me that he had in mind that in the meantime that there would be no state regulation at all. We submit that none of the participants in that debate had in mind an intent which would result in preemption here.

An idea that you should deregulate does not necessarily mean that you want to preempt. I mean the Reagan Administration, and this is detailed in our brief, has consistently opposed federal past regulation and strongly believes in market forces.

But on every occasion when the Administration came to the Congress to discuss whether or not there ought to be preemption and in following the expiration of the EPAA, there was quite an interchange between the Congress and the Administration, they took the position one, that there was not any preemption at the present time; and two, that there should not be any preemption, even though they believed in deregulation. So it does not necessarily follow that deregulation equals preemption.

Now finally, in this case, they say, well, we do not have to show preemptive intent, but we merely have to show a deregulatory purpose. Since the entire statute was wiped out of all of its federal authority in September of 1981, the only thing that could have been left over which you need to do to

create a free market would be to preempt the states. So I suggest that the two are one and the same.

So when you look for evidence here to support preemption, it does not matter whether you call it looking for a congressional purpose to create a free market, or looking for evidence to create preemption, but it really is the same thing.

If I could turn for a moment to the Transco case. As I understand, he concedes that you have to look at the Northern Natural decision and take account of the fact that you are dealing with an occupation of the field there. I think that makes the case distinguishable.

In Transco, there was clear evidence that Congress wanted the narrow category of deep cast to be deregulated. They wanted to provide an incentive for more of its development. And that is distinguishable.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Coleman.

The case is submitted.

(Whereupon, at 2:40 p.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: 2/29/88

Margaret Daly
Official Reporter

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