

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: METROPOLITAN WASHINGTON AIRPORTS  
AUTHORITY, ET AL., Petitioner v.  
CITIZENS FOR THE ABATEMENT  
OF AIRCRAFT NOISE, INC., ET AL.

CASE NO: 90-906

PLACE: Washington, D.C.

DATE: April 16, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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METROPOLITAN WASHINGTON AIR- :  
PORTS AUTHORITY, ET AL., :  
Petitioners :  
v. : No. 90-906  
CITIZENS FOR THE ABATEMENT :  
OF AIRCRAFT NOISE, INC., ET AL. :  
----- X

Washington, D.C.  
Tuesday, April 16, 1991

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:13 a.m.

APPEARANCES:

DAVID L. SHAPIRO, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
Respondent United States, supporting the Petitioners.  
WILLIAM T. COLEMAN, JR., ESQ., Washington, D.C.; on behalf  
of the Petitioners.  
PATTI A. GOLDMAN, ESQ., Washington, D.C.; on behalf of the  
Respondents.

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23  
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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
DAVID L. SHAPIRO, ESQ.	
On behalf of Respondent United States supporting Petitioners	3
WILLIAM T. COLEMAN, JR.	
On behalf of the Petitioners	14
PATTI A. GOLDMAN, ESQ.	
On behalf of the Respondents	22
REBUTTAL ARGUMENT OF	
WILLIAM T. COLEMAN, JR., ESQ.	
On behalf of the Petitioners	39

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

2 (10:13 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 90-906, Metropolitan Washington  
5 Airports Authority v. Citizens for the Abatement of  
6 Aircraft Noise.

7 Mr. Shapiro.

8 ORAL ARGUMENT OF DAVID L. SHAPIRO  
9 ON BEHALF OF RESPONDENT UNITED STATES,  
10 SUPPORTING PETITIONERS

11 MR. SHAPIRO: Thank you, Mr. Chief Justice, and  
12 may it please the Court:

13 This case involves a challenge to the  
14 constitutional validity of the Board of Review created as  
15 part of the administrative structure under which  
16 Washington Dulles and Washington National Airports have  
17 been leased by the Federal Government to an Airports  
18 Authority created by joint action of Virginia and the  
19 District of Columbia. The problem in this case, and it is  
20 a novel one, arises from the fact that Congress made it a  
21 condition of the lease that the Airports Authority create  
22 a Board of Review, that this Board of Review have veto  
23 power over certain significant actions of the Airport  
24 Authority, and that the Board of Review shall consist of  
25 Members of Congress to be selected by the Airports

1 Authority from lists to be furnished by the Speaker of the  
2 House and the President pro tem of the Senate.

3 The problem was addressed by the court of  
4 appeals after holding that the controversy was  
5 justiciable, and the court of appeals made essentially two  
6 determinations. First, that the Board of Review was  
7 exercising Federal power and that its constitutionality  
8 had to be analyzed on that basis; and second, that when it  
9 was analyzed on that basis, its existence, its authority,  
10 and its composition violated the principle of separation  
11 of powers.

12 We contend that the court of appeals was wrong  
13 on both scores. First, and very significant to the  
14 analysis, we contend that it was wrong in concluding that  
15 for purposes of separation of powers analysis the Board of  
16 Review was exercising Federal power. The authority of the  
17 Board of Review derived from the joint action of Virginia  
18 and the District of Columbia in accordance with Federal  
19 conditions that were laid down in the act.

20 Secondly, we believe that the conditions laid  
21 down in the act, although they do raise significant  
22 separation of powers questions in the unusual  
23 circumstances of this case, do not violate that basic  
24 separation of powers principle.

25 If we may first address the rationale of the

1 court of appeals, we note that it is at best only half-  
2 heartedly defended by the respondents. We think that  
3 choice was correct, that the court of appeals' rationale  
4 was wrong. The Board of Review is not created by Federal  
5 law. The Board of Review was created independently by the  
6 joint action of the State of Virginia and the District of  
7 Columbia in accordance with conditions laid down by  
8 Federal law.

9 But Virginia and the District of Columbia were  
10 not coerced into creating that board any more than South  
11 Dakota was coerced into raising the drinking age to 21 as  
12 a condition of receiving Federal funds. Indeed we believe  
13 that the inducement, which admittedly did exist, was  
14 probably a good deal less than in that case and than in  
15 the case of Steward Machine Company against Davis.

16 QUESTION: Mr. Shapiro, by the same logic I  
17 suppose you would be -- you're defending an effort by  
18 Congress to structure some kind of board of review with  
19 effective veto power, as this board has, over, for  
20 instance, the Federal funding of aid to the States for  
21 transportation or health services or welfare benefits, or  
22 anything else that the Federal Government provides money  
23 for. I mean, that would be your theory, and it would be a  
24 means by which the Congress could in effect have a veto  
25 exercised by members of its appropriate committees.

1 MR. SHAPIRO: Your Honor, we believe that this  
2 branch of the analysis doesn't solve the problem. It only  
3 poses the question. That is we think that the fact that  
4 the board itself was not created by Congress leaves a  
5 difficult constitutional analysis --

6 QUESTION: Well, Congress certainly had a gun  
7 pointed at the heads of Virginia and the District of  
8 Columbia, which wanted to establish an airport authority,  
9 and Congress said fine, you can do it but you're going to  
10 give us the veto in effect.

11 MR. SHAPIRO: But we believe, Your Honor, that  
12 in terms of this Court's analysis and in terms of  
13 practical realities it was an offer they could refuse.  
14 That is it was not the kind of coercion that this Court  
15 has said literally destroys the independence of the State  
16 actor.

17 Now, as I said, we believe that that simply  
18 poses the constitutional issue. We have tried to explain  
19 in our brief that the constitutional issue that is posed  
20 by these conditions is a very difficult and serious one.

21 QUESTION: Why does it just pose it, Mr.  
22 Shapiro? If you say that there is no Federal power being  
23 exercised here, isn't that an end of the separation of  
24 powers problem?

25 MR. SHAPIRO: Well, there are -- there are two

1 possible conceptual approaches to this, Your Honor. One  
2 is the one you just suggested, that is taken I think  
3 perhaps by the petitioner, to say if it's done by the  
4 States and if they weren't coerced, that's the end of it.  
5 The respondents take the opposite conceptual approach and  
6 say if Congress has attached this condition, then Congress  
7 is asserting itself in a way in which it is not allowed to  
8 by the Constitution.

9 QUESTION: Well, but there -- which is to say  
10 that there is Federal power being exercised. But you are  
11 contending that there is no Federal power being exercised.  
12 And if there is no Federal power being exercised, that's  
13 the end of the thing, isn't it?

14 MR. SHAPIRO: Well, the Federal power takes the  
15 form of a condition. We see the question as being the  
16 question whether the Federal power in the form of a  
17 condition is an unconstitutional condition because of its  
18 implications for the separation of powers.

19 QUESTION: So you say there is Federal power  
20 being exercised in the form of a condition.

21 MR. SHAPIRO: By Congress, yes.

22 QUESTION: Oh. Well, I thought you were saying  
23 there was no Federal power being exercised.

24 MR. SHAPIRO: No, I'm sorry, Your Honor. I was  
25 saying that we think the court of appeals was wrong in



1 saying that the Board of Review is exercising Federal  
2 power in the actions that it takes, that the Board of  
3 Review effectively is a Federal agency and has to be  
4 analyzed as such. If that were true, it seems to us clear  
5 that it would violate both the incompatibility --

6 QUESTION: Well, I mean, nobody contests that  
7 the statute that Congress passed is an exercise of Federal  
8 power. Is that all you're saying? That's the only  
9 Federal power, the statute?

10 MR. SHAPIRO: That's correct. And the granting  
11 of the lease by the Department of --

12 QUESTION: Well, Congress certainly had the  
13 power to pass the statute.

14 MR. SHAPIRO: Yes, it did. Yes, it did.

15 QUESTION: Well, then that's the end of the  
16 case. The Federal power involved -- the only Federal  
17 power involved, you tell us, was the statute. Congress  
18 certainly had authority to pass that. There is no Federal  
19 power involved in the exercise by the board. What is  
20 left?

21 MR. SHAPIRO: I think what is left is the  
22 question that Justice O'Connor raises about whether or not  
23 Congress may properly use conditions like this attached to  
24 Federal statutes as a way of effectively usurping  
25 executive authority.

1           QUESTION: But it's not -- that would be a valid  
2 argument if they were using the condition in order,  
3 unconstitutionally, to exercise Federal power. But you're  
4 telling me that at the end of the rainbow there is no  
5 unconstitutional exercise of Federal power. So therefore  
6 it can't be an unconstitutional condition because there is  
7 nothing unconstitutional about it. Congress passed a  
8 statute, which it can do, and this board is not exercising  
9 Federal power. Where is the unconstitutionality?

10           MR. SHAPIRO: We -- well, what we are concerned  
11 about -- first of all we believe that in this case what  
12 exercise of Federal power there was did not violate the  
13 Constitution. But change the case, for example, to a case  
14 in which Congress had reserved the authority to appoint  
15 members of the board. Then of course there would be the  
16 additional exercise of Federal power involved in the  
17 appointment, or Congress had reserved the authority to  
18 remove members of the board.

19           Now, one of the arguments that is suggested by  
20 the court of appeals, and that I think is adopted by the  
21 respondents, is that there is in this case additional  
22 exercise of Federal power in the form of a kind of de  
23 facto appointment and removal power existing in Congress.  
24 For example, it is suggested that, by removing members of  
25 the Board of Review from relevant congressional

1 committees, Congress can effectively remove them from  
2 their position of authority in State office. So that  
3 would be an additional exercise of Federal power.

4 QUESTION: Just to finish up your response to  
5 Justice O'Connor, do I understand that the Government's  
6 only problem, the executive branch's only problem with  
7 this statute is a federalism problem, not a separation of  
8 powers problem? It's just the unconstitutional condition  
9 because it impinges on the States. Is that the only  
10 problem the executive branch has with this?

11 MR. SHAPIRO: No. No, it is not, Your Honor.  
12 We do, in addition, have a separation of powers problem.  
13 We think that problem is answered in the context of this  
14 case. We don't think it can be answered in all of the  
15 hypotheticals that Justice O'Connor raises in her  
16 question, because we think that if Congress were to use  
17 this condition device as a way of putting Members of  
18 Congress into essentially executive roles in the playing  
19 out of Federal programs at the State level, that that  
20 would be a usurpation of executive authority and  
21 interference with the executive role.

22 QUESTION: Well, Mr. Shapiro --

23 QUESTION: Does the Government take a position  
24 as to whether the Members of Congress who are appointed to  
25 this -- these State, or State boards, or this board set up

1 by the States, whether their term on the board survives  
2 their term on the committee in question?

3 MR. SHAPIRO: Yes, Your Honor. We believe that  
4 the requirement that the members of the Board of Review be  
5 both Members of Congress and in most cases members of  
6 certain relevant committees do constitute solely  
7 qualifications for appointment. We think that is clear  
8 from the structure of the statute, that subsection 1  
9 refers to appointment of 2456(f). Subsection 2 refers to  
10 fixed terms of office, which in our view do not require  
11 that, once appointed, those members of the board either  
12 continue to be Members of Congress or continue to be  
13 members of the relevant committees.

14 Incidentally, the only time, as I understand it,  
15 that that has come up, when Senator Kassebaum did cease to  
16 be a member of the relevant committee, she did resign from  
17 the board. But our view under the statute is that that's  
18 not required.

19 QUESTION: I suppose if you interpreted the  
20 Constitution that way, a senator who has to be a citizen  
21 to be elected, should he abandon his American citizenship  
22 during his 6-year term, could continue to serve, because  
23 it's only a qualification for taking the office and not  
24 for continuing in it?

25 MR. SHAPIRO: I -- I don't know whether the

1 language of that is identical to the language here. I  
2 think the language here is clear --

3 QUESTION: But Mr. Shapiro, even on that  
4 assumption, does that really answer the issue that Justice  
5 O'Connor raised? And that is, let's assume there may be  
6 incidents in which individuals may continue to serve  
7 though they don't remain Members of Congress or of the  
8 committees. There's still a problem to be answered, and  
9 that is that, as you put it, there is a, appears to be a  
10 de facto exercise of Federal power over -- in this case  
11 over the actions of a non-Federal board of directors.  
12 Congress is still de facto being allowed to exercise  
13 power, isn't it?

14 MR. SHAPIRO: We don't think with respect to  
15 removal that it is, Your Honor. That is we don't think  
16 Congress has either de jure or de facto removal power.

17 QUESTION: No, but with respect to the authority  
18 that they exercise in their approval or disapproval power  
19 over the actions of the board.

20 MR. SHAPIRO: Oh. Yes, Your Honor. That's a  
21 related question which we think is relevant to Justice  
22 O'Connor's question. That is are the Members of Congress  
23 who serve on the Board of Review themselves exercising  
24 congressional power? Are they agents of Congress in  
25 trying to resolve this difficult separation of powers

1 issue.

2 QUESTION: And I took it that was one of the  
3 concerns in her question --

4 MR. SHAPIRO: Yes.

5 QUESTION: -- as to whether a similar structure  
6 could be erected --

7 MR. SHAPIRO: Yes, yes.

8 QUESTION: -- in relation to welfare money to  
9 the States, highway money to the States, and so on. What  
10 is your answer to that?

11 MR. SHAPIRO: Well, our answer to that is that  
12 in the unusual circumstances of this case we don't think  
13 the members of the Board of Review themselves are  
14 exercising congressional power or acting as agents of  
15 Congress. And that's because both in form and in  
16 substance we believe that the Members of Congress are  
17 serving as individual representatives of users. The  
18 statute specifically says they are to serve in their  
19 individual capacities as representatives of the users of  
20 the airport.

21 QUESTION: Mr. Shapiro, are they representatives  
22 of all users or of users who have free parking spaces?

23 (Laughter.)

24 MR. SHAPIRO: Both. Both.

25 QUESTION: You think they are typical users?

1 MR. SHAPIRO: There is no question that the  
2 parking spaces were a matter of some interest. The  
3 legislative history confirms that.

4 (Laughter.)

5 QUESTION: But not to other users.

6 MR. SHAPIRO: But they also have interests that  
7 are shared more broadly by all users, and indeed the  
8 legislative history suggests that they are concerned with  
9 their need to use the airport as individuals. And it's  
10 also true that that is a need that is -- excuse me, Your  
11 Honor, my time is up.

12 QUESTION: Thank you, Mr. Shapiro.

13 Mr. Coleman, we'll hear now from you.

14 ORAL ARGUMENT OF WILLIAM T. COLEMAN, JR.

15 ON BEHALF OF THE PETITIONERS

16 MR. COLEMAN: Good morning, Mr. Chief Justice,  
17 and may it please the Court:

18 The basic issue here is are the congresspersons  
19 who under the statute act in their individual capacities  
20 as members of the State-created review board, quote,  
21 "officers of the United States," end quote, or as review  
22 board members do they exercise any Federal power pursuant  
23 to the laws of the United States. If the answer to these  
24 two questions is negative, as it clearly is, then the  
25 Authority's governing scheme created by the Commonwealth

1 of Virginia and the District of Columbia does not violate  
2 present Federal separation of power doctrine.

3 We agree with the Government that the review  
4 board members do not exercise any Federal power. The  
5 transfer act so states. The statutes of the Commonwealth  
6 of Virginia and the District of Columbia so state. The  
7 review board got all of its power and was created under  
8 bylaw 4, which is on page 152 of the record, and therefore  
9 they are not exercising State power.

10 QUESTION: Well, Mr. Coleman, isn't the reality,  
11 though, that the members of the board are required to be  
12 Members of Congress, or at least a certain number of them,  
13 and they have to be members of a certain committee of  
14 Congress? And it's arguable that when they cease to be  
15 they must be removed. Now, if that is the case, is there  
16 not an exercise of Federal power on a continuing basis?

17 MR. COLEMAN: No, Your Honor, with all due  
18 respect. In the first place, your first question is  
19 directed to the appointment.

20 QUESTION: Um-hum.

21 MR. COLEMAN: The speaker suggests the name.  
22 It's up to the board of directors, the State agency, to  
23 select. And Mistretta and Bowsher each teach that where  
24 there's the governmental, the Congress who suggests the  
25 name, but if the appointing authority has the discretion



1 to select among that group, then you don't have violation  
2 of article -- the article II, section 2, clause 2. So  
3 therefore, even if those people are suggested by the  
4 speaker, the fact that they are appointed by the board  
5 takes away that problem. With respect --

6 QUESTION: Mr. Coleman, as I understand your  
7 position, the phrase that these people shall act in their  
8 personal capacity cleanses it all. I think you would  
9 maintain that even if it were provided that this board  
10 would consist of both Houses of Congress, the Members of  
11 both Houses of Congress acting in their personal capacity,  
12 it would still be okay, wouldn't it?

13 MR. COLEMAN: Well, Your Honor, that would make  
14 it a harder case. But --

15 QUESTION: It would make it a different case.  
16 It wouldn't be harder for you, because they would still be  
17 acting in their personal capacity.

18 MR. COLEMAN: Well, it may be harder, some of  
19 them -- one of the --

20 QUESTION: No --

21 (Laughter.)

22 MR. COLEMAN: So that's a harder case. But if  
23 the determination is that they are selected by State  
24 people and they are not exercising State power, then it  
25 doesn't violate the Constitution. In a constitutional

1 debate it's dramatic the extent to which the people  
2 struggle to make sure that a Federal official still had  
3 the right to serve in State office. And that's what  
4 happened here.

5 Now, with respect to the second part of your  
6 question, our position, it is clear, Justice O'Connor,  
7 that there is no power of removal by the Congress. And  
8 the fact that they used the word de facto reminds me of  
9 that Justice Jackson opinion where he says if we use a  
10 word like quasi, you know that you're really covering up a  
11 disorderly bad, because clearly you're saying you want to  
12 (inaudible). Here the statute says only that the nominees  
13 shall consist of. Secondly, the lease which you have to  
14 read says it shall be made up and selected from the list  
15 of.

16 Thirdly, they are appointed for a specific term.  
17 And as you know, Chief Justice, in your appointment with  
18 Smithsonian, you were appointed but you lose office the  
19 moment you're no longer Chief Justice. That's in the  
20 statute. That's not in this statute here. Fourthly, the  
21 appointing authority, namely the board of directors,  
22 specifically say that they can be removed for cause.

23 So I think under all of your cases it is clear  
24 here that you have to find that once these people are  
25 appointed by the board of directors, they cannot be

1 removed by the Congress, and they can only be removed by  
2 the board of directors or State agency.

3 QUESTION: Mr. Coleman, in your research of,  
4 among the doings of the founders, that it is clear that  
5 people could hold both Federal and State office, but is  
6 there anyone who said that you could hold State office or  
7 be nominated to State office by virtue of your Federal  
8 office? That is ex officio that a State can provide the  
9 Speaker of the House shall be our Governor, or the Speaker  
10 of the House shall be our --

11 MR. COLEMAN: Well, Your Honor, that's not this  
12 case here. The moment you said officio --

13 QUESTION: I know it isn't, but this is a case  
14 where it is not just Federal officials who happen to run  
15 for State office or get appointed separately for,  
16 independently of their being Federal officials. They  
17 acquire this State office only ex officio, only because  
18 they are Federal officials. Now, is there anything in the  
19 sayings of the founders about that?

20 MR. COLEMAN: No, but there is in your cases,  
21 Your Honor. I think Mistretta is right on the point.  
22 There the statute says a person had to be an article III  
23 judge, but yet you held the fact that they were an article  
24 III judge didn't mean that once nominated by the head of  
25 the judicial conference that the President couldn't select

1       them, and by selecting them that they were not functioning  
2       as article III judges.

3               QUESTION: Well, you're not blaming me for that,  
4       Mr. Coleman.

5               (Laughter.)

6               MR. COLEMAN: Well, I think you would know more  
7       about that case than the other people because you  
8       dissented.

9               QUESTION: But of course there was no question  
10       in that case that they were exercising Federal power. We  
11       didn't have to reach that question. Here the question is  
12       whether or not the congressmen, because they are appointed  
13       as congressmen, are not exercising Federal power. Suppose  
14       on this board five, six of the board were Members of  
15       Congress. No difference to your case?

16              MR. COLEMAN: Well, the nine persons are  
17       selected from the group of 107 Congressmen and 47  
18       Senators. And, but they are appointed by a State agency,  
19       and therefore they are exercising State power.

20              QUESTION: Well, but as a practical matter a  
21       Congressman's powers during the time he is in office as a  
22       Congressman, his committee assignments, his perks, are all  
23       controlled by the Speaker. And it seems to me very, very  
24       clear that a Congressman who serves on the board can have  
25       his actions de facto reviewed by Federal authorities,

1 particularly legislative officials.

2 MR. COLEMAN: Well, but they, but the statute  
3 says no, he serves in his individual capacity. What  
4 you're saying is the people that pass the statute are  
5 going to violate the statute. And it seems to me if that  
6 happened, if that happened you may well then have a  
7 grounds for removing him for cause.

8 QUESTION: But, Mr. Coleman, all of our  
9 separation of powers jurisprudence looks to the practical  
10 effect of the constraints and the compulsions and the  
11 authority that a Federal agency has over its own  
12 officials, and in this case the Federal entity is the  
13 Congress.

14 MR. COLEMAN: Well, can we look to the  
15 practical? Here you have a situation where, whatever is  
16 happening, there is no power being exercised on any other  
17 Federal branch of the Government. Too, here, you have the  
18 executive agreeing and standing up, not only negotiating  
19 this in the lease, but in addition signing the statute,  
20 but standing up at the bar of this Court saying that this  
21 does not in any way infringe on my executive power.

22 QUESTION: But this Courts sits to protect the  
23 executive against its own improvidence from time to time.

24 (Laughter.)

25 MR. COLEMAN: Yes, sir. But there is no case,

1 Your Honor, there is no case where you have ever held that  
2 there was an incursion on the executive power when the  
3 executive stands up at the bar of this Court and says my  
4 power is not being intruded upon. Secondly, there is no  
5 case where you have ever determined --

6 QUESTION: Yes, but in the legislative veto  
7 cases the executive from time to time has taken the  
8 position that veto was all right, I think, had he not?

9 MR. COLEMAN: Yes. But in the case that --

10 QUESTION: In the one that was argued here.

11 MR. COLEMAN: But the Chadha case he stood at  
12 the bar of this Court --

13 QUESTION: Right.

14 MR. COLEMAN: -- and said it wasn't all right.

15 QUESTION: Yeah.

16 MR. COLEMAN: In addition --

17 QUESTION: It just shows the executive's views  
18 on these issues can change in different administrations.

19 MR. COLEMAN: They can change. But as you know,  
20 that Justice Powell in the Nixon v. GSA said that once the  
21 executive stands up to the bar of the Court and says that  
22 my powers are not being infringed upon, that that in  
23 itself should cause the Court to give great weight to  
24 whether you're going to strike down the statute.

25 I will reserve the rest of my time for rebuttal.

1 QUESTION: Very well, Mr. Coleman. Ms. Goldman,  
2 we'll hear now from you.

3 ORAL ARGUMENT OF PATTI A. GOLDMAN

4 ON BEHALF OF THE RESPONDENTS

5 MS. GOLDMAN: Mr. Chief Justice, and may it  
6 please the Court:

7 There is no dispute that Members of Congress  
8 could not exercise the powers that are assigned to the  
9 Board of Review if the Federal Government still ran the  
10 airports. There is also no dispute that Congress could  
11 have required the Airports Authority to submit its actions  
12 to Congress for a specified period of time, or ever for  
13 approval in the form of a statute. The question here is  
14 whether Congress can make its delegation of authority over  
15 the airports subject to a condition that requires nine  
16 Members of Congress to exercise significant ongoing  
17 authority over those airports.

18 Four factors of the Board of Review arrangement  
19 bear directly on this issue. First, the Board of Review  
20 arose out of a Federal condition that is contained in a  
21 Federal statute and a lease of Federal property. Second,  
22 that condition requires nine Members of Congress to  
23 comprise the Board of Review. They must all be  
24 recommended by the congressional leadership, and eight of  
25 them must serve on the congressional committees that have

1 oversight responsibilities over the airports.

2           The third factor is the powers exercised by the  
3 Board of Review. There is no question that the types of  
4 powers that the board exercises are executive in nature.  
5 And the fourth factor is the nonseverability clause, or  
6 what we have called the drop-dead clause. Congress has  
7 decided in the statute that if the Board of Review cannot  
8 exercise its powers, neither can the Airports Authority.  
9 And the significance of this factor is that Congress made  
10 that decision, not the District and not Virginia, and also  
11 that Congress believed that the power its Members would  
12 exercise was an essential element of the transfer.

13           QUESTION: Ms. Goldman, what if instead of the  
14 transaction we have here Congress had simply said we're  
15 going to give a year-to-year lease to the Metropolitan  
16 Airports Authority, no Members of Congress on the review  
17 board at all, but the review board totally independent  
18 decides to abolish parking places for Members of Congress  
19 and Justices of the Supreme Court. And the chairman of  
20 the House Commerce Committee calls the members of the  
21 review board over about a month before the first year of  
22 the lease is due to expire and he says I really don't  
23 think Congress is going to renew this lease if you do  
24 that, and they accordingly change their mind. Now, there  
25 would be nothing wrong under separation of powers with



1 that, would there?

2 MS. GOLDMAN: There would be not -- no official  
3 ongoing role that Members of Congress play. Of course  
4 Congress still has the power, the retained congressional  
5 power to pass statutes and to decide whether the lease  
6 could go forward, but that's the kind of power Congress  
7 can exercise. Its mingling in the affairs may be  
8 improper, but it probably would not rise to the level of  
9 the separation of powers violation.

10 QUESTION: Of course if Congress wanted to renew  
11 the lease, if Congress was content with the parking spaces  
12 it got but the executive was not content because the  
13 executive had not gotten parking spaces, the President  
14 could veto the lease renewal in that situation, couldn't  
15 he? I mean, it would be the normal process of legislation  
16 by which Congress would have to act, rather than --

17 MS. GOLDMAN: Assuming that statute was  
18 required, then the President would have that power.

19 QUESTION: It's quite a different process than  
20 just having some individual Members of Congress or a  
21 committee of Congress decide to do it or not.

22 MS. GOLDMAN: It's a very different process, and  
23 that's precisely what's wrong with this arrangement.  
24 Members of Congress are carrying out day-to-day  
25 operational responsibilities over these airports.

1           It's important to recognize too that Congress  
2 did not give up the airports, and that it independently  
3 obtained this power. It refused to give up the powers  
4 that are exercised by the Board of Review. In essence  
5 this is an incomplete delegation of power. Congress gave  
6 up a large measure of the power, but not the power over  
7 the master plan and the budget and regulations. These  
8 powers it kept for the Federal Government, and it assigned  
9 these powers to nine of its own Members. As retained  
10 Federal powers, these powers cannot be exercised by  
11 Congress in this way.

12           QUESTION: You say assigned it to nine of their  
13 Members, but it does provide that the Members are to act  
14 in their individual capacity.

15           MS. GOLDMAN: It does, but that label does not  
16 change the fact that the board must consist of nine  
17 Members, that they must be recommended by the  
18 congressional leadership.

19           QUESTION: What do you do about the Chief  
20 Justice being on the board of the Smithsonian, being  
21 chairman of the board of the Smithsonian, which goes back  
22 quite a ways?

23           MS. GOLDMAN: We certainly don't want to be  
24 accused of laying a hand on the arc of the covenant, as  
25 Justice Holmes said, and fortunately I don't think we have

1 to in this case. I think the powers that are exercised by  
2 the Smithsonian may be different in nature. They may not  
3 rise to the level of significant authority --

4 QUESTION: They're artistic powers, is that --

5 (Laughter.)

6 MS. GOLDMAN: I'm not familiar with the day-to-  
7 day functions that the board would exercise, but it may be  
8 that those powers are not as significant to be a Federal  
9 office under the laws of the United States, so Members of  
10 Congress may be able to exercise those functions. Here,  
11 though, the functions are clearly executive. Members of  
12 Congress could not exercise these functions in the Federal  
13 scheme, and Members of Congress could not in their  
14 individual capacity exercise a veto of the sort that was  
15 struck down by this Court in Chadha. That individual  
16 label would not save that arrangement.

17 If Congress is going to exercise this type of  
18 power it must do so through the bicameralism and  
19 presentment clauses.

20 QUESTION: Let me ask you a question, Ms.  
21 Goldman. There are six congressional regions of the  
22 Smithsonian, and I presume they act in their individual  
23 capacity, don't they? They're not acting as a Member of  
24 Congress or as a member of a congressional committee.

25 MS. GOLDMAN: I believe that their appointment

1 and service is inextricably tied to their role as a Member  
2 of Congress.

3 QUESTION: Well, what distinction are we talking  
4 about here then, between acting in one's individual  
5 capacity and one's presumably official capacity? Is that  
6 the alternative?

7 MS. GOLDMAN: Well, in the Federal scheme  
8 Members of Congress only have one identity, and that is  
9 their official role. Because of the incompatibility  
10 clause, Members cannot take off their congressional hat  
11 and become individuals serving in some Federal kind of  
12 position. In the situation of the Smithsonian their  
13 service is tied with the term of office, as we believe it  
14 is here as well.

15 QUESTION: So you would have no issue to raise  
16 by the mere fact that some Members of Congress happen to  
17 end up on this board if it were not for the fact that  
18 membership on the board -- that membership in Congress is  
19 a qualification for membership on the board? I mean,  
20 that's really the essence of your point. You're saying if  
21 that were not so, then it, it would in fact make sense in  
22 the normal course to say that they were acting in their  
23 individual capacities.

24 MS. GOLDMAN: If Members of Congress are  
25 appointed to a State office, they are not serving as

1 Members of Congress but are clearly serving in an  
2 individual capacity.

3 QUESTION: And their congressional membership is  
4 merely incidental. And you're saying the fact of the  
5 qualification is what removes it from the category of what  
6 is merely incidental.

7 MS. GOLDMAN: It is both the qualification, the  
8 requirement that they be Members of Congress, and also  
9 that that requirement came at least in part from Congress.  
10 So that in this situation we have congressional  
11 aggrandizement, where Congress, by passing a statute that  
12 establishes this condition, has required that its own  
13 members get power over Federal property.

14 QUESTION: And why isn't the same -- why doesn't  
15 the same problem exist for the congressional members of  
16 the Smithsonian?

17 MS. GOLDMAN: It may not because the powers they  
18 exercise may not be as significant of a type of executive  
19 power --

20 QUESTION: Well, what if the power is the power  
21 of a board?

22 MS. GOLDMAN: It may be then a power that they  
23 cannot exercise. I am not as familiar with that  
24 arrangement. That's obviously not before the Court. And  
25 in Springer that was discussed in the context of the

1 powers exercised by the legislature in the Philippine  
2 Islands, and it did not keep the majority from striking  
3 down that arrangement.

4 QUESTION: Do you take the position that a  
5 member of the Board of Review loses the membership if the  
6 member ceases to be a member of the appropriate  
7 congressional committee?

8 MS. GOLDMAN: Yes, we do. The language of the  
9 statute is that the Board of Review shall consist of the  
10 nine Members of Congress, eight of whom must serve on the  
11 oversight committees. It does not say that the board  
12 shall consider these people for appointment or shall  
13 appoint them. It says the board shall consist of these  
14 individuals.

15 QUESTION: Is the removal point essential to  
16 your argument?

17 MS. GOLDMAN: It is not. In this case the clear  
18 indication is that the Board of Review has the power over  
19 the Airports Authority. That is the critical feature.

20 QUESTION: Ms. Goldman, are you familiar with  
21 the national historical publications in the Records  
22 Commission?

23 MS. GOLDMAN: No, I am not.

24 QUESTION: Well, this is set up by statute, and  
25 it provides that on this, which I assume is an arm of the

1 executive, there shall be one judicial member appointed by  
2 the Chief Justice, one Member of the House of  
3 Representatives, and one Member of the Senate. Invalid in  
4 your analysis?

5 MS. GOLDMAN: If its functions are advisory, it  
6 would certainly not be invalid. If it has some  
7 operational functions it may not carry out significant  
8 powers to be an agency or to rise to the level of an  
9 office of the United States. So the answer to that  
10 question would depend on the precise powers that are  
11 carried out.

12 QUESTION: Which you don't know.

13 MS. GOLDMAN: Which I don't know.

14 QUESTION: Well, the Chief Justice has served on  
15 it and so have I and --

16 MS. GOLDMAN: Certainly the service of judges  
17 would not be prohibited under a decision in this case  
18 striking down the Board of Review, since there is no  
19 incompatibility clause for judges and there would be no  
20 aggrandizement if Congress required by statute that judges  
21 serve in this type of arrangement. But the service of  
22 Members of Congress is a different story because of the  
23 aggrandizement factor and the incompatibility clause.

24 If this arrangement is upheld, the Board of  
25 Review would provide a road map for Congress to follow

1 whenever it wanted to acquire a day-to-day power over the  
2 operation of Federal property or Federal funds.

3 QUESTION: But they'd have to do it by statute,  
4 and they would have to get the President to sign it or  
5 override his veto, wouldn't they?

6 MS. GOLDMAN: True. They would have to exercise  
7 that power through a consent to a compact or statute.

8 QUESTION: And you would say if the President  
9 willingly signed it and thought it was a good arrangement,  
10 it would still be invalid in your view?

11 MS. GOLDMAN: Yes, it would be, because the  
12 doctrine of separation of powers is not designed simply to  
13 protect the executive branch, in fact its primary purpose  
14 is to protect the people against arbitrary exercises of  
15 power.

16 QUESTION: And tell me how that is implicated in  
17 this case.

18 MS. GOLDMAN: In this case the respondents are  
19 individuals and organizations that represent individuals  
20 who are affected on a daily basis by the operations at  
21 National Airport. They are interested in the noise, the  
22 traffic congestion and pollution --

23 QUESTION: Well, protecting the executive here  
24 isn't about to cure your problem.

25 MS. GOLDMAN: It's not about protecting the



1 executive. It's about protecting --  
2 QUESTION: All it will do is delay.  
3 MS. GOLDMAN: It might do more than that by  
4 requiring that the Airports Authority take its actions  
5 through a democratic process as required by the  
6 Constitution. And those processes are designed to protect  
7 the people from laws that create too much power to one  
8 branch of Government.

9 QUESTION: Well, if Congress had retained power  
10 over the airport, it could expand the airport with the --  
11 and the executive could go along?

12 MS. GOLDMAN: It could do that. It may have  
13 certain interests in mind that may be adverse to other  
14 users or to the people in the area.

15 QUESTION: As you quoted in your brief, the  
16 problem with that is that Congress would have to pay for  
17 it, as you had an excerpt from some of the debate in which  
18 a Congressman said the beauty of it is that we control it  
19 but we don't have to pay for it.

20 MS. GOLDMAN: Exactly. And that same person  
21 said that Congress would be eating -- getting its cake and  
22 eating it too. And that's the problem with this  
23 arrangement is Congress can't do both. It can't give up  
24 the power and retain the core power at the same time. It  
25 has to do one or the other.

1           The delegation of the power did have the  
2 benefits of ensuring some degree of local control and the  
3 ability to raise money through bonds, and to remove the  
4 airports from a line item in the Federal budget. It can,  
5 the Congress cannot get rid of that responsibility but  
6 keep the decision making power over regulations and master  
7 plans, the chief executive order and the other powers that  
8 are given to the Board of Review.

9           If this arrangement is upheld, Congress will be  
10 able to inject itself into decisions about how the  
11 national parks are operated, perhaps grants given by the  
12 National Endowment of the Arts, postal operations, legal  
13 services programs. And the way it would do this is by  
14 delegating those programs in part to the States or private  
15 entity, but requiring the States or the private entity to  
16 subject their decisions to review by an ad hoc committee  
17 of Congress, or even one House of Congress, and then  
18 Congress would be able to influence and have a mandatory  
19 say over how these programs are run.

20           QUESTION: So is the federalism problem as you  
21 see it that Congress has had a hand in creating the very  
22 position to which they are directing the congressional  
23 appointment?

24           MS. GOLDMAN: Yes. That is what creates the  
25 congressional aggrandizement here, which is the primary

1       flaw in this arrangement. Congress retains --

2               QUESTION: So do you say that this board is  
3 really created by Federal law?

4               MS. GOLDMAN: It is mandated by a condition. If  
5 the State of, Commonwealth of Virginia and the District of  
6 Columbia wanted these airports, they had no choice but to  
7 have a board of review. It was their statutes that  
8 created the Airports Authority, but it was the Federal  
9 statute that set out the powers and composition  
10 requirements for the Board of Review. So Congress had  
11 some say and had some power that it exercised here, and it  
12 used that power to give its own Members a veto.

13              QUESTION: Do you think if there were a 1983  
14 suit against members of the board that it would be an  
15 appropriate defense that they are Federal officers?

16              MS. GOLDMAN: In this situation, because  
17 Congress retains significant Federal powers, I think they  
18 are Federal officers. However, there could be other  
19 Federal conditions that would not create Federal offices.  
20 And even if this is not viewed to be a Federal office it  
21 would be impermissible, because it is giving Members of  
22 Congress powers over Federal property that it cannot have.

23              QUESTION: Well, I suppose you can concede  
24 without sacrificing your position that they're both, both  
25 State and Federal.

1 MS. GOLDMAN: I know no precedent for that, but  
2 I assume they have aspects of both. Even if the power  
3 that is actually exercised is viewed to be State power,  
4 Members of Congress could not serve in those positions  
5 under the doctrine of separation of powers. There is  
6 enough of a Federal role through the Federal condition to  
7 call the doctrine of separation of powers into play, and  
8 that doctrine prohibits Members of Congress from  
9 exercising these types of powers over a significant  
10 Federal interest. And here --

11 QUESTION: Ms. Goldman, do you think this  
12 statute offends more against separation of powers within  
13 the Federal Government or more against federalism,  
14 Federal-State relationships?

15 MS. GOLDMAN: This case concerns the Federal  
16 separation of powers.

17 QUESTION: We're not talking about federalism  
18 then in the sense of South Dakota against Dole?

19 MS. GOLDMAN: I don't think we are, because in  
20 the kind of condition that was at issue in that case there  
21 was a question of who had the power. Congress didn't have  
22 the power to legislate and the States did. And I think  
23 the rationale is that when the States exercise their  
24 power, their political process cleanses the Federal role.

25 But when you're talking about individual rights

1 under the Federal Constitution, or the doctrine of  
2 separation of powers, which in the end protects the  
3 people, the State isn't interested in protecting those  
4 interests. And that -- the State process doesn't remove  
5 the Federal role, the Federal mandate that the separation  
6 of powers be violated.

7 Because of that, a condition is not the right  
8 way to accomplish this result. It doesn't erase the  
9 problems that are presented by Members of Congress serving  
10 in this role.

11 QUESTION: So you see there would be no problem  
12 if Congress said that every State university which  
13 obtained Federal funds should have a board of regents,  
14 five, six of whom are appointed by the President of the  
15 United States?

16 MS. GOLDMAN: I think there would be a problem  
17 in that situation. That's a federalism problem --

18 QUESTION: What would be the problem?

19 MS. GOLDMAN: -- that the Federal Government is  
20 usurping State power in that instance.

21 QUESTION: Well, why isn't that same problem  
22 present here?

23 MS. GOLDMAN: Here there is a stronger Federal  
24 interest at the outset because of the presence of Federal  
25 property in this arrangement. So the power was the

1 Federal Government's power to delegate. And when it  
2 delegated these powers it attached conditions which kept  
3 --

4 QUESTION: Well, I assume the President would  
5 say the, and the Congress the same thing with expenditure  
6 of Federal funds at State universities.

7 MS. GOLDMAN: If Congress set up a review board  
8 that had power over the Federal monies, the connection to  
9 the Federal interest may be strong enough for the Federal  
10 doctrine of separation of powers to be called into play.  
11 But where the power is the power to run a State  
12 university, which is State power at the outset and does  
13 not change by the Federal condition, the Federal  
14 appointment of individuals would probably usurp State  
15 power.

16 QUESTION: But isn't the justification in each  
17 case the fact that there is Federal property in the form  
18 of Federal money going, and that these are conditions  
19 placed upon the Federal money. Don't they ultimately all  
20 stand on the same footing?

21 MS. GOLDMAN: I don't think they necessarily do,  
22 because Congress can pass a statute setting out the  
23 conditions that are attached to the use of Federal money.  
24 If its role ends there --

25 QUESTION: Isn't the difference that the --

1 we're not talking about a condition set once and for all  
2 by Congress which is binding because it is -- it has  
3 statutory significance. It's setting up a condition which  
4 imposes a continuing review by Federal officials.

5 MS. GOLDMAN: That is the -- precisely the  
6 difference. If Congress --

7 QUESTION: Don't we have that in both the State  
8 university example and the highway funds example?

9 MS. GOLDMAN: If Congress sets up an ongoing  
10 role over the Federal funds or the Federal property, then  
11 it is going too far, and that is Federal power that cannot  
12 go to Members of Congress.

13 QUESTION: Okay. And all you're saying is you  
14 don't really have to think of that as a federalism  
15 problem. It's a straight separation problem. Is that what  
16 you're saying?

17 MS. GOLDMAN: As soon as there is an on-going  
18 role by the Federal Government it is a Federal separation  
19 of powers issue.

20 QUESTION: Okay. And you don't have to put a  
21 federalism overlay on it. That's really what you're  
22 saying?

23 MS. GOLDMAN: No. There's no federalism issue

24 --

25 QUESTION: Okay.

1 MS. GOLDMAN: -- that comes up in that context.  
2 There could be other federalism issues, but the one we're  
3 focusing on here is the purely separation of powers one  
4 when there is an ongoing Federal role.

5 QUESTION: Okay.

6 MS. GOLDMAN: If there are no further questions  
7 --

8 QUESTION: Thank you, Ms. Goldman.

9 Mr. Coleman, do you have rebuttal? You have 4  
10 minutes remaining.

11 REBUTTAL ARGUMENT OF WILLIAM T. COLEMAN, JR.

12 ON BEHALF OF THE PETITIONERS

13 MR. COLEMAN: Thank you, Mr. Chief Justice. It  
14 is clear here that the power of appointment is in the  
15 State board. It's equally clear that the Congress has no  
16 power whatsoever to remove these people. We make it clear  
17 in our brief that using the words "consist of" in other  
18 Federal statute doesn't mean that once the person is  
19 appointed he or she loses his job if he no longer holds  
20 the office. You also have the fact that the Federal  
21 statutes, when they want to mean that, say that. This one  
22 doesn't.

23 Also, here the, the State makes it clear that it  
24 has the power of removal. And we say under your cases  
25 where if you're struggling with the power of



1 interpretation, if you can interpret the statute in a  
2 constitutional way, you should do that rather than to  
3 interpret it in a way which I really don't think is  
4 supported by the legislative history.

5 In addition, there was a lease created here, and  
6 that lease lay in Congress, and that lease talks in terms  
7 of appoint, not consist of. And Congress did nothing to  
8 change that. So that's an additional reason why you  
9 should try to interpret the statute the way I suggest.

10 Finally, our forefathers wanted to create a  
11 Federal Government, but they didn't want the Federal  
12 Government to be at war with the State government, and  
13 therefore it went out of its way to say that people that  
14 occupy Federal office could also, if the State wanted,  
15 occupy State office. Here you have that type of  
16 federalism, and there is no reason to stretch the Federal  
17 separation of powers doctrine in this case, where the  
18 chief executive of the Federal Government says I'm not  
19 being intruded upon, there is no aggrandizement. What  
20 aggrandizement can there be when all Congress did was pass  
21 a statute which authorized the Federal officials to do  
22 what the Constitution said they could do, namely serve in  
23 State office.

24 Now, certain States have rejected this. I think  
25 New Hampshire, for example, you have a position,

1 provision, Justice Souter, which specifically says that  
2 the Federal official cannot occupy the State office.  
3 Virginia could have done that. It didn't do that. In its  
4 case it has a statute which says that the Federal officer  
5 can occupy the State officer.

6 And I repeat, unless you find that the  
7 congressional person is an officer of the United States,  
8 which I think under the statute you can't find, or unless  
9 you find that what they're doing is exercising Federal  
10 power, then I think here you have to reverse the decision  
11 of the court below.

12 Thank you.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
14 Coleman.

15 The case is submitted.

16 (Whereupon, at 11:02 a.m., the case in the  
17 above-entitled matter was submitted.)

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# CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: 90-906*

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, ET AL.,

Petitioners, v. CITIZENS FOR THE ABATEMENT OF AIRCRAFT

NOISE, INC., ET AL.

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

BY *Raymond Hartzel*  
(REPORTER)

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