

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NEW YORK, Petitioner V. UNITED STATES, ET AL.;
COUNTY OF ALLEGANY, NEW YORK, Petitioner V.
UNITED STATES; and
COUNTY OF CORTLAND, NEW YORK, Petitioner V.
UNITED STATES, ET AL.

CASE NO: 91-543; 91-558; 91-563;

PLACE: Washington, D.C.

DATE: March 30, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - X
3 NEW YORK, :
4 Petitioner :
5 v. : No. 91-543
6 UNITED STATES, ET AL. :

7 - - - - - X
8 COUNTY OF ALLEGANY, NEW YORK, :
9 Petitioner :
10 v. : No. 91-558
11 UNITED STATES :

12 - - - - - X
13 COUNTY OF CORTLAND, NEW YORK, :
14 Petitioner :
15 v. : No. 91-563
16 UNITED STATES, ET AL. :

17 - - - - - X
18 Washington, D.C.

19 Monday, March 30, 1992

20 The above-entitled matter came on for oral
21 argument before the Supreme Court of the United States at
22 10:03 a.m.

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APPEARANCES:

PETER H. SCHIFF, ESQ., Deputy Solicitor General of New York, Albany, New York; on behalf of the Petitioners.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Federal Respondent.

WILLIAM B. COLLINS, ESQ., Senior Assistant Attorney General of Washington, Olympia, Washington; on behalf of the State Respondents.

C O N T E N T S

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| WILLIAM B. COLLINS, ESQ. On behalf of the State Respondents | 33 |

1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 91-543, New York v. United States, 91-558, the
5 County of Allegany v. United States, 91-563, the County of
6 Cortland v. United States.

7 Mr. Schiff.

8 ORAL ARGUMENT OF PETER H. SCHIFF

9 ON BEHALF OF THE PETITIONERS

10 MR. SCHIFF: Mr. Chief Justice, and may it
11 please the Court:

12 The petitioners in this case challenge the
13 constitutionality of the Low-Level Radioactive Waste
14 Policy Amendments Act of 1985 as being in violation of the
15 Federal system, and specifically we place our reliance on
16 the Tenth Amendment and the Guaranty Clause. We recognize
17 that Congress certainly has the power under the Commerce
18 Clause to deal with the subject of the disposal of low-
19 level radioactive waste, but it is our position that the
20 means that it has chosen here is constitutionally
21 defective.

22 This act is directed solely at the states and
23 makes the states responsible for the disposal of low-
24 level radioactive waste that is generated within the
25 state. It makes the states responsible for the

1 disposition of the waste of private generators, Federal
2 generators, as well as any that is generated by the state
3 itself. This is a totally mandatory provision which
4 requires the states to stay, to enter and to stay in the
5 field of low-level, disposal of low-level radioactive
6 waste.

7 The mandate is made particularly effective by
8 the so-called take title provision which specifies that if
9 the state has not otherwise provided for the disposal of
10 low-level radioactive waste by January 1, 1996 that the
11 state must take title of any such waste, and if it doesn't
12 accept possession that it becomes liable for any, to the
13 other generators if there are any damages, direct or
14 indirect. In other words, one way or the other the states
15 are simply ordered by Congress to enter this activity.

16 The statute is truly unique in the annals of
17 American jurisprudence. We know of no other situation
18 where the states have simply been mandated to take part in
19 a particular activity.

20 In the past what Congress has done, it has
21 essentially recruited the states in one of two ways to do
22 the regulation that the Federal Government would like to
23 have done. It has either, as in the Hodel case involving
24 the land mine, surface act, it gives the states an option.
25 You regulate according to the standards set out by the

1 Federal Government, or otherwise we, the Federal
2 Government, will do the regulation itself.

3 The other means that they have chosen is the
4 Spending Clause, and to provide Federal money as an
5 inducement for the states to do regulation in accordance
6 with Federal standards.

7 QUESTION: Mr. Schiff, is that all this case is
8 about, that Congress is going to have to tie New York's
9 continuing receipt of highway funds to its assumption of
10 this responsibility?

11 MR. SCHIFF: Well, if that is legal, but it
12 hasn't done that, Your Honor.

13 QUESTION: It seems like a lot of trouble for
14 very little, very little point.

15 MR. SCHIFF: Well, it's our position that the
16 means that the Congress uses is a very important
17 consideration in the constitutional structure of this, of
18 the Government. It is our basic position that the
19 Constitution contemplates two sets of sovereigns and that
20 the states are intended to have the choice as to which
21 activities they will participate in. So we think that the
22 means that the Congress chooses is by no means a minor
23 one. We think it is a vital one, and we think it's a
24 serious incursion on the constitutional structure.

25 QUESTION: Mr. Schiff, do you suppose Congress

1 could provide that a state without a site for radioactive
2 waste, that no shipments of radioactive waste could be
3 sent out of state?

4 MR. SCHIFF: Yes, we think that's perfectly
5 acceptable. We have no problem, and we have not, have
6 never objected to that separately. But we think that's
7 not a, what this case is all about either.

8 QUESTION: Let me ask you another question. If
9 we were to agree with you on the take title provision, is
10 it severable?

11 MR. SCHIFF: We think not.

12 QUESTION: Why not? Don't you think Congress
13 would probably have enacted this law absent that clause?

14 MR. SCHIFF: Well, as we point out in our brief,
15 we think the legislative history, all of which really
16 shows up in the congressional record I think on December
17 19 of 1985, the day that this law was passed, shows that
18 the, we don't think it would have been passed by simply
19 excising the take title provision. We think probably some
20 law would have been passed, but it may have been something
21 very different. And as we read your cases that, if it is
22 clear, as we think it is, they wouldn't have passed the
23 legislation by simply excising the provision. Then it's
24 not severable, and there isn't any severability clause
25 here.

1 QUESTION: Well, I would have thought the
2 problems were so acute that they probably would have
3 passed it without that clause. We don't know -- that
4 provision. We don't know exactly where it came from. It
5 appeared rather at the last minute, didn't it?

6 MR. SCHIFF: Well, as we read the legislative
7 history, it came at the instance of the governors of the
8 so-called sited states, ones that had disposal sites, and
9 they made it plain that they did not think that the
10 legislation as it stood at that point was sufficiently, it
11 didn't have enough teeth. And they were concerned that
12 the same thing that happened under the 1980 act would
13 happen with respect to the 1985 act, so they said we need
14 teeth.

15 However, the question of, this Court will have
16 to decide whether it is severable or not, and all I can do
17 is I think refer the Court, in addition to what I have
18 said here on severability, to our brief and commend that
19 you examine that legislative history.

20 I suppose the threshold question before the
21 Court in light of the Garcia decision which the --

22 QUESTION: What do we do if there's no
23 legislative history, or we don't think any of it is very
24 convincing? Do you have any advice for those of us who
25 might find that to be the case?

1 MR. SCHIFF: Well, I think --

2 QUESTION: How do we decide severability? I
3 thought we decide it on the basis of simply whether the
4 statute works without the provision. Does it make sense.

5 MR. SCHIFF: Well, I think there are two
6 elements, Justice Scalia. If it works is the second
7 element, but the first element is whether it's apparent
8 that it would not have been passed without it. It may be
9 that it would be, if one doesn't look at the legislative
10 history in this case, you might reach the conclusion that
11 it is severable, because I'm not sure you can tell for
12 sure that it would not have passed. But for those of us,
13 for those who do look at legislative history we think that
14 the law, that it is apparent that it would not have been
15 passed in that form by simply excising the take title
16 provision.

17 QUESTION: Well, did the title provision
18 originate in the Senate?

19 MR. SCHIFF: Yes. As I recall it it originated
20 in the Senate.

21 QUESTION: And your senator was all for it, I
22 take it?

23 MR. SCHIFF: Senator Moynihan supported the
24 legislation. We don't think that -- well, if I may I will
25 -- that is correct, but I will discuss that slightly

1 later.

2 QUESTION: That's all right.

3 (Laughter.)

4 QUESTION: He wasn't representing the State of
5 New York anyway, was he?

6 (Laughter.)

7 MR. SCHIFF: Not in a constitutional sense, Your
8 Honor.

9 QUESTION: He was representing the people of New
10 York, wasn't he?

11 MR. SCHIFF: He was representing the people of
12 New York and he was acting as a senator, but he was not
13 representing the constituted government of the State of
14 New York which has to speak through the legislature and
15 the governor. And that is I think what this case is all
16 about, that the, that the constitutional system does
17 contemplate action through the state legislatures and
18 through the state governments. We think that is what the
19 Federal system means and that is what did not happen here.

20 That is why we think this case is properly
21 reviewable within the confines of the Garcia case. You
22 will recall while the Garcia case essentially said that
23 this Court will not normally review Tenth Amendment
24 challenges, it did recognize that it would consider or
25 might consider statutes that impair the constitutional

1 structure. And we think that, contrary to the decisions
2 below, that review of this case comfortably fits within
3 what was left open in the Garcia case. In fact we suggest
4 that very little else would fit in any better than the
5 present case.

6 QUESTION: How exactly does this act of Congress
7 violate the Tenth Amendment in your view?

8 MR. SCHIFF: Because this act regulates not so
9 much commerce as it regulates the states. It picks out
10 the states and simply directs the states, that you must do
11 a particular activity. We think that is not a power -- we
12 think the decision as to whether to act with respect to
13 engaging in a particular activity is one that is reserved
14 to the states under the Tenth Amendment.

15 QUESTION: Well, how about where Congress
16 regulates a state-owned railroad?

17 MR. SCHIFF: Well, this is -- the difference
18 between this case and those cases, Your Honor, is that
19 there what Congress is doing is to regulate an activity
20 that the state has already chosen to undertake. It could
21 withdraw from that activity if it chose. I mean, that's
22 the kind of case that was involved in the trilogy of Fair
23 Labor Standards Act cases, Wertz, National League of
24 Cities, and the Garcia case. It's also the kind of thing
25 that was involved in South Carolina against Baker, where

1 the Federal Government decided generally not to permit
2 unregistered bonds if people chose to issue bonds, and, as
3 to states, if they were tax free. But it was applying
4 across the board generally.

5 QUESTION: You say the Congress just included
6 states among the people it was regulating for carrying on
7 a certain activity and it didn't single out states?

8 MR. SCHIFF: That's right. This case is in many
9 ways analogous to an earlier New York against United
10 States case, the one involving the taxing of the waters
11 from Saratoga Springs that were sold by the State of New
12 York, where the Court did say that you could tax New York
13 if you're taxing them like everyone else, but the Court,
14 admittedly by way of dicta, made it plain that the
15 situation would have been very different if you're simply
16 singling out the states and simply taxing them. And the
17 whole Court seemed to think that that, said that that
18 would be unconstitutional. And we think that's precisely
19 the problem here.

20 This is a problem in this case that was
21 essentially left open or avoided, if I might, in FERC
22 against Mississippi, where --

23 QUESTION: Mr. Schiff, are you asking that
24 Garcia be overruled?

25 MR. SCHIFF: No, we're not.

1 QUESTION: You're willing to sit on the little
2 open door that was left there?

3 MR. SCHIFF: Absolutely. We think that it is a
4 reasonable open door and what happens in some other cases
5 we leave to another day. We think that it plainly doesn't
6 need to be overruled.

7 QUESTION: Are you asking that FERC be
8 overruled? I see you're about to get to that.

9 MR. SCHIFF: No. We think FERC is quite
10 distinguishable. The majority of this Court in FERC made
11 it quite clear that the state had a choice. It didn't
12 really have to do what that act of Congress required it to
13 do because it didn't have to regulate public utilities,
14 while --

15 QUESTION: Well, you know that it, you know
16 that's a, just a dream world.

17 MR. SCHIFF: Well, that's what some of the,
18 that's what the dissenters indicated, and I'm not -- but
19 the fact of the matter is that the decision as it was
20 written indicated quite plainly that that was critical to
21 that decision.

22 QUESTION: What are the underlying values that
23 you're trying to further by the Tenth Amendment argument
24 that you urge upon us? Is it, is this simply just a
25 matter of etiquette and form, the etiquette of federalism,

1 or is there something more substantial?

2 MR. SCHIFF: Well, we think, Justice Kennedy,
3 that, as Justice O'Connor's opinion recently in the
4 Ashcroft case indicated, that the Federal system is a very
5 significant element in the constitutional structure, so we
6 don't think it's a matter of etiquette. We think that it
7 is important for the states to be able to determine when
8 to undertake activities, where to place their resources --

9 QUESTION: Is that so that the states can be
10 held accountable to their own political constituencies for
11 the results they reach?

12 MR. SCHIFF: Absolutely.

13 QUESTION: Do you think that the state would be
14 any less clear in the responsibility it had to its
15 constituencies if the Federal Government had enacted the
16 statute such as Justice O'Connor proposed earlier, that no
17 nuclear, no nuclear waste could be shipped out of a state
18 unless all of these conditions are met? It seems to me
19 what the state has done here, or what the Federal
20 Government has done here at least makes it clear who bears
21 the responsibility for this scheme of regulation.

22 MR. SCHIFF: We think that, for one thing it is
23 the question of -- waste can be stored as opposed to
24 disposed of on a short-term basis, short-term basis
25 meaning quite a few years. That's certainly what is being

1 done with respect to high-level radioactive waste. So
2 it's not as if, this isn't a question of whether we have
3 to ship it out of state or not. It's a question of
4 whether we have to do this according to the drum beat of
5 the Federal Government where they don't choose to do it.
6 Actually we're subject to Federal regulation, we're being
7 given a time table which we're not convinced is meaningful
8 or desirable for the people of the State of New York.

9 So in that context we think the Federal
10 Government should be doing the regulation rather than
11 imposing its will directly on us. And it's not a matter
12 of shipping it out. It's a matter of how we control our
13 own destiny.

14 I do want to say that, perhaps in conjunction
15 with your question, that it is argued by our opponents
16 that this is really, was an agreement among the states,
17 and that somehow that is the way the Federal system is
18 supposed to operate. Now we just don't understand that
19 here. The Constitution does provide for agreements though
20 compacts, which again involves the formal action of
21 various state legislatures and the executive, but you
22 don't do agreements by having lobbying activities, even
23 from the Governors' Association or other similar groups
24 and say that represents a state agreement.

25 QUESTION: I suppose my problem is that it does

1 seem to me that if the Federal Government just sat down
2 for a bit with a pencil and paper it could devise some
3 sort of constitutional scheme to accomplish precisely this
4 result. So I wonder what the underlying value served,
5 that is being served by our accepting your argument.

6 MR. SCHIFF: Well, Justice Kennedy, we think the
7 Government could also probably find an appropriate means
8 of doing it. The problem is that they didn't do it, and
9 we think that this opens up a Pandora's box.

10 QUESTION: Well, Mr. Schiff, I suppose there's a
11 difference between offering incentives to the states to
12 make their own choices and simply mandating that those
13 choices be made. Isn't that right?

14 MR. SCHIFF: That's precisely our position.

15 QUESTION: Now, I suppose that finding a
16 location for radioactive waste is a little like trying to
17 find a location for a prison. We all think we need to
18 have these locations, but no one wants it in their state,
19 their community, their county, their city. Isn't that
20 right?

21 MR. SCHIFF: Well, as a matter of fact, Your
22 Honor, no, it's not totally correct. I mean, it may be
23 like --

24 QUESTION: By and large --

25 MR. SCHIFF: It may be like finding a prison,

1 except that I know our experience in New York is that
2 there are some areas that want prisons because of the
3 income that it --

4 QUESTION: Well, those are pretty few and far
5 between, and I suppose it's not very attractive to
6 Congress to have to make that choice, and this is a rather
7 clever way of shifting responsibility for making the
8 choice to the states, which is politically very
9 unattractive, I would think.

10 MR. SCHIFF: Well, we agree with that position,
11 and what's happened here is that the Congress has made the
12 directive and all the burdens, all the accountability is
13 shifted to the state which doesn't have the right to
14 decide whether to do it or not.

15 QUESTION: Certainly it's the State of New York
16 deciding in this case and not Allegany and Cortland
17 Counties deciding, I guess. They might have different
18 views.

19 MR. SCHIFF: Well, I think the basic decision is
20 that of the state. That's correct. I mean --

21 QUESTION: There's no Tenth Amendment that
22 protects the counties from the state.

23 MR. SCHIFF: Not in this case, no. I mean,
24 it's, the National League of Cities, you point out the
25 Tenth Amendment did apply to counties in some respects,

1 but I think in this case it would be the state that is
2 being protected, and that's all that any of the
3 petitioners have argued.

4 QUESTION: Would it have made any difference to
5 you if the Congress had said and by the way, we'll pay
6 half the cost, that this law, that will be foisted onto
7 the State of New York?

8 MR. SCHIFF: Well, if it's only, if it's foisted
9 on, Justice White, it wouldn't make any difference. But
10 if they give us a choice of we will pay half of this and
11 you have an option as to whether you do it, which in the
12 scheme that --

13 QUESTION: No, they're ordering you to do it and
14 they're saying -- what if they say we'll pay the entire
15 cost?

16 MR. SCHIFF: I think our position is that as
17 long as they mandate it without giving the legislature --

18 QUESTION: So you don't think this is just, this
19 is just a budget problem for New York?

20 MR. SCHIFF: No, I don't think so. Absolutely
21 not. And by the way, I should say that the Government
22 somehow thinks in its brief that the Spending Clause is
23 involved here because of the payments that go from the,
24 some money is going from the generators and some of it
25 goes in an escrow fund. But the statute makes it clear

1 that's not Federal money. It's not appropriated, it's
2 simply kept there. So I simply don't understand the
3 argument that the Government has made that that is, the
4 Spending Clause is involved here.

5 QUESTION: Mr. Schiff, is the State obliged to
6 regulate under this law? Can the State comply with this
7 law without using any of its governmental powers?

8 MR. SCHIFF: No. It doesn't have to do anything
9 necessarily in the first part of this, although the
10 language is mandatory, but I think it could do without
11 that. But when you get the take title provision it has no
12 choice but this waste is given to it. Now what's
13 extraordinary about this legislation is that the Federal
14 Government, as to a good part of its radioactive waste,
15 now stuff from the naval reactors and that low-level
16 radioactive waste is not the state's responsibility, but
17 the Federal Government has actually made the state
18 responsible for the Federal waste. It's a truly
19 extraordinary law.

20 QUESTION: But you don't challenge it on any
21 ground other than the Tenth Amendment, do you?

22 MR. SCHIFF: Well, the Tenth Amendment, the
23 Guaranty Clause. I mean basically we're challenging --
24 no, that's the basis on which we're challenging, the
25 Federal system. I mean, we're not trying to dissect the

1 various elements of what makes up the argument that the
2 Federal system is vital to the constitutional structure.

3 QUESTION: Do you think Congress can pass a law
4 that's generally applicable around the country that says
5 if you're going to operate a waste disposal facility you
6 have to do it in the way we prescribe?

7 MR. SCHIFF: I think it can do that. Of course,
8 yeah. I mean, it has -- and it's doing that. I mean
9 basically it, the NRC controls the standards by which you
10 regulate radioactive materials.

11 QUESTION: May I just ask a small question about
12 your argument directed at the take title provision? Is it
13 at the specific shall take title to the waste, and it also
14 says shall be obligated to take possession of the waste
15 and shall be liable for damages directly or indirectly
16 caused? Is it just the title part or do you make the same
17 attack on all three obligations?

18 MR. SCHIFF: Well, it's really all three in
19 combination.

20 QUESTION: So it wouldn't really matter to you
21 if you didn't have to take title?

22 MR. SCHIFF: I think the worst part of it is
23 really being responsible, being liable for anything that
24 may happen if we don't take it. This is a -- our
25 obligation in this can run for 5 centuries. I mean, we

1 think that that is a responsibility that should remain
2 with the generator of the radioactive waste. Now, to the
3 extent that the state has generated some of this waste we
4 are not saying that we're not, we wouldn't be liable, but
5 we're saying it shouldn't be foisted on us, the rest of
6 the liability.

7 QUESTION: But isn't there a way you can avoid
8 that liability?

9 MR. SCHIFF: I have no idea how we -- well, yes,
10 that's why we're here in Court.

11 (Laughter.)

12 QUESTION: There's no way you can get a, set up
13 a program that would avoid your taking --

14 MR. SCHIFF: Well, I suppose, sure, but, I mean,
15 but that's again telling us we have to do something, then
16 we would have to do the regulatory scheme that Justice
17 Scalia was asking about. So it's one way or the other.
18 We have been conscripted, commandeered to do the Federal
19 Government's regulation here.

20 QUESTION: Taking title you say is the sanction
21 for not regulating as the Government has told you to
22 regulate?

23 MR. SCHIFF: That's right, but it's a form of
24 regulating because once we have it eventually we would
25 have to do something with it. And as Justice White points

1 out, that the Government can require people who are the
2 owners of it to deal with it, so that that puts us in that
3 category and we can't avoid it. We are stuck.

4 QUESTION: Well, Mr. Schiff, it's a pretty
5 clever scheme. Maybe Congress can just require the states
6 to take over a pro rata share of the national debt they
7 have run up.

8 MR. SCHIFF: Well, that was a question that we
9 had thought about. If this starts I think it leads us
10 down that path. It can require the state to have beds for
11 all people of a particular illness by some date, and if
12 they don't have it provide a suit to let people who
13 haven't been given a bed, we'll say cancer patients, to
14 sue the state for that. I mean, it's a radical change of
15 the Federal structure, and we certainly hope that the
16 Court will agree with us.

17 If there are no further questions at this time I
18 would like to reserve the remainder of my argument for
19 rebuttal.

20 QUESTION: Very well, Mr. Schiff.

21 Mr. Wallace.

22 ORAL ARGUMENT OF LAWRENCE G. WALLACE

23 ON BEHALF OF THE FEDERAL RESPONDENT

24 MR. WALLACE: Mr. Chief Justice, and may it
25 please the Court:

1 This is the second case this term, Arkansas
2 against Oklahoma being the first, concerning Federal
3 legislation addressed to problems arising from the
4 transmission of pollutants across state lines. In itself
5 the waste disposal problem Congress faced pitted states
6 against states in a manner only Congress could resolve.
7 The three states that had sites could not discriminate
8 against wastes originating out-of-state, the other states
9 lacked incentive to develop additional facilities, and the
10 three sited states were in the unfortunate position of
11 either having to accept waste from throughout the country
12 or shutting down their disposal facilities and depriving
13 the generators within their states of disposal facilities.

14 There was also a broader national concern
15 implicated, and that is that the problem of waste disposal
16 must be solved if the people of this Nation are to
17 continue to enjoy the important benefits of the
18 technologies that generate those wastes. There are
19 millions of residential, commercial, industrial, and
20 institutional customers who get their energy needs from
21 nuclear power plants licensed under Federal statute.
22 There are --

23 QUESTION: Mr. Wallace, that dilemma that the
24 three states that had waste disposal facilities, that they
25 confronted of either shutting them down so that even they

1 couldn't use them for their own in-state waste or else
2 having to accept waste from everywhere, Congress could
3 have solved that problem under the Commerce Clause, I
4 presume, couldn't it? Couldn't it have allowed those
5 states, it could have passed a statute allowing those
6 states to use their in-state disposal sites only for their
7 own nuclear waste?

8 MR. WALLACE: We believe Congress did solve the
9 problem under the Commerce Clause. It could have taken
10 that route, but the studies done by the National
11 Governors' Association and others who were expert in the
12 field indicated that 50 separate disposal sites, one in
13 each of the states, would have been very detrimental. It
14 would have lost economies of scale that were important to
15 the maintenance of these technologies.

16 QUESTION: That had 47 votes going in, I'm sure.

17 (Laughter.)

18 QUESTION: Isn't it true, Mr. Wallace, or is it,
19 that this statute is a step further than the Congress has
20 ever gone in that it is telling a state that it must enact
21 a certain rule?

22 MR. WALLACE: Well, it is giving the state a
23 choice of options because the states came to Congress and
24 proposed that Congress solve this problem by retaining
25 authority in the states to provide for the handling of the

1 low-level nuclear waste.

2 QUESTION: No, but it says the state shall take
3 title.

4 MR. WALLACE: That is only if the state doesn't
5 exercise any of the other options available to it, some of
6 which involve minimal state undertaking, such as
7 contracting with an existing disposal site in one of the
8 compacts, or authorizing a private contractor to develop a
9 site within the state.

10 QUESTION: But can we begin by saying that there
11 is no direct precedent for an enactment of this kind?

12 MR. WALLACE: I think that is true. This is a
13 novel approach to a problem where Congress, pursuant to a
14 unanimous request from a state organization representing
15 the governors of all 50 states, was dividing up the
16 responsibility for handling nuclear waste disposal, where
17 Congress, the Federal agencies would undertake the high-
18 level waste responsibilities and most of the
19 responsibility for low-level waste generated by Federal
20 generators, and the states would retain the policy-making
21 authority with respect to the locally sensitive issue of
22 selecting sites for disposal of the low-level nuclear
23 waste.

24 QUESTION: Could the Federal Government command
25 that the states take title to all illegal handguns within

1 their borders and be responsible for the damages caused by
2 failing to take title and possession?

3 MR. WALLACE: I can't answer that question
4 definitively. It certainly would go much further than
5 what has happened here.

6 QUESTION: Generically it's the same kind of
7 statute, isn't it?

8 MR. WALLACE: The take title provision, which we
9 don't believe is even ripe for decision today in the
10 setting of this case, it may never apply to New York, it
11 can't take effect until 1996, is only one option down the
12 road if New York doesn't undertake any of the other
13 options that are available here. It was added in on the
14 face of things because all of the other disincentives
15 would fall on the generators, and there was some fear that
16 this might impair the availability of the technologies
17 that are so important to the country and that an
18 additional disincentive would be useful to insure that the
19 states would do something on behalf of the generators
20 within their borders.

21 QUESTION: It's rather like saying that 30 years
22 in prison is one of your options for embezzlement. You
23 can either embezzle or spend 30 years in prison. The
24 Federal Government has told the states that they can
25 either regulate or the nuclear waste is yours. I mean, in

1 a sense it's an option, but don't you think it's, a
2 sanction is a more descriptive term?

3 MR. WALLACE: Perhaps. We refer to it as a
4 penalty in our brief. It's part of a series of incentives
5 and disincentives that Congress placed in the '85 act
6 after the 1980 act proved to be too toothless to get the
7 job done. And Congress was relying primarily upon the
8 political clout that the generators within each state
9 would have as the burdens would fall on them to get the
10 state to undertake the responsibilities, and this was
11 added as a final possibility.

12 Exactly what kind of sanction or penalty it is
13 is really subject to much doubt, which is another reason
14 why ripeness principles should be followed here. It is
15 far from clear what, if any, actual enforceable
16 liabilities, enforceable in Federal or state court, would
17 be imposed by this, given the clear statement rule of the
18 Atascadero case and other questions about possible
19 implementation of this provision would arise when and if
20 it ever comes into play.

21 There is no indication that New York will ever
22 actually be subject to this. It's even doubtful whether
23 the generators, if it did kick in, would make the request
24 that would impose this on New York because they don't like
25 to call attention to themselves in ways that might create

1 public controversy. There's much that is speculative and
2 in our view premature about the complaint concerning the
3 take title provision that New York is asking this Court to
4 use as a vehicle for undoing this entire statutory scheme,
5 even though it has had the benefit of the extension of
6 time for disposing of its waste in the sited states and
7 the payments made under this scheme for a period of many
8 years now.

9 And I might point out that most of the amici who
10 are supporting New York with respect to this issue that is
11 prematurely presented agree with us on the severability
12 question. And if I may just say a word about
13 severability, the answer to that seems quite clear to us
14 for two reasons. One is that the 1985 act displaces and
15 in terms repeals the 1980 act which would again be
16 resurrected if the 1985 act were not severable.

17 And it is quite apparent that Congress wanted to
18 make improvements by adding incentives and disincentives
19 to the 1980 act and would prefer the remainder of the 1985
20 act to the 1980 act, and in fact the 1985 act passed
21 unanimously in the House initially without the take title
22 provision which was then added in the Senate. There was
23 never a dissenting vote recorded in any of the enactments
24 of the entire 1985 act. And like the 1980 act which took
25 basically the same approach, it was signed into law by a

1 president who was himself a former governor.

2 So the circumstances that gave rise to this
3 enactment make it singularly implausible to think of it as
4 an attempt to aggrandize Federal power at the expense of
5 the states. Indeed the most basic provision of the act is
6 the conferral of power on the states, acting through the
7 regional compacts, to discriminate against interstate
8 commerce which they would not be allowed to do otherwise.

9 And other than the take title provision which is
10 not ripe for review in our view, we believe that the
11 provisions of which New York complains are squarely within
12 the principle of South Dakota against Dole.

13 QUESTION: Mr. Wallace, if we disagree with you
14 on whether the take title provision is valid and if we
15 disagree with you and think it is indeed ripe for
16 decision, do you think it's severable from the balance of
17 the act?

18 MR. WALLACE: We do indeed, for the reasons I
19 stated a few moments ago, that otherwise the 1980 act,
20 which Congress and the National Governors' Association all
21 had found unsatisfactory, would be resurrected to replace
22 the improvements that were enacted in the '85 act. And
23 the House itself had unanimously passed the '85 act
24 without the take title provision. So there seems little
25 doubt about what the proper resolution of that is if --

1 Congress of course could amend either, but there's no
2 reason to think it would prefer to start with the '80 act
3 rather than the remainder of the '85 act.

4 But we think that the constitutional power of
5 Congress was adequate to the task in the manner Congress
6 went about this, that the commerce power, as augmented by
7 the necessary and proper clause, allowed Congress here to
8 enact this measured series of incentives and disincentives
9 to redress the inequities that had occurred among the
10 states and to provide assurance not only that those
11 inequities would not reoccur as they had after the 1980
12 enactment, but that the serious threat that they posed to
13 important national concerns would not be threatened again
14 because of failure to provide sufficient incentives in
15 honoring the states' request that they be allowed to
16 exercise the regulatory authority here.

17 We think it would be singularly inappropriate to
18 adopt in judicial hindsight some kind of a least
19 restrictive alternative approach to adjudging Federal
20 legislation of this kind. I mean, what may seem a
21 reasonable way of adding something to the deal, such as
22 otherwise you'll lose your highway money so you should go
23 along with these provisions at that possible expense, may
24 well have been a deal breaker. Enormous effort went into
25 negotiating and enacting this legislation.

1 QUESTION: By deal breaker you mean the
2 enactment would not have succeeded if they had not used
3 this particular device?

4 MR. WALLACE: Well, what --

5 QUESTION: Because if that's the import of your
6 question, then this case does have great significance,
7 doesn't it?

8 MR. WALLACE: Well, what I am suggesting is that
9 what was acceptable to the parties who over a period of
10 years negotiated a compromise between the sited and the
11 unsited states and what -- is not always apparent in
12 hindsight to someone who didn't participate in those
13 negotiations. All the states are treated equally under
14 this legislation, and all had a vigorous voice in the
15 Congress. This is very unlike cases dealing with insular
16 minorities or cases dealing with state discrimination
17 against out-of-state commercial ventures.

18 QUESTION: It's like the poor. They all have an
19 equal right to be disappointed.

20 MR. WALLACE: Well, it's very different from the
21 state discrimination against interstate commerce cases,
22 where somebody who is not a vigorous participant in the
23 state's political processes is affected by what the state
24 has done in a way that discriminates against interstate
25 commerce. It's in settings of that kind that the Court

1 has said that the judiciary in hindsight is to see whether
2 a less restrictive approach would have been equally
3 effective.

4 QUESTION: I think what you're saying, Mr.
5 Wallace, is that we really don't know whether this deal
6 would have been put together without this provision, and
7 therefore if we find it invalid I guess the only fair
8 thing to do is to find the whole statute invalid. That
9 seems to contradict an early point you made, though.

10 MR. WALLACE: I'm not saying that it's not, I'm
11 not saying that it's not severable. This --

12 QUESTION: I don't think you can make both
13 arguments then, though. I mean, either, you know, either
14 it wasn't an essential part of the whole deal and
15 therefore is not severable, or it was, in which case the
16 argument you're now making is valid.

17 MR. WALLACE: The argument I'm making is that
18 this additional disincentive was within the legislative
19 power of Congress to enact because it made a judgment
20 about what would be an appropriate grouping of incentives
21 and disincentives. And what might not be necessary and
22 proper in some other settings, given the magnitude of the
23 legitimate Federal concerns at stake here and the
24 unanimous requests of the states that the decision-making
25 authority be reposed in the states, this was a necessary

1 and proper exercise of the commerce power to see to it
2 that this state against state dispute was equitably
3 resolved and would no longer threaten the availability of
4 the important medical research and energy technologies
5 that are vital to the people of this Nation.

6 That is our submission, if there are no further
7 questions.

8 QUESTION: Thank you, Mr. Wallace.

9 Mr. Collins, we'll hear from you.

10 ORAL ARGUMENT OF WILLIAM B. COLLINS

11 ON BEHALF OF THE STATE RESPONDENTS

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

14 I'd like to begin by framing this case from the
15 point of view of the three sovereign states I represent
16 and then, because there were several questions about the
17 implications of overruling Garcia, I'd like to address the
18 point that even if this Court, that this case does not
19 hinge on a broad interpretation of Garcia.

20 Like New York, the sovereign States of
21 Washington, South Carolina, and Nevada have a strong
22 interest in state sovereignty and in the Tenth Amendment,
23 but this case is unlike any of the other Tenth Amendment
24 cases that have come before this Court. One of the
25 obvious differences is this does not pit Federal power

1 against state power. Indeed South Carolina, Nevada, and
2 Washington intervened in this case to support this action.
3 And when you have looked at the amicus briefs you have
4 seen that --

5 QUESTION: Isn't what you mean, Mr. Collins,
6 that as a matter of arguments before this Court the states
7 are not all on one side, not that the statute doesn't pit
8 Federal power against state power?

9 MR. COLLINS: Well, indeed, Your Honor. But my
10 point is that I think if you look at National League of
11 Cities, Garcia, Hodel, you would not find states here
12 advocating that the statute was valid. That difference in
13 opinion doesn't mean that it's valid, but it's an
14 indication that this is a different kind of case.

15 QUESTION: That's just, that was just a
16 regrettable consequence of human selfishness. All states
17 were losers in Garcia. They all had to pay the higher
18 salaries. Here some states are losers and some states are
19 winners. It's not at all surprising that the winners are
20 going to come in and say leave everything alone.

21 MR. COLLINS: That's exactly right, Justice
22 Scalia, and that's why this is a different kind of case.
23 New York --

24 QUESTION: I think it is somewhat surprising
25 that the State of Washington and South Carolina and Nevada

1 are arguing that the Federal Government has the right to
2 direct them to enact a law and direct them to take a
3 governmental action without conditioning it the way it's
4 often, the way it's usually done.

5 MR. COLLINS: Well, first, Justice --

6 QUESTION: I think that's very surprising.

7 MR. COLLINS: Well, I don't think it's
8 surprising at all. This case involves an inherent classic
9 kind of interstate conflict between the states. Some
10 states, like New York, generate a lot of nuclear, low-
11 level nuclear waste. They don't want to store it in New
12 York. Other states, like Washington, South Carolina, and
13 Nevada, have tried to deal with that problem. We have
14 sites in our states to take care of this waste. But as a
15 result of the dormant Commerce Clause and this Court's
16 decision in Philadelphia v. New Jersey we have no option
17 but to take waste from all the other states that choose to
18 send it to us, or, or close down the site.

19 Now this conflict is exactly the thing that
20 separates this case from the other kinds of cases where,
21 as Justice Scalia said, all the states are losers. In
22 this case states that try to be responsible in dealing
23 with their waste are losers and the other states can take
24 advantage of them.

25 QUESTION: Well, Mr. Collins, I just don't see

1 any way to draw the line that you would have us draw on
2 behalf of those three states. I can't believe that the
3 State of Washington or South Carolina or Nevada would be
4 in here arguing that Congress would have the right to
5 shift off part of the national debt or shift off all
6 medical costs by congressional feat to the states, or any
7 other of the potential schemes that this would open up. I
8 can't believe you'd be here making that argument. Would
9 you?

10 MR. COLLINS: No. Indeed we would not. And
11 we're not --

12 QUESTION: Well then how do you justify it here,
13 because it's a principle we have to deal with, not some
14 individual scheme?

15 MR. COLLINS: That's right. And I think that
16 this law meets the kind of principles that, the narrow
17 kinds of exceptions where the Federal Government can make
18 a statement to the states and involve them in a Federal-
19 state cooperative program. And the point I want to
20 emphasize is that even, this case does not hinge on a
21 broad reading of your decision in Garcia. I think that
22 even if we analyze this in light of the dissenting
23 opinions in Garcia that this particular enactment would be
24 valid. And let me do that.

25 There are basically two dissenting opinions in

1 Garcia. One was authored by Justice Powell, and Justice
2 Powell focused on the fourth National League of Cities
3 test to look to see whether the Federal interest is
4 demonstrably greater and state compliance is essential.
5 Now I submit in this case the Federal interest is
6 demonstrably great, simply because nuclear, the nuclear
7 waste area is something that the Federal Government has
8 been involved in, and it's a problem that must be solved.
9 Justice Kennedy's handgun example, people certainly differ
10 about whether handguns are a problem or whether they
11 should be regulated. But no one here is saying that we
12 don't need to safely dispose of nuclear waste.

13 QUESTION: Well, and I suppose everyone would
14 agree that we need to solve the problem of medical care of
15 the indigent and we need to solve crime and we need to
16 solve prison space, and so forth and so on.

17 MR. COLLINS: But it's a unique concern of the
18 Federal Government, Justice O'Connor. The second point
19 that I would say why there is a Federal interest is that
20 this case involves a central concern of the Commerce
21 Clause, and that was something that Justice Powell focused
22 on. This is not a case where the Federal Government
23 through the Commerce Clause power has the ability to have
24 a wide reach and deal with other kinds of things.

25 This goes to the heart of the Commerce Clause

1 because of the dispute between the states. When one state
2 acts to have a site, then other states are relieved of the
3 responsibility, and that inherent conflict, I think, means
4 that the, it is a central concern that the Federal
5 Government in those limited states can make a kind of
6 command to the states. Also I think state compliance is
7 essential simply because you have to do something with
8 this waste. It needs to be dealt with.

9 QUESTION: Isn't there a fundamental difference
10 between this case and Garcia in that when this statute
11 says each state shall be responsible for providing for the
12 disposal of waste, it doesn't limit it to waste generated
13 by the state itself. It means all waste in the state, and
14 therefore this statute cannot be complied with by the
15 state without the state using its sovereign powers. The
16 Federal Government is directing the state how to exercise
17 its sovereign powers.

18 MR. COLLINS: It's directing the state to take
19 responsibility, Justice Scalia.

20 QUESTION: Well, you can put it that way if you
21 like, but it can't take responsibility for somebody else's
22 waste without exercising its sovereign powers. And that
23 was not Garcia.

24 MR. COLLINS: That's what I'm saying. I'm not
25 claiming that this -- I'm talking about -- I agree.

1 QUESTION: I'm saying it's worse than Garcia in
2 that respect, not better.

3 MR. COLLINS: The states are not, are given
4 maximum amount of flexibility to decide how to do this.
5 There are nine compacts that have been formed. The states
6 have a wide option.

7 The last point I'd like to make before I take my
8 seat is just to concur with counsel for the Government
9 that if the Court finds the so-called take title provision
10 invalid, that it is clearly severable from the remainder
11 of the act. There is no severability clause, but there is
12 a presumption in favor of severability. It passed the
13 House unanimously, and in fact the act would operate just
14 fine without the so-called take title provision because
15 this act gives part of the power of, the Federal power to
16 the states so that the states actually have the ability
17 when acting within a compact to exclude waste that is
18 generated from outside the compact region.

19 And that is why we would say that this does not,
20 is not detrimental to the state power. In fact states
21 have a lot of autonomy. They have choices about how to
22 deal with it, albeit with the take title provision they
23 must be responsible. They have a wide range of options of
24 how to deal with the waste. They can enter into compacts,
25 they can contract with compacts. One compact can contract

1 with another compact. The only thing that they are
2 prohibited from doing under the take title provision is
3 simply ignoring the problem.

4 So we would request that this Court affirm the
5 judgment below or, if the Court finds that the take title
6 provision is invalid, the Court should sever that
7 provision and sustain the remainder of the law which we
8 think is an excellent example of the partnership between
9 the Federal Government and the state government.

10 QUESTION: Thank you, Mr. Collins.

11 Mr. Schiff, you have 3 minutes remaining.

12 MR. SCHIFF: I have nothing further absent
13 questions from the Court, Your Honor.

14 CHIEF JUSTICE REHNQUIST: Very well. The case
15 is submitted.

16 (Whereupon, at 10:59 a.m., the case in the
17 above-entitled matter was submitted.)

CERTIFICATION

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

NO. 91-543 - NEW YORK, Petitioner V. UNITED STATES, ET AL.;

NO. 91-558 - COUNTY OF ALLEGANY, NEW YORK, Petitioner V. UNITED STATES; and

NO. 91-563 - COUNTY OF CORTLAND, NEW YORK, Petitioner V. UNITED STATES, ET AL.

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

BY Michelle Sanders

(REPORTER)