

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AMERICAN TRUCKING :

4 ASSOCIATIONS, INC., :

5 CHAMBER OF COMMERCE OF :

6 THE UNITED STATES, ET AL., :

7 Cross-Petitioners, :

8 v. : No. 99-1426

9 CAROL M. BROWNER, :

10 ADMINISTRATOR OF THE :

11 ENVIRONMENTAL PROTECTION :

12 AGENCY, ET AL. :

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14 Washington, D.C.

15 Tuesday, November 7, 2000

16 The above-entitled matter came on for oral

17 argument before the Supreme Court of the United

18 States at 11:15 a.m.

19 APPEARANCES:

20 EDWARD W. WARREN, ESQ., Washington, D.C.; on behalf o

21 of the Petitioners.

22 SETH P. WAXMAN. ESQ., Solicitor General of the United

23 States, Washington, D.C.; on behalf of the

24 Respondent.

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
EDWARD W. WARREN, ESQ.	
On behalf of the Petitioner	3
SETH P. WAXMAN, ESQ.	
On behalf of the Respondent	25

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P R O C E E D I N G S

[11:15 a.m.]

CHIEF JUSTICE RENQUIST: We'll hear argument next in a companion case, number 99-1426, American Trucking Association vs. Carol Browner with the same attorneys back for an encore.

ORAL ARGUMENT OF EDWARD W. WARREN
ON BEHALF OF THE PETITIONERS

MR. WARREN: Mr. Chief Justice, may it please the court again. The -- I don't want to return to the delegation issue, other than to repeat and emphasize that this agency wishes to regulate every nook and cranny of this environment for air pollution reasons, and yet said to the Court of Appeals, nothing in the statute requires her to make any specific findings or to structure her decision making in any particular way.

Now, with that said, I want to turn to the statute. And I want to start a little bit out of order because in my first argument, I intended, I didn't get a chance to respond to, Justice O'Connor's colloquy with General Waxman. You asked, Justice O'Connor, about Section 109(d) of the Act which requires the CASAC committee to advise the administrator on any adverse public health, welfare, social, economic and so forth effects, and Mr. Waxman said two things that I want to

1 very much disagree with. He said that's in a different
2 provision of the statute. Well, it's not. It's in the
3 standard setting provision. It's in Section 109. It
4 refers to standard setting, and entails standard setting.

5 Secondly, the statute makes clear in the
6 judicial review provisions, and I'm looking at pages 6-A
7 and 7-A of my blue brief, that's the Petitioner's brief.
8 It says that the administrator must set forth a statement
9 summarizing --

10 QUESTION: Whereabouts on page 6-A and 7-A are
11 you reading from?

12 MR. WARREN: I'm now on page 7-A and I'm looking
13 at the judicial review provision which is Section
14 307(d)(3)(c).

15 QUESTION: Where it starts the major legal --

16 MR. WARREN: It's at the top of the -- yes, yes.
17 In other words, I'm reading about the statement that the
18 administrator must provide, which is the next sentence,
19 and it says it must set forth the pertinent findings,
20 recommendations and comments and so forth, and if her
21 proposal, and you'll notice it says Section 109(d), that's
22 7409(d) is all of Section 109(d), it's not excluding out
23 the parts that General Waxman would exclude out. What it
24 says is that she has to say where she differs with the
25 CASAC, and where she agrees with the CASAC, and so forth.

1 So this information that Justice O'Connor, you referred to
2 in your question, is very much part of the standard
3 setting process. It's very much part of what the
4 administrator has to say when she promulgates a standard,
5 and it's very much part of the judicial review provision.

6 Now, if I can return to the core provisions of
7 the statute. Requisite to protect the public health with
8 an adequate margin of safety. Now, I'm going to talk
9 mostly about public health this morning, but that doesn't
10 mean that there aren't other words that you should pay
11 attention to, and other provisions in Section 108 and 109.
12 I just would like to focus on public health because I
13 think it's so doggone central.

14 Now, what does it mean to protect the public
15 health? Now, public health is not defined in the statute.
16 We all agree on that. It has to take on its natural and
17 ordinary meaning under this Court's decisions.

18 QUESTION: Well, but the administrator surely
19 has some latitude in defining it since it isn't defined in
20 the statute.

21 MR. WARREN: Well, Mr. Chief Justice, I would
22 agree with that with this point in mind. If the
23 administrator defines public health so that it excludes
24 all countervailing factors, what you are doing is handing
25 over to the administrator a decision of far, far-reaching

1 economic and political significance, and under this
2 Court's decisions, the MCI line of cases, the Court just
3 doesn't presume those kinds of delegations lightly, so my
4 point would be, of course, the administrator in this
5 provision and others has discretion, but it doesn't have
6 discretion --

7 QUESTION: May I ask on your countervailing
8 factors, are you referring to countervailing health
9 factors, as well as countervailing economic factors?

10 MR. WARREN: I am indeed.

11 QUESTION: And do you interpret what she has
12 done is to exclude all countervailing health factors?

13 MR. WARREN: Yes. That's what the lead
14 industry's line of cases says, and really that's what the
15 Court of Appeals said too.

16 QUESTION: You think lead industry holds that
17 they may not consider countervailing health factors, as
18 opposed to countervailing economic factors?

19 MR. WARREN: The Court of Appeals in this case,
20 and this involves the protective effect and ground level
21 ozone, held that the statute required her to consider
22 that. But, but what I'm saying about public health, and I
23 want to, what I'm saying about public health is --

24 QUESTION: Does she acknowledge that, before you
25 go on?

1 MR. WARREN: Yes. She does.

2 QUESTION: Does she acknowledge that you have to
3 consider the effect of particulates in our ozone in
4 reducing ultraviolet rays, for example?

5 MR. WARREN: Well, let's put it this way. She
6 didn't seek cert on that issue, so I think she, she has
7 acquiesced in that point.

8 QUESTION: Well, then if that's so, maybe that
9 ends it because why isn't it a perfectly good, public
10 health must mean basically public health. Not the cost of
11 obtaining public health. Basically. I mean just saying
12 basically in the ordinary case, and then, of course, you
13 could have some unusual cases where in fact what people
14 like to say is we are going to go back to the stone age,
15 which was very unhealthy for people, so, that if in fact
16 the administrator has the authority, not necessarily the
17 requirement, to take into account the health effects of
18 either the, you know, we've seen the skin cancer referred
19 to a lot in the briefs, and I guess if you really
20 destroyed the economy, that would have adverse health
21 effects. I don't know you're -- I don't know if the other
22 side agrees on that.

23 But if I'm thinking that the administrator has
24 the authority, not the requirement, in unusual cases in a
25 technology-forcing statute to take into account the

1 possibility that despite the technology forcing, etcetera,
2 you could hurt the public health, because we are going
3 back to the stone age. I mean, if that kind of reading of
4 the statute, does that satisfy you?

5 QUESTION: No.

6 MR. WARREN: No. Why isn't it, however, a
7 correct reading, which isn't quite what they proposed, but
8 --

9 MR. WARREN: Well, first of all, they've not
10 conceded the point that you're making but let me address
11 it in terms of public health. I call the Court's
12 attention to footnote 1 of our blue brief that I was
13 referring to again, because public health, as I think
14 everybody knows today, is a discipline which examines
15 health questions in terms of protecting the public with
16 explicit reliance on cost/benefit considerations. I mean,
17 this is the way you achieve the most for the public, and
18 that is by taking cost/benefit considerations into
19 account.

20 QUESTION: But the provision you just, you just
21 quoted to us at the beginning of your presentation here,
22 which says that the committee has to advise the
23 administrator of any adverse public health, welfare,
24 social, economic, or energy effects, which may result from
25 various strategies. But you know, they take the pain to

1 separate public health from economic.

2 MR. WARREN: But, but I think my answer to you,
3 Justice Scalia, is the same here as it was with respect to
4 Section 312. Those, those things that are mentioned there
5 obviously overlap. I mean, they infect each other in both
6 directions and it's so true, so is true of public health.
7 Let me say that I didn't make up this definition of public
8 health. Public health was defined most prominently by the
9 head of the public health school at Yale, and his
10 definition is the one you really see in all the
11 dictionaries.

12 QUESTION: What about the definition the
13 Congress gave? It didn't give any?

14 MR. WARREN: It didn't give any. That's
15 significant. And why did Congress --

16 QUESTION: And you think this was relying on
17 this prestigious person at Yale, and not on the EPA?

18 MR. WARREN: No what I really think it was
19 relying on was the implicit definition of public health in
20 the Act before 1970. Let me focus in on exactly what
21 happened again because I think it's very significant. The
22 Senate came up with a bill that would set national
23 standards to protect the health of persons. Now, that
24 expression had a meaning in the previous Act. It was the
25 trigger for abatement actions. But abatement actions, the

1 trigger was only the beginning. You then weighed against
2 the -- what's necessary to protect the public, to protect
3 the health of persons. You weighed against that equitable
4 factors, and economic factors and the like.

5 The House, by contrast, used the term, we're
6 going to set standards requisite to protect the public
7 health. That term had a meaning in the statute as well.
8 From 1955 on, Congress used the word public health. It
9 enlisted the public health service, which engages in
10 exactly the kind of comparisons I'm talking about to help
11 administer the statute and public health was the goal to
12 be achieved when you weighed the health of persons against
13 these other factors. That's implicit also in the purpose
14 of the statute. I see -- I use the purpose to reinforce
15 what public health means, not in any other, in any other
16 way, but it does very much reinforce it. It's really what
17 Justice Breyer was saying. Is healthy people are
18 wealthier, wealthy people are healthier. There is always
19 going to be an interaction between these things.

20 QUESTION: I'm not sure I was saying that, but
21 they --

22 MR. WARREN: It's close. It's close to what you
23 said.

24 QUESTION: I mean, what I don't see to be direct
25 about it is how you import a cost/benefit analysis into

1 this statute. I mean, cost/benefit analysis is a formal
2 discipline. It's very complicated. It's very
3 time-consuming, and if you were going to have that formal
4 discipline in this statute, why would they just use the
5 words public health?

6 MR. WARREN: Justice Breyer, I'm glad you framed
7 the question that way. We are not talking about
8 econometrics. We're not talking about -- we're talking
9 about what Ben Franklin called prudential algebra. Put
10 one side of the column pros. One side of the column cons.
11 We are looking at an analysis just like you see in the
12 presidential executive order of this administration, or
13 that which you see in the Unfunded Mandate Act. What
14 we're talking about is a common sense weighing of
15 competing considerations in a systematic way. That's all
16 we're talking about. The executive order, as I'm sure you
17 know --

18 QUESTION: One difficulty, I guess would be you
19 could put in certainly, I imagine, the economic
20 considerations if perhaps -- if they're related to health
21 considerations, I can see how a person might do that where
22 small risks are involved. I could understand that. How to
23 do it. What I don't really see is how you do that if the
24 statute is technology-forcing. I mean, because you
25 wouldn't know really what the costs are that are being

1 foreseen with the technology that doesn't yet exist. It
2 would be pretty hard to write that.

3 MR. WARREN: Once again, with all due respect,
4 we have a very detailed regulatory impact analysis here
5 which does -- EPA knows a lot about the costs of
6 controlling these two pollutants because it's been
7 controlling them for 30 years, so it knows how much it's
8 going to cost to go that extra step and that extra step,
9 and there is an evaluation of those costs in the
10 regulatory impact analysis, so I don't think it's hard to
11 get a handle on those costs. I'm not saying that any
12 answer on the costs or the benefits is precise. The
13 agency has a lot of discretion on that, but not to try, I
14 think is ultimately going to defeat public health. It's
15 going to defeat the objectives of trying to achieve more
16 good for the public, and that's what this statute's all
17 about.

18 QUESTION: Mr. Warren, may I ask with respect to
19 this add some kind of cost/benefit analysis, what kind we
20 don't know. You just mentioned Benjamin Franklin as one
21 source of this. It seems to me, to put it bluntly, that
22 you would have on your scheme as a target for attack not
23 only the public health as it has been conceived as
24 something discrete from cost/benefit analysis, but what
25 kind of cost/benefit analysis this should be. Did EPA

1 weigh the right factors. It just seems to me that you are
2 adding something that will create another morass, many
3 more things that can be attacked than under the lead
4 industry's regime.

5 MR. WARREN: Not at all, Justice Ginsburg. Not
6 at all. What we are saying is that what the agency can't
7 do in the name of public health is take countervailing
8 factors off the table. But in carrying out its
9 responsibilities to achieve the public health, those
10 factors are weighed on the pros and the cons, just as Ben
11 Franklin was talking about, and we have a process which is
12 -- which it can be subjected to executive branch review,
13 which is going to cut out a lot of the problems, to
14 congressional review. It facilitates what Congress had in
15 mind. Now, let me also go forward and say that this is --

16 QUESTION: If I knew what the "it" was. I mean,
17 you said this is not fancy cost/benefit analysis. It's
18 something -- well, what is it exactly?

19 MR. WARREN: What it is, is what every other
20 health, safety and environmental agency does. We don't
21 have an executive order reviewing these decisions of EPA
22 and OSHA, and NHTSA, and so forth, because every statute
23 has been interpreted by a Court of Appeals the way this
24 one has. The norm is to do the kind of weighing and
25 balancing I'm talking about. Now, that's not to say that

1 if a regulation passes executive branch review and gets by
2 congressional oversight, that there won't be judicial
3 review, but the agency is going to have a lot of
4 discretion with respect to the weight of the evidence
5 questions, questions about which costs can be quantified,
6 which costs can't be quantified, how to quantify them, how
7 to quantify the benefits. All those questions are
8 questions which would come up in the -- in any subsequent
9 review or could come up in any subsequent review, but the
10 Agency's discretion is going to be honored.

11 QUESTION: Mr. Warren, I must say that to the
12 extent you win this argument that you're making now, you
13 sort of weaken your argument on, concerning the ability of
14 EPA to issue revised ozone standards, because frankly,
15 what makes it eminently plausible that Congress might have
16 itself set a fixed table that can't be changed by EPA is
17 the scary idea that if EPA can issue revised standards,
18 God knows what it might issue. It doesn't have to take
19 into account anything but public health, and you know, it
20 could go down to transient costs, and if that's what the
21 scheme is, I can understand why Congress would say in Part
22 II, no, look it, with ozone, it affects everything, it
23 affects every industry. We are going to, we are going to
24 import ourselves some cost/benefit analysis and we are
25 going to set this table, and EPA can't change it.

1 Now, if you tell me that when EPA changes it,
2 EPA also has to take into account whether it's going to
3 bring us back to the stone age, then -- then it's a little
4 less plausible that Congress should have, should have
5 stepped in.

6 MR. WARREN: I think there's a common theme
7 between these two portions of the argument. On the first
8 part that I'm arguing, I will give it to EPA that it's
9 constrained by lead industry and this line of cases from
10 doing what I think is required by the statute to do, but
11 nonetheless it hasn't fought very hard to accomplish the
12 aims that I'm talking about. So when Congress gives it
13 general direction, it doesn't seem to want to follow it.
14 And then when Congress gives it very specific direction,
15 it doesn't want to follow it either, so that's what I
16 think -- that's the common theme here I think of an agency
17 that wants to do what it wants to do, and not what
18 Congress directed it to do. I think that that's, that's
19 the common --

20 QUESTION: Does the agency have the authority --
21 you were saying what discretion they have. They have wide
22 discretion after they do this common-sense balancing of
23 whatever things. That was your view, right? Do they also
24 have the discretion not to do it?

25 MR. WARREN: Not to do it. No.

1 QUESTION: Not to take any of these things into
2 account.

3 MR. WARREN: No. And that's exactly --

4 QUESTION: Well, supposing that the EPA
5 administrator thinks, you know, it's going to be a
6 three-week hearing just to begin, and by the time I get
7 finished reading all that stuff on the costs, etcetera,
8 it's going to be another year and I'll never get this job
9 done and I doubt that it has much to do with the outcome.
10 Is the EPA administrator then have the authority to say I
11 don't want to do it, I don't want to get into this?

12 MR. WARREN: No.

13 QUESTION: No.

14 MR. WARREN: Because the agency, what the agency
15 doesn't have discretion to do, it's got a lot of
16 discretion, and I have emphasized that these decisions are
17 going to be reviewed, you know, under the scheme I'm
18 talking about under the arbitrary and capricious test, but
19 the one thing it doesn't have discretion to do is to take
20 all those countervailing factors off the table because
21 what that is doing, and this feeds right back into the
22 delegation doctrine where they say they have to make no
23 findings and so forth, as I alluded to, what that means is
24 that the agency has the freedom to take us all the way
25 down to deindustrialization, as the Court of Appeals said.

1 That can't be. This Court's decisions at MCI, Benzene I
2 think stands for the same proposition. There has to be
3 some common sense brought to bear. There has to be some
4 determination of what risks are acceptable, what risks are
5 not.

6 QUESTION: No problem. I mean, if EPA goes too
7 far, it looks like things are going too far, Congress will
8 step in and enact Part II with a fixed Table 1 that EPA
9 can't depart from.

10 MR. WARREN: We don't need to -- we don't need
11 -- the problem that I'm talking about, whether the
12 standards make sense in terms of public health, whether
13 they really help public health is not something Congress
14 has ever, ever, ever addressed through oversight. Never
15 addressed that. All it's done is extended some deadlines.
16 It's a completely different question because the question,
17 and we're in the last mile. I want to emphasize that.

18 This is not 1970. This is 2000. And we've been
19 regulating these pollutants for years. We've done lots and
20 lots of things, and this issue of whether or not it's
21 worth the candle in terms of public health is coming
22 sharply into focus. It's come sharp -- much more sharply
23 into focus as a result of things like the executive orders
24 that have, have been in place for the last 20 years. It's
25 come more sharply into focus because of the Unfunded

1 Mandate Act. That's where we are today.

2 But this is something that Congress has never
3 addressed, and can't fix. Or can't fix without rewriting
4 the statute, which it doesn't need to do because for the
5 reasons I've talked about, Congress had it right in the
6 first place. It didn't pass the Senate bill to protect
7 the health of persons. It passed the House bill, which
8 said protect public health, and public health had meaning,
9 just as I'm outlining it here today, and that meaning, and
10 I talked about this definition, but the name of that book
11 is the -- it's either the "Cost of Sickness and the Price
12 of Health" or the other way around. I always get it
13 confused. But the point is is that in this century, the
14 leaders of the public health tradition have been looking
15 at these things, and for good reasons. You know, you
16 don't spend money foolishly and unwisely to achieve a
17 pittance when you can use your money much more wisely and
18 better to achieve more.

19 QUESTION: Can you in one sentence tell me what
20 standard it is you would say public health incorporates?

21 MR. WARREN: Yes. Public health means --

22 QUESTION: Because, I've listened to a lot of
23 vague language.

24 MR. WARREN: Yes.

25 QUESTION: From you. And I don't understand

1 what it is that you are saying.

2 MR. WARREN: Well, okay. Let me try this for
3 you. Public health contemplates a consideration of
4 competing factors, including costs, in seeking to reduce
5 population sickness and increase longevity. I think that
6 says it in a sentence, what I think I have borne out by
7 that definition of public health. When this act was
8 passed, and today.

9 QUESTION: Do you think that standard were to
10 comply with the delegation doctrine?

11 MR. WARREN: I do. I do think it would comply
12 with the delegation doctrine, and it's really, as I was
13 saying to Justice Breyer, when you have countervailing
14 factors, it's not adding factors, factors, factors, it is
15 the fact that the factors countervail. It's one against
16 the other. That narrows discretion and I gave the just
17 and reasonable rates as an example, and I think if we had
18 the analogous situation before us of a Court of Appeals
19 that said in setting just and reasonable rates we're only
20 going to look at the consumer interest, the logic would
21 take us --

22 QUESTION: Tell us, though, what it is in that
23 sentence of yours that makes it meet the nondelegation
24 standards, whereas the present provision does not, as
25 interpreted by CASAC?

1 MR. WARREN: As interpreted. Because the
2 difference between what I read and let me read it again.
3 Public health contemplates consideration of competing
4 factors, including costs, in seeking to reduce population
5 sickness and increase longevity. What the lead industry's
6 case does is it takes all of the first part of that
7 sentence off the table. It says you cannot consider those
8 things. And I don't frankly know how in a world of
9 limited resources, whether it's air pollution or whether
10 it's managed care, how we can make these decisions if we
11 don't think about what risks are acceptable.

12 QUESTION: But we've been living with lead
13 industries for 20 years, I gather. It was decided in
14 1980, wasn't it?

15 MR. WARREN: Yes, it was. And two things on
16 that. One, there is no stare decisis effect.

17 QUESTION: No. But you say you don't know how
18 we can live with this kind of a regime. Well, we have
19 lived with it for 20 years.

20 MR. WARREN: Well, I think that, that we --
21 there's several things you can say about that. I think we
22 have not addressed the sort of last mile problems that we
23 have here today. I think when you say that we have lived
24 with it, that does --

25 QUESTION: You say the last mile. That has a

1 number of connotations.

2 MR. WARREN: Right.

3 QUESTION: What precisely are you talking about?

4 MR. WARREN: Well, what I mean, what I mean,
5 Your Honor, okay, too much shorthand, but what I mean is
6 that both ozone and particulate matter have been regulated
7 very extensively for a number of years and take automobile
8 emissions, for example, what we have done is we've, we're
9 now, we are in the last 1 percent of control. So the
10 costs and the benefits, and the same could be true of
11 utility scrubbers or a number of other things because
12 we've done this kind of regulation, but let me say that --

13 QUESTION: Well, when you get down to that, at
14 the last 1 percent or whatever, it is you're going to get
15 into an area of fuzzy science. You're going to find
16 health effects on both sides as you're finding in this
17 case apparently, and so therefore, if that's what you are
18 worried about, you don't need your -- you don't need more
19 than the health balance, and if you are not talking about
20 that, lead industry seems to have worked.

21 MR. WARREN: Well, first of all, I think the
22 health-health balance really won't work, taking
23 particulate matter because I think you have the same
24 problems. It's just another form of a zero risk standard.
25 What you are doing is you are netting out any

1 countervailing considerations, but there's really no place
2 to stop until you have gone all the way down to zero for
3 pollutants like this which are nonthreshold pollutants.

4 Let me continue. Lead industries, as I indicated, I don't
5 think on the facts was wrongly decided. That was really --

6 QUESTION: Let me just interrupt you on that
7 very one. You said it has no stare decisis effect. Of
8 course, we have the authority to reject the case, and
9 we're not bound by it.

10 MR. WARREN: Right.

11 QUESTION: But doesn't it have stare decisis
12 effect if the doctrine really has meaning in terms of the
13 community and the agency and everything have relied on it
14 for 20 years in planning their courses of action. Isn't
15 that what the heart of stare decisis is.

16 MR. WARREN: Right, but let me -- I take the
17 Central Bank of Denver case as probably the best one to
18 talk about because this Court held no stare decisis effect
19 and overturned a decision where 11 courts of appeals had
20 come out the other way, and everybody had been living with
21 aider and abettor liability under 10(b)(5) of the '34
22 Securities Act for decades, and yet this court said that's
23 not what the statute said, so this Court is in a position
24 to read the statute and make sense of the statute, as I am
25 suggesting.

1 Now, I don't think lead industries really has
2 worked. That's not to say, and I'm not saying, although I
3 don't know that the existing standards have benefits that
4 exceed the costs. I have a pretty good sense then in the
5 first decade of the statute, there wasn't much question
6 about that, that one of the reasons this thing didn't come
7 sharply into focus in lead industries is because we were
8 at the early stages and it made a lot of sense to do what
9 was being done.

10 But at this stage, I don't think health-health
11 tradeoffs really are the answer because for the very
12 reason you're suggesting, the costs are important because
13 the resources, and even in a rich society like this one,
14 we do have limited resources and those resources can be
15 better used elsewhere. I mean, there is no even attempt
16 to reconcile the ozone standard in the particulate matter
17 and the other ambient standards in terms of providing a
18 comparable degree of protection, even without any regard
19 to costs. For example, taking the Benzene case as an
20 example, where you know, you had occupational carcinogens
21 and could you look at the risks and could you at least
22 make some comparison, you note none of that is even
23 attempted in this case.

24 QUESTION: I don't see why that makes for a make
25 or break argument on the point of delegation, because

1 there are health-health tradeoffs so that there are ways
2 of drawing reasonable lines within the limited concepts of
3 health, pro-health, anti-health. If you introduce the
4 economic factors at this stage of the analysis, what you
5 will have done is to create a, or recognize, a new set of
6 reasons, but it doesn't follow from that that for purposes
7 of the delegation doctrine, it is impossible to draw a
8 line short of zero which is not arbitrary if you don't
9 consider the economics so that you complicate the
10 analysis. You may complicate the analysis in what is, a
11 perfectly desirable way, but I don't see that it either
12 makes or breaks the constitutionality of the statute under
13 the delegation doctrine.

14 MR. WARREN: But, the first point is, you got to
15 construe the statute. And I think the statute has to be
16 construed against the backdrop of the MCI Benzene --

17 QUESTION: Right. We may or may not --

18 MR. WARREN: Okay.

19 QUESTION: -- agree on that. But your, your
20 other argument was that if you don't, I thought it was --

21 MR. WARREN: Right.

22 QUESTION: -- that if you don't import the
23 economic consideration at this stage, there is no logical
24 stopping place by which I think you mean there is no way
25 to draw a line which is not inherently arbitrary or

1 capricious. And it seems to me that that is not a sound
2 argument because even if you confine your countervailing
3 considerations to health versus health, you will have
4 kinds of reasons which would count as reasonable bases for
5 drawing lines short of zero.

6 MR. WARREN: But Justice Souter, you are
7 presupposing by the question I think that everything is
8 like ozone. Let's just take particulate matter and let's
9 assume for a minute that there is no countervailing
10 factors that there's risks all the way down to zero. You
11 had the same indeterminacy problem. Let's take ozone,
12 where there are going to be countervailing factors to some
13 degree, but where you still have the same problem, where
14 you are going -- are you really protecting public health
15 if you push it down to a level where the costs greatly
16 exceed the benefits. That's really what the regulatory
17 impact analysis says here. Let me make one more point.
18 Maybe I should reserve the balance. I know I'm --

19 QUESTION: Very well, Mr. Warren. General
20 Waxman, we'll hear from you.

21 ORAL ARGUMENT OF SETH P. WAXMAN

22 ON BEHALF OF THE RESPONDENTS

23 GENERAL WAXMAN: Mr. Chief Justice and may it
24 please the court. For 30 years, the EPA has consistently
25 interpreted the Clean Air Act to require that NAAQS be set

1 solely by reference to the effects of a pollutant's
2 presence in the air. Costs and other factors relating to
3 removing the pollutant are accounted for under the statute
4 in the process of implementing the standards. That
5 interpretation reflects the plain meaning of the statute
6 and the intent uniformly expressed both by the D.C.
7 Circuit and the legislative history of this
8 technology-forcing act.

9 QUESTION: Mr. Waxman, do you concede that EPA
10 can consider countervailing health concerns, for example,
11 the skin cancer problem?

12 GENERAL WAXMAN: The EPA -- we concede that the
13 EPA can consider countervailing health concerns that
14 derive from the presence of the pollutant in the air, for
15 example, the health, the health cancer problem, but we do
16 not concede, and the Court of Appeals has unanimously
17 upheld our determination that we cannot consider any
18 factors, economic or health, that don't derive from the
19 presence of the pollutant in the ambient air because
20 that's what Section 108(a)(2) requires.

21 QUESTION: But that is a little ambiguous, the
22 presence of a certain degree of ozone in the air,
23 according to DOT, is necessary to prevent melanoma.

24 GENERAL WAXMAN: Yes.

25 QUESTION: And if you took it out, then there

1 would be more melanoma, and you count that?

2 GENERAL WAXMAN: We can --

3 QUESTION: On the same theory, I guess you would
4 have to say the stone age problem being that the presence
5 of a certain amount of ozone in the air is necessary to
6 prevent the kind of economic activity that would be
7 associated with the stone age, and that health problem.

8 GENERAL WAXMAN: No. We don't concede that.

9 QUESTION: I know you don't in your brief and I
10 don't really see the difference.

11 GENERAL WAXMAN: Here's the difference.

12 QUESTION: And I'm not sure it's important, it
13 might be.

14 GENERAL WAXMAN: I'm not sure it's important
15 either, but if it might be, I'll address it. The UVB
16 question, that is the question about whether, well, this
17 tropospheric ozone might be even at elevated levels that
18 cause people to die might be protecting against skin
19 cancer was a case of first impression for the EPA in this
20 case. It had never, there had never been such a claim
21 made for any of the other six criteria pollutants in any
22 of the five-year reviews. The EPA's initial
23 determination, which it defended in the Court of Appeals,
24 was that it was not appropriate to consider that, but the
25 Court of Appeals held otherwise, we have acquiesced and

1 the EPA is in fact very well along in the process of
2 evaluating and characterizing those countervailing health
3 effects that derive from the presence of the pollutant in
4 the air.

5 QUESTION: General Waxman, if we're permitted to
6 ask unimportant questions, can I ask what eight hours we
7 are talking about, in the eight hour standard? Which
8 eight hours of the day is it.

9 GENERAL WAXMAN: It's -- you're referring to the
10 --

11 QUESTION: Ozone.

12 GENERAL WAXMAN: -- standard that is set for
13 ozone.

14 QUESTION: Yes.

15 GENERAL WAXMAN: And I don't think that the
16 standard --

17 QUESTION: Because eight hours is more reliable
18 than one hour, but I'm wondering if, I just don't find,
19 you tell me, which eight hours is it? Is it from midnight
20 to 8 a.m., because --

21 GENERAL WAXMAN: I believe it is --

22 QUESTION: Because it would vary, I think,
23 tremendously.

24 GENERAL WAXMAN: I am certain that in either the
25 criteria documents, the staff papers, the CASAC

1 concurrence letters or the preamble, it specifies that in
2 detail, but I'm afraid that I can't tell you the answer.
3 When CASAC -- CASAC concurred unanimously that an
4 eight-hour measuring period should be substituted for the
5 one-hour period.

6 QUESTION: I had assumed that it meant you
7 couldn't go over those levels during eight-hour period in
8 the day.

9 GENERAL WAXMAN: I believe that's right, but I
10 am not a -- I'm not even in the realm of being a
11 scientist, and I -- I would want to be more certain before
12 I said it, but it's not, it's not just --

13 QUESTION: Just a matter of averaging it over
14 the eight hours rather than averaging it for one hour.

15 GENERAL WAXMAN: It is in fact the three-year
16 average of the annual fourth highest daily eight-hour
17 average, if that's clear.

18 QUESTION: General, can we go back -- General,
19 can we go back to your answer from which we're sort of
20 departing. You were at the point of saying -- you had
21 said, that economics can be considered at the
22 implementation stage.

23 GENERAL WAXMAN: Yes.

24 QUESTION: Can economics be considered at that
25 stage for any purpose other than deciding what period of

1 time will be allowed for complete implementation?

2 GENERAL WAXMAN: Yes. Both by the agency --

3 QUESTION: Explain how that works.

4 GENERAL WAXMAN: Okay first of all, costs are --

5 the statute requires the EPA to do a risk assessment

6 analysis which was referred to earlier, and that be

7 provided to the states and Congress, and Congress

8 routinely reviews this to determine whether to adjust the

9 enforcement burdens that the statute applies.

10 QUESTION: Can EPA itself make such a decision?

11 GENERAL WAXMAN: Yes, it can, in the following

12 respects. First, if a state fails to create a SIP, a

13 state implementation plan, EPA must do it and in doing its

14 own implementation plan for one of the 3,000 areas in the

15 country, it must reference all of that data, as if it were

16 a state. Secondly --

17 QUESTION: Okay.

18 GENERAL WAXMAN: I have a whole list.

19 QUESTION: Go ahead. Go ahead.

20 GENERAL WAXMAN: Which I hope will answer your

21 question. Leaving aside question of postponement of the

22 dates and extensions of time, the EPA must use that data

23 to determine what control technique guidelines will be

24 imposed with respect to ozone in particular. It must use

25 that data in determining what requirements to place on

1 light duty truck emissions. It also must use that data to
2 set performance standards for new stationary sources of
3 air pollution and for new motor vehicles. The theme here
4 is, as I said before, we have in essence a two-part
5 statute. Part one is set the standard. And part two is
6 implementation, which also imposes lots of regulatory
7 obligations on EPA itself.

8 QUESTION: Can EPA ever make this decision?
9 Over any conceivable period of time. It simply will be
10 economically undesirable to exact the cost of meeting this
11 standard, therefore, we will not require this standard to
12 be met. We will require, say, nothing more than
13 compliance with this standard discounted by 40 percent.

14 GENERAL WAXMAN: No.

15 QUESTION: Can it make that judgment?

16 GENERAL WAXMAN: It may not make that judgment,
17 and the reason is, as you suggested in I believe in an
18 earlier question that that judgment was specifically and
19 expressly left to Congress. The Senate report which
20 accompanied promulgation of the 1970 act, at pages 2 and 3
21 and 10 expressly reflect Congress' judgment that that
22 determination is to be left for Congress upon reviewing a
23 technology-forcing statute in which costs will not be
24 considered.

25 QUESTION: I wanted to know whether I got it

1 right, but you are telling me --

2 GENERAL WAXMAN: Yes.

3 QUESTION: You are telling me that yes --

4 GENERAL WAXMAN: Yes. They cannot -- EPA can --

5 QUESTION: I wasn't aware, I wasn't aware that
6 they could extend the time beyond, beyond what Congress
7 has prescribed.

8 GENERAL WAXMAN: They can't. Congress has
9 provided, for example, with respect to attainment of the
10 standard under a state implementation program that
11 attainment must be achieved within five years, but EPA can
12 extend it for another five years and then give two
13 additional one-year extensions, all by referencing
14 questions of costs, feasibility, etc. The EPA -- I want to
15 address the legislative history in a moment because the
16 history both before and after the 1970 acts is very
17 revealing here.

18 QUESTION: Is the -- is the congressional scheme
19 for Congress to revisit this if it chooses, is that
20 necessary to save this from unlawful delegation?

21 GENERAL WAXMAN: No. I don't think so at all.
22 The first thing that Congress did after it passed the '70
23 act was to provide in 1977 that the standards should be
24 reviewed and revised every five years. Now, that is a
25 provision that is codified in Section 109(d). It's a new

1 provision, and it's significant because what it says is
2 that the revisions shall be made in the same manner as the
3 original standards are set, by reference to the criteria
4 documents and Section 109(b).

5 Now, I think that one of the things one can
6 glean, one of the many things one can glean from the
7 legislative history, is that when Congress did that in
8 1977, it knew repeatedly without any doubt and from a
9 commission that it itself asked to look at this question,
10 that the EPA was setting the standards without reference
11 to costs or other implementation factors, and yet, it
12 required the EPA to revise the standards every five years
13 and expressly said that they are to do so in the same
14 manner as which the original standards are set. There
15 was, in particular, a 1970 Congressional Research Service
16 Report, 1975, Congressional Research Service Report that
17 was asked to look at this question, and outlined the
18 debate over whether to retain the effects of the
19 pollutants as the sole criteria of standard setting, and
20 Congress did that in 1977.

21 But it went further, Justice Kennedy. It also
22 directed that another commission, an independent
23 commission, be established to look at this question, and
24 that commission reported to Congress in 1981, and it said,
25 "the current statutory criteria and requirements for

1 setting air quality standards at the levels necessary to
2 protect public health without considering economic factors
3 should remain unchanged." And when Congress revised the
4 statute in 1990, that's exactly what it did. And both the
5 House and the Senate reports accompanying the 1990
6 legislation said that primary NAAQS are "set at a level
7 that protects the public health with an adequate margin of
8 safety without regard to the economic or technical
9 feasibility of attainment.

10 This Court itself said in the Union Electric
11 case, construing the Clean Air Act, and I'm quoting, "when
12 Congress intended the administrator to be concerned about
13 economic or technological feasibility, it has expressly so
14 provided." And in the Benzene case, which my opponent has
15 cited but which I think strongly supports us, the Court
16 said, and I am quoting, "when Congress has intended that
17 an agency engage in cost/benefit analysis, it has clearly
18 indicated such intent on the face of the statute."

19 Now there, this Court determined that before
20 OSHA could lower the level for a particular toxic material
21 or hazard physical agent below an existing standard, it
22 had to determine that there was a significant risk to
23 safety. And that determination was to be made without
24 reference to cost/benefit analysis, and if I can just say
25 one thing with respect to the previous argument, that

1 standard, significant risk to safety, has no more
2 countervailing extraneous factors imported into it than
3 the public health adequate margin of safety requisite
4 standard that exists here. In fact, this Court went on at
5 length to say that it doesn't require mathematical
6 precision and there will be a range of factors and that
7 judgment has to be rendered and that the court will simply
8 have to review whether the decision is arbitrary or
9 capricious.

10 QUESTION: So what happens if it turns out
11 because of science that the internal combustion engine
12 does always affect somebody and so that having cars will
13 have some adverse health effects, but what is the EPA
14 supposed to do?

15 GENERAL WAXMAN: Well, the EPA reasonably
16 interprets the Clean Air Act as not either requiring or
17 permitting it to set levels that are at or below
18 background levels, and it has never yet, I mean, you know,
19 science inexorably creeps forward, but the EPA has never
20 set, found a level necessary, for example, to eliminate
21 the internal combustion engine. In fact, with respect to
22 ozone, the first time the EPA changed the standard, it
23 changed the standard from a .08 one-hour standard, which
24 is much stricter than what we have here, to a .12 one-hour
25 standard. That is, it relaxed it and of course, it was,

1 this goes to Justice Scalia's question from a while ago,
2 it relaxed it and of course the American Lung Association
3 and others came running in and saying that's ridiculous.
4 You know, how can you be relaxing the standard? Health
5 effects could occur. And you know I commend the D.C.
6 Circuit's opinion, in, it's called American Petroleum
7 Institute vs. Kostill for an analysis of why there are, in
8 fact, countervailing factors that would permit an
9 administrator exercising judgment within the zone of
10 reasonableness to raise the standard.

11 Now, I want to say something about your, your
12 earlier question about what if the costs were so
13 astronomical to require us to deindustrialize, although
14 deindustrialization would be quite unhealthy, and was
15 quite unhealthy. I want to say two things. First of all,
16 Congress has made a rational decision that with respect to
17 what it viewed and characterized as the most serious
18 problem facing America in 1970, which was air pollution,
19 that it wanted to create an agency, an expert agency that
20 would rely on science and the latest scientific knowledge
21 to do as step one, just tell us. We recognize this is
22 going to be hard. We recognize that some of these
23 chemicals are "nonthreshold," but tell us, based on your
24 best judgment what level would be safe to set for the
25 whole country. And then, establishes a program for how to

1 achieve the levels by balancing the burdens between cars
2 and stationary sources of pollution.

3 But secondly, the EPA was -- the EPA has always
4 done cost estimates at the time that it promulgates the
5 criteria documents so that the states can use them in
6 implementing. And retrospective -- looking
7 retrospectively, every single one of those cost estimates
8 has vastly overstated the actual cost/benefit analysis of
9 what it took to meet that level.

10 QUESTION: What is there, though -- what is
11 there, though, that would suggest that EPA could not
12 decide that with electric motor vehicles we could achieve
13 a better standard and it would be better for health and
14 therefore, we are going to set a much lower standard?

15 GENERAL WAXMAN: Well, Justice O'Connor, the
16 reason is that when it sets the standard, it is -- and
17 this is, I'm making reference to the language of Sections
18 108 and 109 of the act, which are reprinted at pages 109-A
19 through 112-A of the appendix to our petition. They're in
20 several other places.

21 The standards must be set, it says this in 109,
22 based on the criteria. And in 108(a)(2), it says that the
23 criteria shall accurately reflect the latest scientific
24 knowledge useful in indicating the kind and extent of all
25 identifiable effects on public health or welfare which may

1 be expected from the presence of such pollutant in the
2 ambient air, so that does not look at --

3 QUESTION: You left out three words.

4 GENERAL WAXMAN: -- so that does not look at --
5 it does -- when it sets the standard, should it be .08 or
6 .09 or 3.5, when it sets the standard, it does not look
7 at, are there electric cars or not electric cars or are
8 there scrubbers for SO2 emissions or not? It sets the
9 standard at what is requisite to protect public health
10 from the effects of that ubiquitous pollutant, but once
11 those standards are set, it is then up to the states and
12 EPA to determine one, what areas within our jurisdictions
13 don't meet those general standards, and then --

14 QUESTION: I understand. That's what have you
15 been saying all along, but a few minutes ago, you seemed
16 to be trying to reassure that well, I mean, EPA
17 understands we have automobiles and they're not going to
18 set something that means there's no more automobile use in
19 the country. And yet, what you have just said again would
20 indicate that's not a consideration in setting the
21 standards.

22 GENERAL WAXMAN: It's not a consideration in
23 setting the standards, and the point that I wanted to
24 make. I didn't successfully make it. Is that time and
25 again with respect to each one of these standards, there

1 have been complaints that this would require 10 horrible
2 things. With respect to the original standards, which
3 then authorize the EPA to set tailpipe emissions for new
4 cars. This is discussed extensively in some of the amicus
5 briefs. The automobile industry stated publicly that it
6 was impossible to meet those standards, and if it were
7 possible, the companies would go bankrupt. As it turns
8 out, the standard -- the companies did develop the
9 technology. They met the standards well ahead of the
10 schedule that EPA and Congress had revised and as a result
11 with respect to all six of the criteria pollutants, the
12 health in this country is vastly better now than it was in
13 1970, even though we have a much bigger population and we
14 have a much greater level of industrialization.

15 QUESTION: But it would probably be even better
16 if we set it at zero.

17 GENERAL WAXMAN: Well, I don't think -- well,
18 this is a --

19 QUESTION: I would have thought the health would
20 be a lot better if we just said no pollutants.

21 GENERAL WAXMAN: Well, Justice O'Connor, that
22 would be a question for Congress because everybody
23 understands and Congress has said that it does not expect
24 or allow the EPA to regulate to zero biological risk. It
25 regulates to a --

1 QUESTION: The statute doesn't say that, does
2 it?

3 GENERAL WAXMAN: It does. It does. With
4 respect. It says that standards must be set at levels
5 that are requisite, that is necessary, but not more than
6 necessary to protect against, not all effects, but public
7 health effects arising from the presence of the pollutant
8 in the air, which the agency and the courts, supported by
9 the legislative history, interpret as meaning effects that
10 are of medical significance that affect a sufficiently
11 significant proportion of the population that the
12 administrator in her judgment can conclude reasonably that
13 it constitutes a public health effect. Now --

14 QUESTION: Are you saying -- I think you're
15 saying you'd never get to zero because there is no reason
16 to believe that you would have to get to zero to end what
17 are understood to be treatable diseases or treatable
18 effects?

19 GENERAL WAXMAN: That is correct.

20 QUESTION: It's treatability -- is the effect
21 the criterion, isn't it, then?

22 GENERAL WAXMAN: Treatability is a -- is one of
23 the factors that goes -- that builds into the accepted
24 medical profession's definition of what constitutes an
25 adverse health effect. But it would also -- may I just

1 finish the answer? It would also never be required
2 because the EPA, the statute, this is not a statute that
3 requires or permits the EPA to take our society to zero,
4 to take our society below what otherwise occurs in the air
5 without all of this man-made pollution-inducing activity.

6 QUESTION: I'm sorry. The reason that I ask, it
7 says the presence of such pollution in the ambient air in
8 varying quantities. In varying quantities. So I thought,
9 given that word, that there is no effect that the EPA
10 administrator can't take into account if that effect is a
11 public health effect, and is different at different
12 quantities.

13 GENERAL WAXMAN: That is correct. She is --

14 QUESTION: All right. If that is correct, then
15 mightn't it be factually true, I mean, that if you were
16 going to electric cars, or you're really going to change
17 the whole economy, the chances of the costs being so
18 fantastic that they have serious adverse health effects
19 are fairly high, and the saving might be fairly low in
20 terms of health. Maybe that isn't so.

21 GENERAL WAXMAN: I don't know whether or not
22 it's possible or not, Justice Breyer, but I will say this.
23 In 30 years under this act, and this act is -- this act is
24 the premiere example of the point that Justice Kennedy was
25 expressing for the Court in Loving of cooperation between

1 two different branches under the separation, under the
2 permissible separation of powers to achieve a result.
3 Congress has over and over and over again adjusted
4 implementation issues in response to problems of cost and
5 feasibility, but never, it has never done either of the
6 following two things. It has never changed a NAAQS.
7 Never said no, that's too low, we'll have to
8 deindustrialize, and it has never changed the factors that
9 EPA considers and doesn't consider in setting NAAQS.

10 QUESTION: Have there been, have there been
11 other cases in other regulatory statutes where the
12 government has argued that it survives a delegation
13 challenge because there is a cost/benefit analysis -- i.e.
14 have you taken a position, in other cases, in other
15 agencies, cases where cost/benefit is a way to save the
16 statute from the delegation session.

17 GENERAL WAXMAN: Not that I'm aware of, although
18 in some of the rate-making cases, I think it was probably
19 apparent from the context. I mean, my colleague cites
20 Hope Natural Gas, which was not a nondelegation case, but
21 it was apparent from the context. But I think the
22 interesting point, Justice Kennedy, is that this Court has
23 decided many cases in which it is clear that it was
24 neither necessary nor important. Benzene is the best
25 possible example of that. But it is also true in other

1 cases. I mean, if one can go all the way back to --

2 QUESTION: Excuse me. What was neither
3 necessary, nor important?

4 GENERAL WAXMAN: A cost/benefit analysis in
5 determining in either making the statute constitutional
6 under the nondelegation doctrine, or providing a
7 sufficient principle for determining what is a significant
8 safety risk. But the other case that just comes to mind
9 is, in many ways -- the first nondelegation case of the
10 last century, the Stranahan case, Buttfield vs. Stranahan
11 in which Congress passed a law that told the Secretary of
12 the Treasury for some reason to set uniform rates for the
13 quality of tea and to prohibit the importation of any tea
14 that did not meet those standards. Now, there's no
15 indication in the record in the case that cost/benefit
16 analysis went into the determination of what an
17 appropriate standard for tea quality was, and it's frankly
18 hard to imagine how it would have been done so.

19 In my few remaining minutes, I would like to
20 address my comments to the argument that somehow the words
21 public health requires this Court, notwithstanding 20
22 years of D.C. Circuit precedent to the contrary, to
23 require some form of cost/benefit analysis. And I have
24 five points to make with respect to that in my remaining
25 time.

1 First of all, the legislative history, the 1970
2 legislative history reflects that Congress intended the
3 plain meaning of public health to mean to protect
4 populations, not the most sensitive person as is the case
5 in the OSHA Benzene context.

6 Number two, if you look at Section 108(a) of the
7 act, which determines what criteria are, it is the effects
8 on public health of the presence of the pollutant in the
9 air that is being ascertained and costs does not make
10 sense in that context. There are also, as Justice Scalia
11 pointed out, many provisions of the Clean Air Act that
12 require consideration of both costs and public health, and
13 they are collected in the brief of Massachusetts and New
14 Jersey at page 29.

15 Well -- penultimately, the Winslow definition,
16 the 1951 definition that ATA cites is a definition of the
17 profession of public health, the discipline of public
18 health. There is no showing in this record or in the
19 legislative history that that case, that that definition
20 was ever even cited in -- by 1970, much less brought to
21 the attention of Congress. And there is no showing
22 whatsoever in the legislative history that that definition
23 was interpreted that way before 1970. I mean, it would
24 require Section 109(b) to say that NAAQS must be set at
25 the level requisite to protect the profession of public

1 health with an adequate margin of safety. And in fact,
2 there is a reference to the fact that all public health
3 organizations agree you can only determine this with
4 respect to costs, at page 36, footnote 27 of our principle
5 brief on this appeal, we reference and describe the
6 expressed views of the American Public Health Association
7 which is the national umbrella organization for public
8 health professionals, which specifically has endorsed the
9 process that EPA uses for setting the NAAQS standard. In
10 short, there is nothing in Section 108 or 109 that permits
11 EPA to set a level inadequate to protect the public health
12 because of the costs of compliance. If there are no
13 further questions.

14 QUESTION: Thank you, General Waxman. Mr.
15 Warren, have you one minute remaining.

16 MR. WARREN: Your Honors, the cotton dust case,
17 which did construe Section 38, said that cost/benefit
18 analysis either permitted or required by section 38 of
19 that statute, it was ruled out only because the statute
20 provided a feasibility analysis. That's the only thing
21 that ruled it out. The examples that Mr. Waxman, or
22 General Waxman gave are all feasibility examples. He
23 concedes that the standard itself cannot be changed after
24 it is set, and lastly, we have acted as if this provision
25 has made sense in the D.C. Circuit. I call the Court's

1 attention to the American Lung Association case, which
2 shows that this interpretation of the statute makes no
3 sense from any perspective. That was a case where the
4 agency refused to regulate sulfur oxides.

5 Lastly, I would call to the Court's attention
6 the State of Michigan state as an example where there was
7 --

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Warren.
9 The case is submitted.

10 (Whereupon, at 12:15 p.m., the case in the
11 above-entitled matter was submitted.)
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