

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ANDREW S. NATSIOS, SECRETARY OF
ADMINISTRATION AND FINANCE OF
MASSACHUSETTS, ET AL., Petitioners v. NATIONAL
FOREIGN TRADE COUNCIL

CASE NO: 99-474 *c.2*

PLACE: Washington, D.C.

DATE: Wednesday, March 22, 2000

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANDREW S. NATSIOS, SECRETARY :
4 OF ADMINISTRATION AND FINANCE :

5 OF MASSACHUSETTS, ET AL., :
6 Petitioners :
7 v. : No. 99-474

8 NATIONAL FOREIGN TRADE COUNCIL :
9 - - - - - X

10 Washington, D.C.

11 Wednesday, March 22, 2000

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:14 a.m.

15 APPEARANCES:

16 THOMAS A. BARNICO, ESQ., Boston, Massachusetts; on behalf
17 of the Petitioners.

18 TIMOTHY B. DYK, ESQ., Washington, D.C.; on behalf of the
19 Respondents.

20 SETH P. WAXMAN, ESQ., Solicitor General, Department of
21 Justice, Washington, D.C.; on behalf of the United
22 States, as amicus curiae, supporting affirmance.

	C O N T E N T S	
		PAGE
2	ORAL ARGUMENT OF	
3	THOMAS A. BARNICO, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	TIMOTHY B. DYK, ESQ.	
7	On behalf of the Respondent	23
8	ORAL ARGUMENT OF	
9	SETH P. WAXMAN, ESQ.	
10	On behalf of the United States, as a amicus 11 curiae, supporting affirmance	41
12	REBUTTAL ARGUMENT OF	
13	THOMAS A. BARNICO, ESQ.	
14	On behalf of the Petitioners	49
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:14 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 99-474, Andrew S. Natsios v. The National
5 Foreign Trade Council. Mr. Barnico.

6 ORAL ARGUMENT OF THOMAS A. BARNICO

7 ON BEHALF OF THE PETITIONERS

8 MR. BARNICO: Mr. Chief Justice, and may it
9 please the Court:10 The Massachusetts law challenged in this case is
11 similar to the selective purchasing policies adopted by
12 many States, cities, and private institutions in the
13 1980's regarding South Africa. Through the 1980's and
14 1990's, Congress addressed both South Africa and Burma,
15 but took no action to expressly prohibit to the States or
16 individuals the right to make choices about their vendors
17 taking into account matters involving a foreign country.18 We think that Congress has not expressly denied
19 to us the right to make this choice, because it believes,
20 as we do, that these laws serve important national and
21 local interest. There is a national interest in vigorous
22 debate over important questions of foreign policy. There
23 is a local interest as well, the interest in
24 disassociating States and State tax funds from the
25 indirect support of brutal regimes abroad.

1 QUESTION: Mr. Barnico, would you take the same
2 position if Massachusetts decided it didn't like another
3 State's death penalty policy and wanted to discourage it
4 and said, we're not going to let anybody spend State money
5 to buy anything if the seller has anything to do with the
6 other State?

7 MR. BARNICO: Not if the law regulated our
8 citizens in that way, but if it were expending our own
9 funds, as it is in this case, we would consider that to be
10 proprietary as well under our definition. We quickly add
11 that we don't think it would be a usual case at all, given
12 the comity and respect each State ordinarily shows each
13 other.

14 QUESTION: Well, isn't the Gould case somewhat
15 against you on this point, or the Wisconsin Department of
16 Labor? It said that Wisconsin is not going to buy from
17 anyone who has violated an NLRB order and they said, we're
18 just expending our own money, and this Court said, you may
19 be spending your own money but that's -- what they said
20 was, tantamount to regulation.

21 MR. BARNICO: Well, we think there, and the
22 difference with Gould and this case, is the fact that the
23 Court saw a nexus between the regulatory scheme imposed by
24 Federal law and the State action that was at issue. To
25 give the Court an example of what might be closer to Gould

1 than our case would be if Massachusetts had somehow tied
2 its purchasing decisions to violation of the Federal ban
3 on new investment in Burma.

4 There, there might be more of a nexus between
5 the regulatory scheme on the one hand -- we think it was
6 the close connection between the Wisconsin scheme on the
7 one hand and the Federal complete scheme of regulation of
8 the labor field that made the Court decide that we were
9 regulatory in nature.

10 QUESTION: Mr. Barnico, would it make any
11 difference in your analysis if the country with which we
12 were dealing were not Burma but, say, Austria, or
13 Switzerland?

14 MR. BARNICO: The country wouldn't matter, Your
15 Honor, except insofar as some Federal law or treaty
16 established relations between the United States and the
17 country --

18 QUESTION: So that a State would be free to
19 decide what country it believed is violating some human
20 rights norm, be it Austria, be it Burma?

21 MR. BARNICO: That's right, except insofar as a
22 plausible argument could be made that we were preempted by
23 a Federal law or treaty on the point. That really is the
24 heart of our case, that absent the force of enacted law
25 through the Supremacy Clause, such a choice by a State

1 should not be displaced by the Foreign Commerce Clause or
2 the dormant foreign affairs power.

3 QUESTION: Do you think that Congress --

4 QUESTION: Would your answer be the same if two
5 States had different policies? One State says, we will
6 buy not from mainland China but Taiwan, and the others
7 state just the opposite. Absent Federal legislation on
8 the point, States are free to do that, and to have
9 differing policies?

10 MR. BARNICO: That's right, Your Honor. At some
11 point the differing policies becomes to the attention of
12 Congress, and Congress, which has the preeminent voice in
13 foreign affairs, would decide whether the national
14 interest requires a rule of uniformity, but absent that
15 action, or absent some question of a treaty, the States
16 would be free to act indirectly in this way.

17 QUESTION: I'm not sure it's realistic to expect
18 the Congress to exercise this ongoing supervision over
19 every local ordinance, over every State statute, and it
20 certainly is inconsistent with what the Federalist Papers
21 explain was the purpose of forming the Union itself.

22 MR. BARNICO: Well, if I might address both of
23 those points, Your Honor, the first is on the question of
24 the proliferation of these laws. We have to keep in mind
25 that we're acting against our own economic interest here.

1 Massachusetts is paying the price, bearing the burden to
2 speak out on this question. Since that's the case, our
3 principle will be limiting, because it will limit those
4 instances in which a State or local government which is to
5 act against its own interest and act in the way that's
6 challenged here.

7 Furthermore, Congress will be aware, presumably,
8 in the event that a controversy arises due to the
9 conflicting actions of the States as you mentioned, and
10 it's also worth noting, finally, on the proliferation
11 question, that even at high tide in the eighties with
12 South Africa it was 20 States, approximately 100 cities,
13 so I think the parade of horribles that's raised by the
14 other side here about the numerous jurisdictions isn't
15 realistic.

16 QUESTION: Well, here Congress has actually
17 enacted a law dealing with this precise problem, an area
18 of trade with Burma, has it not?

19 MR. BARNICO: It has enacted a law imposing
20 Federal sanctions on Burma --

21 QUESTION: Yes.

22 MR. BARNICO: Restricting new investment by
23 American nationals in that country. It says nothing,
24 however, about State and local action, and we think the
25 question of preemption --

1 QUESTION: Oh, but isn't that kind of similar to
2 what happened in the Hines v. Davidowitz case back in '41,
3 when Pennsylvania had a law dealing with what resident
4 aliens had to have to be in that State, and it was
5 possible, certainly, for a resident alien to comply both
6 with the Federal law and the State law, and yet that was
7 stricken, wasn't it?

8 MR. BARNICO: Yes, Your Honor, but we think that
9 the key phrase from our point of view and Hines would be
10 the reference to a complete scheme of regulations that was
11 in issue there in Hines. That is, the inference that the
12 field has been occupied by the Federal action, that the
13 Federal action here must be read in light of the
14 experience of the 1980's.

15 Our point is that Congress knew well that State
16 and local actions of this type were enacted throughout the
17 country in the 1980's. Then, when the question of
18 sanctions against Burma arose in 1996, it acted against
19 that backdrop. It had tolerated these types of laws and,
20 in fact, and we think this very interesting evidence, in
21 1993, when Congress repealed the sanctions against South
22 Africa, it merely encouraged the States to act as to their
23 own laws.

24 QUESTION: Well, think of California, with 30
25 million people, probably a major textbook buyer, probably

1 buys a lot from Massachusetts. Suppose the State system
2 said, we won't buy any textbooks from Massachusetts
3 because we don't like their environmental policy in that
4 State. We don't like their criminal law policy. We don't
5 like this, we don't like that. We don't like their labor
6 policy.

7 How could you run a Federal Government if
8 States, when they're huge buyers, could refuse to buy from
9 some other State because they don't like the State law in
10 something and want it changed. I mean, is that
11 constitutional?

12 MR. BARNICO: Well, the Federal Government would
13 be run by Congress stepping in in the event --

14 QUESTION: No, no, I mean, the Federal -- in
15 other words, in your view, California could say, we will
16 not buy any textbooks from Addison-Wesley for the reason
17 that we don't like Massachusetts policies in respect to
18 the environment, or we don't like their policy -- they
19 have no death penalty. We think they should.

20 MR. BARNICO: The action's still proprietary,
21 Your Honor. It's still a choice by the State acting --

22 QUESTION: But your answer's yes. Your answer
23 is that the Constitution would permit that under the
24 Commerce Clause.

25 MR. BARNICO: That's right, because of the

1 safeguard included in the document to allow Congress to
2 act in the event the national interest required.

3 QUESTION: I assume California could, under our
4 decisions, decide to buy textbooks only from California
5 manufacturers. Could it do that, in its purchasing?

6 MR. BARNICO: That's right, Your Honor.

7 QUESTION: Yes. Yes.

8 QUESTION: So that's just as destructive of
9 national unity in a way, isn't it?

10 MR. BARNICO: Right, but the holdings of the
11 Court regarding market participation say that whatever the
12 effects of such a law, whatever the question of national
13 interest or uniformity, the dormant Foreign Commerce
14 Clause in that case is not displacing of that type of
15 State choice. It resembles that consumer choice.

16 QUESTION: Well, surely there's a difference in
17 those two cases. In the hypothetical Justice Scalia
18 proposes, California doesn't propose to regulate activity
19 and policies of other States.

20 MR. BARNICO: That's right.

21 QUESTION: So that's different from Justice
22 Breyer's hypothetical.

23 MR. BARNICO: It is different to the
24 hypothetical, but the underlying point, of course, both as
25 to the dormant Commerce Clause in the hypotheticals and

1 the Foreign Commerce Clause that's at issue here, is that
2 those dormant clauses don't reach a certain limited sphere
3 of State activity in which the States can speak and act as
4 they have here. That's really the point of our case.

5 QUESTION: Do you concede that there is a
6 dormant Commerce Clause principle in the international
7 area under the Foreign Commerce Clause?

8 MR. BARNICO: We concede that the Court has
9 recognized in cases such as Barclays some foreign effect.
10 Our point here is that it must be considered and applied
11 with extreme caution in this case. That's because, to
12 return to the historical point, the Framers specifically
13 identified those actions of a State that pose dangers in
14 their view to the national interest, so --

15 QUESTION: Mr. Barnico, you mentioned before
16 that this case is different from Massachusetts, preferring
17 itself as an economic actor, that here it is acting for
18 reasons of foreign policy, and there's no doubt that
19 Congress has the control power, but why shouldn't the
20 assumption be that unless Congress says, States, you can
21 do this, that States can't once Congress has occupied the
22 field at least to the extent of having its own Burma law?
23 Why shouldn't the presumption be exactly the opposite,
24 that is, no State action unless Congress gives them
25 permission?

1 MR. BARNICO: I think this case shows why that
2 presumption goes too far. That's because, although I
3 acknowledge the national interest in the control of
4 foreign policy that's at the heart of your question, this
5 case demonstrates why such a presumption would go too far.

6 There has to be a sphere of State activity so
7 important to the States to speak, to act, to disassociate
8 their funds from this type of regime that the Framers
9 intended to be protected, so as you come to the question
10 of presumption, it seems to me a similar question to the
11 effect of the dormant foreign affairs powers. That is, is
12 there a sphere of State activity such as a resolution,
13 such as a selective purchasing law, so close to the
14 boycotts that the Framers knew so well, that ought to be
15 protected?

16 The presumption would go too far, just as it
17 would operate in this case. It would simply be the fact
18 that Federal Government has acted as to Burma with Federal
19 sanctions, and that's the end of the story, and this
20 particular case also is a demonstration why the
21 presumption would be dangerous.

22 QUESTION: Mr. Barnico, you mentioned the
23 historical approach a few minutes ago. Is there a
24 historical basis for -- say, prior to the 1980's for
25 States taking this sort of position with respect to

1 foreign Governments?

2 MR. BARNICO: You'd have to go back under our
3 research only to the revolutionary times. In the interim
4 there were no such actions. I think the eighties --

5 QUESTION: Until the 1980's?

6 MR. BARNICO: The eighties is what we have in
7 mind.

8 QUESTION: Oh, but there were in the
9 revolutionary times, weren't there?

10 MR. BARNICO: That's right, and they included --

11 QUESTION: Virginia passed laws that prevented
12 the collection of British debts, and there was litigation
13 over that.

14 MR. BARNICO: And -- but we have a different
15 approach, though, as to the boycotts in particular.
16 There's such a strong match here between the boycotts of
17 the revolutionary times and --

18 QUESTION: When you say revolutionary times, do
19 you mean before the Constitution was adopted?

20 MR. BARNICO: Absolutely, Your Honor, and
21 before --

22 QUESTION: I mean, I don't know that that's a
23 terribly satisfactory basis for analyzing the thing after
24 the Constitution was adopted.

25 MR. BARNICO: Well, it goes to the intent of the

1 Framers in adopting the foreign affairs clauses, Your
2 Honor, and the question would be, since the Framers
3 enumerated a number of prohibitions regarding treaties and
4 engaging in war and so forth, we'd have to ask ourselves
5 the question, do the affirmative grants of power to the
6 executive and legislative branches in the Constitution
7 have a nullifying force implied?

8 That is, to what extent does the grant to
9 Congress and the President nullify other State actions
10 that affect foreign affairs, and there we come to the
11 revolutionary times, because the Framers, who knew
12 boycotts well, who held them dear, did not enumerate them
13 as prohibited, and we say it would be highly unlikely to
14 deny to the States the rights that they knew were useful
15 and they knew were so bound up with questions of speech
16 and choice.

17 QUESTION: Mr. Barnico --

18 QUESTION: If you're right, Mr. Barnico, why
19 were there -- have there been no Barnic -- no boycotts --
20 (Laughter.)

21 QUESTION: -- between the time the Constitution
22 was adopted and the 1980's?

23 MR. BARNICO: Well, I think that has to do with
24 the fact that there was very limited global trade for
25 those years. There was limited information available to

1 State governments about other activities in foreign
2 States. This is a --

3 QUESTION: How about the activities of Stalin in
4 Russia and Hitler in Germany and Mussolini in Italy?

5 MR. BARNICO: Well, I don't know why, Your
6 Honor, but of course once -- in times of war the Federal
7 Government does act to establish a rule of uniformity.
8 Whether that has to do with neutrality or aiding a
9 resistance group, there's a new set of rules that would
10 kick in which aren't disturbed by our rules. That is, you
11 need not be concerned that actions of this type would be
12 aid of one side or another in a war, because there is a
13 specific prohibition in Article I, section 10, that the
14 States may not engage in war.

15 So, too, Congress often acts. The President
16 sometimes declares that countries are in a State of war,
17 and so neutrality is preserved through the action of the
18 Federal branch with authority to determine the national
19 rule of uniformity, but of course we argue here that
20 branch hasn't acted.

21 QUESTION: Mr. Barnico, may I go back to an
22 answer that you gave both to Justice Ginsburg and to the
23 Chief Justice a moment ago in which you emphasized the
24 expressive nature of the boycott activity which
25 Massachusetts is engaging in. Why doesn't that suggest

1 that the proper way to draw the line is to allow States to
2 express themselves, to express their views solemnly any
3 way they want to, so long as they do not go beyond the
4 point of verbalizing?

5 Massachusetts or any State could pass, for
6 example, on this theory, resolutions condemning the regime
7 in Burma and, indeed, condemning those who do business
8 with it, but it would be left to the United States to go
9 beyond the expression of views and to regulate actual
10 relationships, including economic relationships. Wouldn't
11 that be a sensible way of having a theory behind our
12 preemption doctrine under the Foreign Commerce Clause?

13 MR. BARNICO: Well, of course we agree that we
14 ought to be able to speak in that way, but we don't think
15 the rule is sufficient for this reason. We think that it
16 leaves us open to the indirect support, through the use of
17 our money, the companies that are doing business in the
18 country.

19 QUESTION: Well, it does that, but that is a
20 judgment of the United States that it is not at least
21 inappropriate for that result to occur. On my proposal,
22 you would get to engage in expression. You would clear
23 your conscience, and any fault would lie, I suppose, at
24 the door of the national Government that was either
25 permitting or at least refusing to block this kind of

1 trade.

2 MR. BARNICO: Well, I'm not sure that it would
3 clear our conscience, because our conscience is based on
4 so much history. To allow us to feel that we were
5 indirectly supporting what's going on in Burma would be so
6 contrary to the principles that underlie our own State
7 constitution, which refers to unalienable rights, the
8 point of view of Massachusetts that it has universal
9 rights at stake here --

10 QUESTION: I think I understand your point. It
11 leads to a second question, and it anticipates a question
12 I was going to ask your friends on the other side, but
13 let's assume for the sake of argument that we accept the
14 position of the other side and we say that the
15 Massachusetts statute is preempted. What will
16 Massachusetts do then? Will it start, in fact, trading
17 with companies that do business with Burma, or,
18 conversely, will it continue to follow the policy that it
19 has now, even though that policy is not, as a matter of
20 law, enforceable against anyone because of the preemption?

21 I guess I'm saying, will you continue to find
22 ways to express yourselves and your conscience, even if
23 there is a preemption or some other source of invalidity
24 in the statute found so that the statute is not, as such,
25 enforceable?

1 MR. BARNICO: Well, it will always depend on the
2 circumstances in the foreign country.

3 QUESTION: Well, I'm assuming the circumstances
4 in the foreign country remain as they are now. Assume
5 that today you have the statute on the books, tomorrow the
6 statute is preempted. What does Massachusetts do in fact,
7 if it is preempted?

8 MR. BARNICO: Well, as a matter of State law we
9 would be bound to accept the proposals of bidders for
10 State contracts.

11 QUESTION: So you would go ahead and trade with
12 them?

13 MR. BARNICO: As a matter of State law, we
14 wouldn't have a choice, provided that the people otherwise
15 qualified for the bid.

16 QUESTION: But it's a matter of State law that
17 would bind you, in other words?

18 MR. BARNICO: The State law governing
19 procurement.

20 QUESTION: Yes.

21 QUESTION: But even if that State law didn't
22 exist, I presume that if we said that Massachusetts can't
23 do this by action of its legislature, we would also say
24 that Massachusetts can't do it by action of its Governor,
25 the Governor simply deciding, oh, you know, yes, the

1 Supreme Court has said that the legislature can't bar
2 these companies from our contracts, but just as my -- in
3 my capacity as Governor I'm not going to let any contracts
4 to these people. That would be invalid as well, wouldn't
5 it?

6 MR. BARNICO: We'd still be here. We'd be here
7 in the event that an executive official had decided that
8 State law was broad enough to take into account the fact
9 the companies were doing business in Burma.

10 QUESTION: Well, you'd be here on a contempt
11 citation.

12 (Laughter.)

13 QUESTION: Mr. Barnico, you mentioned
14 globalization, and you say that's why there's been no
15 action since the colonial times up until now, but one
16 feature of at least the U.S.-Burma law is concern with the
17 reaction of our neighbors in the world community, the
18 desire to have multilateral action, and you know that
19 sanctions have been a controversial subject.

20 MR. BARNICO: Right.

21 QUESTION: So for Massachusetts to go it on its
22 own when the United States is saying, we want to get
23 together with our world neighbors on that, isn't there a
24 clash with the authority that the Founders wanted the
25 national Government to have to speak with one voice on

1 matters of foreign policy?

2 MR. BARNICO: There's no clash in the preemption
3 sense, Your Honor, because, of course, the U.S. sanctions
4 are both unilateral and multilateral. The State sanctions
5 don't clash in that respect.

6 QUESTION: But this sanction was considered and
7 deliberately not done by Congress.

8 MR. BARNICO: By Congress, in its choice as to
9 the Federal sanctions, but the 1996 Federal statute cannot
10 be looked at outside the context of the 1980's and the law
11 I referred to in 1993, that essentially what we're urging
12 here, Your Honor, is, it's unreasonable to conclude on
13 this question of conflict that we have been preempted in
14 light of the history that's gone before.

15 QUESTION: May I ask this question --

16 QUESTION: The word you used previously was, you
17 didn't want to be associated with the regime that
18 seriously interferes with human rights, which is a
19 worthwhile, obviously worthwhile objective, and I can
20 understand that, but the SG says in its brief -- you use
21 the word disassociated, all right.

22 If you're right that you have that right to
23 disassociate yourself, why would we extend that to what is
24 in effect here a secondary boycott? That is, market
25 participants in many situations cannot engage in secondary

1 boycotts. Massachusetts is saying, we won't do business
2 with a Swedish firm that buys \$15 worth of whatever from
3 the Burmese Government, and why doesn't the secondary
4 boycott just go too far, given Justice Ginsburg's
5 concerns, in respect to the need to disassociate yourself?

6 MR. BARNICO: Well, we need to disassociate as a
7 practical matter because of the financial interconnections
8 among the companies, but beyond that, we need to
9 disassociate through the boycott of that type because the
10 question of boycott would entail action both against the
11 country that you hypothesized and people who do business
12 there.

13 Under the Court's precedent in Zschernig, in
14 other words, the secondary boycott as you describe it is
15 less indirect, so we think in the area of law in which
16 we're operating, to the extent that the Court is concerned
17 about effects on international affairs, a secondary
18 boycott is a reasonable means because it's indirect.

19 QUESTION: Well, we're proceeding on the
20 assumption in the last 10 minutes or so of the argument
21 that Massachusetts has a right to speak on foreign
22 affairs, to dissociate itself from certain actions. Is
23 there any opinion from this Court which says a State has
24 the same First Amendment rights as a citizen?

25 MR. BARNICO: No --

1 QUESTION: Can we have 50 States passing
2 resolutions denouncing different Governments? I know of
3 no such principle that's been established. Maybe we'll
4 establish it in this case.

5 MR. BARNICO: It's not a First Amendment right
6 per se, Your Honor. I don't know of such a case that you
7 mentioned, but it has to do with the values that underlie
8 the nature of the action here, which --

9 QUESTION: May I ask this question? You would
10 concede, would you not, that Congress could pass a statute
11 prohibiting this policy?

12 MR. BARNICO: We assume so.

13 QUESTION: What about the President? Could the
14 President, by executive order, preclude this type of an
15 activity?

16 MR. BARNICO: I'd say no, Your Honor, absent a
17 clear delegation from the legis --

18 QUESTION: You don't think his foreign affairs
19 authority would be sufficient for that?

20 MR. BARNICO: No. There needed to be a clear
21 statement from Congress to act in that instance, although
22 Congress has delegated to the President important powers
23 in foreign affairs in the past.

24 If there are no further questions, I'd like to
25 reserve the balance of my time.

1 QUESTION: Very well, Mr. Barnico.

2 Mr. Dyk, we'll hear from you.

3 ORAL ARGUMENT OF TIMOTHY B. DYK

4 ON BEHALF OF THE RESPONDENT

5 MR. DYK: Mr. Chief Justice, and may it please
6 the Court:

7 The first thing I think to make clear is that
8 the purpose of the Massachusetts law is that the district
9 court explicitly found, based on Massachusetts
10 concessions -- and that's reflected at page 81 of the
11 appendix to the petition -- was to condemn Burma and to
12 change the domestic policies of that nation, and the
13 mechanism that Massachusetts has chosen to accomplish
14 that, as Justice Breyer mentioned, is a coercive secondary
15 boycott, the kind of action which no private individual
16 would engage in, and that's undisputed in the record if
17 you look at pages 32 and 560 of the appendix in the court
18 of appeals.

19 Massachusetts has \$2 billion in purchasing power
20 every year. If it joined together with the other States
21 and municipalities, the estimates in the briefs are that
22 there's \$700 billion --

23 QUESTION: Well --

24 QUESTION: May I ask --

25 QUESTION: -- without enacting something with

1 the purpose, can it just spend its money the way it wants
2 and buy from the suppliers that it wants?

3 MR. DYK: Well, Justice O'Connor, I assume that
4 that question is is it compelled to do business with
5 Myanmar if it's not attempting to --

6 QUESTION: Right.

7 MR. DYK: -- communicate a foreign policy?

8 Well, there's no obligation to deal with any particular
9 country, but if it tries to make foreign policy by saying,
10 we're doing this to condemn Myanmar to change its
11 policies --

12 QUESTION: Mr. Dyk -- oh, excuse me. Go ahead.

13 What if it was just the opposite? Instead of
14 trying to discourage something, they want to encourage the
15 change in policy in a different State. Could they offer
16 extra purchases from that community in order to
17 encourage --

18 MR. DYK: Justice Stevens, I think it would be
19 the same thing. It makes no difference whether it's --

20 QUESTION: And what if the motivation was, for
21 example, disaster in a particular country? Could they try
22 to promote recovery from the disaster by fostering
23 purchases from a company that went through a bad famine or
24 hurricane, something like that?

25 MR. DYK: I think it could do that. The

1 question is, is it trying to influence the Government of a
2 foreign country, and that's the essence of foreign
3 affairs.

4 QUESTION: It all depends on trying to influence
5 their policies? That's the key to it?

6 MR. DYK: Trying to influence it and attaching
7 consequences to it, in the sense that they're using one of
8 the tools of foreign policy.

9 QUESTION: Do we have to undertake this
10 subjective inquiry in every case, what was the purpose
11 of -- let's assume a State has a law against bigamy, and
12 the king of some Muslim country is visiting the United
13 States. He wants to stay in that State, and the State
14 says, I'm sorry, you know, you can't bring your -- you
15 know, any more than one of your wives --

16 (Laughter.)

17 QUESTION: -- and he takes umbrage at this, and
18 it's going to seriously impede our relations with this
19 foreign country.

20 MR. DYK: Well, Justice --

21 QUESTION: Can the State enforce its law?

22 MR. DYK: Justice Scalia, if it has a neutral
23 law like that and it's not designed to target a foreign
24 country --

25 QUESTION: So we have to look at the motive.

1 MR. DYK: -- that's a very different question.

2 QUESTION: The --

3 MR. DYK: No.

4 QUESTION: The State's motive can't be to
5 influence --

6 MR. DYK: No, I don't think it's a question of
7 motive. I think it's a question of objective, and what
8 you have with these selective purchasing laws is an
9 objective. They only work if you communicate disapproval,
10 or communicate a desire to change. It's not --

11 QUESTION: Well, this is quite neutral, just
12 like the bigamy law. We don't buy from anybody who
13 violates human rights.

14 MR. DYK: Well, I think that that -- if they
15 said, we don't buy from anybody who violates human rights,
16 that again looks like a foreign policy decision. That's
17 exactly the kind of foreign policy decision that the
18 United States Government makes repeatedly.

19 QUESTION: What is it that prevents the States
20 from making foreign policy decisions, in the
21 Constitution?

22 MR. DYK: Well, Justice Scalia, I think first of
23 all the -- to go back to the questions that you and the
24 Chief Justice had, before the Constitution was adopted,
25 States went their own way on sanctions, and that was a

1 severe problem. I think there's a consensus that that was
2 one of the things that led to the adoption of the
3 Constitution, that that was an intolerable situation, and
4 that was designed to be dealt with by the Constitution.

5 QUESTION: Well, it is dealt with. Congress,
6 everybody concedes, can pass a law. If the horrible
7 occurs that you have 50 States doing these things and
8 upsetting foreign relations, Congress can pass a law and
9 stop it. Isn't that enough to solve the problem that they
10 were concerned about?

11 MR. DYK: No, I think it is not enough, because
12 if Congress had to intercede every time there was a
13 problem here, as the briefs suggest, it's just not capable
14 of doing that, and that kind of institutional concern was
15 addressed by the Framers. They were concerned about that.

16 QUESTION: Where? Where was it addressed? I
17 don't see any -- in fact, I see provisions in the
18 Constitution prohibiting the States from entering treaties
19 with foreign countries, from engaging in war, from --
20 let's see, entering into any treaty, alliance, or
21 confederation. All of these things would have been
22 unnecessary if there is some overriding, unexpressed
23 principle in the Constitution that the States cannot get
24 involved in foreign affairs. You wouldn't need these
25 things.

1 QUESTION: Justice Scalia, I think it was an
2 attribute of sovereignty and, indeed, if you go back and
3 look at the Articles of Confederation, you find that the
4 Articles of Confederation was much more explicit about the
5 things that States could not do in the area of foreign
6 policy. For example, the Articles of Confederation denied
7 the States the power to send ambassadors. There's no such
8 prohibition in the Constitution as adopted. There are
9 other examples, the power to deal with captures, to punish
10 piracies.

11 If you look, if you compare the Articles of
12 Confederation with the Constitution, you find that the
13 articles were much more explicit. The working assumption,
14 we suggest, and it's reflected in the Federalist Papers
15 and in the debates in the Constitution, was that that kind
16 of specificity was not necessary, that the Constitution
17 was designed to give the foreign policy power to the
18 United States as a sovereign nation.

19 QUESTION: Well, Mr. Dyk, how does your theory
20 play out in the context of the eighties, when a number of
21 States were adopting investment policies designed to
22 encourage a change in South Africa from its apartheid
23 Government to a more democratic society? These were
24 widespread practices by States then, were they not?

25 MR. DYK: They were. There were --

1 QUESTION: Now, how does that play -- the very
2 purpose of it was to change something going on in South
3 African Government --

4 MR. DYK: Well --

5 QUESTION: -- to affect foreign policy.

6 MR. DYK: My answer to that, Justice O'Connor,
7 is, to the extent that those States and municipalities
8 used selective purchasing against South Africa, they were
9 unconstitutional and, of course, this Court never ruled on
10 that.

11 QUESTION: Now, the Solicitor General takes a
12 different view, I gather, in the brief about that.

13 MR. DYK: I don't think on the selective
14 purchasing.

15 Now, what they had in connection with South
16 Africa was two kinds of laws, the selective purchasing
17 law, such as the one we have before the Court today, and
18 I've just said that our view is that was clearly
19 unconstitutional. They also had divestiture laws, such as
20 came before the Maryland Court of Appeals in the Board of
21 Trustees case.

22 What the Solicitor General suggests is that
23 divestiture laws, that is, we're not going to invest in
24 companies, we're going to sell our stocks and bonds, could
25 present a different question. They don't --

1 QUESTION: You think it turns on purpose.

2 MR. DYK: Well, purpose plus effect. We don't
3 agree. Now, we think the divestiture laws are
4 unconstitutional, but we recognize they're quite
5 different.

6 QUESTION: What happened during the Civil War
7 years, if you know? Did States take action to try to not
8 deal with people who were using slaves? What did they --
9 weren't there actions taken by States in those years along
10 the lines that Massachusetts is taking now, or do we know?

11 MR. DYK: Against the rebellious States?

12 Justice O'Connor, I'm not sure, but I -- what I do know is
13 that the briefs of the petitioners and all their amicus
14 briefs who go into this long history about this have not
15 found a single instance between the time the Constitution
16 was adopted and the next 150 years in which States
17 asserted the right to exercise a concurrent authority in
18 the area of foreign policy --

19 QUESTION: Mr. Dyk --

20 MR. DYK: -- and under the Printz case --

21 QUESTION: -- what about Ware v. Hilton, which
22 involved the Virginia laws that I mentioned earlier, that
23 erected obstructions to the collection of debts by English
24 creditors, and hostility towards England after the
25 revolution? A Federal case, involved a challenge to those

1 laws. No one asserted that the laws were invalid because
2 Virginia had no authority to muck around in foreign
3 affairs. The entire case was argued and decided on the
4 basis of whether the treaty with England forbade this, and
5 it was accepted that if the treaty did not forbid it, the
6 Virginia laws were okay.

7 MR. DYK: Well, I can't speak to what issues
8 were raised in that case and weren't raised in that case.
9 What I do know is that the practice of refusing to honor
10 debts to British citizens was a central concern of the
11 Framers of the Constitution. They did not want the States
12 to be able to go their own way on that issue, on the issue
13 of sanctions, those were the things that concerned --

14 QUESTION: They handled it by a treaty -- by a
15 treaty, which the Constitution expressly says the States
16 must respect, but there's no provision there that the
17 States can't do anything that affects foreign affairs.

18 MR. DYK: You could -- Justice Scalia, a treaty
19 depends upon the agreement of the United States and a
20 foreign power. I cannot believe that the Framers of the
21 Constitution intended that if there were no treaty, that
22 the States could go their own way, and I believe that the
23 constitutional history, the Federalist Papers, and the
24 debates in the Constitution, support the view that they
25 did not intend that --

1 QUESTION: There's also Article VI, of course.
2 Without a treaty, Congress, if it passed a law, could pass
3 a law that would be the law of the land that would prevent
4 the States to do it, but certainly those two protections
5 are entirely adequate to prevent all of the horribles that
6 we're concerned about, that the States are going to go
7 running off with our foreign affairs power.

8 MR. DYK: Justice Scalia --

9 QUESTION: If that's a problem, the remedy is
10 there.

11 MR. DYK: Justice Scalia, as this Court made
12 clear in Curtiss-Wright and in other cases, the President
13 has an important role to play in foreign affairs. It
14 seems quite unlikely that the Framers intended to say that
15 Congress had to step in and eliminate these State laws,
16 otherwise the President's conduct of foreign affairs
17 could --

18 QUESTION: Well --

19 MR. DYK: -- be hampered just as much as the
20 States wanted --

21 QUESTION: -- you're not talking just about
22 States, either. I take it you're talking about the
23 possibility of cities adopting this policy.

24 MR. DYK: 39,000 municipalities, and this
25 Court -- and we're not just relying on the Zschernig case,

1 as important as that is, but in the Pink case, in the
2 Belmont case, in the Sabbatino case, this Court has
3 assumed again and again and again that State action may be
4 precluded without the necessity of a formal
5 congressional --

6 QUESTION: But that's why affirmative action by
7 the President -- I asked your opponent. He thinks
8 affirmative action by the President wouldn't be enough,
9 but perhaps affirmative action by the President would be,
10 but the question is, with or without either congressional
11 action or presidential action, is this foreclosed, and I'm
12 curious to know, if it all turns on the motive to impact
13 on the foreign country, would it also prevent the State
14 from making its own direct decisions? It just would
15 refuse to buy anything itself from Burma.

16 MR. DYK: Oh, I think that would be a very
17 different case, Justice Stevens.

18 QUESTION: It would be different, but would it
19 not be decided the same way under your analysis of motive?

20 MR. DYK: If they're intending to communicate a
21 message --

22 QUESTION: Yes. They say, we're not going to
23 buy from you because we don't like your policy toward
24 certain minorities, or something of that kind.

25 MR. DYK: That would be forbidden, but Justice

1 Stevens, it's not a question of motive, it's a question of
2 objective. It's not trying to get into the minds of the
3 legislators. We have here a situation in which these
4 things only work if you communicate disapproval. That is
5 the objective of the statute, and they do it through this
6 very coercive secondary --

7 QUESTION: Do we have --

8 QUESTION: So in effect, in -- the only case in
9 which it would be true on your theory that the State
10 could, as you said a moment ago, decide who to deal with,
11 would be the case in which the State says, we are simply
12 going to deal with domestic companies. We're going to
13 keep the money within the State borders.

14 Because the moment the State said, well, we'll
15 deal with people outside the State, but we're not going to
16 deal with California, or we're not going to deal with
17 Burma, there will always be a policy reason behind that,
18 and it will always, as I understand it, be forbidden on
19 your view.

20 MR. DYK: I don't think, Justice Souter, that
21 there'll always be a policy reason behind that. I think
22 that States and municipalities constantly make purchasing
23 decisions based on price and --

24 QUESTION: Oh, exactly, but I'm assuming that --
25 I mean, I think the whole assumption of the case is that

1 there is a departure from the usual purchasing regime of
2 generally accepting the lowest responsible bid, and if
3 there's going to be a departure from that regime, and it's
4 going to be for any reason other than merely favoring
5 domestic producers, I presume there's always going to be a
6 noneconomic policy reason for it and it will always be
7 unconstitutional, in your view.

8 MR. DYK: If they announce that they are trying
9 to change the policies of a foreign Government, to condemn
10 the policies of a foreign Government, and they take
11 action, yes, in our view it would be unconstitutional, but
12 that is a different case.

13 QUESTION: When you say condemn, I -- would it
14 be condemnation if the State simply said, look, we realize
15 we're not running the foreign affairs of the United
16 States, and we realize that we're not running Burma, but
17 we do have responsibility for keeping our own hands clean,
18 and we are not going to buy any goods derived from Burma.
19 Would that be a condemnation sufficient to violate the
20 Constitution, in your view?

21 MR. DYK: In our view it would, but we would say
22 that's a very different case. This is not -- this is not
23 limited to goods coming from Burma.

24 QUESTION: I realize -- I realize --
25 MR. DYK: It's highly doubtful that

1 Massachusetts buys anything from Burma. What they're
2 trying to do --

3 QUESTION: Well, let's -- we want super hands
4 clean so we're not going to deal with any -- anyone who
5 does deal with Burma, and so on.

6 MR. DYK: Right. We're not going to buy
7 computers from a German company because they sell pencils
8 to Burma. That is highly coercive, and it has nothing to
9 do, in our view, with the notion of disassociation.

10 QUESTION: It shouldn't turn upon the coercion.
11 I mean, if we can't -- if States cannot muck around in
12 foreign affairs, I assume that you would have to say that
13 the Governor of New York could not condemn the policies of
14 South Africa, or the policies of Nazi Germany.

15 MR. DYK: If he coupled that with a remedy, with
16 a coercive sanction, no, he could not do that.

17 QUESTION: Why do you need the coercive
18 sanction?

19 QUESTION: Yeah.

20 QUESTION: Doesn't it interfere with our foreign
21 affairs to have 50 State Governors going around, you know,
22 condemning Adolph Hitler as a fiend if, indeed, the
23 Federal Government is trying to -- I don't know,
24 accommodate him, or whatever? Rehabilitate him.

25 MR. DYK: If --

1 (Laughter.)

2 MR. DYK: I think it's highly undesirable. It
3 may possibly, under some circumstances, cause foreign
4 policy problems that could create an issue. That could
5 never come before this Court, and our view is that --

6 QUESTION: Why? Why?

7 MR. DYK: A mere speech by the Governor? I
8 don't see how that --

9 QUESTION: Well, if that cannot be the subject
10 of legal action, then it seems to me that this is not an
11 expressive case, as I -- as you implied a moment ago.
12 It's a case about dollars and cents.

13 MR. DYK: No. I think it's a question of making
14 foreign policy, Justice Souter. If you say, this is our
15 position with respect to Burma, we're trying to change the
16 Burmese policies, and here's the remedy that we're
17 imposing, we're doing something which has a consequence.

18 QUESTION: But -- right, but you're saying it
19 only becomes foreign policy subject to cognizance in a
20 court if, in fact, there is a dollar figure attached to
21 it.

22 MR. DYK: If the -- well, I don't know dollar
23 figures is what -- I would accept it, that it has
24 consequences. There's something behind there. If you
25 take --

1 QUESTION: 50 State legislatures, not just the
2 Governors. 50 State legislatures with the signature of
3 the Governor pass a bill saying Taiwan is independent from
4 China. 50 State legislatures.

5 MR. DYK: Justice Scalia, let me use a homey
6 analogy, if I could. If we look at the States as though
7 it were a dog that is barking, what the Constitution
8 intended to do was to take the teeth away from the dog,
9 and if the dog continues to bark, if the States and
10 municipalities continue to say things on the issue of
11 foreign policy, there is not the same danger of
12 interfering with Federal policy if there are no teeth to
13 enforce it.

14 QUESTION: Well, I'm not sure -- I don't -- I
15 agree one case is justiciable, the other isn't. The
16 hypothetical would be, you are the legal advisor to the
17 Governor. He asks you, may I, in my official capacity,
18 make this foreign policy announcement, and I would think
19 your answer would be no.

20 MR. DYK: I think that from the point -- that it
21 is highly undesirable to do that, and that may constitute
22 the impermissible making of foreign policy.

23 QUESTION: Well, but --

24 MR. DYK: But I think as far as the Constitution
25 is concerned, what it was intending to do was to strip the

1 enforcement mechanisms from the States, and if you go down
2 the lists in Article I, that's what it did.

3 QUESTION: Don't you think that under your
4 theory of this case, if the legislature and the Governor
5 together come to you as their counsel and say, may we
6 constitutionally, not because we're going to be sued, but
7 just to obey our constitutional constraints and duties,
8 join 50 other, or 49 other legislatures in condemning
9 Taiwan, or mainland China, or something? What is your
10 answer?

11 MR. DYK: Well, I think that my answer would be
12 that raises a very significant --

13 QUESTION: Why? Why?

14 MR. DYK: It may be unconstitutional, but the
15 core purpose here in allocating foreign affairs to the
16 Government was to say -- to the Government of the United
17 States was to say, if you're going to speak on foreign
18 policy, and you're going to try to enforce that foreign
19 policy, that's something that's forbidden to you.

20 QUESTION: Well, Mr. Dyk, certainly a good part
21 of your argument is based on the Commerce Clause, and no
22 one could suggest that the resolution hypothesized by --
23 involves commerce. It's just speech.

24 MR. DYK: Right. Under the Commerce Clause that
25 would not be an issue, and under the Commerce Clause the

1 primary issue is whether the action of the State of
2 Massachusetts is proprietary, and it seems to us that it
3 can't possibly be proprietary. It has no economic benefit
4 to Massachusetts and its citizens. It's admittedly not
5 something that any private purchasers of goods and
6 services --

7 QUESTION: In our negative Commerce Clause
8 cases, do we have statements to the effect that we look to
9 the purpose of the legislation?

10 MR. DYK: My --

11 QUESTION: It's usually the purpose to just
12 prefer your own goods. Is there anything else?

13 MR. DYK: Well, as I understand the Commerce
14 Clause jurisprudence, you look to purpose and effect, but
15 in these market participant cases, my understanding is
16 that the line the Court is trying to draw is between
17 regulation and proprietary action.

18 And under cases like Gould, which, while it's
19 not a Commerce Clause case, is highly relevant, if you
20 find that this looks like regulation through market
21 participation, then it's invalid, and we think if you look
22 at this Massachusetts law, it doesn't look anything
23 like -- for a number of reasons it doesn't look anything
24 like purchasing. It looks very much like regulation
25 accomplished through purchasing, and therefore it's

1 invalid.

2 QUESTION: Mr. Dyk, may I ask you about one case
3 of ours that's said to be very close to this, that is, the
4 Barclays case? This Court said, it's okay for California
5 to go its own way, to have its worldwide income tax
6 measure, even though the Feds didn't, and even though most
7 States didn't, and that was okay. It has been argued that
8 this is the same, that there's no difference.

9 MR. DYK: But the difference between the
10 combined reporting in the California case was -- first of
11 all was nondiscriminatory from the point of view of the
12 Commerce Clause and, most important, it had no foreign
13 policy objective. Massachusetts didn't care what the
14 consequences were. The question was whether, even though
15 Massachusetts didn't care what the consequences were, that
16 nonetheless made it unconstitutional.

17 QUESTION: Thank you, Mr. Dyk.

18 General Waxman, we'll hear from you.

19 ORAL ARGUMENT OF SETH P. WAXMAN

20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING AFFIRMANCE

22 GENERAL WAXMAN: Thank you, Mr. Chief Justice,
23 and may it please the Court:

24 Chief Justice Rehnquist, I'd like to follow up
25 on your suggestion and talk first about the Foreign

1 Commerce Clause, because I think that what -- the effect
2 of what Massachusetts has done here in many ways
3 exemplifies precisely what the Framers of the Constitution
4 were trying to accommodate and to accomplish and avoid in
5 enacting the Foreign Commerce Clause.

6 The problem that the Framers were addressing was
7 first and foremost the refusal by States in the Union
8 under the Articles of Confederation to honor debts that
9 they owed to British sympathizers and British citizens
10 notwithstanding the treaty of 1783, and what Massachusetts
11 has done here, and the purpose therefore in the clause,
12 was to keep other States and the Union from being held
13 accountable for decisions and unilateral actions for which
14 they didn't have the responsibility, and what
15 Massachusetts has done here is precisely the same.

16 The United States has had for a long time, at
17 least since 1990, a policy with respect to Burma -- and I
18 want to emphasize here that this is a case about means,
19 not goals with respect to the Burmese regime. We have had
20 a policy that has emphasized in resolutions, in executive
21 orders, in the Federal Burma Act, and in the President's
22 1997 executive order, the importance of a coordinated,
23 multinational effort, because in the view of the national
24 Government it's the only way we can have an effective
25 voice with respect to Burma.

1 But Massachusetts, by choosing to extend
2 sanctions to foreign companies, has created a considerable
3 source of irritation with our trading partners and our
4 allies, and has directly hampered our efforts to achieve
5 multilateral action. Instead of our conversations with
6 the EU and ASEAN and other countries that had been taking
7 place about what to do about Burma, our conversations now
8 are what to do about Massachusetts, and we have been
9 treated to the spectacle of delegations of EU officials
10 and other foreign officials writing to and visiting along
11 with our trade representatives, Boston, Massachusetts in
12 order to decide what the best means is to accomplish
13 reform in Burma, and I think that that's just what the
14 Framers were trying to avoid in enacting the Foreign
15 Commerce Clause.

16 QUESTION: General Waxman --

17 QUESTION: The question is whether they were
18 trying to avoid it by giving Congress the power to prevent
19 it, which everybody concedes they have here. If this is
20 indeed a big deal, a big problem, nobody questions that
21 under Article VI Congress can pass a law which
22 Massachusetts would have to obey, but the question is,
23 what is there in the Constitution that suggests that the
24 President, by snapping his finger, can make
25 Massachusetts --

1 QUESTION: Well, General Waxman, Congress has
2 passed a law, hasn't it?

3 GENERAL WAXMAN: Indeed it has passed a law, and
4 I guess rather than choosing favorites I'll try and --

5 QUESTION: Is there preemption?

6 GENERAL WAXMAN: We think that there is
7 preemption under the Hines-Boyle international paper
8 articulation because, as I was starting to suggest, the
9 Federal law -- the Massachusetts act stands as an obstacle
10 to -- I'm quoting now from many, many opinions of this
11 court. The test is, stands as an obstacle to the
12 accomplishment and execution of the full purposes and
13 objectives of Congress, and I've pointed out one of three
14 ways, and I will elucidate the other two, if I may, in
15 which what Massachusetts has done has interfered.

16 Now, Justice Scalia, your point, if I recall it,
17 was that, well, that's fine, we were really concerned
18 about it and we gave Congress the power to say, no, we
19 don't like that, you can't do that, and I have -- I think
20 that's incorrect for two reasons.

21 First of all, the Foreign Commerce Clause of its
22 own force preempts State laws surely -- and this Court
23 has decided it many times -- that discriminate on their
24 face against a particular country. That was a principle
25 that was elucidated as -- by this Court as far back as

1 Cooley v. Board of Wardens, where the Court pointed out
2 that one of the main objects of the Constitution was,
3 quote, preventing discriminations favorable or adverse to
4 commerce with particular foreign nations that might be
5 created by State laws, and I know that there is
6 considerable uncertainty about the scope of the operation
7 of what has been called the dormant Foreign Commerce
8 Clause, but in essence the scope, the preemptive scope of
9 the Commerce Clause itself, absent positive legislation.

10 But there has never been a question from the
11 start that -- with respect to a law like this that singles
12 out and punishes and sanctions commerce with a particular
13 foreign country, that there is preemption by the Foreign
14 Commerce Clause of its own force.

15 Now, secondly, it would be a regime that would
16 be highly inimical both to the national Government and to
17 our States and the Federal system to require Congress or
18 the Federal executive to expressly keep track of and
19 preempt each one of these actions, and I'd like to just
20 explain --

21 QUESTION: No, but the answer to that, it seemed
22 to me -- Mr. Dyk made the same point -- couldn't they pass
23 a general statute making into positive law the very
24 position you're asserting here today?

25 GENERAL WAXMAN: Yes, I think they could. I

1 believe that they could. I don't think that they could do
2 the converse, or I'd question whether they could do the
3 converse --

4 QUESTION: Will you state -- what I'm suggesting
5 is --

6 GENERAL WAXMAN: -- but they -- if I can just --

7 QUESTION: -- that the constitutional rule that
8 you advocate today could be enacted by Congress as a
9 statute.

10 GENERAL WAXMAN: Yes. In fact, I mean, our
11 position is that at least with respect to Burma, where
12 there is one voice, and the voice has spoken, and the
13 voice has spoken quite clearly with respect to means, it
14 is preempted in any event, either by operation of the
15 Foreign Commerce Clause or by the Federal action.

16 But if I can just go to the point, Justice
17 Scalia's point about what's so bad, what would be so bad
18 about requiring the national Government to act, I would
19 just say first of all, with respect to the national
20 Government's ability to regulate foreign commerce and
21 conduct foreign affairs, it is well-known that -- first,
22 that effective diplomacy often, probably usually requires
23 that things be done and not be done publicly, and
24 expressly, and the Austria example that I think Justice
25 Breyer gave is, I think we are being treated to a vision

1 of that point precisely.

2 Secondly, as this Court recognized in Curtiss-
3 Wright, and as the IEPA statute recognizes, fast action is
4 required by the time -- the problem may have festered and
5 come to a head by the time the national Government can go
6 through the processes necessary to preempt.

7 And I also would say with respect to Federalism
8 and the comity that our system requires, that it is a
9 wholly unnecessary irritant that would constantly come up
10 in the context of our political system if, in the area of
11 foreign affairs and foreign commerce, the national
12 Government in order to pursue its -- the objectives that
13 the Constitution gives it, were required to single out,
14 now, Massachusetts, we -- you know, we preempt what you
15 have done, and the Village of Takoma Park, we preempt what
16 you have done.

17 The question was raised earlier about the South
18 Africa sanctions which is, so far as we know, since the
19 beginning of the Republic, the only instance, and not only
20 the amicus brief citing the petitioner, but all of the
21 scholarly articles that are cited in those briefs, we
22 reviewed, and there are not instances of Governments
23 acting in their procurement capacity to do this.

24 But in the South Africa example, I think it's
25 important to recognize first that in 1986 -- the South

1 Africa case was decided by the Maryland Court of Appeals
2 in 1989, and I believe it's the only decided case -- that
3 the -- there was a congressional resolution, the national
4 Congress, explicitly allowing States to do this, and there
5 was a provision in the South Africa law that was passed
6 that granted an exemption to States engaging, and
7 localities engaging in procurement with Federal dollars
8 from the general Federal rule that required that the
9 lowest bidder, the lowest responsible bidder get it.

10 So I think the South Africa example, to the
11 extent that it consists of the only precedent that we
12 have, is highly distinguishable, because here, in addition
13 to the point I made about the frustration of the national
14 Government's objective to pursue a multilateral strategy,
15 the Massachusetts law is also inconsistent, and therefore
16 frustrates the objectives of the Federal law in two other
17 respects.

18 First of all, and the legislative debates about
19 this couldn't be clearer, Congress considered much more
20 stringent sanctions. It considered precisely what
21 Massachusetts has done, and it deliberately chose what it
22 called a middle path, what Massachusetts -- that is, not
23 to prohibit precisely what Massachusetts has.

24 QUESTION: Thank you, General Waxman.

25 GENERAL WAXMAN: Thank you.

1 QUESTION: Mr. Barnico, you have 4 minutes
2 remaining.

3 REBUTTAL ARGUMENT OF THOMAS A. BARNICO

4 ON BEHALF OF THE PETITIONERS

5 MR. BARNICO: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 First, I would like to go to the question, or
8 the reason why foreign officials have visited Boston in
9 the last few years, and I must point out a Federal statute
10 not previously mentioned in the argument today, which is
11 the Federal law adopting the Uruguay Round agreements
12 under the GATT.

13 We, through the United States, has now been --
14 we have been purported to have been held to a new round of
15 international trade agreements. The foreign complaints
16 that you've heard described are complaints under that
17 agreement. Our point is simply that in this new world of
18 global trade and new international agreements, this type
19 of contact will be common. This type of complaint against
20 Massachusetts and the other States that the procurement
21 laws violate GATT will be all the common. There will be
22 contact. It's not a realistic approach that --

23 QUESTION: Mr. Barnico, are you suggesting that
24 times have changed so that the national unit is no longer
25 responsible under international law for its subunits, that

1 the rest of the world will target their retaliation to
2 Massachusetts, and the rest of the United States will
3 remain unaffected? Is that what you're suggesting?

4 MR. BARNICO: I'm suggesting, Your Honor, that
5 as the -- if the focus is on the effects of our law, the
6 Court should not give great weight to the fact that
7 foreign countries have objected to the Massachusetts law
8 under a trade agreement that's been ratified by Congress.

9 We take that agreement to mean, and the
10 congressional action to mean, that Congress knows full
11 well that States will have complaints made against them of
12 this type.

13 QUESTION: That's what I thought perhaps -- I
14 thought maybe you agree on this, I'm not sure, that
15 whatever it requires, we should treat the Foreign Commerce
16 Clause the same as the dormant Commerce Clause vis-a-vis
17 States and if, in fact, they could do this vis -- give us
18 a -- you'd have a regular body of law, we'd know how to
19 apply it, and what the -- what Massachusetts could do vis-
20 a-vis Texas, it can do vis-a-vis Austria, et cetera, at
21 least for purposes of this case. Is that your view?

22 MR. BARNICO: Yes, Your Honor, and that means --
23 that's why we urge the Court, under both of those
24 constitutional provisions, to recognize what we've
25 described as a market participation exception. That's why

1 we've argued that the boycott, so close in nature to that
2 type of State activity, was not within the thought of the
3 Framers as to either of those dormant clauses.

4 That's the way to handle this, to preserve to
5 the States a limited sphere of activity which has speech
6 components and consumer components.

7 QUESTION: Of course, what I'm thinking of is a
8 kind of nightmare, where all the right-to-work States pass
9 laws stopping procurement in the unionized States, and all
10 the unionized States pass laws trying to stop procurement
11 in the right-to-work States, and that's -- that kind of,
12 sort of chaos is what's worrying me under the dormant
13 Commerce Clause.

14 MR. BARNICO: Well, those questions will remain
15 for Congress. Under our rule they would be proprietary.
16 We can only hope, though, as I mentioned earlier, that
17 there is a comity owing between sister States that's not
18 owing to the Government of Burma, certainly, and
19 Massachusetts has the right in this instance to exercise
20 that proprietary power, that limited sphere of power
21 cabined as historical basis for assuming that the Framers
22 did not intend to take the boycotts out of the hands of
23 the States, just as we know the power of boycott remains
24 in the hands of every American citizen.

25 QUESTION: Mr. Barnico, you said there's comity

1 among the States and there's not comity with Burma, but it
2 isn't Burma. As you yourself recognized, Massachusetts
3 has been visited by an ASEAN delegation, by an EU
4 delegation, so it's the rest of the world of which we are
5 a part that may disagree strongly on the efficacy of
6 sanctions.

7 MR. BARNICO: I acknowledge that, Your Honor,
8 and I point to the '94 law and the GATT simply to say that
9 this will be common in our view. State and local laws,
10 not of human rights dimension, but all kinds of laws will
11 be subject to attack by foreign Governments under these --

12 CHIEF JUSTICE REHNQUIST: Thank you,
13 Mr. Barnico. The case is submitted.

14 (Whereupon, at 11:14 a.m., the case in the
15 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that
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The United States in the Matter of:

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF
MASSACHUSETTS, ET AL., Petitioners v. NATIONAL FOREIGN TRADE COUNCIL
CASE NO: 99-474

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BY Don Van Fossen -----

(REPORTER)