

The Burger Court Opinion Writing Database

Hodel v. Virginia Surface Mining & Reclamation Association, Inc.

452 U.S. 264 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1981

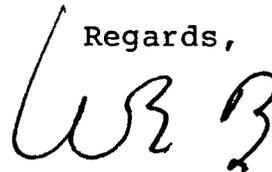
RE: Hodel v Virginia Surface Mining & Reclamation
Association (#79-1538 and #79-1596)
Hodel v Indiana (#80-231)

Dear Thurgood:

I join your opinions in these cases, and I will add the following.

THE CHIEF JUSTICE, concurring: I fully agree with the view of Justice Rehnquist, expressed in his concurring opinion, that the Court often seems to forget that the doctrine that laws enacted by Congress pursuant to the Commerce Clause must be based upon a substantial effect on interstate commerce. I join Justice Marshall's opinion for the Court because I believe the Court today acknowledges and reaffirms this doctrine. See, e.g., Ante at 14.

Regards,



Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1981

RE: Hodel v. Virginia Surface Mining & Reclamation
Association (#79-1538 and #79-1596)
Hodel v. Indiana (#80-231)

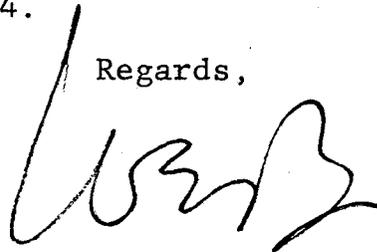
Dear Thurgood:

Please treat this as a substitute for what I will add
in this case.

THE CHIEF JUSTICE, concurring: I agree largely with what
Justice Rehnquist has said about the "fictions" concerning
delegation, and the gradual case by case expansion of the reach
of the Commerce Clause.

I agree fully with his view that we often seem to forget
that the doctrine that laws enacted by Congress under the
Commerce Clause must be based on a substantial effect on
interstate commerce. However I join the Court's opinion
because in it the Court acknowledges and reaffirms that
doctrine. See, e.g., Ante at 14.

Regards,



Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 14, 1981

RE: No. 79-1538 and 79-1596 Hodel v. Virginia Surface
Mining
No. 80-231 Hodel v. Indiana, et al.

Dear Thurgood:

I join No. 80-231 unreservedly but can join Nos. 79-1538 and 79-1596 only if you can delete the words "declaratory and injunctive" from the last sentence of footnote 40. If you prefer not to make that change, will you please add at the foot of your opinion:

"Justice Brennan joins the opinion except for the last sentence of footnote 40. In light of 28 U.S.C. §1346(2), he does not agree with the limitation of that sentence to "declaratory and injunctive relief."

Sincerely,



Justice Marshall

cc: [illegible]

5

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 19, 1981

RE: Nos. 79-1538 & 1596 Andrus v. Va. Surface Mining

Dear Thurgood:

I agree.

Sincerely,

Bill

Justice Marshall

cc: The Conference

2

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 11, 1981

Re: Nos. 79-1538 & 79-1596, Hodel v.
Virginia Surface Min. & Recl. Assn., etc.

Dear Thurgood,

I am glad to join your opinion for the
Court.

Sincerely yours,

P.S.
/

Justice Marshall

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 12, 1981

Re: 79-1538 and 79-1596 -
Hodel v. Virginian Surface Mining
and Reclamation Assn., Inc, etc.

Dear Thurgood,

Please join me.

Sincerely yours,



Justice Marshall

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 15, 1981

Re: 79-1538 and 79-1596 - Virginia
Surface Mining cases

Dear Thurgood,

I have no objection to your making
the changes Lewis suggests.

Sincerely yours,



Justice Marshall

Copies to the Conference

cpm

3, 4, 7, 13, 16, 18, 25, 27
29, 36

6 MAY 1981

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-1538 AND 79-1596

Donald Paul Hodel, Acting Secretary of the Interior,
Appellant,

79-1538 v.

Virginia Surface Mining and Reclamation Association, Inc., et al.

Virginia Surface Mining and Reclamation Association, Inc., et al., Appellants,

79-1596 v.

Donald Paul Hodel, Acting Secretary of the Interior, et al.

On Appeals from the United States District Court for the Western District of Virginia.

[May —, 1981]

JUSTICE MARSHALL delivered the opinion of the Court.

These cases arise out of a pre-enforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act or Act), 30 U. S. C. § 1201 *et seq.* (1976 ed., Supp. III). The United States District Court for the Western District of Virginia declared several central provisions of the Act unconstitutional and permanently enjoined their enforcement. 483 F. Supp. 425 (WD Va. 1980). In these appeals, we consider whether Congress, in adopting the Act, exceeded its powers under the Commerce Clause of the Constitution,¹ or transgressed affir-

¹The Commerce Clause empowers Congress “[t]o regulate Commerce with foreign nations and among the several States, and with the Indian Tribes.” U. S. Const. Art. I, § 8, cl. 3.

15, 22, 29, 30

13 MAY 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-1538 AND 79-1596

Donald Paul Hodel, Acting Secretary of the Interior,
Appellant,

79-1538 v.

Virginia Surface Mining and Reclamation Association, Inc., et al.

Virginia Surface Mining and Reclamation Association, Inc., et al., Appellants,

79-1596 v.

Donald Paul Hodel, Acting Secretary of the Interior, et al.

On Appeals from the United States District Court for the Western District of Virginia.

[May —, 1981]

JUSTICE MARSHALL delivered the opinion of the Court.

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pp. 13, 21, 30, 31

5/19/81

3d DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-1538 AND 79-1596

Donald Paul Hodel, Acting Secretary of the Interior, Appellant,

79-1538 v.

Virginia Surface Mining and Reclamation Association, Inc., et al.

Virginia Surface Mining and Reclamation Association, Inc., et al., Appellants,

79-1596 v.

Donald Paul Hodel, Acting Secretary of the Interior, et al.

On Appeals from the United States District Court for the Western District of Virginia.

[May —, 1981]

JUSTICE MARSHALL delivered the opinion of the Court.

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¹The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign nations and among the several States, and with the Indian Tribes." U. S. Const. Art. I, § 8, cl. 3.

HA

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 24, 1981

MEMORANDUM TO THE CONFERENCE:

Re: Cases held for Nos. 79-1538, Hodel v. Virginia Surface Mining & Reclamation Ass'n and 80-231, Hodel v. Indiana.

There are two cases held for our decision in the above cases.

1.) No. 79-1567, Virginia Citizens for Better Reclamation v. Virginia Surface Mining & Reclamation Ass'n.

This appeal is from the judgment of the United States District Court for the Western District of Virginia that we affirmed in part, reversed in part, and remanded with instructions in our decision in the Virginia Surface Mining case. These appellants intervened as defendants in the proceedings in the District Court. The issues raised in this appeal are identical to those presented in the Secretary's appeal, and the District Court issued only one judgment. Thus, the instant appeal is directly controlled by the Secretary's appeal.

see I suggest that we dispose of this appeal by entering an order indicating that judgment below is affirmed in part, reversed in part, and remanded with instructions, with a citation to the Virginia Surface Mining opinion.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 15, 1981

Re: No. 79-1538 - Hodel v. Virginia Surface Mining
and Reclamation Association, Inc.
No. 79-1596 - Virginia Surface Mining and
Reclamation Association, Inc. v. Hodel

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 5, 1981

79-1538 Andrus v. Virginia Surface Mining

Dear Chief:

As I "passed" at the Conference on the above cases, I now write to advise as follows:

I agree with the majority that there is no merit to the respondents' arguments with respect to (i) the Commerce Clause, (ii) substantive due process and equal protection, and (iii) procedural due process.

I am still not at rest on what I view as the Tenth Amendment/taking question.

Although I could agree that Congress has the power to regulate the conducting of strip mining and perhaps the restoration of the mined land, this legislation goes very far indeed in imposing post-mining obligations on miners. The intrusion on traditional state and local land use control is substantial and pervasive, in addition to raising with respect to individual situations questions of "taking" without just compensation. Thus, I may try to work out a dissent with respect to post-mining regulation - although I recognize that this might not be easy.

In sum, my tentative vote is to reverse in part and affirm in part.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 14, 1981

79-1538 and 79-1596 Virginia Surface Mining Cases

Dear Thurgood:

You have written a fine opinion, and I expect to be able to join you.

My only concern relates to some of the language in Part IV. Your holding there is quite clear: The taking issue is prematurely presented on a facial attack, and remedies remain available to individual owners or operators. It seems to me, however, that some of the language in Part IV, particularly in footnotes 38 and 40, may create some doubt as to remedies.

Footnote 38 refers to the District Court's flight of fancy as to land "left leveled or stabilized with benches" being worth up to \$300,000 per acre. The paragraph of the opinion that contains this language is not easy to understand. It commences with the statement that "95% of the strippable coal lands in Virginia are located on slopes in excess of 20%". This suggests the rugged character of the mountainous area in question. Having been in the mining country of southwest Virginia (and attended college in sight of the Allegheny range), I am familiar with the terrain. It tends to be rugged, and sparsely settled. Mining and bootlegging support this poverty stricken area. The cost of leveling these hills in most places is wholly prohibitive - certainly unless the owner or operator is permitted to mine the coal at the same time. Moreover, except where coal land is located near a town or a plant site (both of which are rare in southwest Virginia), the leveled land would be largely worthless for residential or commercial purposes. The soil will grow little except scrub trees of no value.

Thus, when note 38 suggests that "owners presumably retain the option of simply leveling the land without first mining the coal" it is an option that may exist for relatively few owners. I would prefer to

eliminate the note entirely, as the purpose of Part IV is merely to leave open all questions of taking. In any event, I think it is necessary - in the interest of accuracy - to add the word "some" in the second line of n. 38 immediately prior to the words "land owners".

The last two sentences of note 40 purport to identify specific remedies. Resort to the Tucker Act is characterized "as a first step", and then if that "remedy is unavailable", you say that "declaratory and injunctive relief" may be sought. I would think it more appropriate for us not to speculate as to the types of remedies available. You have correctly said that a "taking is not constitutional unless just compensation is available". If there is any doubt as to recovery under the Tucker Act, an owner or operator should be able to obtain an injunction, and he should not be deprived of his property without assurance - such as that available under the condemnation laws of the states - that a fair compensation proceeding is available.

In sum, on this second point, after making clear that just compensation must be provided for a taking, we should not undertake in this case to indicate what remedies are available or the order in which they must be pursued. Identifying two possible remedies also could be read as excluding all others. I hope you will be willing to omit the last two sentences in this footnote.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 20, 1981

79-1538 and 79-1596 Hodel v. Virginia Surface Mining
80-231 Hodel v. Indiana

Dear Thurgood:

Please join me.

I may write a brief concurring opinion.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

*Thurgood. My thanks for
the changes.
L.*

to. The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackman
 Mr. Justice Rehnquist
 Mr. Justice Stevens

LFP/lab 06/01/81

From: Mr. Justice Powell

Circulated: JUN 1 1981

Recirculated: _____

Nos. 79-15~~92~~³⁵ & 79-1596 Hodel v. Virginia Surface

Mining and Reclamation Association, Inc.

JUSTICE POWELL, concurring.

The Surface Mining Act mandates an extraordinarily intrusive program of federal regulation and control of land use and land reclamation, activities normally left to state and local governments. But the decisions of this Court over many years make clear that, under the Commerce Clause, Congress has the power to enact this legislation.

The Act could affect seriously the owners and lessees of the land and coal in the seven westernmost counties of Virginia. The Federal Government is required by the Fifth Amendment to pay just compensation for any taking of private property for public use.¹ See

¹We assume, of course, that Congress weighed this probable cost against the desirable environmental goals of the Act.

The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Burger
Mr. Justice Rehnquist
Mr. Justice Souter

6-3-81

Printed
1st DRAFT

JUN 12 1981

SUPREME COURT OF THE UNITED STATES

Nos. 79-1538 AND 79-1596

Donald Paul Hodel, Acting Secretary of the Interior,
Appellant,
79-1538 v.
Virginia Surface Mining and Reclamation Association, Inc., et al.
Virginia Surface Mining and Reclamation Association, Inc., et al., Appellants,
79-1596 v.
Donald Paul Hodel, Acting Secretary of the Interior, et al.

On Appeals from the United States District Court for the Western District of Virginia.

[June —, 1981]

JUSTICE POWELL, concurring.

The Surface Mining Act mandates an extraordinarily intrusive program of federal regulation and control of land use and land reclamation, activities normally left to state and local governments. But the decisions of this Court over many years make clear that, under the Commerce Clause, Congress has the power to enact this legislation.

The Act could affect seriously the owners and lessees of the land and coal in the seven westernmost counties of Virginia. The Federal Government is required by the Fifth Amendment to pay just compensation for any taking of private property for public use.¹ See *San Diego Gas & Electric Co. v. City of San Diego*, — U. S. —, ——— (1981) (BREN-

¹ We assume, of course, that Congress weighed this probable cost against the desirable environmental goals of the Act.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 8, 1981

Re: No. 79-1538 Hodel v. Va. Surface Mining &
Reclamation Association

Dear Thurgood:

I plan to write separately in this case.

Sincerely,



Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: JUN 3 1981

Recirculated: _____

Re: No. 79-1538 & 79-1596 Hodel v. Virginia Surface Mining

& Reclamation Association

No. 80-231 Hodel v. Indiana

JUSTICE REHNQUIST, concurring in the judgment.

It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the states or to the people. The manner in which this Court has construed Commerce Clause amply illustrates the extent of this fiction. Although it is clear that the people, through the states, delegated authority to Congress to "regulate Commerce ... among the several states", U.S. Const., Art. I, § 8, one could easily get the sense from this Court's opinions that the federal system

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SUPREME COURT OF THE UNITED STATES

Nos. 79-1538 AND 79-1596

Donald Paul Hodel, Acting Secretary of the Interior
Appellant,

79-1538 v.

Virginia Surface Mining and Reclamation Association, Inc., et al.

Virginia Surface Mining and Reclamation Association, Inc., et al., Appellants,

79-1596 v.

Donald Paul Hodel, Acting Secretary of the Interior, et al.

On Appeals from the United States District Court for the Western District of Virginia.

[June —, 1981]

JUSTICE REHNQUIST, concurring in the judgment.

It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction. Although it is clear that the people, through the States, *delegated* authority to Congress to "regulate Commerce . . . among the several states," U. S. Cont., Art. I, § 8, one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress.

As interpreted by the Court, Congress' power under the Commerce Clause is broad indeed. The power has evolved through the years to include not simply the regulation of com-

①

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 8, 1981

Re: 79-1538 and 79-1596 - Hodel v. Virginia
Surface Mining

Dear Thurgood:

Although I voted the other way on the civil penalty issue, I am now satisfied that your proposed disposition is sound. Please join me in your opinion.

Respectfully,



Justice Marshall

Copies to the Conference