

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MICHAEL A. LEBRON, Petitioner v. NATIONAL
RAILROAD PASSENGER CORPORATION

CASE NO: 93-1525

PLACE: Washington, D.C.

DATE: Monday, November 7, 1994

PAGES: 1-56

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'94 NOV 14 P12:01

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 MICHAEL A. LEBRON, :

4 Petitioner :

5 v. : No. 93-1525

6 NATIONAL RAILROAD PASSENGER :

7 CORPORATION :

8 - - - - -X

9 Washington, D.C.

10 Monday, November 7, 1994

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

15 DAVID D. COLE, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 KEVIN T. BAINE, ESQ., Washington, D.C.; on behalf of the
18 Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	DAVID D. COLE, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	KEVIN T. BAINE, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	DAVID D. COLE, ESQ.	
10	On behalf of the Petitioner	53
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 93-1525, Lebron v. National Railroad
5 Passenger Corporation.

6 Justice Breyer has asked me to announce that he
7 is in England because his mother-in-law has passed away
8 and the funeral is being held today, but that he will
9 participate in the cases argued today, listen to the
10 arguments on tape.

11 Mr. Cole.

12 ORAL ARGUMENT OF DAVID D. COLE

13 ON BEHALF OF THE PETITIONER

14 MR. COLE: Thank you, Mr. Chief Justice, and may
15 it please the Court:

16 This case asks whether Amtrak was subject to the
17 constraints of the First and Fifth Amendments when it
18 refused to display Michael Lebron's advertisement in
19 Pennsylvania Station, New York, because of its political
20 content.

21 If Amtrak is correct that it is a private actor,
22 then an entity wholly owned by the United States, managed
23 by the U.S.-appointed board, dependent on massive United
24 States subsidies for its very survival, would be
25 constitutionally free to engage in blatant viewpoint

1 discrimination.

2 QUESTION: Mr. Cole, we don't have before us, do
3 we, any question as to whether, if Amtrak is indeed a
4 Government entity as you contend, whether it would be
5 permissible for it to take the action that it did here?

6 MR. COLE: That's -- that's correct, Your Honor.
7 The -- Amtrak's argument is that no matter what its speech
8 policies are, they are not subject to constitutional
9 review because they are not a State actor.

10 QUESTION: And you say they are subject to
11 constitutional review, but the question of, if they're
12 subjected to that constitutional review, is it permissible
13 or not, is not before us.

14 MR. COLE: That would be decided by the First
15 Circuit -- I mean, by the Second Circuit on remand.

16 QUESTION: Mr. Cole, in the proceedings in
17 courts below, it appeared to me that your client waived
18 any argument in the nature of a direct argument that
19 Amtrak is a Government agency, and instead proceeded on a
20 rather different theory.

21 MR. COLE: Well, we didn't waive any claim, Your
22 Honor. This Court held in Yee that one waives claims, not
23 arguments. The claims that we have made from the outset
24 are that Mr. Lebron's First and Fifth Amendment rights
25 were violated because Amtrak is a Federal actor.

1 We argued that Amtrak was a Federal actor
2 because it is owned and controlled by the United States,
3 the very argument that we are making here today. In
4 the --

5 QUESTION: I understood, at least, that in the
6 courts below the position was taken that we don't contest
7 the fact here that -- and make the point that Amtrak is an
8 agency of the Federal Government. Instead, we say that
9 there was a sufficiently close nexus here that we will
10 approach it on a different basis.

11 MR. COLE: In the lower courts, the Second
12 Circuit had held that Amtrak was not a governmental entity
13 for various purposes. We did not contend that Amtrak was
14 a governmental entity as such for statutory purposes, et
15 cetera, but what we did argue --

16 QUESTION: Are you trying to argue that here --

17 MR. COLE: No. No, for --

18 QUESTION: -- because it looks like it --

19 MR. COLE: No.

20 QUESTION: -- in the brief.

21 MR. COLE: For statutory purposes, we believe
22 that whatever Congress labels, Amtrak decides what
23 statutory consequences apply to Amtrak, and that, and the
24 fact that Congress said that Amtrak is not an agency
25 establishment or a department of the United States means

1 like certain laws like the APA, et cetera, the Federal
2 Tort Claims Act, would not apply.

3 However, we have always maintained that because
4 this entity is owned and controlled by the United States,
5 it must be subject to the constitutional constraints that
6 apply where the Government is responsible for a particular
7 action.

8 QUESTION: Mr. Cole, I suppose in the abstract
9 we could approach the issue in either of two ways.

10 We could approach it by asking the question
11 whether, for purposes of controlling advertising policy,
12 Amtrak should be regarded as a Federal entity, a
13 characterization way of approaching the case, and the
14 other way would be to approach it on the assumption,
15 arguendo, that Amtrak is private, and yet ask the question
16 whether the control by the national Government through the
17 appointment process and so on is so great that the
18 relationship, the nexus, however you want to call it, is
19 established.

20 Would it make any difference, for the outcome of
21 this case, whether we went the characterization route of
22 analysis as distinct from the relationship to the
23 undoubted national Government kind of analysis?

24 MR. COLE: No, as long -- we believe that the
25 question under the State action analysis is, is the

1 Government responsible for the conduct that is being
2 challenged? We believe that when you look at the facts of
3 Amtrak, its ownership and control by the United States,
4 the board, the funding, et cetera, it is -- the Government
5 is responsible for this conduct, for the policy that we
6 have challenged here.

7 However, whether you call it private or public
8 is in some way just a label. The question --

9 QUESTION: Mr. Cole, are you saying this is in
10 effect a centaur-like entity, that it is part Government
11 and part not Government, it depends on which purpose --

12 MR. COLE: Our position, Your Honor, is that
13 Amtrak is a -- for constitutional purposes it must be
14 subject -- it is a Government actor.

15 QUESTION: How about for sovereign immunity
16 purposes? It would not be immune --

17 MR. COLE: For sovereign immunity purposes it's
18 not immune because Congress established -- gave it the
19 right to sue and be sued, and therefore it's not immune
20 under the sovereign immunity principles, and there are
21 various -- the question of whether an entity is an agency
22 determines various statutory things, like whether the APA
23 applies, whether the Federal Tort Claims Act applies,
24 whether procurement laws apply, whether financial
25 accounting laws apply -- those are statutory questions to

1 which Congress' label is obviously a very central
2 question.

3 The question before this Court, however, is,
4 should this entity be constitutionally responsible when it
5 denies advertising in Penn Station on --

6 QUESTION: I assume its directors, then, under
7 your theory, would have to be appointed by the President
8 and confirmed by the Senate. That's a constitutional
9 provision as well. You say this is a --

10 MR. COLE: We say that for the question of State
11 action, for the question of governmental responsibility --

12 QUESTION: Oh, no, you've said more than that.
13 You've said, for constitutional issues --

14 MR. COLE: Right.

15 QUESTION: -- Congress can't change it by just
16 saying so, and that makes sense to me, but the only
17 constitutional issue in the world is not the First
18 Amendment. There are other provisions of the
19 Constitution, one of which is the Appointments Clause.

20 MR. COLE: That's correct.

21 QUESTION: So I assume that the managers of this
22 Federal agency would have to be appointed by the President
23 and confirmed by the Senate, is that right?

24 MR. COLE: Well, we --

25 QUESTION: So Amtrak is unconstitutionally

1 established.

2 MR. COLE: Well, I think -- I think, two points
3 in response to that, Justice Scalia. First, the question
4 of whether Amtrak is constitutionally responsible for the
5 conduct challenged here cannot turn on whether Amtrak is
6 constitutionally composed. We don't argue that it's not
7 constitutionally composed.

8 QUESTION: No, I --

9 MR. COLE: Second of all, we do believe that it
10 is constitutionally composed because the directors of
11 Amtrak are appointed either by the President or by the
12 Secretary of Transportation and would be inferior officers
13 under the Appointments Clause.

14 QUESTION: Inferior officers under the
15 Appointments Clause? Why are they inferior officers?

16 MR. COLE: Well, the Congress has deemed that
17 they shall be appointed by the Secretary of
18 Transportation. They --

19 QUESTION: So whenever Congress makes that
20 appointment disposition the agency automatically becomes
21 an inferior agency, even if it isn't an inferior agency,
22 or the officers become inferior officers even if they
23 aren't?

24 MR. COLE: I think the central point, Your
25 Honor, is that whether Amtrak is constitutionally

1 responsible for its actions in this case does not turn on
2 whether its board is constitutionally composed.

3 QUESTION: I didn't suggest that, but I'm just
4 exploring the consequences of your thesis that Amtrak is a
5 Government agency. One of the consequences, it seems to
6 me, is that it is unconstitutionally composed, which may
7 have consequences elsewhere, though not with respect to
8 its First Amendment liability.

9 MR. COLE: Well, we believe that if the Court
10 were to conclude that the officers were inferior officers,
11 it would be permissibly composed, because the executive
12 department, through the President or the Secretary of
13 Transportation, appointed --

14 QUESTION: But you concede that the executive
15 does not control Amtrak. Nobody but the directors really
16 decide what Amtrak does, isn't that right?

17 MR. COLE: Well, no --

18 QUESTION: Except by a general law. I mean,
19 Congress could pass a law, but they can control a lot of
20 things.

21 MR. COLE: Well, no, in fact the United States
22 owns all of Amtrak's preferred shares and has 99 percent
23 of the votes, so the United States, as essentially the
24 sole shareholder of Amtrak, has the ultimate
25 responsibility for what Amtrak does. In addition, the

1 United States appoints the entire membership of the board,
2 so --

3 QUESTION: But it can't tell those members what
4 to do. It can throw out the members and put in new
5 members --

6 MR. COLE: Right. Right.

7 QUESTION: -- but ultimately those members make
8 the decisions.

9 MR. COLE: That's right, and they are --

10 QUESTION: Nobody else in the United States
11 Government makes the decisions, right?

12 MR. COLE: That's right, and no --

13 QUESTION: And yet you say these officers are
14 still inferior officers, even though they make the final
15 decision.

16 MR. COLE: I'm -- we're not taking a position,
17 Your Honor, on whether the board is constitutionally
18 composed or not. What we believe is that that question is
19 a separate question from whether it ought to be
20 constitutionally accountable, and certainly --

21 QUESTION: I agree with that. I'm not
22 questioning whether it's a separate question.

23 QUESTION: Mr. Cole, what is the tenure of the
24 directors?

25 MR. COLE: The directors are appointed to a

1 range of fixed terms. Some, I think, are appointed to 2-
2 year terms, some to longer terms.

3 QUESTION: Can they be removed?

4 MR. COLE: The statute is silent as to removal,
5 and so the removal power would presumably be implied under
6 the case law.

7 Amtrak is not only owned by the United States,
8 its board is not only appointed by the United States, it
9 would not be here were it not for massive Federal
10 subsidies that Congress has provided through the years.

11 Today, its subsidy is about \$1 billion a year.
12 That's half of what the State Department gets. It's six
13 times what the United States Postal Service got in 1994.
14 Its property, valued at \$3.4 billion, including Penn
15 Station, was all purchased by the United States with tax
16 dollars. It is subject to governmental obligations,
17 obligations that no private entities are subject to -- the
18 Inspector General Act, the Government and Sunshine Act,
19 the FOIA.

20 Congress micromanages Amtrak. It sets goals for
21 its on-time performance, for how fast the trains should
22 go, for who can be appointed as officers and what they
23 shall be paid, for how much of a profit it ought to make.
24 It only has to cover 61 percent of its costs.

25 QUESTION: Well, what sort of guideline has

1 Congress set for its scheduling, train schedule?

2 MR. COLE: It's supposed to -- it's trains are
3 not supposed to be any later than 15 minutes for each
4 stop, Your Honor.

5 QUESTION: That's by act of Congress.

6 MR. COLE: Yes.

7 (Laughter.)

8 MR. COLE: In short, this is an entity that has
9 no independent will of its own.

10 QUESTION: I don't understand your point. Your
11 point is that anything that the Government micromanages
12 becomes the Government?

13 MR. COLE: The point is, Your Honor, and the
14 purpose of the State action inquiry, is to assign
15 governmental responsibility. Ordinarily, in a State
16 action case, you have a clearly private actor, and you
17 have some State influence, and the court's role is to
18 determine whether the State is responsible --

19 QUESTION: Suppose you have enormous State
20 influence, the Government, by statute, micromanages a
21 particular industry. Does that industry become the
22 Government?

23 MR. COLE: By -- if it's -- if -- the mere fact
24 of regulation, even extensive regulation, the Court has
25 held, is not sufficient to establish State action, but

1 this is not simply a question of mere regulation. When
2 you have the board appointed by the United States, you
3 have the ownership of the shares wholly owned by the
4 United States --

5 QUESTION: Board controlled by the United
6 States. You acknowledge that the board votes the way it
7 wants, once it's there.

8 MR. COLE: The board, it's fiduciary obligation
9 is to the shareholders. The 99-percent shareholder is the
10 United States.

11 QUESTION: That doesn't mean whatever the
12 shareholder wants. You have a fiduciary obligation to
13 someone, it doesn't mean that you have to jump the way
14 that that person tells you.

15 MR. COLE: No, that's true, and I guess the
16 question is somewhat -- who is the United States? I think
17 ordinarily, as a -- ordinarily, the State action inquiry
18 tries to assign responsibility between a private actor and
19 the Government. Here, there is no private actor to which
20 the Court could point.

21 In the Court's previous decisions in which it
22 has held that there is no State action, the Court has
23 always pointed to a private entity which is responsible
24 for the action alleged. In Blum, it was private doctors.
25 In Rendell-Baker, it was a private school, in Jackson --

1 QUESTION: Well, Mr. Cole, may I interrupt you
2 here? I thought the assumption of the argument -- since
3 you have not proceeded on the basis of the
4 characterization theory, I thought the assumption of the
5 argument was that for the sake of argument, we will assume
6 that Amtrak is private, and the question is whether its
7 connection with the undoubted Government, i.e., the
8 President and the Secretary of Transportation and so on,
9 is such as to justify concluding that the action that it
10 takes is ultimately State action.

11 And now you keep -- now in your argument you're
12 referring to Amtrak not as a private actor, but, in
13 effect, as a governmental actor, and if we make that
14 assumption, it's all over. We know what the answer is,
15 because we know who made the choice in this case.

16 MR. COLE: Your Honor, I don't think it's a
17 question of assumptions. I think it's a -- the Court has
18 to look at the objective characteristics of the entity and
19 determine whether it is constitutionally -- whether the
20 Government is constitutionally responsible for its
21 actions. That is the question.

22 And in order to do that, you have to look at all
23 the facts and circumstances of Government ownership,
24 control, et cetera.

25 QUESTION: I agree, but the -- aren't you kind

1 of sneaking a different kind of approach in, not
2 necessarily intentionally, here, when you say, well, there
3 isn't a private actor here as distinct from Burton-like
4 cases, because once you do that you're saying, well,
5 Amtrak really is not a private actor.

6 MR. COLE: For constitutional purposes, we are
7 saying that it ought to be treated as the Government.

8 QUESTION: Is the -- okay.

9 MR. COLE: For constitutional purposes.

10 QUESTION: So that you are -- you are depending
11 in part on the characterization argument here. This is
12 not a Burton case.

13 MR. COLE: It is --

14 QUESTION: This is a case in which the person
15 who take the action, i.e., the vice president here, is an
16 agent of a governmental organization. That's your
17 argument -- governmental entity.

18 MR. COLE: That is our first argument, Your
19 Honor. Our second argument is that under Burton, the
20 interrelationship between the Federal Government and this
21 entity is such that it will -- it is a joint participant
22 with the entity, and therefore it is constitutionally
23 responsible.

24 Our third argument is that the Federal
25 Government is responsible for the policy challenged here

1 because the board, which is solely composed of Federal
2 appointees, is responsible for the policy, and --

3 QUESTION: Well, Burton was a long time ago,
4 Mr. Cole. It's been distinguished in many successive
5 cases. I think there are probably closer and more recent
6 decisions that state the Court's view as to what the
7 relationship is on the State action.

8 MR. COLE: Well, Burton was a long time ago,
9 Your Honor, but Burton has been --

10 QUESTION: It's been distinguished in a number
11 of succeeding cases.

12 MR. COLE: But its -- it has not been overruled,
13 Your Honor, and the distinguishing features have always --
14 the cases which have distinguished it are distinguishable
15 from this case.

16 That is, the courts that have distinguished it
17 have essentially said, we don't find joint participation
18 here, because the Federal -- the Government cannot control
19 this entity. The Government is not responsible for the
20 conduct. The Government is not profiting from the
21 challenged conduct.

22 Here, the Government can control the entity, the
23 Government controls the entity through its ownership and
24 control. It's the only way that a corporation can be
25 controlled, is through ownership and control. The United

1 States owns 99 percent of the votes, and appoints the
2 entire board. In addition --

3 QUESTION: Well, but then that makes it in many
4 respects a case that is quite different from Burton, if
5 you have that dominance of the Government in the case.

6 MR. COLE: It's a much stronger case than
7 Burton, and in fact Amtrak does not suggest that we have
8 not clearly made a showing of joint participation under
9 the Burton test. Rather, that they are --

10 QUESTION: Mr. Cole, is there any other case --
11 I'm not aware of one -- where you have an agency of this
12 unique character? That is, for some purposes it's treated
13 like a Government agency. For FOIA purposes, it's treated
14 like a Government agency. For the Inspector Generals Act,
15 it's treated like a Government agency. For APA purposes,
16 it isn't.

17 In Burton, you have a private actor, private
18 restaurant owner in a State building. I don't know of any
19 case that has a unit that is in some respects
20 governmental, in some respects not. Is there any other
21 such case?

22 QUESTION: Well, there are numerous other
23 entities, Federal entities which are for all intents and
24 purposes indistinguishable from Amtrak, and which have
25 been treated as State actors.

1 For example, the United States Postal Service,
2 the Tennessee Valley Authority, the FDIC, the Export-
3 Import Bank, all of those are corporations which are owned
4 and controlled by the Government which have been held to
5 be and treated as -- as State actors, but are exempt from
6 numerous laws, statutory laws that otherwise apply to
7 agencies. Procurement laws, civil service laws, those
8 entities are exempt from those laws.

9 So it is not treated as a governmental agency
10 for all purposes -- that is, for all statutory purposes --
11 but because those entities are owned and controlled by the
12 Government, they are treated as Federal actors.

13 QUESTION: Have there been any cases where such
14 an agency, where its status as a Federal actor, State
15 actor has been challenged successfully?

16 MR. COLE: Has been -- well, there have been
17 many cases where constitutional claims have been
18 adjudicated against such entities, yes. The question of
19 Federal action has not arisen directly in this Court. For
20 example, FDIC v. Mallen proceeds on the assumption that
21 the FDIC could have violated Mr. Mallen's due process
22 rights, so the Court has -- in this Court --

23 QUESTION: But the FDIC was distinguished as an
24 entity. It didn't have as many characteristics that
25 arguably could qualify it as private, as Amtrak does.

1 MR. COLE: Well, it is -- I'm not sure about
2 that. The FDIC is labeled as a mixed ownership Government
3 corporation, just as Amtrak is. The FDIC receives no
4 Federal funding whatsoever. Amtrak only survives by
5 virtue of its massive annual subsidies from Congress. So
6 I think, in fact, Amtrak is more of a governmental entity
7 for constitutional purposes than the FDIC.

8 QUESTION: The nature of the challenged action
9 in this case does not particularly help your State action
10 argument, does it? That is to say, in a case like the
11 preemptory challenge case, we said only Governments can
12 have juries, only Governments can have preemptory
13 challenges.

14 Here, all businesses of a private nature control
15 the speech that's contained, so the nature of the action
16 taken here doesn't particularly help you, does it?

17 MR. COLE: The nature of the function performed
18 by Amtrak?

19 QUESTION: The nature of the action that you
20 challenge. That is to say --

21 MR. COLE: Well --

22 QUESTION: -- regulating the billboard.

23 MR. COLE: Well, we don't contend that it is a
24 traditional Government function, no.

25 QUESTION: Does -- do you think that when

1 someone enters the station they think, I'm in a Government
2 building?

3 MR. COLE: Enters Penn Station?

4 QUESTION: Yes.

5 MR. COLE: Absolutely, and the district court
6 found, in fact, that when you walk through Penn Station,
7 you can't know, because Penn Station is shared with other
8 governmental entities -- New Jersey Transit and the Long
9 Island Railroad -- you can't know whether you're in an
10 area that is controlled by a governmental, clearly,
11 undisputably governmental entity or Amtrak.

12 In addition, Amtrak itself, I think many people
13 would not know whether Amtrak is governmental or not.
14 When you look at it, it certainly looks governmental. The
15 United States owns all the shares. The United States
16 appoints the whole board. This is, for all intents and
17 purposes, a governmental entity.

18 QUESTION: Mr. Cole, is it your position that
19 the Government cannot acquire a private company without
20 making that private company the Government?

21 I mean, suppose -- the Government, for instance,
22 some years ago made a major loan to Chrysler Corporation.
23 Now, suppose Chrysler had defaulted, and the Government
24 had taken over ownership, private ownership of Chrysler
25 Corporation. Would Chrysler Corporation have become the

1 Government?

2 MR. COLE: Our position -- yes. If Chrysler
3 Corporation were nationalized, then it would be a
4 Government --

5 QUESTION: Not nationalized. The Government
6 just gets the stock in a bankruptcy proceeding, just as a
7 private individual could get the stock.

8 MR. COLE: Our position is that when --

9 QUESTION: You see, I mean, we normally maintain
10 in the common law distinction between the corporation and
11 the owner of the corporation, right?

12 MR. COLE: Well --

13 QUESTION: Why can't you do that, and why
14 shouldn't you do that with respect to Government ownership
15 just as you do with respect to private ownership?

16 MR. COLE: Well, I think the question with a
17 corporation is, with any corporation is, should you treat
18 it as governmental, or should you treat it as private?

19 If the corporation is controlled -- is owned by
20 51 percent private shareholders, has a 51 percent private
21 majority board, then it is -- you can say that
22 responsibility for its actions are in the private realm,
23 unless there is something more which would establish State
24 action.

25 Where, on the other hand, the Government has a

1 controlling interest both in ownership and in appointment
2 of the board, there's no private entity to which you can
3 point which is responsible for the actions alleged, and
4 the Congress has recognized this.

5 With respect to virtually every other
6 corporation, it has acknowledged that those corporations
7 which it owns in whole and whose boards it appoints are
8 wholly-owned Government corporations, are treated as
9 agencies, and would clearly be State actors.

10 Those entities which Congress supports which are
11 privately owned, privately run, like the Government-
12 sponsored enterprises Fannie Mae, Freddie Mac, Sallie Mae,
13 et cetera, those are treated as private entities and ought
14 to be treated as private entities, because they are
15 privately owned, they are privately run, the only
16 governmental involvement there is the Government has a
17 minority representation on the board, usually 3 of 15
18 members of the board.

19 But where an entity is owned and controlled by
20 the United States -- and I think a perfect example is the
21 Rural Telephone Bank. The Rural Telephone Bank is a mixed
22 corporation. There's private ownership, and there is
23 governmental ownership, and the way that Congress has set
24 that entity up is that, as long as the United States owns
25 51 percent of the shares, its board is a majority

1 Government appointees with some private representation and
2 it is owned by the Government.

3 As soon as 51 percent of the shares switch over
4 to private ownership, then the governmental appointees
5 from the board drop down to a very small number, and
6 majority ownership -- majority control of the board is
7 lodged in a private majority board, and it is no longer an
8 agency of the Government.

9 So Congress itself has recognized that the
10 question of ownership and control is central to how you
11 treat an entity, and it has -- and many Government
12 corporations are privately owned, privately run, like the
13 Government-sponsored --

14 QUESTION: Is your test that whenever the
15 Government has 51 percent control it becomes a Government
16 actor?

17 MR. COLE: Our test, Your Honor, is you have to
18 look at all the facts and circumstances.

19 QUESTION: Well, the 51 percent is not, in
20 itself, enough, then.

21 MR. COLE: Well, we believe that in this case
22 all the --

23 QUESTION: I know what you believe in this case.
24 I'm just asking you, are you adopting a test that
25 51 percent is enough in all cases?

1 MR. COLE: Our position -- yes. Our position
2 would be --

3 QUESTION: You are. The answer's yes.

4 MR. COLE: Our position would be that if the
5 United States owns a controlling -- has a controlling
6 ownership of the shares, or appoints a controlling
7 majority of the board --

8 QUESTION: Are there a lot of Federal Savings &
9 Loan Associations around the country that are now
10 Government actors?

11 MR. COLE: That -- no. The Federal Savings &
12 Loan Associations would be privately -- would be
13 considered private actors under that test.

14 The only entities that would be considered
15 governmental actors under that test are those which are
16 essentially wholly-owned Government corporations.
17 Essentially, with Amtrak Congress --

18 QUESTION: Well, essentially, 51 percent owned,
19 is that what you're saying? I thought you said --

20 MR. COLE: That's right.

21 QUESTION: -- 51 percent.

22 MR. COLE: That's right, because --

23 QUESTION: So you're saying, wholly owned.

24 MR. COLE: That's right, because the State
25 action inquiry is about responsibility, it's not about

1 sole responsibility.

2 QUESTION: What about the converse of that
3 proposition? If the ownership is less than 50 percent,
4 does that mean it is -- it is not a Government actor?

5 MR. COLE: That means that the ownership and
6 control in and of themselves are not sufficient to make it
7 a Government actor. Of course, if there is -- in addition
8 there are factors which support State action such as State
9 compulsion of the particular conduct, then it might be a
10 State actor.

11 I'd like to reserve the rest of my time for
12 rebuttal.

13 QUESTION: Very well, Mr. Cole.

14 Mr. Baine, we'll hear from you.

15 ORAL ARGUMENT OF KEVIN T. BAINE

16 ON BEHALF OF THE RESPONDENT

17 MR. BAINE: Mr. Chief Justice, and may it please
18 the Court:

19 The question in this case is whether it is fair
20 to say that the Government was responsible for Amtrak's
21 decision to reject the petitioner's political ad.

22 Under a realistic view of the facts of this
23 case, the answer to that question is no. The Court will
24 not find the fingerprints of any Government official on
25 that decision, nor will it find the shadow of any

1 Government regulation on Amtrak's policy.

2 QUESTION: Well, I take it the board of
3 directors of Amtrak would have had authority to set the
4 policy for advertising if they'd thought it worth their
5 time and attention.

6 MR. BAINE: Yes, that is correct.

7 QUESTION: So --

8 MR. BAINE: There is no --

9 QUESTION: So really, you can attribute to the
10 directors of the corporation the acts of its subordinate
11 officers, can't you?

12 MR. BAINE: The board was responsible. In fact,
13 the board did not know of the policy, but it did have
14 responsibility.

15 QUESTION: Suppose it had? Suppose it had
16 adopted the policy? Would the result then be any
17 different?

18 MR. BAINE: It wouldn't make any difference.
19 The mere fact that the president appoints --

20 QUESTION: Well, then, I'm not sure why we're
21 talking about it, then. But --

22 (Laughter.)

23 QUESTION: Why wouldn't it have made a
24 difference? Suppose the board of directors said, this
25 will be our policy, and they had a policy which was highly

1 restrictive of certain forms of speech?

2 MR. BAINE: It would make no difference. The
3 fact that the President appoints the board of directors
4 does not make Amtrak a Government instrumentality. The
5 Court has faced that question directly once and indirectly
6 another time. In the Conrail case, the Regional Rail
7 Reorganization Act cases, the Court dealt with Conrail.

8 QUESTION: Well, just before we get there, I
9 just want to ask whether or not, isn't it fair for us
10 assign this policy to the directors?

11 MR. BAINE: Yes.

12 QUESTION: Thank you.

13 MR. BAINE: And my point is that it doesn't make
14 any difference, because in the Regional Rail
15 Reorganization Act cases, the Court was confronted with
16 the question whether or not the Government's appointment
17 of Conrail's board of directors, and Conrail was an entity
18 very much like Amtrak, formed for the same purpose and
19 with the same structure, and the Court said that the fact
20 that the President appointed board members did not make
21 Conrail a Government entity.

22 In FCC v. League of Women Voters, the Court
23 faced the same question indirectly. It was dealing with
24 the Corporation for Public Broadcasting, and every member
25 of the board of directors of the Corporation for Public

1 Broadcasting is appointed by the President, but the Court
2 didn't think that that made the corporation part of the
3 Government.

4 In fact, quite to the contrary. The Court's
5 opinion emphasized that the corporation was intended to
6 provide insulation against Government interference in the
7 affairs of the stations that received money from the
8 corporation.

9 QUESTION: Mr. Baine, was there some legislative
10 change regarding Amtrak after the date of the Conrail
11 decision to which you referred?

12 MR. BAINE: There were a number of changes.
13 There was a change pertaining to Amtrak after that case.
14 However --

15 QUESTION: What was the change?

16 MR. BAINE: Well, there were several changes.
17 The board composition was changed slightly and the
18 ownership was changed slightly. But Conrail --

19 QUESTION: In what respects were they changed?

20 MR. BAINE: The United States required an
21 ownership interest and appointed more board members, and
22 Conrail, however, at the time the board in -- the United
23 States in fact was able to control the majority of the
24 board.

25 The petitioner has made the point that Conrail

1 wasn't really functioning yet, and so we shouldn't pay too
2 much attention --

3 QUESTION: In any case, it would be a
4 stronger --

5 MR. BAINE: -- to the Conrail case.

6 QUESTION: -- stronger case after the Conrail
7 decision than before, because of those legislative
8 changes. They tended in favor of the finding of
9 governmental color to this entity, not against it.

10 MR. BAINE: Well, but they didn't change the
11 issue that the Court addressed in the Conrail case, which
12 was whether or not appointment of board members by the
13 President made an entity a part of the Government.

14 The most important fact, I think, to bear in
15 mind here is that --

16 QUESTION: Mr. Baine, do you take the position
17 that the plaintiff waived the argument below about the
18 direct question, is Amtrak a Government agency?

19 MR. BAINE: We most certainly do, and this is
20 not a case as in Yee, in which a party simply failed to
21 raise a question, or failed to raise an argument. The
22 argument and the question was specifically raised and
23 explicitly waived and conceded.

24 QUESTION: So what do we do with it here? We
25 address the Government function inquiry, the close nexus

1 inquiry --

2 MR. BAINE: I think the Court --

3 QUESTION: -- or something of that sort?

4 MR. BAINE: I think the Court should address the
5 case on the basis upon which it was presented to the court
6 of appeals. It would come as a surprise, I would think,
7 to the court of appeals to learn that its judgment was
8 going to be reversed on the basis of an argument that was
9 explicitly conceded --

10 QUESTION: May I --

11 MR. BAINE: -- and so we say the question --

12 QUESTION: All right. May I ask, in making that
13 analysis, whether it is the same analysis we would make if
14 it were a question of, for instance, State sovereignty,
15 asking whether it's an arm of the State for State
16 sovereignty purposes. Is it the same analysis?

17 MR. BAINE: I don't think it's precisely the
18 same. I think this Court has on a number of occasions
19 faced the argument that the petitioner is making that, by
20 virtue of a close relationship between the Government and
21 an entity that is nominally not the Government, there is
22 State action.

23 What the Court has said is that when that
24 argument is made, the proper inquiry is whether the
25 relationship between the Government and the otherwise

1 private entity affected the decision or the policy that's
2 under review.

3 The fact that the Government might appoint board
4 members here, or that there might be some other
5 connections, at the very most would suggest that it's
6 conceivable that the Government might have asserted some
7 influence --

8 QUESTION: Mr. Baine --

9 MR. BAINE: -- but that only frames the
10 question.

11 QUESTION: Mr. Baine, the second question
12 presented in the petition for certiorari is whether the
13 court of appeals erred in holding that Amtrak's asserted
14 policy was not State action. Are you saying that a
15 petitioner in this Court has to just stick with exactly
16 the same arguments on which he lost in the court of
17 appeals?

18 MR. BAINE: I wouldn't go quite that far, but I
19 would say that it would be inappropriate to permit the
20 petitioner to raise an argument that he explicitly
21 conceded, and that the district court and the court of
22 appeals -- where the district court and the court of
23 appeals relied upon that concession. The petitioner said,
24 we do not argue that Amtrak is a Government entity, but we
25 accept that it is, generally speaking, a private entity.

1 QUESTION: Mr. Baine --

2 QUESTION: Well, did a factual determination, or
3 a factual inquiry, turn on that statement? I mean, were
4 factual findings avoided?

5 It seems to me it was just an argument not made
6 that perhaps could have been made, and I don't see why,
7 since it's the same claim, basically, the petitioner can't
8 now make it here.

9 MR. BAINE: If the argument had not been
10 explicitly waived, the evidence might well have been
11 different, but I'm perfectly happy to address the merits
12 of the argument. I think the merits --

13 QUESTION: May I also ask, along with the Chief
14 Justice's question, did you claim any waiver in your brief
15 in opposition to the cert petition?

16 MR. BAINE: No, because the petition for
17 certiorari does not make the explicit argument that's made
18 for the first time in the brief on the merits.

19 QUESTION: No, but it --

20 MR. BAINE: That --

21 QUESTION: -- clearly was embraced within the
22 question the Chief Justice quoted, wasn't it?

23 MR. BAINE: Well, there are two questions here.
24 One is whether it's fairly embraced if you read the
25 question very generously to the petitioner, and that might

1 be so, but our point is different.

2 Our point is, if you're going to read it that
3 generously, you're going to read it to include an argument
4 that was explicitly withdrawn from the case in the court
5 of appeals, but I'm prepared to address the question in
6 case the Court does entertain it.

7 QUESTION: Mr. Baine, it's easy to concede this
8 is not a Government agency for the Federal Tort Claims Act
9 purposes, it is not a Government agency for purposes of
10 APA purposes, but where is there a concession that this is
11 not a Government actor for purposes of constitutional
12 limitations?

13 MR. BAINE: Well, I would simply direct the
14 Court's attention to the petitioner's brief in the
15 district court and the court of appeals, in which they
16 said they do not contend that Amtrak is a Government
17 entity, but, rather, a private entity so interrelated to
18 Federal entities that it's to be treated as a State actor
19 here.

20 Now, if the question is presented whether or not
21 this is a Federal agency or instrumentality for all
22 purposes, our answer to that question is no for three
23 reasons.

24 First, because Congress very unambiguously said
25 the entity they were creating was not to be considered

1 part of the Government.

2 Second, because this Court said in the pass
3 rider case, Atchison, Topeka, and Santa Fe case, that
4 Amtrak is not a governmental entity, but rather a private
5 corporation.

6 And third, because there were valid and
7 legitimate reasons why Congress said that Amtrak should
8 not be a part of the Government and, indeed, today Amtrak
9 has important features that are not at all like a
10 Government agency, and that are very much like a business.

11 QUESTION: Would you --

12 QUESTION: Mr. Baine --

13 QUESTION: Would you agree with the
14 characterization I suggested before that this is a
15 centaur-like entity, that it is part private, part
16 Government?

17 MR. BAINE: One could call it quasi-public in
18 the sense that that word is sometimes used to refer to
19 corporate entities.

20 There are aspects of Amtrak that one could say
21 are public in the sense the public rides the trains, and
22 it's certainly true that the Government regulates Amtrak
23 and has the other relationships that we've been talking
24 about.

25 But our position is that if you have an entity

1 that arguably has some features that may be governmental
2 and some that are private, the appropriate question is,
3 what about the action or the policy that we're talking
4 about here, is that influenced by the fact that the
5 Government's involved, and the answer to that is clearly
6 no. The policy against political advertising --

7 QUESTION: Mr. Baine, can I test your hypothesis
8 with a rather unlikely hypothetical question?

9 MR. BAINE: Certainly.

10 QUESTION: Assume that the board, viewing itself
11 as totally private, like -- it adopted a policy of
12 accepting advertisements only from Presbyterians and
13 Democrats, say, an extreme example, and would refuse all
14 other advertising. Congress disapproves of this policy,
15 and passes a law and says, you do not have the freedom to
16 make that kind of decision. You must act neutrally in all
17 cases. Would that statute be constitutional? I think
18 not, if it's a totally private entity.

19 MR. BAINE: We would begin the analysis with the
20 question whether or not Amtrak has any First Amendment
21 rights, and we would say that it does, and then we would
22 ask whether or not there was a compelling State interest
23 that justified the legislation that said Amtrak couldn't
24 discriminate in that sense. In that case, it could come
25 out either way. It really wouldn't affect this question.

1 But we would contend that Amtrak does have First
2 Amendment rights in the same way that its competitors
3 have.

4 QUESTION: Well, if it has the same rights as
5 its competitor, private competitors have, it could engage
6 in a policy of selective advertising that could not be
7 overruled by statute.

8 MR. BAINE: That may be, but it is a far-fetched
9 hypothetical, and in fact the policy in this case is that
10 Amtrak wanted very much to stay away from all matters of
11 controversy, to avoid any suggestion that they're favoring
12 one side or the other in political debate, and have no
13 political advertising whatsoever, and we think that's a
14 policy choice they ought to be able to make.

15 QUESTION: Well, but that goes to the merits.
16 What Justice Stevens presents is the specter of a
17 corporation that is beyond Congress' control, a
18 corporation that on the one hand Congress funds,
19 subsidizes, and controls the appointment of 100 percent of
20 its directors, but on the other hand it cannot be
21 controlled by the Congress. That is very odd.

22 MR. BAINE: Well, under *Rust v. Sullivan*, I
23 think Congress would have the power to control the
24 expenditure of public funds, and if the concern here is
25 that Amtrak receives Government funds and might misuse

1 Government funds in a way that the Congress thought was
2 inappropriate, I think Congress would have greater ability
3 to restrict Amtrak's use of those funds than it would have
4 an ability to restrict the use of American Airlines
5 funds --

6 QUESTION: No, but my hypothetical --

7 MR. BAINE: -- which are not coming all from the
8 Government.

9 QUESTION: -- didn't involve the use of
10 Government funds. It involved a revenue-generating
11 policy, generating revenues only from selective
12 advertisers.

13 MR. BAINE: Then it might be immune. But --

14 QUESTION: Couldn't you say that anybody who
15 receives Government funds shall not engage in the
16 following practices? I thought we do that all the time.
17 I thought --

18 MR. BAINE: There's no question that if the
19 activity involves the expenditure of Government funds I
20 think it's clear that the answer is the Government can
21 regulate. If the question doesn't involve the expenditure
22 of Government funds at all, I think it would be a question
23 that would be hotly debated.

24 QUESTION: The activity in question, as opposed
25 to the institution? Even if the Government subsidizes

1 Amtrak, it can't say any institution that gets a
2 Government subsidy shall not engage in these forms of
3 discrimination? Surely you can say that. It has to be a
4 particular activity?

5 MR. BAINE: It wouldn't be of any great concern
6 to Amtrak if the case came out that way, and no doubt the
7 petitioner would be arguing that's exactly the way it
8 should come out.

9 I said before that --

10 QUESTION: Let's take a case without any
11 regulation.

12 Suppose Amtrak says, we don't want any
13 leafleting in Penn Station, and that's challenged as in
14 violation of the First Amendment, and this Court's
15 decision involving the Port Authority Terminal is cited by
16 the plaintiffs as precedent, could Amtrak have a policy
17 that says, no leafleting on these premises?

18 MR. BAINE: Amtrak could have such a policy.

19 The important point to bear in mind, I think, is
20 that Amtrak is continuing in the same business of the
21 railroads that it succeeded, and it is important and it's
22 desirable, it seems to me, that Congress have the
23 flexibility to approach crises in the business world, to
24 essentially reorganize and restructure and industry, as it
25 did in this case, without necessarily saddling the

1 enterprise that results with all of the obligations of
2 Government.

3 Amtrak's competitors in the airlines and the bus
4 companies are not required to observe all of the
5 requirements of the Constitution, and it is important that
6 Amtrak be able to compete on an even playing field.

7 If we look at Amtrak's function, we see that its
8 function is commercial, not governmental. It doesn't
9 govern in any sense of the word. It doesn't make policy,
10 it doesn't regulate business, it is a business. If we
11 look at its structure --

12 QUESTION: That sounds like it describes the
13 Bank of the United States, which was given governmental --
14 intergovernmental immunity in McCullough v. Maryland.

15 MR. BAINE: Well, the function of the -- the
16 function of the entity is significant. It is not the only
17 factor, but it is significant, and --

18 QUESTION: Do you think McCullough v. Maryland
19 was correctly decided?

20 MR. BAINE: I think I have to say yes.

21 (Laughter.)

22 MR. BAINE: I don't want to bite off too much.
23 We'll accept McCullough v. Maryland.

24 (Laughter.)

25 MR. BAINE: But there are many things about

1 Amtrak that are not at all governmental. Its structure is
2 a structure of a private corporation, and it makes a
3 difference.

4 There are private shareholders who contribute
5 private capital to the formation of this company. It is
6 managed by a board of directors who are, for the most
7 part, except for two people, private citizens, not public
8 officials. They don't take an oath to support and defend
9 the Constitution. They assume a fiduciary duty to try to
10 operate this business as a business, and to try to make
11 money.

12 The management and control of this corporation
13 is in the hands of its board, not the United States
14 Government. There is not a shred of evidence in the
15 record that the Government, the President, the Secretary
16 of Transportation, has ever attempted to interfere in the
17 day-to-day operations of Amtrak, and there's certainly no
18 evidence that the Government --

19 QUESTION: Well, does it have to be day-to-day
20 operation? I mean, does the management have to be that
21 precise in order to qualify?

22 MR. BAINE: There's no evidence that the
23 Government interfered in the operation at all, except
24 insofar as --

25 QUESTION: Well, I presume the governmental

1 officers take into consideration the policy choices which
2 the directors make or support when they decide whether or
3 not to reappoint directors, or that they anticipate those
4 policies when they appoint them in the first place.

5 That's not enough?

6 MR. BAINE: Well, one of the things that might
7 have been different if the petitioner made the argument --

8 QUESTION: But that's not enough, I take it?

9 MR. BAINE: No, I don't think that's enough.

10 QUESTION: So it's basically got to be day-to-
11 day management before the nexus is close enough?

12 MR. BAINE: Well, I think in fact there ought to
13 be some evidence that the Government cared about Amtrak's
14 advertising policy, and if there are some things about
15 Amtrak that may arguably be governmental, and some that
16 are commercial, this surely falls on the commercial side
17 of the line.

18 QUESTION: Well, you say the Government cared.
19 I mean, if the President of the United States said, I
20 think it's appalling that there are political
21 advertisements in Amtrak stations, would that be enough?

22 MR. BAINE: That probably would be enough, but
23 it depends on how you read --

24 QUESTION: What if the director said, too bad,
25 we like it?

1 MR. BAINE: That would show the independence.

2 But the point is that --

3 (Laughter.)

4 QUESTION: No, but I mean, the criterion can't
5 be whether the Government cares or not. The criterion has
6 got to be some criterion of control, hasn't it?

7 MR. BAINE: I think there are two ways to look
8 at it.

9 QUESTION: Doesn't it have to be a criterion of
10 control?

11 MR. BAINE: I would say yes, and --

12 QUESTION: And the only question is, how precise
13 must the control be? Must they be micromanagers or
14 macromanagers, isn't --

15 MR. BAINE: Well, when the Court has faced the
16 question in the past that because of a relationship
17 between the Government and another entity there is State
18 action, the Court has asked the question whether or not
19 the Government exercises any control, overt or covert,
20 over the particular decision that is at issue in the case,
21 and that surely did not happen here.

22 The petitioner is taking the position that, even
23 though the Government had nothing whatsoever to do with
24 this particular policy -- indeed, it's not even a case in
25 which the Government acquiesced in a policy, because

1 there's no evidence that it even knew about it, but the
2 petitioner takes the position that even though that is the
3 case, the Government's domination of Amtrak is so complete
4 that we must assume that everything it does is
5 governmental.

6 QUESTION: Are you willing to accept de facto
7 control as the criterion?

8 I mean, I can imagine a lot of entities,
9 including, for example, the Corporation for Public
10 Broadcasting, the National Endowment for the Arts, many
11 private institutions that are so dependent upon Federal
12 subsidies, for example, that if it becomes pretty clear
13 that the Federal Government wants something to be done,
14 they will do it, lest they lose their subsidies. Is that
15 enough to make that --

16 MR. BAINE: No, it isn't. The only thing we
17 accept --

18 QUESTION: But that's control.

19 MR. BAINE: The only thing --

20 QUESTION: That's de facto control, isn't it?

21 MR. BAINE: The only thing we accept is that if
22 the Government, in fact, exercised control over the
23 particular decision, then there would be State action.

24 QUESTION: So it isn't just the ability to
25 control that you're arguing, it is the exercise of the

1 control.

2 MR. BAINE: That is correct. The ability to
3 control frames the question, and the question is, was the
4 ability exercised?

5 QUESTION: Well, but Mr. Baine, what do you do
6 with cases like Monroe v. Pape, where the City of Chicago
7 certainly didn't approve or know about what the police
8 officers were doing, but nevertheless was treated as State
9 action?

10 MR. BAINE: Well, the police officers --

11 QUESTION: You put people in a position where
12 they can act as though they were the Government, and here,
13 I guess, Amtrak has quite a bit of authority to act in an
14 important way.

15 MR. BAINE: But we regard Government officials
16 as the Government, and we always have, and the question
17 here is whether or not --

18 QUESTION: Even though they're acting ultra
19 vires. Even though they're acting beyond their --

20 MR. BAINE: That's the way we've always viewed
21 it, and I don't think that that affects this case in any
22 way.

23 QUESTION: Well, does it make -- do you think it
24 makes a difference in this case that Amtrak inherited this
25 policy from Penn Central and did nothing about it, as

1 opposed to having initiated it itself?

2 MR. BAINÉ: I think it underscores the degree to
3 which this is not a governmental action or policy at all.
4 The case would come out the same way if Amtrak formulated
5 the policy, but the fact that it was formulated by the
6 Pennsylvania Railroad underscores that it's the kind of
7 decision that is a business decision. It's not
8 governmental at all.

9 QUESTION: I'm just puzzled by the concept that
10 an action is governmental or nongovernmental based on the
11 indifference of its directors. I just don't understand
12 the legal --

13 MR. BAINÉ: No, I'm not -- if I --

14 QUESTION: -- the legal reasoning --

15 MR. BAINÉ: If I suggested that, I didn't mean
16 to suggest that. What I mean is, by its very nature, it
17 is not governmental. That's the point that I was trying
18 to make.

19 The board, no question, has the ability to
20 control that policy, but it is very important, I think, to
21 underscore the point that the Court has never suggested
22 that the mere fact that the Government may have the power
23 to appoint board members makes the entity a governmental
24 entity, and I think that would be a very incorrect
25 statement to make.

1 There's no evidence in the record that anybody
2 on the board has ever buckled under to the pressure of a
3 President. Judges are appointed by presidents, and some
4 judges are appointed by something other than life terms,
5 for fixed terms.

6 It would be unreasonable to assume that these
7 board members would violate their fiduciary duty and take
8 an action that's not take for the business interests of
9 the corporation, but, rather, to promote some political or
10 governmental objective. If that is the theory of the
11 case --

12 QUESTION: Don't you see some difference between
13 the Secretary of the Department of Transportation as the
14 Government's person on this board and a judge appointed
15 under Article III, in terms of affiliation with the
16 Government?

17 MR. BAINE: The Secretary has a continuing
18 relationship to the President in a way that judges do not,
19 and that is true, but the point is that --

20 QUESTION: The President is the master of the
21 Secretary.

22 MR. BAINE: Of one member of the board, and
23 not --

24 QUESTION: Well, but he's also taken --

25 MR. BAINE: -- of any of the others.

1 QUESTION: He's also taken an oath under the
2 Constitution, and I find it rather odd to say that we
3 could say, oh, this is a business decision, and we are not
4 going to allow our governmental character to influence the
5 policies that we make. I think that's -- I thought that's
6 exactly why they sit on the board.

7 MR. BAINE: One Government official, one Federal
8 Government official sits on the board. The board is
9 composed primarily of private citizens who are appointed
10 by the President, but who are, in fact, initially selected
11 by other bodies.

12 QUESTION: Do you think in that capacity that
13 official, the Secretary, is free to make any judgment he
14 wishes with reference to matters of speech?

15 MR. BAINE: I think he's entitled to vote the
16 way he feels his fiduciary duty compels him to vote, and I
17 don't think the mere fact that one of the board members
18 also serves as Secretary of Transportation makes the
19 board's decision a Government decision.

20 QUESTION: Are constitutional policies any part
21 of that consideration?

22 MR. BAINE: Well, I think they're certainly part
23 of the consideration, but when one out of nine members of
24 a board has taken an oblig -- an oath to uphold the
25 Constitution, that doesn't affect the way the other eight

1 think, nor is it fair to assume that --

2 QUESTION: I thought your position was he's
3 entirely upholding the Constitution when he allows a
4 private entity to behave like a private entity.

5 MR. BAINE: Well, we'd certainly take that
6 position, too.

7 QUESTION: You wouldn't say the Secretary is
8 violating his oath of office when he allows a private
9 entity which he's been placed in charge of to act like a
10 private entity.

11 MR. BAINE: No, I don't think that he would. I
12 think that he obviously has in the back of his mind some
13 sense of his other job, I suppose, but when he sits on
14 that board, he has to function like a board member, and he
15 has to ask himself, how are we going to run this board
16 like a business, and he certainly does not violate his
17 oath when he in fact carries out his obligation as a board
18 member.

19 The Court has considered the question whether or
20 not Amtrak is a governmental actor for purposes of a due
21 process challenge in the pass rider case. The question in
22 that case was whether certain agreements entered into by
23 Amtrak were governmental agreements, such that when
24 Congress came along later and impaired the obligations of
25 those contracts, it impaired the obligations of the United

1 States, and the Court said, no, that's not the case,
2 Amtrak is not part of the United States, those contracts
3 are not obligations of the United States, they are
4 obligations of a private entity.

5 The label that Congress placed on Amtrak was not
6 a mere label. It has meaning, and it has consequences.
7 In fact, it's an instruction to Amtrak that it is not to
8 regard itself as part of the Government, and it's also an
9 instruction to the Government that it's not to think that
10 it can exercise control over Amtrak's affairs. It's a
11 statement that Amtrak doesn't speak for the Government,
12 and the Government is not generally bound by what Amtrak
13 says.

14 At the very least, this statement by Congress
15 means that Amtrak and the Government are separate entities
16 and, as a general matter, the Government is not
17 responsible for what Amtrak does.

18 QUESTION: Do you -- can you give an example of
19 another private entity that is subject to the FOIA and to
20 the Inspector Generals Act?

21 MR. BAINE: I don't know that I can give a list
22 of entities that are subject, but the fact that this
23 corporation --

24 QUESTION: FOIA doesn't apply to the private
25 sector, does it?

1 MR. BAINE: In general, it doesn't, and I think
2 it does show that Congress was not simply acting blindly.
3 Congress recognized that there are some things about
4 Amtrak that suggest that it ought to ask whether or not
5 certain statutory policies apply, and in the case of FOIA,
6 it decided it would be a good idea if the public could
7 examine Amtrak's affairs and be able to learn about how to
8 conduct itself.

9 QUESTION: To recognize that in some respects
10 this was a public and not a private corporation.

11 MR. BAINE: In some --

12 QUESTION: At least for that respect --

13 MR. BAINE: That's right.

14 QUESTION: -- for purposes of the Freedom of
15 Information Act.

16 MR. BAINE: Yes.

17 QUESTION: And for purposes -- and also under
18 the Inspector Generals Act, do you know any private entity
19 that is subject to that legislation?

20 MR. BAINE: No, but in the Inspector General
21 Act, the Congress said, we're doing this, but we recognize
22 that Amtrak is not part of the Government.

23 What the statement by Congress that has been
24 accepted by this Court means is that as a general matter,
25 the Government is not responsible. There may be some

1 instances where the Government is responsible for what
2 Amtrak does, but we would suggest that those instances are
3 instances in which the Government has, either by law, or
4 by regulation, or by exercise of coercion or influence,
5 had some impact on Amtrak's decision, and that is not the
6 case here.

7 This is a case of Government inaction. Insofar
8 as this policy was concerned, the Government was
9 completely inactive and uninterested, and that is why the
10 argument, until the briefs in this Court, has been that
11 there's Government action under the theory of Burton,
12 which was a case in which, under very unusual
13 circumstances, this Court did hold that the Government's
14 inaction amounted to action.

15 Burton has never been applied beyond the limited
16 factual setting in which it occurred, and the last place
17 to apply it would be in a case involving the First
18 Amendment, where the constitutional command essentially is
19 to be inactive, and to leave the decisions regarding
20 speech to private entities.

21 The position that we think is supported by the
22 cases is that in a case like this, when there is evidence
23 that the Government has, in fact, influenced or affected
24 the decision that took place, it is fair to say that the
25 Government is responsible.

1 But when the Government has not had any
2 influence whatsoever over the particular action, in those
3 cases when Amtrak has made a decision for purely business
4 reasons, it ought to have the same freedom to act that its
5 competitors enjoy.

6 Thank you very much.

7 QUESTION: Thank you, Mr. Baine.

8 Mr. Cole, you have 3 minutes remaining.

9 REBUTTAL ARGUMENT OF DAVID D. COLE

10 ON BEHALF OF THE PETITIONER

11 MR. COLE: Thank you, Mr. Chief Justice.

12 Going back to Mr. Chief Justice Rehnquist's
13 question regarding the private initiation of this policy,
14 the case that is closest to this case is the Gerard
15 College case, in which a privately founded, privately
16 funded, privately funded institution was run by a board of
17 Government appointees, and this Court found that the
18 private founders' policy of limiting admission to white
19 males was State action because the board was responsible
20 for that policy. The board didn't adopt that policy, but
21 the board was responsible.

22 The Pennsylvania supreme court found that the
23 board was not a governmental entity, because the city had
24 specifically disavowed any relationship to the board
25 through its city charter. The Supreme Court did not find

1 that compelling, and that, I think, underscores that the
2 case is not to be decided by label --

3 QUESTION: Perhaps you can remind me, were the
4 trustees of Gerard College ex officio members, or were
5 they simply private people that were appointed by the
6 city?

7 MR. COLE: They were -- it was a -- they were
8 appointed by the Government. They were not -- it was
9 only -- it was a board of trustees of the City of
10 Philadelphia, but the City of Philadelphia had said that
11 this board -- although we appoint the trustees, this board
12 does not constitute a city entity. This Court said, we
13 don't decide by labels.

14 In West v. Atkins, the doctor, who was held to
15 be a State actor, was not a Government employee. This
16 Court said, we don't decide by labels.

17 In Cherry Cotton Mills, the Reconstruction
18 Finance Corporation, the question was, should it be
19 treated as the United States for counterclaim purposes?
20 Congress had labeled it a corporation. This Court said
21 that the fact that Congress called it a corporation does
22 not make it something other than what it actually is, an
23 agency selected by the Government to serve governmental
24 purposes.

25 Government today is increasingly doing business

1 through the corporate forum, bringing business principals
2 into Government.

3 QUESTION: The Corporation for Public
4 Broadcasting, do you think that's governmental, too?

5 MR. COLE: I think the Corporation for Public
6 Broadcasting is a difficult question. It's board is
7 wholly --

8 QUESTION: I know that. What do you think the
9 answer is?

10 MR. COLE: Well, its board is wholly appointed
11 by the United States. However, there are fairly stringent
12 statutory guarantees of independence, and I think the
13 question would be whether those statutory guarantees of
14 independence, which provide that the board members cannot
15 be chosen on a political basis, and that no political
16 person can affect the running of that corporation in any
17 way --

18 QUESTION: What difference does that make? I
19 mean, you have --

20 MR. COLE: Well, the question -- because the
21 question, Your Honor, is whether there is an independence,
22 a sufficient independence to this entity that it should
23 not be treated as --

24 QUESTION: The board members are appointed by
25 Government officials.

1 MR. COLE: Right, and we think --

2 QUESTION: There and here.

3 MR. COLE: That's right, and we believe that,
4 ordinarily, where the Government appoints the board, it
5 ought to be treated as a State actor.

6 As this Court has held, all State action cases
7 depend on the facts and circumstances of the case, and
8 because of the statutory designation with respect to the
9 Corporation for Public Broadcasting, might be a different
10 question. That's not a question posed here.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cole.

12 MR. COLE: Thank you.

13 CHIEF JUSTICE REHNQUIST: The case is submitted.

14 (Whereupon, at 11:00 a.m., the case in the
15 above-entitled matter was submitted.)

16
17
18
19
20
21
22
23
24
25

CERTIFICATION

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

MICHAEL A. LEBRON, Petitioner v. NATIONAL RAILROAD PASSENGER CORPORATION

CASE NO.:93-1525

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

BY Ann Marie Federico

(REPORTER)