

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. GARY LOCKE,  
GOVERNOR OF WASHINGTON, ET AL.; and  
INTERNATIONAL ASSOCIATION OF INDEPENDENT  
TANKER OWNERS (INTERTANKO), Petitioner v. GARY  
LOCKE, GOVERNOR OF WASHINGTON, ET AL.

CASE NOS: 98-1701 & 98-1706 c-1

PLACE: Washington, D.C.

DATE: Tuesday, December 7, 1999

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UNITED STATES

CAPTION - UNITED STATES - BARBER v. CLAY

COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

LOCAL 1000 OF THE INTERNATIONAL ASSOCIATION OF

FIRE FIGHTERS - LOCAL 1000 OF THE INTERNATIONAL ASSOCIATION

CASE NO:

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1           General, Department of Justice, Washington, D.C.; on  
2           behalf of Petitioner United States.

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

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

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 98-1701, the United States v. Gary Locke, and  
5 19-8 -- 98-1706, International Association of Tanker  
6 Owners v. Locke.

7 Mr. Benner.

8 ORAL ARGUMENT OF C. JONATHAN BENNER

9 ON BEHALF OF THE PETITIONER IN NO. 98-1706

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

12 From the first day of our existence as a Nation,  
13 we've relied on the merchant ships of the United States  
14 and foreign nations to bear the vast preponderance of our  
15 interstate and our foreign commerce. There have been some  
16 amicus submissions on this side of the argument that give  
17 you some sense not only of the historic scope of that  
18 reliance, but also the present scope and the complexity of  
19 the routes that these vessels travel.

20 Each of these vessels is a complex collection of  
21 systems and subsystems, both structural and mechanical,  
22 but also each depends on the knowledge and skill and  
23 judgment of mariners not only from the United States, but  
24 from around the world. Each of these vessels is subject  
25 to an intricate Federal system of permits, inspections,

1 certifications by personnel of the United States Coast  
2 Guard acting pursuant to authority vested in them by the  
3 United States Congress.

4 The Founders were very familiar with this  
5 industry. They knew it very well. They knew its  
6 complexities. They knew its central importance to the  
7 commerce of the United States and the economic health of  
8 its -- of the Nation. And they knew its links to  
9 international law. They understood that each vessel  
10 carried with it a physical projection of the sovereignty  
11 of another Nation and they knew that the citizens aboard  
12 that vessel often were from other nations and that along  
13 with the possibility of prosperity that came with these  
14 maritime transactions, there also was the possibility of  
15 conflict with other nations in how we dealt with those  
16 vessels when they called at our ports.

17 The United States and Intertanko here seek  
18 reversal of a decision from the Ninth Circuit Court of  
19 Appeals which I believe for the first time in the history  
20 of the United States countenanced an intrusion by a State  
21 government, in this case the State of Washington, into  
22 areas that are exclusively regulated by the Federal  
23 Government. And to define this field at the start, we are  
24 relying on the enumeration of subject matters in 46 U.S.C.  
25 3703(a), the design, construction, alteration, repair,

1 maintenance, equipping, personnel qualifications, and  
2 manning of the vessels. This is the realm that we believe  
3 has strong Federal connotations that must be protected in  
4 this case.

5 By inserting itself into these subject matters,  
6 our concern is that the State of Washington necessarily  
7 displaces Federal judgments governing these vessels and  
8 compromises the constitutionally essential supremacy of  
9 Federal law in this particular area.

10 The practical --

11 QUESTION: May I -- may I ask you, Mr. Benner,  
12 if you take the position that all 13 of the provisions  
13 before us here are preempted by Federal law itself or that  
14 some of them are preempted by Coast Guard regulation?

15 MR. BENNER: We take the position that all of  
16 them, Justice O'Connor, are preempted by Federal law  
17 itself in the subject matters described in 46 U.S.C.,  
18 section 3703.

19 QUESTION: Some sort of field preemption.

20 MR. BENNER: Yes. We -- we do contend -- and  
21 I'll be very clear about that.

22 QUESTION: Yes.

23 MR. BENNER: There is a condition of field  
24 preemption that surrounds that component of the United  
25 States Code.



1 QUESTION: So, your first position would be that  
2 field preemption applies and we don't have to look  
3 further.

4 MR. BENNER: That is correct.

5 Now, like people in our profession have a  
6 tendency to do, we have also pointed to express --

7 QUESTION: A fall-back provision.

8 (Laughter.)

9 MR. BENNER: We -- we have also pointed to -- to  
10 instances in which the United States Coast Guard has  
11 spoken expressly preemptively in its regulations and that  
12 those express preemptive statements are entitled to  
13 deference.

14 QUESTION: And there you rely on Coast Guard  
15 regulations that contain language expressly preempting  
16 State law?

17 MR. BENNER: Yes, that is correct. The Coast  
18 Guard has said on several occasions, in issuing  
19 regulations pursuant to title 46 and also to title 33,  
20 that it is the Coast Guard's intent to oust differential  
21 State action in those areas.

22 QUESTION: But if the Coast Guard were silent on  
23 some of these points, you still think there is Federal --

24  
25 MR. BENNER: Indeed, Justice O'Connor, that

1 is --

2 QUESTION: Do you think your position is  
3 entirely consistent with our decision in Ray? Your first  
4 position. I know your second is.

5 MR. BENNER: Yes. I -- I believe it is, Justice  
6 Stevens. The -- Ray we rely on heavily, but I -- I  
7 certainly acknowledge that in Ray the issues you were  
8 looking at in that decision were design and construction  
9 elements. We are saying here --

10 QUESTION: Well, but also the Court held that  
11 some of the regulations were valid in that --

12 MR. BENNER: The -- the two that were held valid  
13 by the Court in Ray that -- that maybe illustrate our  
14 point are, one, a tug escort provision, which was not held  
15 valid under what we are calling title II, as a shorthand  
16 reference, to PWSA, the 3703(a) subject matters, but was  
17 held valid under title I of PWSA which was a discretionary  
18 element of the law and remains a discretionary element of  
19 the law. We read the Court's decision in Ray to say the  
20 States do have an ability to act in these discretionary  
21 areas -- and the tug escort provision was deemed to be one  
22 -- if the Federal Government has not acted.

23 Now, a salient point in the fact pattern that we  
24 present to you here is that in every single element of the  
25 challenged State regulations, there is a corresponding

1 Federal regulation. We do not believe --

2 QUESTION: Oh, I understand that, but that's  
3 your second -- that's your fall-back argument. Your first  
4 argument is the statute itself, 3703, takes care of  
5 everything.

6 MR. BENNER: That is our argument because we  
7 believe that every one of these regulations falls within  
8 the understood meaning of design, construction,  
9 alteration, repair, maintenance, particularly in this case  
10 personnel qualifications and manning and operations.

11 QUESTION: Why should manning and operations --  
12 I mean, why shouldn't the State have something to say  
13 about that?

14 MR. BENNER: I think to understand why it's  
15 important to the Federal system, Your Honor, that -- that  
16 all of these things work together, you have to understand  
17 the system -- the vessel as a system. The section 3703(a)  
18 describes a number of elements of the operation of the  
19 vessel, all of which link together. What we're concerned  
20 about is that if the States can selectively adjust  
21 elements of that system, they are not in a position to  
22 judge what the impact of that adjustment is.

23 QUESTION: Well, what do you concede is left  
24 open to States in this area? What about conditions  
25 peculiar to local waters?

1 MR. BENNER: The language, Justice O'Connor,  
2 that you find in -- in much of the maritime preemption  
3 case law that this Court has generated about local  
4 conditions seems to be related to such matters as fishing,  
5 conservation, that kind of thing, or is -- is recited  
6 before, in the case of Ray, finding that the tug escort  
7 provision was a title I discretionary PWSA matter. We  
8 believe that the significance of local conditions --

9 QUESTION: Well, how do we know that the -- the  
10 provisions of Washington law you are contesting  
11 necessarily fall under title II and not under title I? It  
12 seems that some title I subjects involve operations.

13 MR. BENNER: Yes. I -- I do acknowledge,  
14 Justice Ginsburg, that in title I you have vessel  
15 operating requirements as -- as part of the statutory  
16 description of the field there; whereas, in title II you  
17 have operations.

18 We -- as a first level answer to your question,  
19 we contend it doesn't make any difference to our  
20 preemption analysis. We're contending that even title I  
21 is heavily preemptive, and if you look at Ray, it's very  
22 clear that the Court found that the congressional decision  
23 to permit State action with regard to structures included  
24 an implicit decision to ban the States from regulating  
25 with regard to vessel standards.

1           The thing that saved the tug escort requirement  
2 in Ray and which is not applicable here was the absence of  
3 a Federal presence in that particular element. The Court  
4 said, it may be that the United States will come to  
5 regulate that, and when that happens, that will have  
6 preemptive effect. But it hadn't happened at the time of  
7 the Ray decision. So, our answer is --

8           QUESTION: I must say I don't understand. It  
9 seems to me where you have field preemption, I -- I  
10 thought that by definition field preemption meant, if  
11 you're relying on the statute --

12           MR. BENNER: Yes.

13           QUESTION: -- which is what you're doing, it  
14 means, whether or not the Government acts, we've occupied  
15 the field. And if -- if we decide there should be no  
16 regulation of this, there shall be no regulation. Period.  
17 That -- and -- but you're -- you're -- you have some kind  
18 of a hybrid where -- where you claim field preemption but  
19 then explain the exception in Ray by saying, well, there  
20 was no -- you know, there had been no specific rule  
21 promulgated there.

22           MR. BENNER: Justice Scalia, we make a  
23 distinction between title II of the Ports and Waterways  
24 Safety Act and title I of that act. In other words, the  
25 one that is mandatory is title II, and in that case, we're

1 claiming field preemption.

2 QUESTION: But Justice Ginsburg's question drew  
3 your attention to the fact that you could place these  
4 matters under title I.

5 MR. BENNER: I -- I don't believe you can place  
6 all of them under title I. The -- the ambiguity about the  
7 distinction between title I and title II is the use of the  
8 word operating requirements in title I and the word  
9 operations in title II. We contend that all of these  
10 provisions fall within title II because they're either  
11 operations, personnel qualifications, or manning  
12 requirements that -- and -- and we accept your -- your  
13 proposition that, because we are arguing field preemption,  
14 the States are completely barred from entering that area.

15 The confusion -- my time is expired.

16 QUESTION: Thank you, Mr. Benner.

17 Mr. Frederick, we'll hear from you.

18 ORAL ARGUMENT OF DAVID C. FREDERICK

19 ON BEHALF OF PETITIONER UNITED STATES

20 MR. FREDERICK: Thank you, Mr. Chief Justice,  
21 and may it please the Court:

22 I'd like to start with the international  
23 ramifications of the decision by the court of appeals in  
24 this case because under title II of the PWSA, the  
25 Secretary is obliged to give reciprocal rights to foreign

1 flag vessels that -- that comply with international  
2 agreements to which the United States has acceded. And  
3 that international reciprocity is tied into the title II  
4 fields that Mr. Benner earlier described that are  
5 particularly applicable in this case, that those fields,  
6 personnel qualifications, manning, operations, and  
7 equipment. And the same reasons that this Court held in  
8 Ray it applied for design and construction are equally  
9 applicable for those fields as well.

10 The Secretary issues a license as --

11 QUESTION: Well, could we talk about whether  
12 it's field preemption or conflict preemption or something  
13 else? And how do you read Ray? There were exceptions in  
14 Ray. So, it's hard to look at it as a field preemption  
15 case.

16 MR. FREDERICK: That's --

17 QUESTION: Where are we?

18 MR. FREDERICK: Well, Justice O'Connor, we're in  
19 both. And let me try to distinguish for you.

20 QUESTION: Well --

21 MR. FREDERICK: Some of the -- some of the  
22 issues here involve the fields, and they relate to the  
23 vessel as a system, what the qualifications are of the  
24 personnel aboard, what manning requirements are -- are  
25 imposed, what kinds of equipment has to be tested at

1 particular times and operational. Those are clearly in  
2 the fields. There are international agreements that set  
3 standards the Secretary is obliged to give reciprocal  
4 rights to.

5 Now, there are other rules, and I would identify  
6 three for the Court that arguably -- arguably -- could be  
7 within the local peculiarities of the waterways, and those  
8 concern the advance notice of entry, the position  
9 plotting, and restricted visibility watchkeeping  
10 requirements.

11 I would point out to the Court that the State of  
12 Washington here has not attempted to justify in its  
13 rationale for these rules that they are related at all to  
14 the peculiarities of Washington waters. They apply to the  
15 many thousands of miles of Washington waters that are in  
16 Puget Sound and out -- the underlying -- outlying coast.

17 QUESTION: Well, may I ask -- you say visibility  
18 and piloting. Was it piloting that you said was involved?

19 MR. FREDERICK: Watchkeeping.

20 QUESTION: Watchkeeping. Does that mean in the  
21 heavy -- when the visibility is way down, as it often is  
22 in that area, is their three officer on the deck something  
23 that would be arguably not subject to field preemption?

24 MR. FREDERICK: That's -- that -- it's not  
25 subject to field preemption within the statutory fields of



1 title II. Our position is, consistent with Ray, that  
2 title I gives the Coast Guard regulatory field preemption  
3 so that if --

4 QUESTION: Well, you say that that would be bad  
5 only if it's covered by a Coast Guard regulation.

6 MR. FREDERICK: That's correct. And the Court  
7 made very clear with the tug escort requirement in that  
8 case that if the Coast Guard had issued a tug escort  
9 requirement, that that would occupy the field as to tug  
10 escorts and would not preempt a -- and would not be  
11 preemptive of a State rule if there was no Coast Guard  
12 regulation.

13 QUESTION: I don't understand how you -- how you  
14 get into the definition of the field the matter of local  
15 conditions. I mean, it seems to me if a manning  
16 requirement is -- is demanded by local conditions, it is a  
17 manning requirement nonetheless. It seems to me you're  
18 trying to slip in under the -- under the field definition,  
19 a totally extraneous matter, and that is whether local  
20 conditions, in fact, do justify some exceptions to the  
21 field preemption.

22 MR. FREDERICK: That's why I stressed arguably,  
23 Justice Scalia. In our view, most of these rules apply to  
24 the vessel as a system. They're not local traffic type  
25 rules.

1 QUESTION: That's a more honest -- that's --  
2 that's a more honest explanation. Right?

3 MR. FREDERICK: No. And -- and, you know, some  
4 of them in our view would be deemed manning requirements,  
5 but that in any event because -- if they are justified as  
6 local traffic rules, they are preempted because of  
7 contrary Coast Guard determinations to issue a rule as to  
8 those kinds of conditions.

9 QUESTION: Mr. Frederick, the lower courts  
10 didn't get into any of -- any of this, and so far, no one  
11 has mentioned the basis of their decision which was  
12 section 1018. So -- so --

13 MR. FREDERICK: I would be happy to address the  
14 error of the court of appeals' reasoning.

15 In our view, section 1018 of the Oil Pollution  
16 Act has no applicability to this case whatsoever. The  
17 plain language of that statute, which respondents do not  
18 contest our argument -- it begins with the phrase, nothing  
19 in this act -- i.e., nothing in OPA -- shall affect the  
20 right of the States to impose additional requirements.  
21 Nothing in section 1018 affects the ability -- the  
22 preemptive force of Federal law under the Ports and  
23 Waterways Safety Act, the PTSA --

24 QUESTION: Well, Mr. Frederick, if we agree with  
25 you on that point and if we also agree that in fact the

1 court gave a rather restricted reading of Ray, simply  
2 assuming that its principles went no further than the  
3 design and construction, shouldn't we simply at that point  
4 vacate and send this thing back rather than in the first  
5 instance, as if we were a court of -- of first instance,  
6 parse our way through every regulation?

7 MR. FREDERICK: Justice Souter, that would be an  
8 eminently reasonable holding of this Court. We have  
9 offered illustrations in our submissions so that the  
10 concreteness of the dispute is apparent to the Court, and  
11 in our view some of these rules are sufficiently clearly  
12 preempted that the Court could hold them so. We've  
13 offered those illustrations for the benefit of the Court.  
14 We have not attempted to be exhaustive because of the page  
15 limits.

16 QUESTION: But am -- am I right that if -- that  
17 your position is that if we agree with you on 1018 and we  
18 agree with you on the restricted reading given to Ray,  
19 that those two points are sufficient to require vacation  
20 and -- and remand?

21 MR. FREDERICK: Yes, and we would urge the Court  
22 to reaffirm the title II/title I preemptive dichotomy that  
23 the Court explained in Ray and to show that those issues  
24 and subjects in 46 U.S.C. 3703(a) are entitled to the same  
25 field preemptive consequences because they basically allow

1 for the same reasons. If I could just point out that  
2 vessels move from place to place and nation to nation, and  
3 there's no difference in the design and construction of a  
4 vessel as there are in the kinds of personnel  
5 qualifications that would be at issue for a vessel that  
6 would move in such places.

7 QUESTION: Mr. Frederick, before you get too far  
8 away from section 1018, doesn't -- doesn't section 1018  
9 support the respondent at least to this extent? It  
10 doesn't make much sense to say -- to be sure, it only  
11 deals with the preemptive effect of -- of that  
12 legislation, but it doesn't make much sense to say the  
13 State's authority to regulate -- it doesn't make much  
14 sense to say this legislation shall not preempt the  
15 State's authority to regulate when there was already no  
16 extant State authority to regulate because of a prior  
17 statute. Doesn't it, in effect, acknowledge that under  
18 the prior legislation, there -- there was State authority  
19 to regulate?

20 MR. FREDERICK: No, Justice Scalia, for several  
21 reasons. First, the Oil Pollution Act addresses pollution  
22 not only from vessels but from land-based sources. So,  
23 when Congress was attempting to save from preemptive  
24 effect preexisting authority, there is clearly State  
25 police power with respect to land-based oil pollution.

1 There's no indication at all in the legislative history of  
2 -- of the Oil Pollution Act, and in particular section  
3 1018 where the conference committee that added that  
4 section said expressly that it had no intent to undo Ray  
5 v. Atlantic Richfield, which clearly upheld the preemptive  
6 scope of the Ports and Waterways Safety Act.

7 Moreover, there are things that are clearly  
8 saved by 1018, the response that a State can make to oil  
9 pollution, additional liability requirements that a State  
10 might impose, penalties for polluters, requirements and  
11 certificates of financial responsibility. That doesn't  
12 mean that it brings the State on board the vessel to  
13 regulate the subjects that have been historically within  
14 the realm of Federal regulation.

15 QUESTION: How would you characterize then the  
16 principal error of the Ninth Circuit with reference to the  
17 savings clause? Was it in its conclusion that the savings  
18 clause, because it's in a later act, shows that field  
19 preemption is now in doubt or has been narrowed?

20 MR. FREDERICK: Well, I think there are a couple  
21 of errors. The principal one is, as you say, that -- that  
22 somehow in a later act Congress intended, silently without  
23 saying so in a seven-word phrase, to eviscerate literally  
24 thousands of pages of Federal statutory and regulatory and  
25 international treaty law. There's no indication that --

1 that Congress would have intended to do that.

2 It also read a savings clause so broadly as to  
3 eviscerate specific directives contained in Federal law in  
4 these other vessel regulation statutes. And we point out  
5 the cases from this Court indicating that a savings clause  
6 should never be read so broadly as to eviscerate the  
7 specific directives given in -- in the Federal law.

8 And finally, it just missed it on the plain text  
9 of the provision which says, this act means this act.

10 So --

11 QUESTION: Mr. Frederick, there's a difference  
12 between --

13 QUESTION: Mr. Frederick, doesn't the -- at  
14 least common sense and perhaps some of our earlier cases  
15 suggest that when you're talking about field preemption,  
16 you would not -- you would hesitate to apply it in an area  
17 where there are very strong local interests. You know,  
18 supposing you say that in a heavy fog in Puget Sound,  
19 coming into the Seattle harbor, you have to have a tug. I  
20 -- I for one would be quite loathe to read some rather  
21 general Federal statute as having preempted something like  
22 that.

23 MR. FREDERICK: Congress specifically took local  
24 concerns into consideration in enacting the PWSA title I  
25 where it directed the Coast Guard to take into account the

1 views of State and local officials in promulgating local  
2 traffic rules. And then after Ray, it amended title II to  
3 require the Coast Guard to take into account the views of  
4 States in issuing the systems-based regulations. So,  
5 there is a role for the States to play.

6 QUESTION: But a very subordinate one,  
7 obviously.

8 MR. FREDERICK: Well, the Congress made very  
9 clear it wanted there to be one decision maker, and there  
10 are important international ramifications to that.  
11 Because of the international treaties to which we've --

12 QUESTION: Well, what would be the international  
13 ramifications of saying that -- of the State of Washington  
14 saying that in a heavy fog coming into Seattle harbor, you  
15 had to have a tug?

16 MR. FREDERICK: The international ramifications  
17 are as follows, Mr. Chief Justice. Under applicable  
18 treaties, manning requirements and certain conditions are  
19 specified, and the discretion is left to the master to  
20 determine how best to get to port. Congress made the  
21 decision that because the -- of the Coast Guard's  
22 expertise and its role in the international maritime  
23 field, the Coast Guard could make the decision as to those  
24 particular conditions.

25 We would concede, Mr. Chief Justice, if there is

1 no rule where the Coast Guard has specifically looked at  
2 this, the State has room to regulate, and in that regard,  
3 we may differ somewhat from Intertanko's position.

4 But that's far -- a far cry from the  
5 encroachment of these State rules onto the vessel that  
6 apply extraterritorial, like the drug testing provision  
7 which requires drug tests, random drug tests, on vessels  
8 that may never come to Washington for many years but  
9 require tests to be submitted and sent to the State of  
10 Washington --

11 QUESTION: May I ask, to what extent do the  
12 Coast Guard regulations are -- to what extent are they  
13 uniform or harbor-specific?

14 MR. FREDERICK: It varies widely, Justice  
15 Stevens. We've got five volumes of the Code of Federal  
16 Regulations here, two of which --

17 QUESTION: But they might have a -- just to take  
18 an -- they might have a regulation that would apply  
19 specifically to Puget Sound and nowhere else --

20 MR. FREDERICK: That's correct.

21 QUESTION: -- to cover the specific --

22 MR. FREDERICK: That's correct, or even to a  
23 part of Puget Sound. And we've acknowledged in our reply  
24 brief that a tug escort requirement imposed by these BAP  
25 rules for a tug escort in and out of Port Angeles is the



1 kind of local operating rule where the Coast Guard has not  
2 issued a regulation, and in our view that is not preempted  
3 by a Coast Guard regulation promulgated under title I.

4 QUESTION: Mr. Frederick, there's another  
5 difference between you and Mr. Benner. I hope you clarify  
6 that. You say 1018 just says no spill-over effect on the  
7 preexisting law, but he goes beyond that and would like us  
8 to say that it doesn't have a savings effect even within  
9 OPA except for title I. And your brief is silent on that.  
10 Do you have a position?

11 MR. FREDERICK: Justice Ginsburg, we didn't  
12 brief the question because we don't regard it as necessary  
13 for the Court to decide. The textual indicator of this  
14 act is sufficiently clear to dispose of the question.

15 I've indicated those areas that we think are  
16 clearly saved. In title IV, Congress gave certain  
17 directives to the Coast Guard to promulgate certain kinds  
18 of rules. Our view is that the savings clause doesn't  
19 affect the preemptive effect of title IV because the Coast  
20 Guard had preexisting preemptive authority under prior  
21 statutes, and title IV is simply telling the Coast Guard  
22 we want you to exercise that preexisting authority.

23 There is an area in the middle between those  
24 aspects of direct vessel regulation and those aspects of  
25 financial liability requirements that I outlined before

1 the response to liability where it is a difficult  
2 question. And because of the -- the concern with not  
3 creating unintended consequences for creating our  
4 position, we have not taken a position in the abstract  
5 about what the phrase, additional requirements with  
6 respect to an oil discharge or substantial threat of oil  
7 discharge, are.

8 Now, I would also like to add that since Ray a  
9 number of important developments have occurred that  
10 reaffirm the preemptive force of Ray. In the Court's  
11 decision in that case on pages 166 to 68, the Court  
12 emphasized that Congress had made international uniformity  
13 a key issue. And since Ray was decided, Congress has  
14 enacted the PTSA. It has promulgated into positive law  
15 title 46 which contains field preemptive elements that we  
16 have been talking about, and in the international realm,  
17 the SOLAS Convention, the Safety of Life at Sea  
18 Convention, has been ratified by the United States. The  
19 standards for training certification of watchkeeping have  
20 been implemented and enforced by the United States. The  
21 MARPOL Convention, which directly relates to pollution by  
22 vessels from oil tankers, has been ratified in the United  
23 States. And the International Safety Management Code has  
24 also been -- has also been implemented into United States  
25 domestic law.

1           This international regime is a constantly  
2 evolving process in which the United States is the leader,  
3 and every year a refinement to that process has been made.  
4 It would greatly upset uniformity if each State, each --  
5 each of the 23 coastal States, were able to pick and  
6 choose which Federal requirements they wanted to adopt,  
7 which ones they wanted to go beyond.

8           QUESTION: Have we ever said that the  
9 ratification of an international convention is sufficient  
10 to show field preemption?

11           MR. FREDERICK: I don't -- I don't know of a  
12 case on that subject, Justice Kennedy, and I'm not sure  
13 that it's relevant for this purpose because Congress, in  
14 each instance of those acts -- and we've provided the  
15 citations in our brief -- has not only ratified, but it  
16 has directed the Coast Guard to engage in that  
17 enforcement. So, the Court would not need to rely on just  
18 the ratification of an international treaty for field  
19 preemption. And each of those subjects of those  
20 international treaties is a subject in title II of the  
21 PWSA which --

22           QUESTION: Are you saying that then -- that  
23 these new treaties and laws that you refer to show express  
24 preemption?

25           MR. FREDERICK: No. We -- express preemption

1 would be where there was, you know, an express statement  
2 that the law was intended to be preempted.

3 QUESTION: How -- on -- on what aspect of  
4 preemption then do these international agreements and  
5 obligations bear?

6 MR. FREDERICK: In two ways. They cover the  
7 subjects in title II that are field preemptive and the  
8 Secretary is obliged under the statute to honor reciprocal  
9 rights. They also are given licenses, and the -- the  
10 uninterrupted flow of this Court's cases since *Gibbons v.*  
11 *Ogden* is that a State may not supplement or augment a duly  
12 authorized Federal license. 47 U.S.C. 370 -- 46 U.S.C.  
13 3703 says these treaties require certificates.

14 QUESTION: Well, if they just give effect to a  
15 title II field preemption that's already there, then it  
16 doesn't add anything to the -- to the case.

17 MR. FREDERICK: Well, it adds in the sense that  
18 there are specific provisions here that make very clear  
19 the occupation of the field and Congress' intent to do so.

20 If I could reserve the balance of my time, Mr.  
21 Chief Justice.

22 QUESTION: Very well, Mr. Frederick.

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

24 ORAL ARGUMENT OF WILLIAM B. COLLINS

25 ON BEHALF OF THE RESPONDENTS

1 MR. COLLINS: Mr. Chief Justice, and may it  
2 please the Court:

3 This case concerns Washington's authority to  
4 prevent oil spills from tankers traveling on Puget Sound  
5 and in the Columbia River.

6 Congress has not expressly preempted the State's  
7 authority to regulate companies that operate oil tankers  
8 in Washington, nor do we believe has Congress impliedly  
9 expressed a broad intent to preempt State authority in  
10 this field. Washington's prevention rules complement  
11 Coast Guard rules and the international regime, and there  
12 is no conflict.

13 I want to just spend a moment talking about the  
14 State's regulatory regime because, contrary I think to the  
15 position of the United States and Intertanko, it is a  
16 complementary system, not a conflict system.

17 First of all, we regulate by requiring the  
18 owners and operators of tankers to file a prevention plan,  
19 and that plan must meet certain requirements. Those  
20 requirements were developed in -- in consultation with  
21 both the Coast Guard and the tanker industry, and they  
22 involve a lot -- many of the rules involve simply  
23 operations on local waters, that is, the twisting, narrow  
24 waters of Puget Sound.

25 QUESTION: Mr. Collins, do you take the position

1 that the OPA and -- what is it -- section 1018 --

2 MR. COLLINS: Yes, Your Honor.

3 QUESTION: -- amended the PWSA in some way?

4 MR. COLLINS: No, we don't, Your Honor.

5 QUESTION: How -- how is it possible then that  
6 that section has any effect on any preemption affected by  
7 PWSA or the other -- or PTSA?

8 MR. COLLINS: Justice O'Connor, our position is  
9 that the outcome of this case would be the same even if  
10 section 1018 had not been enacted, but we --

11 QUESTION: Do you defend the treatment given by  
12 the Ninth Circuit to the OPA section?

13 MR. COLLINS: Well, I think the Ninth Circuit  
14 correctly observed that the -- section 1018 we believe is  
15 an exclamation point indicating Congress' intent not to  
16 preempt State regulation in this area. I mean, in the  
17 briefs of the United States and Intertanko, they talk  
18 about the fact that since the Constitution was adopted,  
19 there have been regulations in this area. And sometimes  
20 State regulations in this area have been struck down.  
21 Other times State regulations in this area have been  
22 upheld. Congress is well aware of that fact, and yet  
23 Congress has never, in the PTSA or any of the statutes  
24 that follow it, expressly preempted the State from  
25 regulating in this area. And as this Court is well aware,

1 Congress certainly knows how to express that intent.

2 QUESTION: It's very hard to understand how the  
3 Ninth Circuit ruling comports with what we said in Ray.  
4 Do you think Ray is still good law?

5 MR. COLLINS: Oh, yes, Ray is good law and we  
6 rely on Ray heavily.

7 But the difference between the parties I think  
8 on Ray is that essentially the Government and Intertanko  
9 view Ray or view title -- title II, what is in 46 U.S.C.  
10 3703(a), as a labeling exercise. That is to say, if they  
11 can call a requirement manning or personnel, then they say  
12 that it's preempted.

13 But we believe that Ray was not a labeling  
14 exercise. The Court in Ray was very careful to do what  
15 you have to do in a field preemption case. It took --  
16 looked at the purpose and character of the Federal rule;  
17 that is, the purpose and character of the design and  
18 construction requirement and concluded that in that area  
19 there was no room for State regulation because after --

20 QUESTION: Well, I -- I thought there was  
21 language in the Ray opinion that title II has twin goals  
22 of providing for vessel safety and protecting the marine  
23 environment.

24 MR. COLLINS: Well, that's correct, Your Honor.

25 QUESTION: And -- and there certainly is

1 language in those statutes dealing with the manning of  
2 vessels and vessel safety.

3 MR. COLLINS: Yes. But in analyzing -- in other  
4 words, in Ray the Court didn't simply say everything  
5 listed in title II is subject to field preemption.  
6 Rather, it looked carefully at the area of design and  
7 construction and decided there was no room for the States.

8 QUESTION: Well, it -- it appeared, at least to  
9 me, to look to those areas where Congress required the  
10 Coast Guard to make regulations.

11 MR. COLLINS: Well, Your Honor --

12 QUESTION: And as to that, I don't see what room  
13 is left. I mean, Congress spoke pretty clearly there.

14 MR. COLLINS: Well, Your Honor, I -- I think --  
15 I think that that is not the correct reading of Ray  
16 because the Court was very -- I mean, for example,  
17 operations is listed in title II, but the Court was very  
18 careful in Ray to distinguish design and construction from  
19 other kinds of requirements. So, even though there was a  
20 specific statute about pilotage, the Court went out of its  
21 way to point out that pilotage was not a design and  
22 construction requirement. It looked at the tug escort  
23 requirement and said tug escort is not a design and  
24 construction requirement. So, the Court didn't --

25 QUESTION: But they also invalidated, didn't



1 they, the requirement that tankers carry State licensed  
2 pilots? And that requirement has nothing to do with  
3 design and construction.

4 MR. COLLINS: For the coast-wise trade. That's  
5 correct, Justice Ginsburg. But --

6 QUESTION: So -- so, Ray was not limited to  
7 design and construction. In quoting the statute, in  
8 quoting 3703(a), at least three times the -- Justice  
9 White's opinion puts together operations, as well as  
10 design and construction.

11 MR. COLLINS: Your Honor, I believe that in Ray  
12 the -- the pilotage requirement for the coast-wise trade  
13 was struck down because of a specific pilotage statute  
14 enacted by Congress and -- and that's in fact why the  
15 requirement for a pilot for the registered vessels was --  
16 was upheld because of a specific statute.

17 But in spite of that specific statute, the Court  
18 went out of its way to contrast a pilotage requirement  
19 from a design and construction requirement. So, we  
20 believe, when you're looking at field preemption in title  
21 II, it is not simply a labeling exercise, but you have to  
22 take a look at what is the Federal purpose.

23 Now --

24 QUESTION: Is -- is it right that you've now  
25 given up on the Ninth Circuit?

1 (Laughter.)

2 QUESTION: I took their reasoning as being a --  
3 a new act, the oil spill act, has a savings clause  
4 applicable to the oil spill act, and therefore all these  
5 other acts which don't have the savings clause are treated  
6 just as if they did.

7 MR. COLLINS: Yes, that's right, Your Honor.

8 QUESTION: All right. That's what they said.  
9 And I couldn't think of any justification for that  
10 whatsoever, and I take it you can't either.

11 (Laughter.)

12 MR. COLLINS: I take your point, Your Honor.

13 (Laughter.)

14 QUESTION: Okay. Now, if we're back to Ray --  
15 if we're back to Ray, then -- then, as I read Ray -- I'm  
16 quite interested -- now, we're keeping the oil spill act  
17 out of this. We're back to Ray. I thought that Ray  
18 simply looked at title II and said it all depends in these  
19 areas whether the Secretary issues a regulation or not,  
20 but if he does issue a regulation, that's the end of that.

21 Now, I thought that they got that from a  
22 provision of the statute that said the Secretary shall  
23 prescribe regulations for the design, construction,  
24 alteration, repair, maintenance, operation, equipping,  
25 personnel qualification, and manning of tank vessels. And

1 if I'm right so far -- and I'm looking to you to say I'm  
2 not -- then I can't understand what the difference could  
3 possibly be between design regulations, which are right  
4 there in the statute, followed by manning regulations,  
5 which are four words over, followed by these other  
6 subjects, and when I look at the titles of your  
7 regulations, I see work hours, languages, training,  
8 engineering, watch practices, operating procedures. In  
9 other words, they all fit right within those words.

10 So, it seems like Ray, Q.E.D. That's the end of  
11 it. We'll send it back so you get a chance to argue, but  
12 -- but nonetheless, it doesn't look good for you.

13 Now, I'm --

14 (Laughter.)

15 QUESTION: Okay, at least as it responds to  
16 those.

17 So now, what -- what are your -- what are your  
18 responses to that?

19 MR. COLLINS: Well, my response to that is that  
20 that wasn't the analysis in Ray, Justice Breyer. The --  
21 the Court did not say -- I will -- I will agree that the  
22 Court in Ray did make a reference to the mandatory nature,  
23 did point out that title II used the word shall. But it  
24 didn't say, okay, how are we going to analyze this? This  
25 statute says, the Secretary shall adopt regulations, the

1 list that you gave me. End of case. We don't need to say  
2 anything more because that shall means that there is field  
3 preemption of everything that follows that word.

4 That's not what the Court did in Ray. It went  
5 to take a look at the nature of the design and  
6 construction requirement and indicated that State  
7 interference -- State design and construction requirements  
8 would interfere with that Federal purpose. I mean, you  
9 can't redesign your oil tanker.

10 QUESTION: A little ambiguity. Neither of us  
11 means the word shall is their field preemption; rather,  
12 the word shall prescribe regulations is there and  
13 preemption if, and only if, the Secretary decides to issue  
14 a regulation. So, we're both at that point. Right?

15 MR. COLLINS: Well, I'm not --

16 QUESTION: And you -- now you're going to say  
17 even if the Secretary does issue a regulation, still there  
18 is not necessarily preemption.

19 MR. COLLINS: Not necessarily field preemption,  
20 Your Honor. We would agree that if the Secretary issues a  
21 regulation -- I mean, you've got to take a look to see  
22 whether there's a conflict. We -- under the Supremacy  
23 Clause, it's clear that we can't be in conflict with a  
24 regulation issued by the Coast Guard. I mean, the easy  
25 example --

1 QUESTION: Now, you -- you also disavow that  
2 part of the Ninth Circuit's opinion. They argued that the  
3 regulations did not preempt. The Ninth Circuit said --

4 MR. COLLINS: Well, I think --

5 QUESTION: -- because there's no -- no  
6 preemptive authority for the regulations, if I -- if I  
7 read the opinion correctly.

8 MR. COLLINS: Justice Stevens, are you speaking  
9 of the -- the express -- their -- their discussion about  
10 the Coast Guard's statements of express preemption?

11 QUESTION: Yes.

12 MR. COLLINS: Yes. Well, I don't think the  
13 Ninth Circuit is --

14 QUESTION: They didn't analyze any of the  
15 regulations --

16 MR. COLLINS: No.

17 QUESTION: -- because they said the Coast Guard  
18 had no authority to issue regulations that would preempt  
19 State law.

20 MR. COLLINS: See, I think that -- I think that  
21 that is a characterization of the Ninth Circuit's opinion  
22 that is not quite accurate. At least what I would say --

23  
24 QUESTION: It fully explains why they didn't pay  
25 any attention to what the regulations said. They didn't

1 even look at them --

2 MR. COLLINS: The --

3 QUESTION: -- having concluded that the Coast  
4 Guard was acting outside its delegated authority, insofar  
5 as it tried to preempt.

6 MR. COLLINS: It --

7 QUESTION: That's what I -- I thought the  
8 opinion was quite clear.

9 MR. COLLINS: It seems to me, Your Honor, that  
10 what the Ninth -- in the action below, as Mr. Benner said,  
11 their fall-back argument was that some regulations were  
12 expressly preempted by the Coast Guard. And the only  
13 thing that they pointed to was that the Coast Guard had  
14 said we expressly intend to preempt. I mean, that was the  
15 limit of their analysis. They didn't look to see whether  
16 there was a conflict or whether there was any other  
17 problem.

18 I believe that the Ninth Circuit held that just  
19 because the Coast Guard declares preemption doesn't mean  
20 there is preemption. Obviously, that's an important  
21 indicator. If the court -- if the Coast Guard says, we  
22 think our regulations preempt, then, I mean, that  
23 certainly is an important decision about -- an important  
24 factor in discussing preemption. But we have -- think you  
25 have to go out and still take a look at the regulations

1 themselves.

2 QUESTION: But that's what the Ninth Circuit  
3 didn't do. And in defense of that court, can you tell us  
4 whether the Ninth Circuit got this idea of the sweeping  
5 savings provision of 1018 -- did they get that idea -- did  
6 they make it up, or wasn't it argued to them by the State  
7 of Washington?

8 MR. COLLINS: This case is in a --

9 (Laughter.)

10 MR. COLLINS: I -- I don't think they quite got  
11 it from us, Justice Ginsburg.

12 But this -- this case is in -- in a somewhat  
13 peculiar posture because of the way that it was tried.  
14 When the case was first filed, Intertanko brought the  
15 action. They invited the United States to come in at the  
16 district court level. The United States declined to do so  
17 for reasons that I don't know.

18 And Intertanko's theory before the Ninth Circuit  
19 and -- and the district court, as before this Court, is  
20 field preemption, sort of the home run ball. So, they did  
21 not go through and try to argue specific conflict  
22 preemption. They didn't try to talk about places where  
23 the Washington rule and the international rule were, you  
24 know, in conflict. They didn't build a record on that  
25 point.

1           Later at the Ninth Circuit, the United States  
2 entered the case and, frankly, in their briefs have a lot  
3 of what they say are illustrative examples of potential  
4 conflicts that might exist. But that's not in the record  
5 in this case, and that wasn't raised below.

6           So, Justice Souter, you had talked about what  
7 should happen to this case if things go south for the  
8 State of Washington and whether it should be remanded to  
9 -- to sort that out. But I think that would be  
10 inappropriate in this case. I mean, I think the parties  
11 here had their day in court. They didn't build a record  
12 and --

13           QUESTION: Well, but part of -- part of my -- my  
14 point was -- was institutional. I mean, we do not sit as  
15 a court of first instance. And a great deal of what we're  
16 arguing about now was -- was never addressed because of  
17 what seems to be these threshold -- perhaps threshold  
18 errors on the part of the court of appeals.

19           MR. COLLINS: So, from our point of view, Your  
20 Honor, what we think should happen in this case is the  
21 Court should rule that there is no broad field preemption  
22 of all of the items that are listed in title II of the  
23 Ports and Waterways Safety Act and essentially affirm the  
24 result at the Ninth Circuit. Later, if Intertanko --

25           QUESTION: I -- I mean, you're saying that you



1 should hold them to some kind of waiver. If your  
2 colleagues here in the State Attorneys General's office  
3 and they had forgotten to raise -- to raise an -- no  
4 exhaustion point in a -- in a habeas case, they would be  
5 up here arguing interests of comity of the State of  
6 Washington and the big exception to waiver. Now, does  
7 Canada and Belgium and 280 sovereign nations not have some  
8 kind of -- of right to assert their comity in light of  
9 their sovereignty in respect to these technical matters  
10 like waiver?

11 MR. COLLINS: Well, Justice Breyer, I don't  
12 think of it so much as -- as an issue of waiver.

13 QUESTION: Well, you were just saying they  
14 hadn't put in the evidence --

15 MR. COLLINS: Well --

16 QUESTION: -- and they didn't -- they didn't  
17 take in the international significance of this. There are  
18 -- there are hundreds of thousands of cases in the courts  
19 and they -- they didn't apparently take in the  
20 significance of it till it got to the appellate level.

21 MR. COLLINS: But it -- it's -- what I would  
22 direct you to, I guess, is this Court's decision in Askew  
23 where one of the questions in Askew was whether the State  
24 of Florida could require certain kinds of equipment on the  
25 vessel for purposes of response, and the Court said we're

1 not going to engage in speculation at this point about how  
2 this conflict might work out. And later if a case comes  
3 to us that presents that conflict or comes to the courts  
4 that presents that conflict, then that's when it should be  
5 resolved. And we think that's the kind of thing that  
6 should happen in this case.

7 QUESTION: I'm not sure that's quite consistent  
8 with the record because at page 30a of the Ninth Circuit  
9 opinion, they -- they refer to the fact that Intertanko  
10 did call attention to several regulations as being  
11 expressly preempted by Coast Guard regulations, identified  
12 some in the text and some in the footnote. So, I don't  
13 think you can tell us that the specific conflicts with  
14 Coast Guard regulation wasn't brought to the attention of  
15 the lower court.

16 MR. COLLINS: Well, it was brought to the  
17 attention of the lower court, Justice Stevens, with Mr.  
18 Benner's fall-back argument. That is to say --

19 QUESTION: Certainly, but that fall-back  
20 argument is before us.

21 MR. COLLINS: Yes. No, that's right.

22 QUESTION: And they responded to the argument  
23 not by disagreeing on the conflict, but by saying, as I  
24 understand it, the preemption by regulations does not  
25 occur if the agency is acting beyond the scope of its

1 delegated powers. And that was, as I understood their  
2 reasoning -- and I -- I'm still not clear whether you  
3 agree with that position or don't.

4 MR. COLLINS: Well, I think I got -- I think I  
5 was taken off track when I was responding to your  
6 question, so let me try to get back to it.

7 The only thing that was argued below I believe  
8 on those points was the simple declaration by the Coast  
9 Guard that the State should be excluded. And I think the  
10 Ninth Circuit said --

11 QUESTION: By virtue of the Coast Guard  
12 regulation.

13 MR. COLLINS: By virtue of the declaration.

14 QUESTION: Well.

15 MR. COLLINS: But -- well -- but I think there's  
16 a difference, Your Honor. The question is -- I do not  
17 believe that the Ninth Circuit said that Coast Guard  
18 regulations could not preempt State authority, and indeed,  
19 if you read it that way, we would disagree with it. It's  
20 clear that Coast Guard regulations would preempt the State  
21 if there's a -- if there's a conflict. But to simply  
22 declare -- simply declare that the State is preempted, the  
23 Ninth Circuit indicated -- and we believe is correct -- is  
24 beyond Coast Guard authority. We do not believe Congress  
25 delegated to the Coast Guard the authority to declare

1 field preemption, if you will.

2 QUESTION: Congress could do that.

3 MR. COLLINS: Congress could do that.

4 QUESTION: And you're saying that Congress  
5 didn't delegate that function to the Coast Guard.

6 MR. COLLINS: Right, for field preemption.

7 QUESTION: Yes.

8 MR. COLLINS: And so -- and that's of some  
9 concern to us because if that's the rule, then the Coast  
10 Guard can eliminate State participation by simply adopting  
11 a rule saying we intend that no State shall adopt any  
12 rules or regulations pertaining to oil tankers. And we  
13 believe that just that declaration is beyond the Coast  
14 Guard authority.

15 QUESTION: Congress could delegate that to the  
16 Coast Guard if it chose.

17 MR. COLLINS: I think Congress could do that if  
18 it -- Congress could itself say we intend to exclude the  
19 States from this field, and they could --

20 QUESTION: What if Congress said in the -- in  
21 the delegation of the Coast Guard, we authorize the Coast  
22 Guard to determine whether or not the States should be  
23 excluded from this field?

24 MR. COLLINS: I think that would be kind of an  
25 express statement that would give the Coast Guard the kind

1 of authority that we do not believe that it has been  
2 given.

3 QUESTION: But otherwise you say we should look  
4 at title I and -- and ask whether the Coast Guard  
5 implicitly meant to preclude the States?

6 MR. COLLINS: No. I think what you have to do  
7 under -- frankly, under both title I and title II is look  
8 to see whether there's a conflict; that is, look at the  
9 purpose and object of the congressional enactment and the  
10 Coast Guard regulation and look to see if State law is  
11 preventing the achieving of that objective, either through  
12 physical impossibility -- and of course, in this case,  
13 there's no contention of physical impossibility -- or  
14 through preventing the Coast Guard from achieving some  
15 important objective. And that kind of a case was not --  
16 was not the case that was made below.

17 QUESTION: Is -- is uniformity of maritime  
18 regulation an important objective?

19 MR. COLLINS: Well, I think that uniformity is a  
20 -- is -- is an important factor in places where uniformity  
21 is needed. Let me give you -- let me give you an example  
22 about the certificates that -- that counsel for the  
23 Government talked about.

24 In the international regime with certificates,  
25 there are three kinds of certificates. One is for the

1 design and construction, so a flag state will certify that  
2 the design of the ship is proper. There's also a  
3 certificate for manning, which is the complement of the  
4 crew, which is you need one master, one chief mate, a  
5 certain number of officers, a certain number of other  
6 crew, and that for a tanker of a certain size, there's a  
7 certificate that says this is the -- the crew that is  
8 required. And then there are third certificates which are  
9 essentially licenses for the mariners, the crew of those.

10 Uniformity would probably dictate that a State  
11 could not say -- if the Coast Guard says the crew of the  
12 tanker should be 60, I think it would -- a State would be  
13 preempted from saying, no, the crew of a tanker has to be  
14 70. For like design and construction, it's hard to change  
15 the composition of the crew, that is, the number of the  
16 crew, when they go from San Francisco to Seattle or come  
17 from France to Seattle.

18 But that's very different -- and we don't do  
19 that. But that's very different from saying, once you  
20 have your certified ship and your certified crew and the  
21 crew have the proper licenses, that when they come to  
22 Washington, they need a tug escort. They need a third  
23 officer on the bridge during restricted visibility. Those  
24 things do not interfere with the necessary uniformity that  
25 probably is required.

1 QUESTION: How about the drug testing  
2 requirement?

3 MR. COLLINS: Well, Your Honor, the drug testing  
4 requirement is one where there is no international  
5 standard. The treaties are silent on the drug testing  
6 issue, and it's a place where the -- Intertanko has relied  
7 on the express statement of the Coast Guard to force the  
8 State out of that area. But one of the reasons we think  
9 you have to go beyond the express statements is it's  
10 unclear to us exactly why foreign flag --

11 QUESTION: I would think that would relate  
12 directly to manning the vessels in an area where Congress  
13 has told the Coast Guard to regulate and the Coast Guard  
14 has said what it --

15 MR. COLLINS: I would disagree, Your Honor, that  
16 that is a manning requirement. I mean, we're not saying  
17 that -- what we're -- we have -- Washington has -- the  
18 drug -- the drug and alcohol has two parts. The first is  
19 a local part. We have zero tolerance for drug and alcohol  
20 in Washington, so you can't -- obviously, you can't use  
21 illegal drugs anywhere, and you can't drink in Washington  
22 waters. The Coast Guard regulation is more flexible. It  
23 allows --

24 QUESTION: Not on land, I take it.

25 MR. COLLINS: No. No, I don't think so, Your

1 Honor.

2 (Laughter.)

3 MR. COLLINS: The other part is a testing  
4 requirement.

5 QUESTION: But if the -- if the Coast Guard  
6 regulation is not a manning requirement, where did they  
7 get the authority to regulate it?

8 MR. COLLINS: Well, on the drug and alcohol  
9 one --

10 QUESTION: Yes.

11 MR. COLLINS: -- they actually got that from the  
12 Oil Pollution Act of 1990 because there's a specific  
13 provision in OPA '90 -- and I think it's -- let's see.

14 QUESTION: You're saying that -- that the  
15 authority to issue manning regulations would not have  
16 authorized them to give -- to issue the drug and alcohol  
17 regulation, except for the -- unless that later statute  
18 had been passed. That's not persuasive --

19 MR. COLLINS: No. I'm not sure that that's  
20 accurate, Your Honor. But -- but part of the reason that  
21 they did it is because Congress told them to in OPA '90.  
22 But the difference is the Coast Guard -- the big  
23 difference is the Coast Guard tests U.S. flag -- requires  
24 testing of U.S. flag vessels. It doesn't require testing  
25 of foreign flag vessels. But we don't see that there's



1 any relationship between that and protecting the  
2 environment, running a ship, safety --

3 QUESTION: What about -- what about the  
4 requirement that says, as they describe it, all licensed  
5 deck officers -- I guess that means every one -- must  
6 speak English and speak a language understood by all the  
7 crew, which could be 14 different languages. It may be  
8 rather hard to find somebody who -- I don't think any of  
9 us could satisfy that requirement, but we're not applying  
10 to be a deck officer. But -- but --

11 (Laughter.)

12 QUESTION: -- the -- I mean, what about that  
13 one? I mean, that sounds a little hard to meet.

14 MR. COLLINS: Well, Your --

15 QUESTION: And it also sounds like a manning  
16 requirement and it also doesn't, you know --

17 MR. COLLINS: Well, Your Honor, in that  
18 situation, we think the Government is simply mistaken.  
19 Again, this may be the problem with not having had them at  
20 the district court. We have the same requirement for  
21 language that the international standard is. So, a deck  
22 officer doesn't have to be able to speak 14 languages, but  
23 there has to be some common language that the deck officer  
24 and the crew speak so when the deck officer gives an  
25 order, the crew can carry it out. If the --

1 QUESTION: Was that based on that thing that  
2 happened down in New Orleans where -- where --

3 MR. COLLINS: Oh, where they ran into the  
4 shopping center?

5 QUESTION: Yes.

6 MR. COLLINS: Well --

7 (Laughter.)

8 MR. COLLINS: That -- our -- I think our  
9 regulation was in place before that occurred, but that's  
10 the -- that's the kind of concern. And in our -- in the  
11 briefs, we've talked about difficulties in Washington with  
12 people not being able to speak English.

13 QUESTION: Getting back to this distinction in  
14 drug regulations where it applies to vessels from -- I  
15 guess American flag vessels and not others, if it's a  
16 local regulation, what -- what authority does the State  
17 have to make a distinction for its regulations depending  
18 on the origins of -- of the ship? It seems to me that's  
19 inherently an interstate determination.

20 MR. COLLINS: Oh, no, Your Honor. It's the  
21 United States that makes the distinction. The United  
22 States requires testing of U.S. flag vessels and does not  
23 require testing of foreign flag vessels. The Washington  
24 rule requires testing of both United States flag vessels  
25 and foreign flag vessels. And part of the reason is

1 because we can't think of any safety reason why -- you  
2 know, do foreign flag crews hold their liquor better?

3 QUESTION: Just as long as it's foreign flag. I  
4 want to just be a little -- does -- is Washington saying  
5 everybody on a foreign flag vessel has to speak English?

6 MR. COLLINS: No.

7 QUESTION: Or everybody has to speak French?

8 MR. COLLINS: No.

9 QUESTION: What are they saying?

10 MR. COLLINS: The requirement is the officers  
11 have to be able to speak English enough to be able to  
12 communicate. There's sort of a --

13 QUESTION: Yes, but I mean, they have, you know,  
14 thousands of people. They have deck hands. Some come  
15 from France. Some come from Belgium. Some come from -- I  
16 don't know -- 48,000 different countries, and maybe not  
17 everybody speaks English down there. Maybe there's  
18 somebody who doesn't. So, do they flunk if they don't?

19 MR. COLLINS: The deck officers have to be able  
20 to speak English, and they also have to be able to speak a  
21 common language understood by the crew. And that's the  
22 same requirement that the international requirement  
23 imposes.

24 And I want to talk just for a second about the  
25 -- the international requirements.

1           QUESTION: Before you do that, you mentioned and  
2 you placed considerable reliance on Askew. And as I  
3 understand that case, it involved only what is now an  
4 undisputed matter, that is, that the States can impose  
5 additional liability for an oil spill. I -- I didn't  
6 understand the holding to be dealing with anything pre-  
7 incident.

8           MR. COLLINS: Your Honor, I think my reference  
9 to Askew was a -- was to argue that this Court shouldn't  
10 just send this back to determine conflict preemption  
11 because the conflicts that the Government raises are  
12 speculative and weren't raised below, and those are better  
13 left for another day. I mean, I don't -- Askew I think  
14 confirms that States can regulate in the maritime area,  
15 but I mean, it's not directly -- I mean, we're talking  
16 about different kinds of requirements. So, you're correct  
17 about that.

18           The -- the Government has -- has talked about  
19 these certificates that I talked about a little bit  
20 earlier as a license and has said that States cannot  
21 impose any kind of licensing -- once something is  
22 licensed, then that's the end of it and States can't  
23 regulate.

24           And I submit that that is simply not correct.  
25 If a State, as I said earlier, if a foreign flag tanker

1 has a license, it can still be subject to  
2 nondiscriminatory environmental regulations imposed by the  
3 State. And this Court itself in the Florida Lime case  
4 indicated that the fact that there was a license didn't  
5 mean that you couldn't have other kinds of State  
6 regulations. Certainly in the Ogden v. Gibbons case,  
7 referred to by counsel, there the State of New York was  
8 trying to create a monopoly and exclude commerce.

9 Quite a different system here, where what we're  
10 trying to do is preserve the ability of the State to  
11 regulate in -- in a couple of areas. First of all, things  
12 that are local to Washington waters that relate directly  
13 to the unique areas of Puget Sound, and secondly, we have  
14 requirements that mirror international standards.

15 We think this is awfully important because it's  
16 a second set of eyes on the -- on the ground -- at sea.  
17 We conduct annual safety inspections to see if tankers are  
18 complying with their prevention plans. In Washington we  
19 work very cooperatively with the Coast Guard people there.  
20 We give them information, they give us information. The  
21 whole system of cooperative federalism working together we  
22 think will make the waters safer, and ultimately we think  
23 that's what Congress intended. It didn't intend for the  
24 Coast Guard to be exclusive except in areas where it  
25 needed to be exclusive, the kinds of certificates that I

1 talked about earlier.

2 Therefore, we would ask this Court to affirm the  
3 result by the Ninth Circuit and continue to give  
4 Washington the authority to regulate and preserve the  
5 quality of our waters.

6 QUESTION: Thank you, Mr. Collins.

7 Mr. Frederick, you have 2 minutes remaining.

8 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

9 ON BEHALF OF PETITIONER UNITED STATES

10 MR. FREDERICK: I'd like to make a -- a couple  
11 of points.

12 First, I direct the Court's attention to three  
13 footnotes in our reply brief which I think will help the  
14 Court in its opinion in this case. Those are footnotes 4,  
15 12, and 14.

16 Footnote 4 sets out those BAP rules that are  
17 directly in fields that we think are preempted under the  
18 field preemptive theory of title II.

19 Footnote 12 sets out the BAP rules where there  
20 is a subject covered by a license and that includes things  
21 like language proficiency which is clearly a personnel  
22 qualification and the like.

23 And note 14 is the only one where there arguably  
24 might be a reason to remand for purposes of developing a  
25 record. I would note that at the district court both

1 sides made consensual motions for summary judgment and  
2 viewed this as something that could be decided on the  
3 record. As to those subjects in the field, that clearly  
4 could be the case here as well.

5 The treaties that I emphasized in my opening  
6 presentation reinforce the preemption that Congress  
7 specified in title II, and those treaties make very clear  
8 the reciprocal rights that must be afforded. What  
9 Washington here is -- is purporting to be able to do is to  
10 imprison and impose civil fines against vessels and their  
11 operators for people who don't comply with State rules.  
12 That's directly contrary to a long line of this Court's  
13 decisions that say that States can't supplement Federal  
14 licenses or federally recognized licenses.

15 Now, with respect to language proficiency,  
16 counsel is simply incorrect, and I would direct the  
17 Court's attention to page 36 of our opening brief where we  
18 make very clear that the purpose behind the international  
19 STCW requirement is to ensure that the vessel as a system  
20 can work appropriately so that those officers on the  
21 navigation watch can communicate with the people who will  
22 be carrying out the orders. English may, in fact, be the  
23 problem in some circumstances and not the solution and  
24 that is a reflection of the way the international maritime  
25 commerce works.

1                   Finally, I would just point out that the flag  
2 state controls, and with respect to drug testing and  
3 alcohol, there is a Coast Guard regulation that makes  
4 clear -- it's at 33 C.F.R. 95.020 -- that no vessel,  
5 foreign or otherwise, may operate in U.S. waters by  
6 personnel who have an alcohol level above .04. Now, that  
7 is indeed different from a zero tolerance level, but that  
8 is a determination made by the Coast Guard.

9                   CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
10 Frederick.

11                   The case is submitted.

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



## CERTIFICATION

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UNITED STATES, Petitioner v. GARY LOCKE, GOVERNOR OF WASHINGTON, ET  
AL.; and INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS  
(INTERTANKO), Petitioner v. GARY LOCKE, GOVERNOR OF WASHINGTON, ET  
AL.

CASE NOS: 98-1701 & 98-1706

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BY: Jonathan M. May  
(REPORTER)