Recent Decision

Federal Control of State Highway Planning: *County of Los Angeles v. Colemen*

I. INTRODUCTION

Late in 1976, the Federal District Court for the District of Columbia handed down its decision in *County of Los Angeles v. Coleman*.[1] In the spring of 1978, that decision was affirmed by the D.C. Circuit in *County of Los Angeles v. Adams*.[2] These decisions upheld as constitutional the enforcement of some important conditions imposed by the Secretary of Transportation on the availability of federal highway funds. What is more significant, they have expanded the federal government's spending power and further reduced the effectiveness of state government. In this article, the case will be examined in some detail.

1. County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496 (D.D.C. 1976).
2. County of Los Angeles, Cal. v. Adams, 574 F.2d 607 (D.C. Cir. 1978).

II. BACKGROUND

A. THE STATUTES

States receive substantial amounts of federal aid for highways under authority of the Federal-Aid Highway Act of 1956 and its subsequent amendments.[3] This aid comes in the form of matching funds appropriated from a trust fund.[4] Percentages of federal taxes on fuel, tires, and trucks—highway user taxes—provide income for this trust. Section 104 of the Highway Act[5] is the statutory provision for apportionment of aid to the several states. Portions of such funds are specifically earmarked by statute[6] for allocation to urban areas.[7]

The Highway Act designates four federal-aid systems:[8]

(1) the federal-aid primary system, "rural arterial routes and their extensions into or through urban areas";[9]
(2) the federal-aid secondary system, "rural major collector routes";[10]
(3) the federal-aid urban system, arterial and collector routes exclusive of urban extensions of the federal-aid primary system;[11]
(4) the interstate system.[12]

In this case, the parties were concerned only with the federal-aid urban (FAU) system. All the projects for which the County of Los Angeles sought funding were FAU projects.[13]

In the Highway Act of 1962, as amended by the Highway Act of 1970,[14] Congress put forth its specifications for a highway planning process. (These specifications are contained in section 134(a) of Title 23.)[15]

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3. 23 U.S.C. §§ 101-156 (1976).
4. Federal-Aid Highway Act. of 1956, Pub. L. 627, § 209, 70 Stat. 374.
5. 23 U.S.C. § 104(b) (1976).
6. 23 U.S.C. §§ 104(b)(6), 104(f)(2) (1976).
7. "Urban area," for the purposes of the Highway Act, is defined by 23 U.S.C. § 101(a) to be an area so designated by the Bureau of the Census.
8. 23 U.S.C. § 103 (1976). For a more extensive description of these systems, *see*, FEDERAL HIGHWAY ADMINSTRATION, DEP'T OF TRANSP. HIGHWAY FUNCTIONAL CLASSIFICATION, Vol. 20, Appendix 12 (July 1974).
9. 23 U.S.C. § 103(b) (1976).
10. 23 U.S.C. § 103(c) (1976).
11. 23 U.S.C. § 103(d) (1976).
12. 23 U.S.C. § 103(e) (1976).
13. Brief for Appellant at 6, County of Los Angeles, Cal. v. Adams, 574 F. 2d 607 (D.C. Cir. 1978) [hereinafter cited as Appellant's Brief].
14. Federal-Aid Highway Act of 1962, Pub. L. No. 87-866, § 9(a), 78 Stat. 1148, subsequently amended by the Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, title I, § 143, 84 Stat. 1737.
15. 23 U.S.C. § 134(a) (1976) reads as follows:

> It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective the Secretary shall cooperate with the States, as authorized in this title, in the development of long-range highway plans and programs which are properly coordinated

Congress therein originated its "3-C" planning process; the three C's are "continuing, comprehensive, cooperative." In urban areas of more than fifty thousand, planning is to be long-term (continuing), consideration of future effects (comprehensive), and is to involve local officials (cooperative). Thus the Secretary of Transportation is to approve no project unless that project has satisfied the 3-C reguirements. Congress left to the Secretary the authority to promulgate the necessary regulations.[16]

B. Statutory Interpretation

In 1969, the Department of Transportation, via the Federal Highway Administration (FHWA), issued a memorandum[17] [hereinafter Memorandum 50-9] which indicated what would be required from state and local planners if they were to meet the 3-C standards. Memorandum 50-9 was revised in 1971 to include requirements that projects be part of an areawide plan and that the 3-C process be certified annually by the FHWA.[18] The most pertinent section of the 1969 Memo is that which sets forth the FHWA's construction of the statutory (section 134) language mandating "cooperation." That part of the Memo provides that cooperation is to mean that local officials "should have appropriate voice in the transportation planning process, either through direct participation or through adequate representation." State solicitation of such participation can be made "directly to the governing bodies of each individual political subdivision or through an appropriate local agency." This interpretation obviously did not require states to create or use any particular "local agency," nor did it grant to such agencies any particular authority in the planning process.

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with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. After July 1, 1965, the Secretary shall not approve under section 105 of this title any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section. No highway project may be constructed in any urban area of fifty thousand population or more unless the responsible public officials of such urban area in which the project is located have been consulted and their views considered with respect to the corridor, the location and design of the project.

Essentially the same language is found in the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1604(1) (1976). Although the UMT Act also governs urban transportation funding, it is the Highway Act that is applicable to the present case.

16. 23 U.S.C. § 315 (1976).

17. Bureau of Public Roads, Fed. Highway Administration, Dep't of Transp., Policy and Procedure Memorandum 50-9 (1969) [hereinafter cited as Memorandum 50-9].

18. Federal Highway Administration, Dep't of Transp., Instructional Memorandum 50-3-71 (1971) [hereinafter cited as Memorandum 50-3-71].

C. *OMB A-95*

Apart from the highway statutes and their interpretation, there is a broader mandate for cooperation among state and local agencies: OMB Circular No. A-95.[19] This circular was first issued in 1969,[20] long before promulgation of the regulations here at issue, and has not been substantially changed since then. The purpose of OMB A-95 was to "encourage" (by requiring)[21] regional review of *all* proposed federally-funded projects. A regional clearinghouse body collects input from local officials on each proposal. The clearinghouse body then makes its recommendation (to whichever federal agency controls the funds) as to the proposed project's compatibility with regional plans. *Highway* projects are included within the purview of OMB A-95.[22] Note that OMB A-95 did and does require the establishment of regional agencies, and it gives those agencies at least a power of recommendation. Thus, the A-95 requirements of state-local cooperation exceed those of the FHWA Memos described above. OMB A-95 is important here, not because it was the subject of dispute in the present case, but because its requirements existed before the Secretary issued the regulations here at issue, and because it creates just the sort of state-local cooperation that section 134(a) appears to require.

D. THE REGULATIONS AT ISSUE

To further implement the congressional 3-C mandate,[23] the Secretary delegated to the administrators of the Federal Highway Administration and the Urban Mass Transportation Administration (UMTA) his authority to promulgate the necessary rules and regulations.[24] The final regulations were published in 1975.[25] They are generally referred to as the Transportation Improvement Program (TIP) regulations. These regulations, which represent the Secretary's current interpretation of his administrative responsibili-

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19. OFFICE OF MANAGEMENT AND BUDGET CIRCULAR NO. A-95, 41 Fed. Reg. 2052 (1976) [hereinafter cited as OMB A-95]. The stated purpose of this circular is to "[e]ncourage, by means of early contact between applicants for Federal assistance and State and local governments and agencies, an expeditious process of intergovernmental coordination and review of proposed projects." 41 Fed. Reg. at 2053.

20. Appellant's Brief, *supra* note 13, at 11.

21. The federal funding agency must be assured "that all applications for assistance under programs covered by this part have been submitted to the funding agency." OMB A-95, *supra* note 19, at Attachment A, Part I, § 6b, 41 Fed. Reg. at 2054.

22. OMB A-95, *supra* note 19, at § 3a, 41 Fed. Reg. at 2052.

23. 23 U.S.C. § 134(a) (1976).

24. 29 C.F.R. §§ 1.48, 1.51 (1978). Similar Congressional intentions are expressed in the Highway and Urban Mass Transportation Acts.

25. 40 Fed. Reg. 42976 (1975) (codified in 23 C.F.R. Part 450 and 49 C.F.R. Part 613 (1978)).

ties under section 134(a), were the cause of Los Angeles County's complaint.

The TIP regulations set up a system of highway planning that must be used by all states seeking federal funds. The system is to be established in urbanized areas.[26] The Governor is to designate a Metropolitan Planning Organization (MPO) for each urban area.[27] The MPO is "responsible for carrying out the urban transportation planning process"; it is to be "the forum for cooperative decision-making by principal elected officials of general purpose local government."[28] Hence, the MPO is a regional council composed of representatives of local governments and agencies. The idea is to implement the mandate of section 134(a), the 3-C process, by making the MPO the body that does the programming of highway projects. "Programming" is the development of both long-term (multi-year) plans and annual (single-year) project proposals. The regulations require each MPO to develop a transportation improvement program,[29] which includes an "annual element" within the long-range program. ("Annual element" is a list of the upcoming year's project proposals.) "Programming," more specifically, includes three stages: (1) initiation and development of project proposals, (2) endorsement of proposals, and (3) submission of those proposals. With a minor exception,[30] these three functions are presently the exclusive province of the MPOs.[31] The state is left with only a veto power over the MPO-approved proposals. When the state does veto a proposal, that state must in certain cases provide written reasons for its disapproval.[32] The state can submit to the FHWA only those federal-aid urban proposals that have been developed, endorsed, and submitted by the MPO. Hence, the MPO has taken over, by regulation, most urban highway planning activities. More importantly, the state depends for its FAU highway funds upon the MPO's; the TIP regulations prohibit the Secretary from approving any FAU project unless it has been endorsed and submitted by the MPO. Even more important, from the perspective of local jurisdictions, is that their project funds cannot be allocated without MPO approval.

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26. The 3-C process is specifically designed for urban areas of over 50,000 population. 23 U.S.C. § 134(a) (1976).

27. 23 C.F.R. § 450.106(a) (1978).

28. 23 C.R.F. § 450.112(a) (1978).

29. 23 C.F.R. § 450.118, 450.304-.316 (1978).

30. The state can only initiate "urban extension and Interstate System projects." 23 C.F.R. § 450.310(e) (1978). "Urban extension" means urban extensions of the federal-aid primary and secondary systems. 23 C.F.R. § 318(b)(3) (1978). This exception is irrelvant to this case, however, because we are here concerned only with the fereral-aid urban (FAU) system.

31. 23 C.F.R. §§ 450.310(a)-(d), 450.316(a), (b) (1978).

32. 23 C.F.R. § 450.318(b)(1) (1978).

E. California Before the Regulations

A regional council of governments has existed in the Southern California area since 1965 — the Southern California Association of Governments, or SCAG. SCAG is an association of representatives of the six counties that make up the Los Angeles-Long Beach urbanized area.[33] Since 1967, SCAG has been the clearing house for purposes of the regional review required for all federal-aid projects by OMB A-95.[34]

California law made SCAG the Regional Transportation Planning Agency for Southern California in 1973.[35] This, in turn, made SCAG responsible for the preparation of a Regional Transportation Plan. This plan is designed for incorporation into the California Transportation Plan.[36] Data for the regional plan were obtained from studies conducted by SCAG pursuant to the directives of Memorandum 50-9.[37] Included in the regional plan was the Los Angeles Master Plan of Highways, which was developed and continues to be updated by "input from the planning agencies of all jurisdictions within the country, under priorities established by the elected officials of those jurisdictions."[38]

SCAG, the regional body, thus had a planning role, but such planning was limited to something like the clearing house function described in OMB A-95. SCAG reviewed project proposals and made comments thereon, coordinated local planning agencies' efforts, and defined regional transportation goals.[39] There was no requirement that SCAG endorse local proposals before those proposals are submitted to the state. Los Angeles County performed its own programming and, by agreement with its member jurisdictions, provided programming services for those jurisdictions as well,[40] even to the point of submitting its project proposals directly to the state.[41] In short, Los Angeles County did not depend for its funds, or its planning, on SCAG.

The situation in Southern California before promulgation of the TIP regulations was, arguably, entirely within the intent and letter of Congress' 3-C

33. The six counties are Los Angeles, Orange, Riverside, San Bernardino, Ventura, and Imperial.

34. Brief for Appellee at 16, County of Los Angeles, Cal. v. Adams, 574 F.2d 607 (D.C. Cir. 1978) [hereinafter cited Appellees' Brief].

35. Cal. Gov't Code § 29532 (West Supp. 1977).

36. Cal. Gov't Code § 65080 (West Supp. 1977).

37. Appellant's Brief, *supra* note 13, at 12.

38. Complaint for Declaratory Judgment and for Temporary and Permanent Injunctive Relief at ¶ 7, County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496 (D.D.C. 1976) [hereinafter cited as Complaint].

39. Appellees' Brief, *supra* note 34, at 17.

40. Complaint, *supra* note 38, at ¶¶ 7, 9.

41. Findings of Fact and Conclusions of Law at ¶ 16, County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496 (D.D.C. 1976).

requirements, including the Secretary's existing interpretation of that program.[42] That there was comprehensive, long-term planning is evidenced by the existence of the three plans already mentioned: the Los Angeles Master Plan, the Regional Transportation Plan, and the California Transportation Plan. That this planning involved local agencies is apparent and was not disputed by the Secretary. Regional review and coordination was mandated not only by the existing requirements of OMB A-95, but by California state law[43] as well, and such review and coordination did in fact exist.[44] In sum, Congress' requirements for "continuing, comprehensive, and cooperative" planning were met, without the existence of any veto power or exclusive programming authority in SCAG.

F. Los Angeles After the Regulations

With the promulgation of the TIP regulations came the requirement that all locally-initiated project proposals be submitted to SCAG for endorsement and inclusion of the proposal in the regional plan.[45] In May of 1976, Los Angeles County submitted its fiscal year 1976-77 requests to SCAG. In October of 1976, the State of California sent its requests to DOT. For some reason, there was no annual element from SCAG in the California submission: SCAG had been unable to get its annual element to the state in time.[46] Hence, none of the county's projects could be approved by the Secretary because the Secretary cannot approve proposals that have not been submitted to the state by the appropriate MPO.[47] Federal funds became suddenly unavailable to the county for its highway projects, and several projects had to be discontinued or not commenced at all.[48] The delay in funding was ended when SCAG's annual element was finally submitted and accepted; the funds became available to the county as of November 22, 1976.[49] There would have been no delay in availability of federal funds but for the TIP regulations — under the former system, the county could have submitted its requests directly to the state, and the proposals would have been approved by the Secretary in time to allow the continuation of ongoing projects and the commencement of planned projects.

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42. Memorandum 50-9, *supra* note 17, as amended by Memorandum 50-3-71, *supra* note 18.
43. Cal. Gov't Code §§ 29532, 65080 (West Supp. 1977).
44. Appellees' Brief, *supra* note 34, at 16.
45. 23 C.F.R. § 450.316 (1978).
46. County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496, 499 (D.D.C. 1976).
47. 23 C.F.R. § 450.320 (1978).
48. Complaint, *supra* note 38, at ¶¶ 14-19.
49. Appellees' Brief, *supra* note 34, at 19.

III. The Complaint

The County of Los Angeles brought suit in the Federal District Court for the District of Columbia against the Secretary of Transportation and the administrators of the Federal Highway Administration and the Urban Mass Transportation Administration. The county claimed that it suffered irreparable injury solely as a result of the TIP regulations.[50] The regulations were alleged to be illegal because (1) they exceed and even contradict the intent of Congress,[51] and (2) they are in violation of the Constitution.[52] The county asked for declaratory relief, in the form of a declaration that the regulations are unconstitutional,[53] and injunctive relief, in the form of an order to the Secretary to immediately consider and approve the county's highway proposals.[54] It should be noted that, if granted, injunctive relief of the kind sought here would have negated not only the TIP regulations but also the congressional mandate for regional and state review[55] because the county would be taking its proposals directly to the federal funding agency without stopping at SCAG or the governor's office along the way.

IV. The Decisions

The trial court denied relief and dismissed the case.[56] The appellate court, in a per curiam opinion, upheld the dismissal and added some discussion of its own.[57] What follows is a discussion of the arguments advanced by the plaintiff and the rebuttals offered by the defendants. Where appropriate, that is, where the courts discussed an issue, the court's comments will be included. Editorial remarks will be set out in separate paragraphs.

A. *Arguments of the Parties*

As mentioned previously, Plaintiff's arguments fall within two general categories: first, the Secretary exceeded his delegated authority when he promulgated his TIP regulations; second, the regulations are, on their face and in their interpretation, unconstitutional. Within these two categories were expressed several more specific arguments.

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50. Complaint, *supra* note 38, at ¶¶ 14-16, 18-21.
51. *Id.* at Counts II, III.
52. *Id.* at Count I.
53. *Id.* at 15.
54. *Id.*
55. County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496, 500 N. 12 (D.D.C. 1976).
56. *Id.* at 503.
57. County of Los Angeles, Cal. v. Adams, 574 F.2d 607, 609 (D.C. Cir. 1978); Bazelon, C.J., and Leventhal and Robinson, Circuit Judges.

1. ULTRA VIRES

In support of its claim of ultra vires action by the Secretary, Plaintiff argued[58] that the TIP regulations (a) give the MPOs powers unintended by Congress, (b) have created discord instead of cooperation, (c) inevitably cause delay, (d) have actually encountered Congressional disapproval, and (e) have replaced a system that worked well. These arguments, the Secretary's answers, and editorial comments are presented below.

A. UNINTENDED POWERS

County's Argument: Congress intended the metropolitan planning organizations to be nothing more than planning and advising bodies. The term "metropolitan planning organization" is mentioned only once in the Highway Act,[59] and then only as the organization which is to receive highway funds and be responsible for implementing the provisions of section 134. Nowhere is there any statutory language that indicates that the MPOs should have the ultimate authority to select and implement highway projects or the exclusive authority to perform a programming function. Thus, there is no statutory basis for the TIP regulations, at least in the form in which they were promulgated. In fact, the situation before the TIP regulations were issued was adequate to meet the statutory requirements; SCAG's "A-95" clearinghouse function was all that was intended by Congress for any MPO to do.

Secretary's answer:[60] It was Congress' intention that local officials do the selection of projects and that there be only a power of concurrence in the state. There is a clear trend in recent years toward increasing decision-making power in regional and local officials. The system imposed by the TIP regulations, including the programming authority that has been invested in the MPOs, is not an unreasonable means of implementing Congressional intentions. Those intentions are clear; planning is to be done in large measure by local agencies, and in every case local officials are to have a voice in planning. The TIP system is a way to give those local officials that voice.[61]

B. DISCORD

County's argument: Congress' mandate was for cooperation among all levels of government agencies involved in highway planning. Contrary to that intent, however, is the situation which has developed since the promul-

58. Appellant's Brief, *supra* note 13, at 30-40.
59. 23 U.S.C. § 104(f)(3) (1976).
60. Appellee's Brief, *supra* note 34, at 23.
61. *Id.* at 32.

gation of the TIP regulations.[62] In giving programming authority that is practically exclusive to the MPOs, the Secretary has created discord among local agencies. "Politics," rather than cooperation, now dominates highway decisionmaking. Since the MPOs are made up of representatives of local jurisdictions and agencies, and since it is the MPO that must do the planning and approving of highway projects, there is too much opportunity for contention among individual interests. Under the "old" system, wherein funds were allocated strictly on a population basis, there was no such discord.[63] As evidence of its "discord" allegation, Plaintiff offered a study[64] done by the Defendants themselves, wherein significant political problems were noted in more than one metropolitan area.

Secretary's answer: There is no evidence of discord in Southern California (at least concerning highway planning). In fact, there has been no known occasion whereon SCAG failed to approve one of the county's projects, for political or other reasons.[65]

C. DELAY

County's argument: The new system creates delay in the programming process and in the delivery of highway funds,[66] and this delay is an inevitable result of the nature of the system, because the system requires a new step on the planning process—endorsement of each project and submission of endorsed projects through the state to the FHWA by the MPO. While this delay would not always lead to the cutoff of funds that was experienced in this case by the county, it did happen here, and the nature of the system makes it very possible that it will occur again. Before the regulations made the extra step mandatory, the county submitted its proposals directly to the state. The extra step was eliminated, and the possibility of fund cutoff that is raised by the requirement of MPO endorsement did not exist.

Secretary's answer: The delay in this case was not the fault of the TIP system; rather, it was the result of some administrative malfunction within SCAG itself.[67] In any case, the Secretary was prevented from acting on the county's proposals as long as those proposals were not submitted by SCAG. That restriction came not only from the Secretary's own regulations, but from section 105 of Title 23; that is, the Secretary was confined

62. Appellant's Brief, *supra* note 13, at 22, 33.
63. *Id.* at 12, 22. *See also* text accompanying note 74, *infra*.
64. Appellant's Brief, *supra* note 13, at 21.
65. Appellees' Brief, *supra* note 34, at 28.
66. Appellant's Brief, *supra* note 13, at 34-35.
67. Appellees' Brief, *supra* note 34, at 26.

by statute[68] as well as by regulation.

Comment: The Secretary's response does not explain away the fact that if there had been no requirement of the extra step, then this kind of problem could not occur. Section 105 does *not* specifically require the MPO-approval step.

D. DISAPPROVAL

County's argument: As further proof that the TIP regulations exceed Congressional intentions, and therefore are an ultra vires act by the Secretary, the county offered letters[69] written to the Secretary by the authorizing committees of both the House and the Senate. The letters, actually written by the chairmen of those committees, were a response to the Secretary's notice of intent to promulgate the TIP regulations. The suggested regulations, as published in the Federal Register, were unacceptable to the chairmen of the authorizing committees for some of the same reasons that the county found them objectionable; the regulations give more authority to the MPOs than the authorizing committees had comtemplated. Despite the disapproval of the chairmen of the authorizing commmittees of both houses of Congress, the Secretary promulgated the TIP regulations without removing the extensive grant of authority to the MPOs.

Further, the fact that Congress did not invalidate the regulations when it passed the 1976 Highway Act was not, according to Plaintiff, equivalent to a ratification of those regulations.[70] At the time, the Secretary was still waffling on interpretation of his own regulations. A letter was written by the Defendants to Omaha,[71] a region that was having trouble meeting the requirements of the regulations. In that letter, the Secretary indicated that his interpretation of the regulations, and their application to the situation in Omaha, would not necessarily be as stringent as the language of the regulations might suggest. Since there was no clear interpretation, Congress' failure to pass legislation that would invalidate the regulations was not an approval of them, especially in light of the letters from the authorizing committees.

In the 1976 Act there was *some* indication of Congressional concern, however; section 149 authorized the Secretary to conduct a study to determine how well the 3-C process was being implemented. Plaintiff maintained that the fact that Congress chose to authorize a study instead of enacting more specific guidelines for the implementation of its directives

68. *Id.*

69. Appellant's Brief, *supra* note 13, at 17; the text of the letters may be found in Appendix at 208, # 212.

70. Appellant's Brief, *supra* note 13, at 38.

71. *Id.* at 24; the text of the letter is reproduced in Appendix at 205.

was, like its failure to invalidate the regulations, not a tacit approval of the regulations.

Secretary's answer: The Secretary's response[72] was one which the trial court found very persuasive.[73] Congress had, argued the Secretary, the opportunity to act. Not only did Congress choose deliberately not to contravene the clear intent of DOT, but the action that *was* chosen was simply an authorization of the study mentioned above. The letters held out by Plaintiff as being indications of Congressional disapproval are inadequate as legislative history.[74] The stronger evidence, in the view of the court, showed that Congress was fully aware of the situation and chose to act by authorizing only a study.

E. Old Procedure

County's argument: An argument that "tagged onto" the ends of some of Plaintiff's other arguments[75] concerns the OMB A-95 review process which has previously been mentioned. Plaintiff argued that the A-95 review requirements were being met by the procedures followed by itself and SCAG and that those requirements were essentially the same as the section 134 Congressional requirements. There was enough cooperation among regional and local officials under the old system to satisfy Congess' mandate. Also, the previous method of fund distribution, which was allocation on a population basis, created no problem at all as far as intergovernmental cooperation was concerned.[76] The regulations have "rendered nugatory" the previous population-based suballocation procedures by causing funds to be divided "according to putative regional priorities."[77] Local jurisdictions will now be competing with each other for funds.[78] MPO members, who represent the interests of local jurisdictions and agencies, will be contending for money for their own projects.

Secretary's answer: The regulations have no effect on the process of suballocation; that suballocation is "purely a matter of state policy."[79]

Comment: While it is true that the regulations do not specifically require any method of suballocation, it seems equally true that, regardless of

72. Appellees' Brief, *supra* note 34, at 35.
73. County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496, 502 (D.D.C. 1976).
74. *Id.* at 501, n. 19.
75. Appellant's Brief, *supra* note 13, at 12, 16, 27, 31.
76. *Id.* at 12, 22.
77. Reply Brief for Appellant at 7, County of Los Angeles, Cal. v. Adams, 574 F.2d 607 (D.C. Cir. 1978).
78. Appellant's Brief, *supra* note 13, at 33.
79. Appellees' Brief, *supra* note 34, at 27.

any state allocation policy, the MPO will still decide which projects (hence, which local interests) will be funded. Although the MPO *could* attempt to do its planning so that funds would be allocated on a population basis, it could just as easily *not* do so.

Neither the Defendants nor the court discussed the county's more general argument that the section 134 planning requirements were being complied with long before the Secretary issued his regulations. The OMB A-95 procedure was mentioned only in Defendants' descriptions of the statutory scheme[80] and in their description of SCAG as the region's OMB A-95 clearinghouse.[81] The court's mention[82] of SCAG's OMB A-95 function was taken directly from the Defendants' brief.

This part of the county's argument is essentially one of "lack of necessity." In other words, the TIP regulations were unnecessary since the Congressional directives for cooperation and for comprehensive, long-term planning were already being met in the Los Angeles area. In its attack on the regulations, Plaintiff did not make enough of this 'unnecessariness.' While it has generally been true that administrative regulations cannot be overturned simply because they are unnecessary, the argument is at least worth making. The approach the court took caused it to avoid this kind of discussion; the court chose to stand on the presumption of validity that administrative regulations have long enjoyed. "In the absence of any compelling indication to the contrary," said the court, the regulations must be allowed to stand.[83]

2. *Unconstitutionality*

The next arguments fall within the second category, that of constitutionality. The first is a federalism argument, and the second concerns interference with state police power.

A. *Federalism*

County's argument: The regulations violate the Tenth Amendment because they interfere with matters which have been properly left to state governments.[84] There is a precedent in *National League of Cities v. Usery*.[85] In *Usery*, the Supreme Court prohibited federal interference with functions carried out by states *as states*. One of the specific prohibitions was against

80. *Id.* at 9.
81. *Id.* at 16.
82. County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496, 499 n. 8 (D.D.C. 1976).
83. *Id.* at 503.
84. Complaint, *supra* note 38, at ¶¶ 35-37. In its brief, however, the county addresses this issue only in a footnote, Appellant's Brief, *supra* note 13, at 32 n. 13.
85. 426 U.S. 833 (1976).

any federal attempt to alter the actual *structure* of state government.[86] In the instant case, there is an alteration of state governmental structure inasmuch as the federal TIP regulations require the creation, where one does not already exist, of some regional organization to be the MPO.

B. Police Power

County's argument: The TIP regulations are an interference with the state's police power;[87] the delay in the funds, which were already earmarked for specific street projects, caused Plaintiff to be unable to finish these safety-related projects. Since the public welfare and safety are matters that are within the province of the police power, which is in turn within the province of state government, the delay in funding caused by the TIP-required procedures was an interference with state police power. This is a violation of the Tenth Amendment and of basic federalism principles.

Secretary's answer: Both of Plaintiff's arguments pertaining to the constitutionality of the regulations were answered[88] by Defendants thus: there has been no reduction of the state's sovereignty, since the final decision (approval or disapproval) on each project rests with the state even under the TIP system. In addition, since it is federal money in the form of grants-in-aid under discussion here, the federal government has the right to place conditions on the granting of these funds. If any state does not wish to meet the conditions, that state can simply not participate in the program.

Comment: As to the County's own sovereignty as differentiated from that of the state, Defendants said nothing. Federalism has traditionally been exclusively a *state* issue, a matter of contention between only the federal government and the states. Regional and local governments have not been parties to the discussion, except in their roles as units of *state* government, and these sub-state governments have not had standing to bring actions under federalism theories. A "sovereignty" in regional and local governments has not been recognized. That is why the court in this case took Defendants' arguments as its own and remarked: "Inasmuch as the Secretary's regulations in no way diminish the power of the State, Plaintiff's "federalism" argument (even if it were the proper party to advance it) must fail."[89] Even if the *state's* sovereignty were unimpaired by the regulations (a questionable assumption, as will be noted later), the "sovereignty" of *the county* has been impaired. It is not necessary to put forth a whole new theory of federalism wherein the sovereignty of each municipality and

86. 426 U.S. at 849.
87. Complaint, *supra* note 38, at ¶¶ 17, 26-30.
88. Appellees' Brief, *supra* note 34, at 40.
89. County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496, 502 n. 27 (D.D.C. 1976).

county is treated like that of the state, and the relationship between such local governments and the federal government is equivalent to that which exists (or is supposed to exist) between the state and federal governments. It is only necessary to recognize the fact that Plaintiff is a part of the governmmental structure of its state, and an action against it is an action against the state itself.

As the court said, Plaintiff was not the proper party to raise the federalism issue. By traditional standards (that is, under the federalism-is-strictly-a-state-issue approach), Plaintiff had no standing to complain. But as mentioned above,[90] there is a trend in Congressional thinking toward a sort of "urban sovereignty." Our large cities receive more and more attention directly from the federal government. This attention is directed right by, without stopping it, state government. The eventual effect of this trend may be to create the very kind of new federalism that was described above as unnecessary. In other words, metropolitan areas will be treated as independent governments in many ways. If that happens, then the courts will have to recognize the propriety of local governments bringing actions on this expanded theory of federalism.

At present, however, there is no such expanded theory, and we must deal with realities. Thus, the trial court in this case found the Defendants' response to the federalism arguments sufficiently persuasive to enable the court to dismiss the entire federalism issue in a footnote.[91] This summary dismissal was possible because the court followed the current practice (*Usery* was an exception held inapplicable in this case) of finding no interference with a state's sovereignty whenever that state has the option of simply refusing to participate in the federal government's offered program. That this practice may no longer be appropriate is an argument raised later in this article.

3. Summary

Plaintiff contended that the regulations were in contravention of both Congressional intent and constitutional principles. The court said that the first of those arguments was Plaintiff's strongest, but the fact that Congress could have invalidated the regulations and did not do so tipped the balance in Defendants' favor. Constitutional principles were not violated, because the federal government may properly put conditions on the distribution of its funds. Where those conditions do not remove the states' option of nonparticipation in the program, there is no improper interference with state sovereignty. Overall, the trial and appellate courts found the TIP regulations to be both consistent with the language of section 134 and "a reasonable

90. *See* text accompanying note 60 *supra*.

91. County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496, 502 n. 27 (D.D.C. 1976).

means of effectuating the statutory command."[92]

B. Arguments of the Amici

Two amicus curiae briefs were filed at the appelalte stage by the States of Virginia and Oklahoma. The fact that these briefs were filed by *state* attorneys is important — there were no constraints of the type faced by the County of Los Angeles regarding the federalism issue. Virginia and Oklahoma *were* the proper parties to advance this type of argument, and they did so. Both states strongly opposed the regulations. Their arguments were essentially the same as those advanced by the county: (1) the regualtions are inconsistent with Congress' section-134(a) mandate, (2) congressional inaction should not have been considered by the trial court to be an indication that the regulations are consistent with section 134(a), and (3) the institutionalization of the MPOs and the MPOs assumption of powers that had previously been vested in state governments constitute invasions of state sovereignty.

1. Less Cooperation

Argument: Oklahoma mentions the "interjurisdictional strife" that was alleged by Plaintiff, but the amici's primary argument here is slightly different — giving the MPOs exclusive planning power will create less, not more, cooperation among the MPOs, the state, and the local agencies.[93] The MPO will either take all the decision-making power itself and make decisions unilaterally, or it will become the sounding board for "political squabbles."

Comment: It is difficult to see how interjurisdictional strife would be any different when the *MPO* is the sounding board than it would when the *state* is the sounding board. The MPOs are made up of representatives from local agenices, so the outcome of their "cooperation" would likely be no different from the outcome of their interaction with state-level planners as it existed prior to the regulations. What would be different, though, is the role of the state in the whole process. Congress specifically stated[94] that the authority of the states was not to be decreased, even though cooperation between the states and local agencies was required. Removal of a state's programming and project-initiation powers is removal of its ability to effectively cooperate with local agencies. All a state can do under the present regulatory regime is to disapprove projects; it can initiate only a few,

92. County of Los Angeles, Cal. v. Adams, 574 F.2d 607, 609 (D.C. Cir. 1978).

93. Brief of the Commonwealth of Virginia, as Amicus Curiae [hereinafter cited as Virginia's Brief] at 12. Amicus Curiae Brief of State of Oklahoma [hereinafter cited as Oklahoma's Brief] at 10, County of Los Angeles, Cal. v. Adams, 574 F.2d 607 (D.C. Cir. 1978).

94. 23 U.S.C. § 145 (1976).

and those few are not the ones with which local agencies would be most concerned.[95] The "interjurisdictional strife" argument as advanced by the county may be as yet unresolvable, since the system is still only a few years old. But the state's argument seems to have more immediate truth; when there is only veto power, "cooperation" tends to be more negative than positive. The latter is the type of argument that the Plaintiff, being a county and not a state, was in no position to pursue.

2. Congressional Inaction

Argument: The "Congressional inaction" argument advanced by Oklahoma[96] is not much different from Plaintiff's,[97] except that Oklahoma added a discussion of the *Missouri v. Volpe*[98] precedent. This discussion centers on the idea that congressional inaction could mean almost anthing, so it should not be a heavily-weighted factor in any court's decision (much less the *determining* factor). Virginia took the trial court to task[99] for improperly relying on several cases; these cases were intended by the court[100] to support its reliance on Congress' inaction as being indicative of Congressional approval. Those cases were *Red Lion Broadcasting Co. v. FCC*,[101] *Zemel v. Rusk*,[102] *FHA v. The Darlington, Inc.*,[103] and *Costanzo v. Tillinghast*.[104] Each of these cases involved both long-standing regulations *and* subsequent affirmative legislative action which upheld the regulations. That is not true in the present case.

Comment: It might be counter-argued that Congress' authorization of a study of the highway planning situation after promulgation of the TIP regulations is equivalent to at least provisional approval of those regulations (provisional, that is, upon the outcome of the study). This argument is like clutching at straws. As was mentioned earlier,[105] the Secretary's own interpretation of the regulations was in question at the time the study was authorized. At any rate, the cases relied upon by the trial court do not apply to the present case. The *Volpe* case seems much more reliable; Congressional inaction really does not mean much. This, taken into consideration

95. Under the current regulatory restrictions, a state may initiate only Interstate and "urban extension" projects; *see* note 30 *supra*.
96. Oklahoma's Brief, *supra* note 93, at 13.
97. *See* text accompanying note 70 *supra*.
98. 479 F.2d 1099 (8th Cir. 1973).
99. Virginia's Brief, *supra* note 93, at 17.
100. County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496, 502 (D.D.C. 1976).
101. 395 U.S. 367 (1969).
102. 381 U.S. 1 (1965).
103. 358 U.S. 84 (1958).
104. 287 U.S. 341 (1932).
105. *See* text accompanying note 71 *supra*.

together with the arguments in paragraph one immediately above, makes the court's perception of the importance of Congressional inaction seem unfocused at best.

3. *State Sovereignty*

Argument: With the state's rights argument the amici most clearly distinguished themselves from Plaintiff. Since both were arguing the interests of their states, there was no problem of standing, and both argued forcefully that the sovereignty of their states has been infringed upon.[106] Both amici cite the *Usery* case.

Comment: It is common knowledge that until the *Usery* decision, the Tenth Amendment had been reduced to a "mere truism."[107] But the *Usery* decision was seen by many commentators as giving the Tenth a new lease on life. It was still a new case when the present case was being argued on appeal. Since it has been thoroughly discussed elsewhere, there is no need to discuss *Usery* here. It is only necessary to say that the Supreme Court in *Usery* found a violation of the Tenth Amendment in an attempt on the part of Congress to direct an activity carried on by a state *in its role as a state*. A federal "restructuring" of government operations was held to be interference with actions done by a state as a state and was therefore prohibited. In the present case, both amici argued[108] that the Secretary's creation of the MPOs, especially in states wherein such organizations did not previously exist, was an interference with state governmental function comparable to that which was struck down in *Usery*; it was (and is) a "restructuring" of state government.

The arguments set forth in the amicus curiae briefs have been discussed separately from those contained in the county's pleadings because they approach the problem from a different point of view - the point of view of state rather than local interests. The amici give us an idea of what the case would be like if a state were a party. This latter is not an unforseeable possibility. *County of Los Angeles v. Adams* will be an unfortunate precedent in that event, but there are further argumnts that could be made in an attempt to tip the balance of the states.

V. Further Observations

A. *Entitlement*

The federal government has created an entitlement in the states to highway funds. This is not the same limited kind of post-allocation entitle-

106. Virginia's Brief, *supra* note 93, at 20; Oklahoma's Brief, *supra* note 17, at 17.
107. United States v. Darby, 312 U.S. 100, 124 (1941).
108. Virginia's Brief, *supra* note 93, at 23; Oklahoma's Brief, *supra* note 93, at 19.

ment that the County of Los Angeles claimed in this case;[109] this is a more general "right" in the states to federal aid for highway projects, a right to funds that have not yet even been allocated. An unbroken, high-quality national system of highways is required as much by the federal government[110] as by each individual state government. If only in furtherance of efficient interstate commerce, it is in the national interest to promote such a system. Since the highways are required, and since the federal government controls the means (*i.e.*, the money) to build them, surely the states (for it is the states that do the actual building) cannot be denied access to those means. It is useless to pretend that any state could simply take over the funding of its highway construction and maintenance. Such a shift of responsibility is unthinkable, given the large amount of aid that the federal government currently provides. The situation is such that the states not *depend* on federal highway funds. For the federal government to use this situation not only for the purpose of altering state governmental organization, but also in at least temporary contravention of its own policy, is uncessary and improper.

B. Sovereignty

The states cannot simply refuse to participate. Highway planning, construction, and maintenance are no longer voluntary activities, if indeed they ever were. A good highway system is required by practical necessity as well as by national policy. If a state were to cease its highway work, that state would soon face economic ruin. Interstate commerce would be impeded and would soon simply be carried on elsewhere. Highway construction-related activities provide jobs for thousands of people. To say that the states retain their sovereignty under the TIP regulations because they can choose not to receive federal aid is to deny the practical reality of the situation. The states have no real choice, and whatever sovereignty the federal courts saw was illusory.

C. Spending Power

The TIP regulations cannot stand upon Congress' spending power. If one assumes *arguendo* that the TIP regulations *are* consistent with the statutory (section 134) language, then the statute itself is unconstitutional. Congress' power to spend for the "general welfare" (Article I, Section 8 of

109. Appellant's Brief, *supra* note 13, at 5. The county claimed that, since a certain amount of federal highway money had already been allocated to it, a statutory entitlement had been created, and the Secretary could not lawfully prevent or delay the county's use of that money.

110. Congress has stated that the national transportation policy shall be "[t]o ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense . . . ." 49 U.S.C.A. § 10101 (Supp. 1979).

the Constitution) has not been unduly restricted by the judiciary; in fact, it is often taken for granted. There are limits, however. In *United States v. Butler*,[111] it was stated that Congress could not use its spending power to accomplish a purpose "beyond the powers delegated to the federal government." Since the Constitution specifically grants Congress the authority to establish "post roads,"[112] and since mail is delivered on virtually every street in the country, it is apparent that Congress' highway spending is not beyond the powers delegated to it. It is then necessary to ask, can Congress spend to achieve a constitutionally prohibited end—an end that it could not achieve by direct legislation? The answer is clearly no.

In *Steward Machine Co. v. Davis*,[113] the Supreme Court indicated that where legislation is coercive it will not stand. The party assailing the legislation must show "coercion, destroying or impairing the autonomy of the states."[114] It has been shown that federal highway aid is not voluntary; the threat of its withdrawal is a club in federal hands. The form of coercion taken by the TIP regulations (assuming, again, that they are consistent with the section 134 legislation) does impair the autonomy of the states. What has been done before by state planning organizations will now be directed by a federally-imposed procedure. It would be clearly unconstitutional for Congress to pass legislation that had no purpose but the express one of reorganizing state highway planning systems, yet the same result has been reached here by a less direct route. Admittedly, it has been held that Congress can place conditions on its funding,[115] but a condition impairing state integrity is one condition that has *not* been allowed.[116]

VI. Conclusion

The ostensible objective of both section 134 and the TIP regulations is improvement of the nation's system of highway transportation. There is evidence that the opposite has happened,[117] at least in several instances. A second objective is to ensure that local officials have a role in highway planning. Both of these are worthwhile goals. The TIP regulations, though, are improper and unnecessary means to achieve the desired ends. The structure of state and local decision-making processes is so much a matter of state authority and so little a matter of federal authority that "state sovereignty" is inseparable from it. If a state is sovereign of anything, surely it is sovereign in its own political subdivisions and decision-making processes.

111. 297 U.S. 1, 68 (1935).
112. U.S. Const. art. I, § 8.
113. 301 U.S. 548 (1936).
114. 301 U.S. at 586, at 1290.
115. *See, e.g.*, Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127, 794 (1946).
116. Fry v. United States, 421 U.S. 542 (1975).
117. *See* text accompanying note 62 *supra*.

County of Los Angeles v. Coleman was not a good case for a full-blown debate of many of the important issues created by the Secretary's regulations, especially those issues which concerned the Tenth Amendment. It is appropriate at this point to return to a subject that *could* have been discussed by the parties— that of the lack of necessity of the regulations. Neither the Secretary nor the courts denied that the section 134 "3-C" requirements were being met *before* promulgation of the TIP regulations in Southern California. There is no reason to believe that this was not also the case in most urban areas. Why create new bureaucracies in every urban area of the United States? There is a better way; an administrative remedy could be provided for those local agencies, or even state agencies, that have been excluded from the planning process. Administrative hearings could be made available for the complaining parties. If funding of the particular project in question were required to be withheld pending resolution of the dispute, the resulting delay and inconvenience would undoubtedly be an incentive for all parties involved to cooperate, at least in the vast majority of instances. (There will be exceptions no matter which system is used.) This procedure should be adequate in the few situations in which the already-required OMB A-95 review is not working.

If local interests are truly to be made influential in the highway planning process, and if the goal of multi-level cooperation is to be realized, then it seems counterproductive for a centralized federal agency to impose new structure and procedures upon state governments. It is difficult to see how Congressional goals will better be achieved by means of a new bureaucracy than by adherence to existing procedures. OMB A-95 created procedues designed to result in the multi-level cooperation that was intended by Congress when Congess enacted section 134. Even if OMB A-95 procedures are insufficient to meet the "continuous and comprehensive" requirements of the "3-C" mandate, would it not be better to set forth *standards* that must be met by every state highway planning agency than to set up a new agency with accompanying new procedures? Whatever the theoretical benefits that may be gained by making every local agency a member of a new regional agency, those benefits are outweighed by the fact that the states have been deprived of much of their ability to coordinate and unify highway planning processes. The states have been left with only a power to veto; they are left, now that the TIP regulations have been upheld, with the ability to exercise only a negative influence on planning. This is indeed unfortunate. It is hoped that, should a similar case soon arise, the courts will see fit to stop the trend toward centralized, federal decision-making and will allow the states to perform those functions that states are best suited to performing.

Philip L. Dubois

HAROLD S. SHERTZ ESSAY AWARD CONTEST

The Film, Air and Package Carriers Conference of the American Trucking Association, in conjunction with the Motor Carrier Lawyers Association, in an endeavor to encourage interest within the legal education community in the field of transportation, annually holds the Harold S. Shertz Essay Award Contest. The contest title was selected to honor Harold S. Shertz, Esq., of the Philadelphia, Pennsylvania, Bar for his long service to the transportation industry and to the legal profession.

Submission of manuscripts must be in conformance with the competition's rules as follows:

1. *Eligibility*:

The contest is open to any law student of a school in the United States or Canada. An essay may be written in collaboration with another student provided there is full disclosure.

2. *Subject Matter*:

A contestant may write on any area of transportation law.

3. *Determination of Award*:

Essays will be judged on timeliness of the subject, practicality, originality, quality of research, and clarity of style. The Board of Governors of *Transportation Law Journal* shall act as judges. In the discretion of the judges, no prize may be awarded. The decision of the judges shall be final.

4. *Prizes*:

A prize of $500.00 will be paid and the winning essay will be published in the *Transportation Law Journal*.

5. *Right of Publication*:

Each contestant is required to assign to the *Transportation Law Journal* all right, title, and interest in the essay submitted, and shall certify that the essay is an original work and has not had prior publication. Papers written as part of a contestant's law studies are eligible provided first publication rights are assigned to the *Transportation Law Journal*.

6. *Formal Requirements*:

Essays must be submitted in English and be typewritten (double space) on 8 1/2" x 11" paper with 1" margins. Footnotes shall be typed separately and all citations must conform to *A Uniform System of Citation* 12th ed., 1976, Lorell Press, Avon Mass. The essay shall be limited to forty pages including text and footnotes.

7. *Submission Requirements*:

Three copies of the essay should be enclosed in a plain envelope and sealed. Contestant's name should not appear on either the envelope or the essay. The envelope containing the essay should be placed in another envelope with a letter giving the name and address of the contestant and stating that the article is submitted for the contestant and that the author has read and agrees to be bound by the Rules of the contest. Enclosed with this letter must be the certification set forth in Rule 5 above and a brief biographical sketch of the contestant.

8. *Date of Submission*:

The essay must be received at the University of Denver College of Law, 200 West 14th Avenue, Denver, Colorado 80204 on or before March 31, 1981.