The SG's Basic Argument (Commerce Power):

The SG's brief states:

"The power of state government to discriminate arbitrarily in employment on the basis of age is not a legitimate attribute of sovereignty, comparable to the power of the state to make fundamental employment decisions concerning minimum wages and hours".

Putting it differently, the SG says "arbitrary discrimination is not an attribute of state sovereignty" *** 
It does not interfere with the state's power to prescribe reasonable qualifications ... or to discharge individuals found unfit" (p. 10).

Respondent's Answers:

The Act does interfere with the same state sovereignty functions in the same way that the FELA Act did: it affects numerous decisions with respect to employment, and arguably may be an even greater intrusion on the state's authority. For example:

1. Increased costs. Salaries generally increased with years of service. Fringe benefits also continue to increase (e.g., cost of group life, health and accident insurance). More persons would be retired because of disability, often at full salary.
2. **Retirement plans.** Structuring retirement plans will be more difficult as well as expensive.

3. **Handicaps recruiting of talented young people.** Upward mobility to positions of leadership and higher salaries will be affected.

4. **Natural degenerative process.** As persons age, there is some natural degeneration physically and sometimes mentally. Identifying this to the point of justifying termination of employment will be impossible in most situations.

5. **Bona fide occupational qualification.** The SG says the Act will not interfere with the "state's power to proscribe reasonable qualifications" or "to discharge those individuals found unfit". The SG cites the provision that an employer (the state) need not comply "where age is a bona fide occupational qualification (BFOQ)". But this usually requires litigation.

6. **Litigation.** Experience under Title VII demonstrates that resulting litigation has been a burden. The threat of it has to be considered with respect to every employment decision: hiring, promoting, and firing. Litigation is expensive, and also distracts key personnel from normal duties.

**In sum,** the states make a rather strong case for arguing that there is no distinction on principle between the effect on state sovereignty of the Age and
Discrimination Act and FELA. I am inclined to agree (for Commerce Clause analysis) that National League of Cities either must be followed here or overruled. It has been undercut to some extent by the language in Hodel, but this does not justify overruling it.

The SG also argues that §5 of the Fourteenth Amendment empowers Congress to impose this burden on the states. But the legislative history lends no support to Congressional reliance on that Amendment. And in Pennhurst State School v. Halderman (WHR), the opinion suggests that we do not assume or imply Congressional reliance on this Amendment. 451 U.S., at 16.

L.F.P., Jr.
MEMORANDUM

TO: Jim Browning  DATE: Sept. 22, 1982
FROM: Lewis F. Powell, Jr.

81-554 EEOC v. Wyoming

Thank you for your most helpful bench memo.

In taking a second look at the briefs, I am impressed by the fact that the parties debate whether the Age Discrimination Act "directly impairs [the ability of states] to structure integral operations in areas of traditional functions" (see Model).

In your memorandum you mention, perceptively, that there is a substantial difference between the unfettered right to require mandatory retirement at age 65 (for example), and the necessity to make individual judgments with respect to every employee over 65 whom the state wishes to retire. Apart from other negatives, each of these decisions is made in the shadow of possible litigation. In view of the threat of litigation, demonstrated to be a reality in thousands of cases since Title VII was enacted, a state government in particular usually would choose to retain a marginally incompetent employee rather than separate him or her before age 70.

It would be interesting - if the information is readily available - to know how many suits have been brought against states under the Age Discrimination Act. Would Lexis provide this information? At best, it would reflect
only cases of record that have gone to judgment – the tip of the iceberg.

I do not suggest that the number of suits would be more than another interesting item of information. In this connection, it may be that the annual report of the Administrative Office (full of statistics) would show the total number of Title VII cases filed in federal court in a fiscal year. We have the 1981 fiscal year report in my Chambers (I think Mark may have it).

L.F.P., Jr.
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6. Litigation. Experience under Title VII demonstrates that resulting litigation has been a burden. The threat of it has to be considered with respect to every employment decision: hiring, promoting, and firing. Litigation is expensive, and also distracts key personnel from normal duties.

* * *

In sum, the states make a rather strong case for arguing that there is no distinction on principle between the effect on state sovereignty of the Age and
Discrimination Act and FELA. I am inclined to agree (for Commerce Clause analysis) that National League of Cities either must be followed here or overruled. It has been undercut to some extent by some by the language in Hodel, but this does not justify overruling it.

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L.F.P., Jr.
separate the controller is not effective, without the consent of the controller, until the last day of the month in which the 60-day notice expires.

(b) A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(c) An employee of the Alaska Railroad in Alaska and an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Company or the Canal Zone Government, who becomes 62 years of age and completes 15 years of service in Alaska or on the Isthmus of Panama shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes age 62 or completes 15 years of service in Alaska or on the Isthmus of Panama if then over that age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(d) The President, by Executive order, may exempt an employee from automatic separation under this section when he determines the public interest so requires.


Historical and Revision Notes

Derivation: United States Code

5 U.S.C. 2357

Revised Statutes and Statutes at Large

July 31, 1906, ch. 804, § 401 “Sec 9”, 70 Stat. 748.

Pub.L. 88-267, § 1 (item (a)-(o)), 72 Stat. 9.

Explanatory Notes

Standard changes are made to conform with the definitions applicable and style of this title as outlined in the preface to this report.

Codification. Pub.L. 96-70, Title III, § 5302(e)(2), Sept. 27, 1979, 93 Stat. 498, directive that “Panama Canal Commission” be substituted for “Panama Canal Company or the Canal Zone Government” in subsection (c) of this section has not been executed in view of the 1978 repeal of subsection (c) of this section by Pub.L. 95-256.
To: Mr. Justice Powell
From: Jim
Re: EEOC v. Wyoming, No. 81-554

A. You requested information on how many suits have been brought against states under the ADEA. In FY 80, the EEOC's Trial Division filed 47 ADEA suits and intervened in two others. There were 14,040 charges of age discrimination filed with the EEOC. Of those 14,040 charges filed, 1500 were filed against state/local governments; 21 against state employment agencies; 241 against elementary/secondary public schools; and 282 against public colleges/universities.

B. You also wanted to know how many ADEA cases against state governments have been decided, and the total number of title VII cases filed in federal court in a fiscal year. For this information, the librarians will have to contact services outside the Court. I will await further instructions on how far you would like to pursue this search given that the EEOC is a party.
SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell
From: Jim
Re: EEOC v. Wyoming, No. 81-554

The SG has submitted a reply memorandum for the EEOC. He argues that, despite some language in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), Congress is not constitutionally required to generate legislative history to enact valid legislation. The legislative history of an enactment is not itself the subject of judicial review in the sense that courts seek to ascertain the adequacy of Congress' knowledge about constitutional law. The teaching of Pennhurst is that, when Congress exercises its spending power, it is crucial to ascertain whether Congress intended to impose an unconditional rule of conduct pursuant to its regulatory powers or whether it merely intended to require those who elect to participate in the federal program to conform their conduct to the conditions imposed upon recipients of federal funds. Pennhurst requires an explicit congressional statement of reliance on the fourteenth amendment only when it is asserted that a funding provision is also a regulatory provision.

Although this is a possible means of distinguishing Pennhurst from the present case, I am not sure the broad language in Pennhurst gives much indication that the Court meant to limit its "explicit
reliance" requirement. In any case, I agree fully with the SG's fundamental position that the purpose of judicial review under our constitutional system is not to enable the courts to take issue with the constitutional theories specified by the political branches in exercising their powers, but to ascertain whether the coordinate branches of the government have acted within their constitutional powers. If the Court finds Congress' extension of the ADEA to state employees an unconstitutional use of its commerce powers, it should decide whether Congress could enact the legislation under the fourteenth amendment.

In view of Respondent's brief, I'm not sure we should do more than say we can assume Congress intended to make their type of use of § 5.
Margie (police at age 50)

Vancev Bradley (cert. service officer at 60)

are relevant but not controlling.
Lee (56)

The case here on motion to dismiss. No evidence.

Responding to P5, Lee agreed that the Congress could enact a law requiring all state wardens to retire at age 55, (then answer rebuts any analogy to sex or race discrimination).

Salzburg (Defeats A 6 Wmm)

What Wmm has done is not unconstitutional. Merger settles this. The Q is whether Congress has acted more beyond its power.

The Act is more intrusive than FLSA. The state Congress is not defending status of right to choose its employees. This affects quality of state service as well as a state's pocket book.

Fed. Gov. counsel withdrew for its law enforcement officers.
Supreme Court of the United States
Memorandum

81-554 EEOC v Wynn

1. *League of Cities controls*

2. At least equally intrusive
   FESA only costs
   money, plus the federal intrusion

*ADEA, in addition*
   interferes directly with
   *who the State may*
   *employ.*

Their effects on
   efficiency of State operations.
   Older less efficient
   More sick time
   Recruitment of young
   Increased costs

III 3.5
   Not applicable
The Chief Justice

League of Cities controls

Justice Brennan

Rev.

Only issue in CP presented was whether Congress violated 10th Amend. It did not.
Age is not necessarily a BFOQ.
Revenue v Commerce Clause issue. This is very different from League of Cities.
If we reach 55 issue, Morgan v Katzenbach controls. 35 clearly controls.

Justice White

Rev.

Agree basically with WJB—certainly on Commerce Clause.
Either by State or Congress, legitimacy could make a BFOQ finding on a group basis (but can this Count as Flex?)
Need int reach 55.
Justice Marshall

Rev.
Agree with WJB

Justice Blackmun

Rev.
I agree with WJB on both grounds - Commerce clause + S 5.

Justice Powell

Affirm
See my notes.
I'm not prepared to overrule. League
Justice Rehnquist  Affirm
Agree generally with L.F.P.

Justice Stevens  Rev.
Disagree with wisdom of regulation.
But in within Commerce Power
Wouldn't agree § 5 applies.

Justice O'Connor  Affirm
Meets Nat. Ceres Standard.
Agrees with L.F.P.

Dear Chief:

I'll try my hand at an opinion for the Court in this case.

Sincerely,

The Chief Justice

Copies to the Conference
October 16, 1982


MEMORANDUM TO: Justice Powell
               Justice Rehnquist
               Justice O'Connor

I will put my hand to a dissent in this case.

Regards,

[Signature]
December 17, 1982

81-554 EEOC v. WYOMING

Dear Bill:

I will await the dissent.

Sincerely,

Justice Brennan
Copies to the Conference

LFP/vde
December 20, 1982

81-554 EEOC v. Wyoming

Dear Chief:

I have written separately that I agree. But two or three relatively minor points occurred to me in reading your memorandum.

The short paragraph on page 5, written in terms of "turf", can be put in more lawyer-like terms. You might say something along the following lines:

"If Congress were free to regulate state sovereignty in this area at all, at least it should not demand more restrictive regulation of state employment policies than Congress itself imposes upon federal employment."

As you suggest (p. 7, 8), the SG's reliance on the B.F.O.Q. provision is wholly unpersuasive. I would emphasize, somewhat more than you have, the fact that B.F.O.Q. claims often - if not usually - result in lawsuits. These are expensive and also divert state officials from their normal duties.

On p. 11 (third line of first full paragraph), your memorandum said you would "have little doubt" as to the applicability of Bradley and Murgia. This is a rather weak statement. I would say that "the precessorial force of these decisions would require that we sustain the Wyoming Act".

The second paragraph commencing on page 11 talks about City of Rome and several other cases that seem to me to be essentially irrelevant. I do agree that Oregon v. Mitchell is used to make a good point.

I am glad you will file a vigorous dissent. In my view, our colleagues' decision in this case leaves very little of the principle of federalism upon which our government was founded.

Sincerely,

The Chief Justice

LPP/sfs
December 20, 1982

81-554 EEOC v. Wyoming

Dear Chief:

I agree with the substance of your memorandum and will await the dissenting opinion.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference
December 20, 1982

No. 81-554 EEOC v. Wyoming

Dear Bill,

I will await the dissent in this case.

Sincerely,

[Signature]

Justice Brennan

Copies to the Conference
Re: No. 81-554 - EEOC v. Wyoming

Dear Bill:

Please join me.

Sincerely,

Justice Brennan

cc: The Conference
Re: 81-554 - EEOC v. Wyoming

Dear Bill,

Please join me in your first draft with the addition you propose today.

Sincerely yours,

Justice Brennan

Copies to the Conference

December 21, 1982