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## A Pipe and Cigar Smoker Puts His Case Against Chief Justice Warren Burger

UNLESS a usually reliable source, Newsweek, has seriously misled its readers, Chief Justice Warren Burger

has initiated an egregious violation of my constitutional rights and the rights of those similarly situated. Noting the Chief Justice's penchant for direct action, Newsweek relates that he went to New York in a first-class Amtrak car and was annoyed by cigar smoke. When he complained to the attendant, the latter told him there was a "No Smoking" car in the coach class. The Chief Justice, profoundly dissatisfied, appealed to the then Secretary of Transportation John A. Volpe. The result: cigars and pipes were banned.

If we pipe and cigar smokers haven't got a case under the Equal Protection Clause of the Constitution, I should start teaching poetry. True, the Equal Protection Clause is in the Fourteenth Amendment, which limits the states, but the Supreme Court has held that its general thrust is incorporated in the Due Process Clause of the Fifth Amendment, which applies to the Federal Government. In this case, to the Secretary of Transportation, who could not thus arbitrarily, capriciously and summarily discriminate against one

class of citizens (those who smoke cigars and pipes) and in favor of another class (which smokes cigarettes).

I SAY THIS with special feeling. At about age 10 some adventurous classmate turned up with a pack of Wings (which must have cost a dime) and all of us had to demonstrate our machismo by smoking one. From the moment I lit it, I realized it was bad news: my eyes started watering like faucets. This

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experience was repeated until I decided that if machismo demanded masochism, I was prepared to be a sissy. During the war I would smoke a cigarette to wake up for reveille, but aside from that it was a pipe and (when the PX ran out of every brand of tobacco except Red Dog) cigars.

This choice automatically put me in a much-abused category. On airplanes, buses or trains the cigarette smokers were sovereign. If I lit my pipe (or, God forbid, a cigar) howls of rage would go up and authority would descend to stop this foul stench. Of course, my eyes were dripping away from those acrid cigarette fumes, but nobody cared. Whenever possible I would ride in the "No Smoking" cars—as, indeed, I do now in aircraft. But down inside I have always been furious; damn it I like to smoke, too. And ironically all the medical reports indicate that—while any kind of smoking is regrettable—my forms of addiction are harmless in comparison with cigarettes.

TO PUT IT broadly, I believe that people who don't like smoke blown in their faces have rights which I am prepared to respect, no matter what kind of smoke it may be. This would justify a flat ban on smoking in buses, where it is simply impossible to segregate tobacco fumes. However, in situations where it is possible to separate smokers from non-smokers in an effective fashion, I think there should be absolutely no discrimination this side of marijuana. If cigarette smokers don't like my pipe or cigar, that's their problem—I don't like their cigarettes. What we need is a *modus vivendi* based on equality of suffering.

In short, it's either all or nothing, and as soon as I can marshal my constitutional authorities and discover what writ would be appropriate, I plan to launch a class action against the present discriminatory system. I trust that if *Roche et al. versus Secretary of Transportation* reaches the Supreme Court, the Chief Justice will disqualify himself.