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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL MARITIME COMMISSION, :

Petitioner :

v. : No. 01-46

SOUTH CAROLINA STATE PORTS :

AUTHORITY :

- - - - -X

Washington, D.C.

Monday, February 25, 2002

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:03 a.m.

APPEARANCES:

PHILLIP C. HUGHEY, ESQ., Washington, D.C.; on behalf of
the Petitioner Federal Maritime Commission.

PAUL D. CLEMENT, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the United States, supporting the Petitioner.

WARREN L. DEAN, JR., ESQ., Washington, D.C.; on behalf of
the Respondent.

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(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 01-46, the Federal Maritime Commission v. the South Carolina State Ports Authority.

Mr. Hughey.

ORAL ARGUMENT OF PHILLIP C. HUGHEY

ON BEHALF OF THE PETITIONER FEDERAL MARITIME COMMISSION

MR. HUGHEY: Thank you, Mr. Chief Justice, and may it please the Court:

The adjudication of a Shipping Act complaint by the Federal Maritime Commission is an administrative regulatory process through which the agency makes findings of fact and applies its interpretation of the Shipping Act to those findings of fact. This is an exercise of executive power.

QUESTION: Well, why isn't that adjudication, if it applies the law to findings of fact?

MR. HUGHEY: Mr. Chief Justice, it is adjudication, but what we're suggesting is that it's not judicial. It is an executive branch adjudication that permits the agency to determine what position it would like to take with respect to potential violations of the Shipping Act.

QUESTION: But doesn't it involve a decision as

1 to whether this particular respondent before the
2 commission has violated some provision of the act?

3 MR. HUGHEY: Yes, and in that sense, Your Honor,
4 it is an exercise of ad hoc regulation. It's regulation
5 on a specific and discrete set of facts.

6 QUESTION: Well, you could say the same thing
7 about a court, that it's not making an -- making an ad hoc
8 regulation on these particular facts.

9 MR. HUGHEY: However, Your Honor, in the case of
10 a court and a decision issued by a court, such an order
11 would be self-executing, whereas a Federal Maritime
12 Commission regulatory determination is not self-executing.
13 Rather, in the event that it's not voluntary compliance
14 with whatever order the agency reaches at the end of an
15 adjudication, the Attorney General or a private
16 complainant must go into a Federal district court and seek
17 to have that Federal district court compel compliance.

18 QUESTION: Suppose Congress --

19 QUESTION: Well, presumably a State would
20 feel -- would hesitate not to appear because it might
21 ultimately be enforced against the State by the Attorney
22 General, isn't that right?

23 MR. HUGHEY: Yes, I think that is correct,
24 Justice O'Connor, that a State might --

25 QUESTION: Well, if the State is compelled to

1 participate, does that alter our analysis of it?

2 MR. HUGHEY: No, I don't think so, because the
3 extent to which the State feels compelled by a potential
4 action by the Attorney General of the United States is
5 compulsion that arises from an action of the Federal
6 Government itself in the name of the United States.

7 QUESTION: What if a -- is a private plaintiff
8 entitled to take a decision, or order, whatever you want
9 to call it, of the commission, and seek to have it
10 enforced by a court?

11 MR. HUGHEY: Yes, Your Honor, under the Shipping
12 Act a private plaintiff is permitted to go into a Federal
13 district court --

14 QUESTION: And would the Eleventh Amendment
15 defense raised by the State there prevail?

16 MR. HUGHEY: I think that that case would
17 present a much more significant Eleventh Amendment issue.
18 The Shipping Act provides that the district court hearing
19 and, of course, an action brought by a private complainant
20 must have jurisdiction of the parties. I would suggest
21 that to the extent there's any Eleventh Amendment interest
22 that requires vindication under the Shipping Act, that
23 vindication can be explored in the Federal district court
24 proceeding.

25 QUESTION: Do you concede that at least as to

1 reparation, where as I understand it the Government can go
2 into the district court to seek reparations, only the
3 private party, at least as to seeking dollars from the
4 State agency, that the Eleventh Amendment would preclude
5 that?

6 MR. HUGHEY: Well, in its order in this case,
7 Justice Ginsburg, the commissioner finds that it would
8 like to see its reparation orders deemed to be enforceable
9 by a Federal district court, so I can't concede that they
10 wouldn't be, but what I can say is that determination is
11 not within the agency's jurisdiction. That would be a
12 determination for the Federal district court to make in
13 the event that the State instrumentality raised an
14 Eleventh Amendment immunity defense to the attempted
15 enforcement action by the private complainant.

16 QUESTION: Mr. Hughey, why do you assume that if
17 this is not judicial action, sovereign immunity doesn't
18 apply? I mean, I guess whatever sovereign immunity the
19 States retained upon the formation of the Federal
20 Constitution was the sovereign immunity that existed in
21 international law at the time.

22 Can foreign sovereigns be summoned before
23 executive or legislative tribunals in this country?

24 MR. HUGHEY: I don't know whether foreign
25 sovereigns can be summoned before the --

1 QUESTION: Well, but the State sovereign
2 immunity is just what -- the sovereign immunity that they
3 had at international law. That's what -- the Eleventh
4 Amendment is just a reflection of the fact that they
5 retained that sort of sovereign immunity, and I don't
6 think it makes any difference that, you know, if the King
7 of England summons George Washington, President of the
8 United States, to appear before a parliamentary commission
9 or some royal tribunal instead of an English court. I
10 think George Washington would say, you know, go fly a
11 kite.

12 (Laughter.)

13 MR. HUGHEY: Well, I think that one can turn to
14 the text of the Eleventh Amendment itself for some
15 guidance on this issue, Justice Scalia.

16 QUESTION: No, you can't, because the Eleventh
17 Amendment is just -- we have held that it represents just
18 a reflection of the fact that the States retained that
19 sovereign immunity that they had before the formation of
20 the Federal Republic, and --

21 MR. HUGHEY: It's a reflection, Your Honor, of
22 the immunity from coercive judicial process. I think
23 that's why the Eleventh Amendment begins that the judicial
24 power of the United States shall not be construed to
25 any --

1 QUESTION: That's the conclusion, but what
2 Justice Scalia's asking, and I think we're interested in,
3 is whether there's any precedent that you could cite, any
4 historical source that says that an administrative
5 tribunal can summon a sovereign before it and render a
6 judgment.

7 MR. HUGHEY: Well, if I may suggest a different
8 side to that is that there is no precedent to suggest that
9 it can't. It's been held by this Court in California v.
10 United States that State-run courts are subject to
11 commission regulation.

12 QUESTION: Well, but if it's the dog that didn't
13 bark theory, it seems to me that cuts against you. If
14 this has never been done, that's probably because it can't
15 be done. At least we can make that inference.

16 MR. HUGHEY: No, I think it has been done since
17 the Shipping Act was first passed, and it simply --

18 QUESTION: I'm not talking about the Shipping
19 Act. I'm talking about other authority. If you're saying
20 that the Shipping Act is the precedent-breaking ground, it
21 seems to me that you're then on somewhat a slender
22 foundation for your argument here.

23 MR. HUGHEY: This Court held in California v.
24 United States that the Shipping Act as a regulatory
25 statute applies to all State-run courts. What the

1 commission is suggesting, Justice Kennedy, is that that
2 applies equally with respect to agency adjudications.

3 QUESTION: But California v. United States, the
4 United States was a party, so there was no Eleventh
5 Amendment question there.

6 MR. HUGHEY: No, the question I think was
7 whether the entire statute, which at that time included a
8 regulatory procedure that could be initiated by private
9 complainants, whether the entire statute, which was a
10 coherent regulatory scheme, applied to State-run ports,
11 and that's what the Court held. The Court specifically
12 referred to the scheme for regulating waterfront
13 terminals, not the specific provision within that scheme
14 that permits the United States itself to initiate an
15 investigation.

16 QUESTION: But the case itself, United States v.
17 California, raised no Eleventh Amendment problem.

18 MR. HUGHEY: No, that's correct. That's
19 correct, it didn't raise an Eleventh Amendment problem,
20 but the issue was whether the regulatory scheme as a whole
21 could be applied to State instrumentalities, and this
22 adjudicatory proceeding under the Shipping Act is part of
23 that regulatory program.

24 With respect --

25 QUESTION: Is there any -- I mean, it's sort of

1 an interesting question, but I wonder if there are laws or
2 rules which say that the Congress says that any ship,
3 including ships belonging to foreign States that enter New
4 York Harbor, will abide by the rules of the New York
5 Harbor Authority, and if they don't, you can -- there's
6 some argument about whether the pilot comes on or
7 something, that ship, including a military ship of a
8 foreign nation, or any other, has to adjudicate the
9 controversy in front of the New York Authority or other --
10 I don't know how that works, but maybe you do. I imagine
11 they are subject to our rules when they come here, and
12 bring their ships into the harbor.

13 MR. HUGHEY: Yes, I would think so, and the
14 commission does have some jurisdiction over foreign-
15 operated and -- foreign operated vessels that are owned by
16 sovereigns. The commission regulates sally-to-port
17 controlled carriers which are vessels that are owned by
18 Governments. If a complaint were to be filed against such
19 an entity, I see no reason why the commission would not
20 attempt to assert its regulatory adjudicatory jurisdiction
21 over such a complaint, but I know of no such specific case
22 under the statute.

23 QUESTION: How do you get around the, sort of
24 the principle of dignity which has been emphasized in
25 every case, I think, since Seminole, and it's been given a

1 prominent place in the reasoning of the court majority in
2 those cases, that it's the dignity of the States, and so
3 on, which must be preserved.

4 If under the rule of sovereign immunity which
5 overarches the Eleventh Amendment there were infeasible
6 dignity interests in the adjudication, say, in Seminole
7 and all of them, doesn't it follow, a fortiori, that there
8 are dignitary interests that would be offended by hauling
9 the State in front of an Article I, a purely
10 administrative tribunal?

11 MR. HUGHEY: I think I would have two responses
12 to that, Justice Souter. First is that I understand the
13 dignitary interest to be co-extensive with the sovereign
14 immunity interest, and second --

15 QUESTION: Well, that leaves the question in
16 a -- unanswered, I guess. The --

17 QUESTION: Justice Souter says the sovereign
18 immunity interest is co-extensive with the dignitary
19 interest.

20 (Laughter.)

21 QUESTION: Let's assume the co-existence.
22 What's the answer to the question?

23 MR. HUGHEY: Well, I think the answer would be,
24 then, that sovereign immunity doesn't apply, that a
25 State's dignity is not offended.

1 QUESTION: I certainly agree with you.

2 (Laughter.)

3 QUESTION: Because dignity seems to have been
4 taken, in fact, as one of the interests to be served by
5 sovereign immunity. Why doesn't the doctrine of sovereign
6 immunity, why doesn't it apply if applied in those other
7 cases?

8 MR. HUGHEY: Well, I think that the dignity of
9 the State is less offended by this type of regulatory
10 adjudication, given the fact that the agency has no
11 coercive power to compel anything from the State.

12 QUESTION: I -- it seems to me intuitively just
13 the opposite. I mean, these are tribunals that -- if
14 we're going to talk about dignity, these are tribunals
15 that do not have the dignity of the judicial forums that
16 were at stake in the preceding cases, and I would have
17 supposed that the offense to the sovereignty of the State
18 was even greater to pull the State before these lesser
19 tribunals.

20 MR. HUGHEY: Well, I think the offense to the
21 dignity interest of the State occurs when a State is
22 forced to do something which is the result of a coercive
23 act. Under the Shipping Act --

24 QUESTION: Everything was fine in Seminole and
25 all of them, until we got to the point of judgment? I

1 mean, is that the way you're trying to cut the argument?

2 MR. HUGHEY: No. I think in cases like Alden
3 and Seminole Tribe it was the threat of judgment that hung
4 over the United States that was the problem, because in
5 those cases, if the court entered an order against a State
6 it was automatically self-enforcing them.

7 QUESTION: Well, they could have made them
8 appear and just said, you know, we understand that -- just
9 as you're saying, we understand that an order can't issue
10 against you, but that doesn't mean you shouldn't show up.

11 We haven't said that in sovereign immunity.
12 We've said the State does not have to appear. It is
13 hauling the State before the tribunal that is the offense,
14 not just the judgment.

15 MR. HUGHEY: Well, I think with respect to your
16 hypothetical this Court has found the power of coercion or
17 contempt is the judicial power necessary to the exercise
18 of all others, so I don't think that a court could just
19 tell a State, well, appear and we're not going to be able
20 to issue an order against you. I think the fact that
21 coercion can result from the judicial proceeding is the
22 point of the judicial proceeding and is what
23 differentiates it from this type of regulatory
24 adjudication.

25 QUESTION: Well, but the court can't say it, but

1 the Eleventh Amendment says it. I mean, and whereupon the
2 court can say, look, you know, by reason of your sovereign
3 immunity, we understand if you show up we can't issue any
4 contempt judgment, we can't issue a merits judgment
5 against you, but that doesn't mean you don't have to show
6 up. But it does mean you don't have to show up, doesn't
7 it?

8 MR. HUGHEY: Well, yes, the State can move to
9 dismiss any suit that's filed against it in a court, but I
10 still think that it's the threat of coercive judgment
11 against the State that is the reason that the State can --

12 QUESTION: There is no threat of coercive
13 judgment. The Eleventh Amendment makes it very clear that
14 you can't issue the coercive judgment, but the State still
15 doesn't have to show up.

16 MR. HUGHEY: I don't think that analysis should
17 apply to this statute, Justice Scalia, because under the
18 Shipping Act the agency can -- cannot compel an appearance
19 by the State. If the State just doesn't show up under the
20 Shipping Act, the only way to do anything about that is to
21 go into a Federal district court and seek a court order,
22 and if the agency determines to do that, it then has to
23 ask the Attorney General to do so. Under the statute, the
24 Attorney General may, rather than shall, enforce any order
25 the commission issued. That is therefore, by definition,

1 an exercise of the executive discretion that this Court
2 found acceptable in Alden v. Maine.

3 QUESTION: Does the commission have contempt
4 powers?

5 MR. HUGHEY: No. No, it does not.

6 QUESTION: Well, if it issues its process to a
7 State and the -- like the entity in the present case, and
8 the entity simply fails to show up, what can it do?

9 MR. HUGHEY: If the entity failed to show up,
10 Mr. Chief Justice, the commission could issue an order
11 telling it to show up, but again, that would have to be
12 enforced by a Federal district court, and if --

13 QUESTION: At the behest of the Attorney
14 General, or --

15 MR. HUGHEY: Yes. Yes. The commission would
16 have to ask the Attorney General to enforce it. Under the
17 statute the Attorney General doesn't have to, but if he
18 determined to do so, he could then go into a district
19 court and try to enforce the order.

20 QUESTION: And what would be the Eleventh
21 Amendment situation there, when the commission went into
22 district court to try to enforce its order to require
23 appearing?

24 MR. HUGHEY: Oh, I would suggest that there
25 would be no Eleventh Amendment problem there, because the

1 enforcement action would be in the name of and by the
2 United States.

3 QUESTION: It would be by the United States?

4 MR. HUGHEY: Yes. It would be in the name of
5 and by the United States. In this case, it would be, for
6 example, United States v. South Carolina State Ports
7 Authority.

8 QUESTION: How many agencies have a pattern like
9 this, where they determine the rules by rule-making, this
10 kind of adjudication, and a commission-initiated
11 proceeding?

12 MR. HUGHEY: I know that the Surface
13 Transportation Board, which used to be the NSA Commerce
14 Commission, has this authority, and I think that the
15 Federal Communication Commission does, but I'm not
16 entirely certain of that. I would suggest, if I may, that
17 to uphold the State's claim of Eleventh Amendment immunity
18 in this case will have an adverse effect on the regulatory
19 scheme that the Congress has created in the Shipping Act
20 by undermining the notion of national uniformity in
21 maritime commercial regulations.

22 QUESTION: Well, Congress could certainly handle
23 that by making it very clear by legislation that if the
24 State runs one of these operations, the State waives its
25 sovereign immunity. Couldn't Congress make that clear?

1 MR. HUGHEY: I'm not sure if that kind of waiver
2 is still acceptable after this Court's opinions of recent
3 years.

4 (Laughter.)

5 MR. HUGHEY: I would suggest that it's probably
6 not, but we think that, under the statute as it's written
7 now, there's no need for something like that, because it's
8 merely a regulatory action that the commission is
9 attempting to utilize to find facts to determine what
10 constitutes a Shipping Act violation, and again, there's
11 no use of coercive power. In order for there to be
12 coercion, the commission has to go into a Federal district
13 court.

14 If I could reserve the remainder of my time for
15 rebuttal.

16 QUESTION: Very well, Mr. Hughey.

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

18 ORAL ARGUMENT OF PAUL D. CLEMENT

19 ON BEHALF OF THE UNITED STATES

20 IN SUPPORT OF THE PETITIONER

21 MR. CLEMENT: Mr. Chief Justice, and may it
22 please the Court:

23 States enjoy no sovereign immunity from Federal
24 executive branch action, even when it takes the form of
25 adjudication. It is well-established that States have no

1 immunity from a suit brought by the Federal Government.
2 That's true not because of some preexisting notion of
3 sovereign immunity, but because that consent to suits by
4 the United States Federal Government is implicit in the
5 plan of the convention.

6 Now, proceedings before the Federal Maritime
7 Commission are a necessary predicate for the United States
8 Government to bring a Federal suit to enforce the Shipping
9 Act. Given that the States enjoy no immunity from such a
10 suit, they should not be allowed to reach back into the
11 administrative process and assert an immunity from the
12 preliminary proceedings before the agency.

13 QUESTION: But I'm not -- I don't understand the
14 argument. Sovereign immunity is based on parties, and we
15 have said that when the United States is a party, there's
16 no sovereign immunity, and not, incidentally, because that
17 was inconsistent with some earlier notion of sovereign
18 immunity, because the Constitution changed it.

19 MR. CLEMENT: No --

20 QUESTION: But here we have a private party.
21 That's all -- isn't that all the difference in the world?

22 MR. CLEMENT: But we have a private party that's
23 not initiating a lawsuit, but is initiating executive
24 action. Private parties are free to complain to the
25 Federal Government and say a State government is violating

1 Federal law. In fact, the Petition Clause rightly
2 protects the individual petitioner's right to petition the
3 Federal Government and complain about that violation.

4 Now, I don't think it violates the Constitution
5 for the United States Federal Government to say, we take
6 citizen complaints seriously, and we're going to
7 investigate each and every one of them, and I wouldn't
8 think that it would violate the Eleventh Amendment for the
9 Attorney General to give the party who's the subject of
10 the complaint, even if it's the State, an opportunity to
11 come before --

12 QUESTION: Yes, but --

13 MR. CLEMENT: -- the executive branch and
14 explain why there wasn't a violation.

15 QUESTION: But the commission isn't just like
16 kind of an ombudsman here. I mean, it's got very definite
17 procedures that greatly resemble adjudication.

18 MR. CLEMENT: Well, they do resemble
19 adjudication, and that's part of the process to formalize
20 and regularize this process of getting complaints from
21 citizens and response from others, but I don't think the
22 formalization and regularization of that process turns it
23 into a judicial act. It remains an act --

24 QUESTION: Well, isn't it the case that if the
25 State defaults and says, you have no jurisdiction over me,

1 and the commission therefore comes to a conclusion --
2 we'll leave the word adjudication out of it. It comes to
3 a conclusion. That conclusion itself is enforceable as
4 such, at the behest of the National Government, in a
5 district court, isn't it?

6 MR. CLEMENT: Well, first I want to clarify
7 something. If there's a case where the State doesn't
8 appear, and the private party is asserting a view of the
9 Shipping Act that's contrary to the view of the Federal
10 Maritime Commission, then there will be no order.

11 QUESTION: Let's assume it's not contrary.
12 Let's assume the Maritime Commission says, you, private
13 party, are right, and we hold that the State has committed
14 the following violations, and I presume should be enjoined
15 from further commission, whatever order it might come up
16 with.

17 Once the commission has come to such a
18 conclusion, isn't that conclusion, as such, enforceable at
19 the behest of the United States in the district court?

20 MR. CLEMENT: It is -- it would be enforceable
21 through a judicial procedure under the Shipping Act.

22 QUESTION: So -- if that is so, there's
23 something much more involved here than merely an agency of
24 the National Government taking a complaint seriously and
25 investigating it, and the difference is that in the --

1 under the act, its conclusion on the investigation becomes
2 an enforceable order at the behest of the National
3 Government in a district court, and isn't that the
4 difference?

5 MR. CLEMENT: But I don't think it's a critical
6 difference, because the reason that that becomes
7 enforceable, subject to whatever defenses there are, the
8 reason that becomes enforceable is not because it's the
9 midway point in some litigation. It's enforceable because
10 it reflects the executive branch's definitive
11 interpretation of the Shipping Act.

12 The cease-and-desist order --

13 QUESTION: Well, the Federal Government could
14 have an interpretation of the Shipping Act and go into
15 it -- assuming there is otherwise a statutory jurisdiction
16 here, the National Government could have a view of the
17 shipping Act and go into the district court and say, this
18 is our considered view, and the other party would have an
19 opportunity to oppose it. We'd have a lawsuit.

20 As things stand now, when the United States goes
21 in with what you call its considered view, that is the end
22 of the issue on the merits, as I understand it. The only
23 thing the district court is there for is to enforce it.

24 MR. CLEMENT: Well, there are some challenges
25 that can be brought to that, and I guess the problem with

1 this --

2 QUESTION: Could they have a trial de novo on
3 the merits?

4 MR. CLEMENT: No, they can't, under the current
5 system.

6 QUESTION: Could they collaterally attack and
7 say, look, it doesn't mean anything to us, because we
8 can't be hauled in front of the commission by a private
9 party. Can it -- is such a plea recognized?

10 MR. CLEMENT: I don't think it currently is, but
11 if that's --

12 QUESTION: No, I don't think it is, either, and
13 that's why your argument that this is nothing but a way
14 for the National Government to take a considered view of a
15 complaint and come to a conclusion seems to me beside the
16 point.

17 MR. CLEMENT: Well, it -- but the point, I
18 think -- first of all, if the problem is the level of
19 review that's given at the end of the process, then that's
20 what should be adjusted, not throwing out the entire
21 proceeding ab initio as the Fourth Circuit did.

22 But more to the point, I think the reason
23 there's deference is because it reflects the executive
24 branch's view, and it's the same in that order whether
25 it's the product of a privately initiated complaint and

1 adjudication, or whether it's an agency-initiated
2 complaint. In both cases there's going to be practical
3 pressure for the State-regulated entity to participate in
4 the proceeding, but neither should they get an immunity.

5 The practical pressure is not the same as the
6 compulsive process that the judiciary has. Nobody's
7 summoned before the commission because a summons is
8 necessarily enforced through the contempt power of the
9 court. This is --

10 QUESTION: Well, Mr. Clement, when I began to
11 read your brief and I sensed that the sky was falling, and
12 so I was turning my pages to see all of the horrible
13 things that were going to happen to the Federal scheme if
14 the court of appeals judgment stood, and I didn't see much
15 there. There's the Vending Stand Act in one of the
16 circuit courts, but do Federal agencies call Governors
17 before them all the time and say, well now, Governor,
18 you're not enforcing the Federal laws? I don't see that
19 as part of our constitutional tradition. I don't see that
20 we would create a great revolution in traditional practice
21 by pulling the Ninth Circuit.

22 MR. CLEMENT: What there is a tradition of is
23 the executive branch having the flexibility to determine
24 how it is going to enforce Federal law. There aren't many
25 of these cases precisely because there just aren't that

1 many State-run entities that are regulated, but the
2 executive branch has the flexibility to regulate them
3 through rule-making, through agency-initiated
4 adjudications, or through private adjudications.

5 In each one of those, there are practical
6 pressures to participate. In each one of those, the rule-
7 making can be initiated by a private complaint. There's a
8 specific provision in the commission's regulation to allow
9 rule-makings to be kicked off by a private complaint, but
10 that doesn't turn it into something other than the
11 executive branch's determination of what the law is and
12 how it should be enforced, and this Court has generally
13 deferred to the executive branch's need to determine how
14 best to take care that the laws are faithfully executed.

15 QUESTION: What about the labor board?

16 MR. CLEMENT: What's that?

17 QUESTION: What about the labor board,
18 universities?

19 MR. CLEMENT: Well, --

20 QUESTION: State universities and the labor
21 board.

22 MR. CLEMENT: I don't know the specific
23 application, but --

24 QUESTION: No, but I'm thinking that the
25 universities often have unions, and I gather that -- why

1 hasn't the labor board been involved in adjudicating
2 complaints about the State university as an employer in
3 respect to the labor unions?

4 MR. CLEMENT: Well --

5 QUESTION: Maybe it hasn't. I wouldn't know why
6 it wouldn't have.

7 MR. CLEMENT: I mean, but one thing that's
8 certainly clear about the labor board is that that's a
9 perfect example of an administrative agency that decides
10 to proceed by adjudication.

11 QUESTION: I'm not arguing with you. I'm just
12 wondering why there were not more examples.

13 MR. CLEMENT: Well, another example is the
14 Railway Labor Act, because the Railway Labor Act is --
15 defines its jurisdiction coextensively with the Interstate
16 Commerce Commission. There are State-run railroads under
17 the Railway Labor Act. Typically those kind of employment
18 disputes are initiated by a private party. This court in
19 California v. Taylor said that the Railway Labor Act can
20 apply to a State-run railroad.

21 Interestingly, in footnote 16 of that opinion,
22 the Court reserved the question of whether the Eleventh
23 Amendment provided protection for the suit in court, but
24 it didn't say anything about Eleventh Amendment protection
25 before the board itself, and I think the relevant history

1 here is almost exactly the opposite of the case in Alden.

2 In Alden, this case had a long history of State
3 sovereign immunity, and very few and only recent efforts
4 by the Federal Government to abrogate that immunity.
5 Here, by contrast, there's a 115-year tradition of State
6 entities being subject to regulatory commissions, and very
7 few and only recent efforts to invoke any kind of Eleventh
8 Amendment immunity before them.

9 I also think that the text of the Eleventh
10 Amendment has a special relevance here that it lacked in
11 Alden. In Alden, the determination that State courts not
12 exercise the, quote, judicial power of the United States,
13 only began the analysis of whether or not the States
14 enjoyed their sovereign immunity free from congressional
15 disturbance.

16 Here, the recognition that the commission
17 exercise -- does not exercise the judicial power of the
18 United States necessarily means it exercises the executive
19 power of the United States, and this Court has
20 traditionally held that the executive branch may initiate
21 process against the States without an Eleventh Amendment
22 bar.

23 The fact that this proceeding --

24 QUESTION: Well, it's not -- you keep speaking
25 about an Eleventh Amendment bar. The bar is sovereign

1 immunity. We're not concerned about the textual
2 limitations about the Eleventh Amendment. We're concerned
3 with sovereign immunity.

4 MR. CLEMENT: But in this particular context, I
5 think the text is relevant, because this is not a free-
6 floating, pre-existing notion of sovereign immunity. What
7 we're saying is that the Eleventh Amendment waiver in the
8 plan of the Constitution that allows the United States
9 Government to sue a State also allows it to take the
10 preliminary steps in the administrative process.

11 QUESTION: Thank you, Mr. Clement.

12 Mr. Dean, we'll hear from you.

13 ORAL ARGUMENT OF WARREN L. DEAN, JR.

14 ON BEHALF OF THE RESPONDENT

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

17 This case presents the question of whether
18 sovereign immunity protects a State from a private suit
19 brought before a Federal administrative tribunal. We have
20 heard today arguments and suggestions that this proceeding
21 is not a suit within the meaning of the doctrine and
22 principle of sovereign immunity.

23 In 1868, this Court addressed this question. It
24 held in *Nichols v. United States* that a proceeding before
25 an Article I administrative tribunal, a so-called

1 legislative court, just like the Federal Maritime
2 Commission, was a suit for sovereign immunity purposes.
3 The case was appealed from an appeals court.

4 The Court confirmed that legislative court
5 status of the claims court twice, in Ex parte Bakelite in
6 1929, and then in Williams v. United States in 1933, and
7 later in 1934 the court again, in United States v.
8 Sherwood, unanimously confirmed both conclusions, that
9 States -- that claims court was an Article I legislative
10 court, and its jurisdiction was dependent upon a waiver of
11 sovereign immunity. There were no dissenting justices in
12 any single one of those decisions.

13 QUESTION: Mr. Dean, but that was an Article I
14 court that just adjudicates. Here we're being told that
15 the Maritime Commission is in the business of making rules
16 for the governance of people in the trade, and it makes
17 the rules three ways. One through rule-making, another's
18 through commission proceeding, and a third through private
19 complaints, and why couldn't the private complainant be
20 regarded as a kind of delegate to the commission? I take
21 it if the commission itself decided to investigate, you
22 would have no question about sovereign immunity, is that
23 true?

24 MR. DEAN: We've made that clear throughout this
25 proceeding, Justice.

1 QUESTION: All right. So why can't the
2 commission say, one of the ways that we investigate is, we
3 listen to what private people tell us, so that in effect
4 we're taking that private complaint and we're making it
5 our own by processing it?

6 MR. DEAN: That's exactly -- that is exactly
7 what does not happen in this case, Your Honor. A private
8 complainant files a complaint before the Federal Maritime
9 Commission, we receive the notice, we either respond or
10 we're in default. It is quite clear -- and I submit with
11 all due respect that Mr. Clement is absolutely wrong on
12 this. It is quite clear that the agency can find both
13 findings of fact and findings of law against a
14 nonresponding party.

15 That's been established administrative procedure
16 law for sometime and, in fact, the private party controls
17 the disposition of this proceeding. The executive arm of
18 the Federal Maritime Commission, its Bureau of
19 Enforcement, does not even have a right to intervene in
20 the proceeding. It has to petition like any other private
21 party to get involved in the proceeding. They did not do
22 that in this case.

23 QUESTION: Can the private party ask --

24 QUESTION: -- have standing?

25 MR. DEAN: They have to show cause for

1 intervention, Justice Kennedy, just like any other private
2 party would do. They have no greater standing than any
3 other private party.

4 QUESTION: But could a private party say to the
5 commission, commission, here's a serious complaint,
6 something wrong has been done, I don't have the resources
7 to prosecute it, would you please investigate it?

8 MR. DEAN: Oh, absolutely. That's the way the
9 commission traditionally does business. That is an
10 entirely separate proceeding. That is the proceeding to
11 which we would not object. If a private party came into
12 the commission and said, we have this grievance against
13 the South Carolina State Port Authority and we'd like you
14 to look into it, and the Bureau of Enforcement came to us
15 and said, we think you're doing something wrong, we would
16 obviously talk to them, and if we couldn't reach some kind
17 of accommodation with respect to that matter, then we
18 would -- and they brought a complaint against us, they
19 would be entitled to do that if -- provided the complaint
20 was brought in their names and formed by the United
21 States.

22 And I might add that, in a reparations
23 proceeding -- this is not a sanctionless exercise. In a
24 reparations proceeding, if the agency issues an order
25 against us, a judgment against us, and we fail to comply

1 with that judgment, we incur statutory liabilities,
2 automatic, of up to \$25,000 a day. Now, they can be
3 compromised by the agency for a period of 5 years after
4 each violation, if it so chooses, but any time somebody
5 says to me, for example, that if you don't do XYZ you're
6 going to incur an automatic statutory liability of \$25,000
7 a day, I consider that a sanction, and --

8 QUESTION: Well, is that statutory liability, is
9 that enforceable by the commission without court order, or
10 did it have to go to court to do it?

11 MR. DEAN: Ultimately, if push comes to shove
12 and there's a confrontation, they have to go to court, but
13 Mr. Chief Justice, I think anybody faced with a statutory
14 liability of the United States imposed by Federal law
15 considers that a sanction, and we do not have the
16 opportunity to protect our interests, to say, no, no, no,
17 this wasn't a violation, this is what we did, when the
18 agency, the only standard for the enforcement of the
19 agency's order in court is whether or not it was duly and
20 regularly issued.

21 So the position of the United States that this
22 is not a -- that this is a proceeding that is essentially
23 equivalent to a petition by a private party for executive
24 action is absolutely incorrect, and they don't even
25 believe that position themselves.

1 QUESTION: Could I go back to your opening
2 statement? Why is it an exercise of the judicial power of
3 the United States? I mean, we have an ordinary
4 administrative agency. What's the theory of it?

5 I mean, I grant you, I'm sure you're right, that
6 there's some case that said once the court of claims,
7 which is a court in exercising -- though set up under
8 those Article I exercises the judicial power of the United
9 States, so my Constitution says it has nothing to do with
10 whether it's a lawsuit, not a lawsuit, I don't care. I
11 want to know, is it the judicial power of the United
12 States, and frankly, I didn't know that the executive
13 branch could exercise the judicial power of the United
14 States.

15 MR. DEAN: The court below held --

16 QUESTION: Whatever they held, I want to know
17 what the reasoning of it is.

18 MR. DEAN: Well, the reasoning -- the
19 judicial -- you don't need to find the judicial power.

20 QUESTION: You don't? My Constitution happens
21 to say, the judicial power of the United States shall not
22 be construed, so I'm -- maybe I don't have to find it,
23 but I'd like to know on what basis I wouldn't have to .

24 MR. DEAN: This is a case brought by a citizen
25 of the State of South Carolina, like *Chisholm v. Georgia*,

1 I might add, against the -- against a -- the State of
2 South Carolina. It's not technically for those terms and
3 those terms alone within the scope of the Eleventh
4 Amendment.

5 QUESTION: All right, fine, it's not within the
6 scope of the Eleventh Amendment.

7 MR. DEAN: It's Hans v. Louisiana.

8 QUESTION: Oh, no, no, I want to know if it is
9 with -- forget the fact -- I think it is within the scope
10 of the Eleventh Amendment if a -- I believed, as far as I
11 know, when a citizen of a State sues the State itself, of
12 which he is a citizen, it is an interpretation of the
13 Eleventh Amendment, and I didn't know that for that
14 purpose you didn't have to find the judicial power of the
15 United States, so I'm open to that argument.

16 MR. DEAN: Well --

17 QUESTION: I want to know, is this the judicial
18 power? If so, what's the argument? If it's not the
19 judicial power, what part of the Constitution forbids it?

20 MR. DEAN: First, it is -- we have stated it is
21 the judicial power, but you need not find that, and I'll
22 give you the reason it is the judicial power of the United
23 States, is because this agency acts as an adjunct to the
24 court, just as this Court has held in Northern Pipeline
25 and --

1 QUESTION: Do all administrative --

2 QUESTION: Did you say it was the exercise of
3 judicial power?

4 MR. DEAN: It is the exercise of -- the Shipping
5 Act entails the exercise of judicial power, Justice
6 Stevens. You can look at this either as an organic
7 analysis, as you have done under the Appointments Clause
8 of the commission itself, or you can look at the statutory
9 process and procedure that is involved.

10 QUESTION: Does the Federal Trade Commission
11 exercise the judicial power, does the State Department,
12 does the Commerce Department, the Post Office -- I mean,
13 what is the principle under which this is or is not?

14 MR. DEAN: Well, the --

15 QUESTION: What about the President, let's say,
16 when he's -- you see the point.

17 MR. DEAN: In your book, Justice Breyer, you
18 call this an uneasy constitutional area, and I certainly
19 agree with that.

20 (Laughter.)

21 MR. DEAN: The judicial power of the United
22 States, this Court has held in a number of cases,
23 including the cases that I just mentioned, that the
24 judicial power can -- at least some component of the
25 exercise of the judicial power in a comprehensive

1 proceeding can be delegated to nonjudicial officers,
2 provided it is subject to judicial supervision and subject
3 to some specific supervisory parameters that exist in this
4 case, but it's a complicated question, and the Court has
5 disagreed on it, and various court have disagreed on this
6 question for sometime, and in fact, in some of the cases
7 that I just mentioned, the United States Supreme Court
8 took appellate jurisdiction from an Article I tribunal in
9 the executive branch, and under those circumstances
10 something was going on before the court of claims.

11 QUESTION: You know, now that I can quote one of
12 my favorite authors, Justice Scalia, he says it is no
13 doubt true that all such administrative bodies adjudicate,
14 they determine facts, apply a rule of law to those facts,
15 and thus arrive at a decision --

16 MR. DEAN: Well --

17 QUESTION: -- but there is nothing inherently
18 judicial about adjudication.

19 MR. DEAN: Granted, but --

20 QUESTION: Then what is it that makes it the
21 judicial power?

22 MR. DEAN: What is it that makes it subject to
23 sovereign immunity, or what is it that makes it the
24 judicial power?

25 QUESTION: The judicial power is what we're

1 all -- and I'm --

2 MR. DEAN: Well, the judicial power, if you look
3 at a proceeding, an administrative proceeding like the
4 Shipping Act, and this Court held that, held this in the
5 Far East Conference case, it said, you can't take one
6 isolated aspect of it. You cannot take the organic entity
7 which is the Federal Maritime Commission and consider its
8 functions independent of the rest of the proceeding that
9 is involved.

10 Ultimately, this proceeding ultimately, in
11 combination with the courts of the United States, this
12 proceeding invokes the judicial power, whether the FMC is
13 acting --

14 QUESTION: All executive action does. I mean,
15 that's just too broad a principle. I mean, the fact is,
16 since we don't have a -- we have a Constitution that has
17 a Habeas Corpus Clause. There's nothing the executive can
18 do to you that can't be challenged in court.

19 MR. DEAN: Well, this is --

20 QUESTION: Ultimately, the court is the moment
21 of truth, but that doesn't convert every executive action
22 into an exercise of the judicial power.

23 MR. DEAN: I know, but this is clearly not
24 purely executive action. This is an independent agency,
25 and this Court has held repeatedly that officers that

1 exercise quasi-judicial power can be subject to special
2 removal requirements, and that is --

3 QUESTION: Ah, so if this wasn't an independent
4 agency, it would be different?

5 MR. DEAN: No, but let me -- both in Hensel and
6 in Artistani, and in this Court's decision in West v.
7 Gibson --

8 QUESTION: Would you -- may I just interrupt
9 you? What if this were an executive agency, rather than
10 an independent agency? Could you make the same argument?

11 MR. DEAN: Like -- the claims court was within
12 the Department of Treasury at the time these decisions
13 were handed down. That doesn't necessarily resolve the
14 matter, but it does instruct the Court's analysis that
15 this is a quasi-judicial independent agency --

16 QUESTION: Well, but that's not answering my
17 question.

18 MR. DEAN: -- and its officers are not subject
19 to executive supervision.

20 QUESTION: What is your answer to my question?
21 If it were a pure executive agency, would it be the same
22 case for you?

23 MR. DEAN: No. It would be the same case
24 depending on the statutory process involved, Justice
25 Stevens. The agencies --

1 QUESTION: In the statutory process, but clearly
2 an executive agency within the Department of Commerce or
3 Department of Agriculture, or something like that.

4 MR. DEAN: It was -- the court of claims was in
5 the Department of Treasury at the time, and customs
6 officials have done --

7 QUESTION: You're a little too fast for me.

8 MR. DEAN: I'm sorry.

9 QUESTION: What is your answer? Is it the same
10 case entirely within the executive branch?

11 MR. DEAN: It is.

12 QUESTION: Okay.

13 QUESTION: Let me ask you a slightly different
14 question. If we assume for the sake of argument that it
15 is not the judicial power that's being exercised here, do
16 you lose?

17 MR. DEAN: No.

18 QUESTION: Why don't you lose? Why don't you l
19 lose?

20 MR. DEAN: The court below said it was
21 irrelevant.

22 QUESTION: Pardon me?

23 MR. DEAN: The court below said it was
24 irrelevant, and I agree with that proposition.

25 QUESTION: And it's irrelevant because?

1 MR. DEAN: Because sovereign immunity --

2 QUESTION: Sovereign immunity -- in other words,

3 you've got a sovereign immunity argument which is at least

4 distinct from the Eleventh Amendment argument?

5 MR. DEAN: Absolutely.

6 QUESTION: Okay.

7 MR. DEAN: And the United States has a sovereign

8 immunity argument, and they apply sovereign immunity --

9 QUESTION: That's what I thought.

10 MR. DEAN: The United States applies its

11 sovereign immunity in proceedings just like this. It has

12 for all time. As a matter of fact, this Court has held

13 sovereign immunity applies to the United States in

14 administrative proceedings consistently for the last 130

15 years, and there has not been one single dissent from that

16 proposition that I've been able to find.

17 In West, all the Justices of this Court assumed

18 for the purposes of that analysis that sovereign immunity

19 principles apply before the EEOC.

20 QUESTION: Well, but sovereign immunity for the

21 United States may not be co-extensive with sovereign

22 immunity for the States. Granted that sovereign immunity

23 to the States goes beyond just the literal language of the

24 Eleventh Amendment about the judicial power.

25 MR. DEAN: Mr. Chief Justice, I agree with that

1 proposition in the abstract, but in this particular case,
2 I think there's a lot of similarity, and I'll give you
3 exactly -- I'll tell you exactly why I think why.

4 Firstly, the courts have held that it's a
5 reciprocal -- this Court has held over the years that it
6 is a reciprocal privilege, but the United States in its
7 brief in this case --

8 QUESTION: Excuse me. What do you mean by that,
9 that it's a reciprocal privilege?

10 MR. DEAN: Well, in Alden and in Hans and -- the
11 Court has held that the privilege of Federal sovereign
12 immunity -- State sovereign immunity is a reciprocal
13 privilege to the privilege enjoyed by the States.

14 QUESTION: By reciprocal you mean that it's co-
15 extensive?

16 MR. DEAN: Co-extensive mirror image, yes,
17 Justice Scalia.

18 The United States has suggested in this case,
19 and it's a proposition that I agree with, that the
20 sovereign immunity of the United States at least as it
21 applies to money judgments -- and it's much broader than
22 money judgments, but let's just talk about money judgments
23 for a minute, that at least as it applies to money
24 judgments is informed by the Appropriations Clause, which
25 reserves to the legislature, to the Congress the right to

1 spend, and we all know the right to spend is the right to
2 tax.

3 So our body politic, our -- the public -- the
4 people of the United States have made a determination that
5 their Constitution, which is their sovereign, commits to
6 the legislative branches the exclusive right to expend the
7 public's money, and that's a very fundamental principle in
8 our Federal Constitution. That principle is also
9 reflected word for word in this constitution of South
10 Carolina --

11 QUESTION: Well, you don't think the States
12 have --

13 MR. DEAN: Pardon me?

14 QUESTION: -- the exclusive right to determine
15 when their money will be spent in a proceeding brought by
16 the United States, do you?

17 MR. DEAN: Excuse me?

18 QUESTION: You don't say that the States have
19 the same power over their own money that the United States
20 has over its money, in an action brought by the United
21 States?

22 MR. DEAN: I do.

23 QUESTION: There's sovereign immunity -- even in
24 an action brought by the United States?

25 MR. DEAN: No, this Court has held that they

1 have consented to suit, so it doesn't apply in that area.

2 QUESTION: So they don't have sovereign immunity
3 in cases brought by the United States.

4 MR. DEAN: That's correct, but in this
5 constitution of the State of South Carolina that was
6 adopted 9 years before this Constitution was adopted,
7 there is the same Appropriations Clause. The same
8 principle is reflected, that no moneys may be obligated --

9 QUESTION: But that was before the Supremacy
10 Clause was adopted in the Federal Constitution.

11 MR. DEAN: But this is a constitutional
12 principle Justice Stevens. It is a question --

13 QUESTION: It is not a constitutional
14 protection -- principle that protects the States from
15 liability to the United States.

16 MR. DEAN: I ask you this question as a
17 hypothetical. The Constitution of this --

18 QUESTION: No, counsel doesn't ask questions.

19 (Laughter.)

20 MR. DEAN: I'm sorry, Mr. Chief Justice.

21 The constitution of -- I'll state it in a
22 declaration. The constitution of the State of South
23 Carolina reflects the same principle reflected in the
24 Appropriations Clause. We have two sister sovereigns,
25 both of them organized on the same fundamental principle

1 that only the people have the right to levy on the public
2 treasury, and only the people through their elected
3 representatives, and only the people have the right to
4 spend, and therefore only the people have the right to
5 tax.

6 QUESTION: Mr. Dean --

7 MR. DEAN: Now, you have these two comparable
8 constitutions. How do you put them together and violate
9 that principle?

10 QUESTION: Mr. Dean --

11 MR. DEAN: I don't know the answer to that
12 question, Justice Stevens.

13 QUESTION: -- you recognized a case called Ex
14 parte Young, and let's say that the private complainant
15 says, okay, I'm not going to sue the State court
16 authorities. I'm going to sue the commissioners, and so
17 as the FMC to please substitute for the entity the
18 individual commissioners, and they said go ahead, and they
19 don't have sovereign -- individuals, at least with respect
20 to prospective relief do not have sovereign immunity.

21 Why couldn't -- is that then just a matter of
22 amending a complaint to name different parties?

23 MR. DEAN: That suit belongs in Federal court,
24 and I doubt very seriously that the commission has that
25 statutory jurisdiction. The reason is that it has

1 jurisdiction over persons engaged in the business of
2 operating, or internal operators. I very sincerely doubt
3 that any individual employee would satisfy that test, but
4 the test certainly exists under Ex parte Young.

5 The opportunity might exist, except for the fact
6 that the proper way for the individual to proceed in this
7 particular case would be to file a declaratory judgment
8 under State law, which is available, to obtain the relief
9 the individual requested.

10 QUESTION: But you haven't answered the
11 question --

12 MR. DEAN: I'm sorry, Justice --

13 QUESTION: -- why couldn't the FMC say --

14 MR. DEAN: I don't believe the Shipping Act
15 gives the FMC jurisdiction over individuals who are
16 employees of entities that are engaged in --

17 QUESTION: Not employees, the commissioners
18 themselves, the members of the State body.

19 MR. DEAN: The officers of the -- I don't
20 believe the Shipping Act gives the FMC jurisdiction over
21 officers of entities that it regulates. I don't believe
22 it has that kind of personal jurisdiction, Your Honor.
23 That issue has not -- I am not aware that that issue has
24 decided, but I frankly have grave doubts that it would.

25 QUESTION: But if that matter were clarified so

1 that Congress, wanting the FMC to have this third way of
2 regulating said, in the case where State agencies are
3 involved you can sue the individuals, individuals who
4 compose the entity --

5 MR. DEAN: Well, the proper way for the Federal
6 Maritime -- as I said, I don't think the FMC has that
7 jurisdiction. It does have jurisdiction over us. All it
8 has to do is initiate its own complaint. When the ALJ
9 dismissed the complaint in this case, he invited the
10 commission, if the commission deemed the case had merit,
11 satisfying the test in Alden, he invited the commission to
12 initiate a proceeding through its own Enforcement Bureau.
13 The commission did not do so. Instead, they reversed the
14 ALJ's order, which is in turn reversed by the Fourth
15 Circuit.

16 The parties in this, the Federal parties in this
17 case do not challenge the holdings of this case in
18 Nichols, Hans, Sherwood, Alden, or Seminole, so in effect
19 what they're asking this Court to decide is the following
20 three propositions, and all of the following three
21 propositions: that lesser tribunals established under
22 Article I have powers that both State and Federal courts
23 lack, even though they constitutionally may adjudicate
24 only subject to the supervision of the latter; 2) that
25 Congress, merely by assigning a private cause of action to

1 administrative tribunal, acquires and exercises power it
2 does not otherwise have to abrogate State sovereign
3 immunity, thereby bypassing this Court's sovereign
4 immunity jurisprudence, and 3) that States lack the
5 reciprocal right to assert sovereign immunity in Federal
6 fora where the immunity of the United States clearly
7 applies.

8 QUESTION: Well, you really don't need your
9 third argument, do you, that the State sovereign immunity
10 is co-extensive with Federal sovereign immunity?

11 MR. DEAN: I don't need that third argument, Mr.
12 Chief Justice, that's quite correct, but what the United
13 States asserts, says about administrative proceedings, if
14 they were purely executive action -- for example, if it
15 was purely an executive branch matter, this -- the United
16 States has come into this Court on numerous occasions most
17 recently in *Artistani* and *West*, and asked this Court to
18 intervene in what they now say is a purely executive
19 branch matter.

20 There was no inquiry. There was no special
21 analysis that the court did to determine whether or not
22 the intervention in that kind of purely executive branch
23 matter was warranted. There was no discussion of that.
24 The court assumed that the doctrine of sovereign immunity
25 as it applied to the Federal Government applied to it, and

1 I might add that --

2 QUESTION: Oh, what is the boundary? Apparently
3 you're now talking about a principle of state sovereign
4 immunity outside the scope of Amendment 11 of the United
5 States Constitution, and I haven't really heard of that
6 one. I'm not saying it doesn't exist, but where do I go
7 to discover what its bounds are, to discover what the
8 implications are, to discover if it applies when the
9 President does anything? I mean, I don't know what the
10 scope of that one is, so where do I go to find out about
11 that?

12 MR. DEAN: If the President does something and
13 the President --

14 QUESTION: No, I'm just asking -- my question
15 is --

16 MR. DEAN: Hans -- Hans v. Louisiana is the only
17 place you need to go.

18 QUESTION: In other words, Hans you say is
19 outside the scope of the Eleventh Amendment.

20 MR. DEAN: By its terms it held it was outside
21 the scope of the Eleventh Amendment.

22 QUESTION: All right, so Hans does not have to
23 do with the Eleventh Amendment.

24 MR. DEAN: It does not by its terms have
25 anything to do --

1 QUESTION: Okay, it does not.

2 MR. DEAN: -- it reflects the --

3 QUESTION: Then how do I discover the scope of

4 this principle of State sovereign immunity outside the

5 Eleventh Amendment?

6 MR. DEAN: Well, the same way you discover the

7 principle of Federal sovereign immunity. You look at what

8 the nature of the proceeding, and the nature of the

9 affront to the dignity of the sovereign is being involved,

10 you identify what the sovereign's interests are, and in

11 this particular case, in the money judgment it violates

12 the same clause of our constitution that it violates in

13 the case of the Federal Constitution, and that's pretty

14 persuasive.

15 QUESTION: But as I understand your argument,

16 it's not limited to the reparations part of the case.

17 There's --

18 MR. DEAN: No.

19 QUESTION: -- also a request for a cease and

20 desist order.

21 MR. DEAN: Although I might add, Justice

22 Stevens --

23 QUESTION: You don't really need the reparations

24 for your position.

25 MR. DEAN: -- that the pure participation in

1 this lengthy proceeding has had consequences for the
2 Treasury of the State of South Carolina, but nonetheless,
3 it's much broader than that, yes, Your Honor. It goes to
4 the nature -- as this Court held in Seminole, and I might
5 add, when I was -- when we argued the case before the
6 Fourth Circuit we had a little discussion about whether or
7 not the State of South Carolina was willing to be a
8 scofflaw.

9 In other words, whether we were willing to have
10 our -- to have allegations, whether they be frivolous or
11 serious, against us go unanswered in an administrative
12 tribunal that concededly regulates us in Washington and
13 have as the United States maintains this become a
14 precedent that would affect their dealing with us in the
15 future without defending ourselves, and that's simply not
16 a realistic option for the State of South Carolina.

17 It's not a realistic option for anyone, much
18 less a sovereign. If there's anything to dignity, there's
19 a dignity to that, to be able to defend yourself against
20 allegations and not have people who are decisionmakers
21 make judgments against you --

22 QUESTION: But let me just --

23 MR. DEAN: -- based on unanswered allegations,
24 or unanswerable allegations.

25 QUESTION: May I interrupt you for just a

1 moment, please?

2 MR. DEAN: Justice Stevens.

3 QUESTION: Let's put the reparations to one
4 side, and let's assume you're dead right on the monetary
5 aspect of the case. Is it your position that it would be
6 in everyone's best interest to have proceedings like this
7 initiated ex parte, and then the agency makes up its mind
8 whether to go -- bring an enforcement proceeding, or it
9 would be better to have a formal proceeding where you
10 have a chance to respond to the charges and so forth?

11 MR. DEAN: No, it's far better, Justice Stevens,
12 to have a person come to the agency, present its concerns
13 to the agency, and the agency approach the State of South
14 Carolina, one sovereign to another sovereign.

15 This case involves the regulation of gaming
16 ships. The Congress has committed that to our discretion
17 under State law. We are given that right. The Johnson
18 Act, which gave us the right to regulate gaming ships,
19 does not say that it's subject to review by the Federal
20 Maritime Commission. It does not say, for example that
21 the Federal Maritime Commission --

22 QUESTION: No, but if you have --

23 MR. DEAN: -- has the right to preempt the
24 Congress.

25 QUESTION: If you have an issue such as this in

1 which the agency thinks there's a colorable basis for a
2 proceeding, do you think the only way they can proceed
3 against you formally is to first of all get all the
4 information ex parte from the private parties, and then
5 make up their own mind as to whether to bring a formal
6 proceeding in the name of the agency?

7 MR. DEAN: Just like the Department of Justice
8 does when it enforces the laws against the States, yes,
9 Your Honor, that is the proper way of doing it, because we
10 can and will address those allegations at that time, but I
11 can assure you that the -- this case implements policies
12 of the State of South Carolina that are important to it,
13 the regulation of gaming ships, the Johnson Act Congress
14 has said it's up to the State of South Carolina to make
15 those policies and to implement those policies --

16 QUESTION: Well, but the Johnson Act certainly
17 didn't say that South Carolina was exempt from the
18 requirement of the Shipping Act, that it not discriminate.

19 MR. DEAN: No, but I can -- that's correct, but
20 in -- any regulatory system has at its core the right to
21 make discretionary, discriminatory judgments about what
22 does and does not comply with the policies of that regime.

23 QUESTION: Well --

24 MR. DEAN: And the FMC is now sitting in
25 judge -- as a judge of the -- of our implementation of

1 State law as authorized by the Johnson Act.

2 QUESTION: Well, certainly you're not suggesting
3 that the Shipping Act in its prohibition against
4 discrimination can't be applied to South Carolina other
5 than on a sovereign immunity basis, are you?

6 MR. DEAN: No, we're not, but what we're saying
7 is that if they exercise the executive discretion that
8 they ought to act, that the Constitution envisions them
9 enacting, that they would approach us as a sovereign, we'd
10 say, these are our sovereign interests, they'd say, they
11 are their sovereign interests --

12 QUESTION: Well, yes, but --

13 MR. DEAN: -- ultimately they would trump ours,
14 if there was a disagreement --

15 QUESTION: Yes. In 1787 we adopted a
16 Constitution so they didn't have to approach one another
17 as sovereign to sovereign any more.

18 MR. DEAN: That's true, but in this particular
19 area the Congress has decided that the sovereign State of
20 South Carolina gets to do the regulating, Mr. Chief
21 Justice, so we would come down and we would have two
22 different regulatory regimes, and we would approach each
23 other, and we would resolve the differences between them,
24 and if they disagreed, if ultimately they disagree, they
25 could bring a complaint against us, which they have the

1 right to do, and we would defend it, and we would
2 participate. We would have the opportunity to defend
3 ourselves, and we would defend ourselves, and so that's --

4 QUESTION: It would not be, perhaps, as
5 intellectually satisfying as resolving the case
6 specifically on the merits. Is it open to us to say that
7 there's no clear statement that waives sovereign immunity,
8 as we did in Vermont Yankee?

9 MR. DEAN: There is no statement that waives
10 sovereign immunity. I think that's been conceded in the
11 proceedings below. There's no waiver of sovereign
12 immunity in this case. Yes, Your Honor.

13 QUESTION: But there's no clear statement by the
14 Congress of the United States intending abrogate --

15 MR. DEAN: Oh, no, clearly not. There's no
16 mention in the Shipping Act at all of intention to waive
17 State sovereign immunity. I can't find a mention in the
18 Shipping Act of intention to waive Federal sovereign
19 immunity if and when the Federal Government ever wants to
20 get into the business of operating ports. It operates two
21 airports in the Washington area, so I don't think it's
22 inconceivable that it might do so at some point, but it is
23 clearly -- it is clearly no waiver of sovereign immunity,
24 even if -- even going back to the law where it said the
25 Congress could waive the sovereign immunity of the United

1 States, of the States, I'm sorry, there is no evidence of
2 any intent whatsoever in the Shipping Act to do that.

3 The fact that the Federal Maritime Commission
4 may bring its own actions against the United States --
5 against the States as it did in the California case proves
6 the opposite proposition, that the Congress, that was the
7 proper way to proceed, and I think that is the proper way
8 to proceed.

9 The -- I'd like to go back to -- this complaint
10 is a verified private complaint. It is -- calls for
11 reparations in the broadest form of reparations, including
12 consequential damages, interest and attorney's fees, the
13 commission has no discretion in the handling of this
14 complaint, it's required by law to adjudicate it, and the
15 agency's findings become final subject only to judicial
16 review.

17 This is precisely the kind of anomalous
18 proceeding suit that the Court had in mind in Hans, and
19 Hans came 30 years after --

20 QUESTION: But only to the extent they're
21 seeking a money judgment.

22 MR. DEAN: No, Your Honor, I think the sovereign
23 immunity --

24 QUESTION: Well, Hans was purely a money
25 judgment.

1 MR. DEAN: Yes, but they held that the Court
2 was -- they held the State immune from the proceeding.
3 Obviously, the proceeding had already been completed, but
4 I think it's fairly clear now that the dignity of the
5 sovereign entails to the entire proceeding, applies to the
6 entire proceeding, but you know, this question about the
7 dignity of the sovereign, the Court in Hans gave us some
8 instructions, some future instructions --

9 QUESTION: But Hans was a court case.

10 MR. DEAN: Hans is a court case.

11 QUESTION: Well, I mean, it's not a case, then,
12 in which they say it's not the judicial power --

13 MR. DEAN: Just like Federal sovereign immunity
14 is a court case.

15 QUESTION: And why is it a case in which they
16 say -- isn't it -- I mean, I'm back on my judicial --
17 forget it, I'm sorry.

18 MR. DEAN: My time is up.

19 QUESTION: Thank you, Mr. Dean.

20 MR. DEAN: Thank you, Mr. Chief Justice.

21 QUESTION: Mr. Hughey, you have 3 minutes
22 remaining.

23 REBUTTAL ARGUMENT OF PHILLIP C. HUGHEY

24 ON BEHALF OF THE PETITIONER FEDERAL MARITIME COMMISSION

25 MR. HUGHEY: If I could keep going with your

1 inquiry, Justice Breyer, I think we are suggesting that
2 there is a line in this case, and that line is Freytag v.
3 Commissioner of Internal Revenue. We're not suggesting
4 that State instrumentalities would never have sovereign
5 immunity in administrative proceedings. Rather, we're
6 suggesting that they might in proceedings in which
7 contempt power can be exercised, and this is not one such
8 proceeding. This agency doesn't have coercive authority
9 over the entities that it regulates. It has to rely on a
10 Federal district court for that.

11 To make another point, I think Mr. Dean
12 emphasized that the Shipping Act allows the agency to fine
13 instrumentalities that don't comply with its order.
14 However, I should point out that in this case the
15 commission has never indicated that it has the authority
16 to fine a State instrumentality for not complying with a
17 reparation order. That was something that ended up in the
18 Fourth Circuit's opinion. We've never said we could do
19 it, and the United States in its reply brief to this Court
20 has specifically expressed the view that the FMC could not
21 fine a State-run court for not complying with the agency-
22 issued reparation order.

23 And finally, with respect to the issue of
24 whether and when the agency's Bureau of Enforcement can
25 intervene in an agency proceeding, I should point out that

1 whether or not the Bureau of Enforcement intervenes in the
2 adjudication does not get to the point of whether it is an
3 agency action, because the agency always retains the
4 ability to review, sua sponte, any administrative law
5 judge order that comes out.

6 QUESTION: Why is it that you cannot fine the
7 State?

8 MR. HUGHEY: I think the United States has
9 suggested that because the commission and the Attorney
10 General don't have the authority to enforce a reparation
11 order against a State, that the authority to fine the
12 State for not complying with that reparation order would
13 not be an appropriate interpretation of the Shipping Act.

14 Again, that's something, the commission has
15 never said that it has the authority to, or that it would
16 fine a State for not complying with an agency-issued
17 reparation order.

18 QUESTION: Could the commission substitute the
19 commissioners of the South Carolina Ports Authority for
20 the port authority itself?

21 MR. HUGHEY: I'm unsure of that, Justice
22 Ginsburg, but we would suggest that the pleading
23 requirements of Ex parte Young need not be imported into
24 the Shipping Act, and that a request for, for example, a
25 cease and desist order against the ports authority would,

1 under the Shipping Act, be sufficient, and that the
2 complaint need not name the commissioners of the ports
3 authority themselves.

4 Thank you -- oh, sorry.

5 QUESTION: I think what Justice Ginsburg's
6 question went to, you're saying you don't have to name the
7 individuals, but suppose that we held that you couldn't
8 name the State, do you think you have authority to name
9 the individuals?

10 MR. HUGHEY: I'm unsure of that, Justice Scalia.
11 The Shipping Act provides that complaints must be filed
12 against persons. I think the question would be rather
13 whether the port commissioners are persons. It may be
14 that a fiction could be conceived that they would be under
15 the Shipping Act, but again, that issue has never come up
16 in the commission's administration of the statute.

17 Thank you.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hughey.

19 The case is submitted.

20 (Whereupon, at 11:04 a.m., the case in the
21 above-entitled matter was submitted.)
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25