

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FEDERAL MARITIME COMMISSION, :

4 Petitioner :

5 v. : No. 01-46

6 SOUTH CAROLINA STATE PORTS :

7 AUTHORITY :

8 - - - - -X

9 Washington, D.C.

10 Monday, February 25, 2002

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 10:03 a.m.

14 APPEARANCES:

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

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

20 WARREN L. DEAN, JR., ESQ., Washington, D.C.; on behalf of  
21 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 indefeasible  
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.)  
22  
23  
24  
25