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In the

Supreme Court of the United States

UNITED STATES STEEL CORPORATION, ET AL.,

APPELLANTS

V.

MULTISTATE TAX COMMISSION, ET AL.,

APPELLEES

No. 76-635

Washington, D. C.
October 11, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES STEEL CORPORATION, Et Al., Appellants	
v.	No. 76-635
MULTISTATE TAX COMMISSION, Et Al., Appellees	

Washington, D. C.

Tuesday, October 11, 1977

The above-entitled matter came on for argument at 1:45 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., 1100 Connecticut Avenue, N.W., Washington, D.C. 20036 Attorney for Appellants

WILLIAM D. DEXTER, ESQ., Bank of Olympia Building, Olympia, Washington 98501 Attorney for Appellees

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 76-635, United States Steel Corporation against Multistate Tax Commission.

Mr. Griswold, you may proceed whenever you are ready.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF APPELLANTS

MR. GRISWOLD: Mr. Chief Justice and may it please the Court:

This case is here on appeal from a three-judge district court in the Southern District of New York.

The question involved is the constitutional validity, particularly under Article I, section 10 but also under the Commerce Clause and the Due Process Clauses of the Constitution, of the Multistate Tax Compact and of the Appellee, the Multistate Tax Commission, which administers the Compact.

The text of the Multistate Tax Compact is set forth at pages 54 through 79 of the white-bound Appendix to the Jurisdictional Statement. I may say that the record in this case is really contained in two documents, the papers which we filed in connection with the jurisdictional statement and that includes the text of the Multistate Tax Compact at pages 54 to 79 and then the brown-covered

Appendix in which we did not undertake to reprint those things which had already been put before the Court.

At the time this suit was brought, 21 states were members of the Compact. Since that time, four states, Illinois, Florida, Wyoming and Indiana, have withdrawn from the Compact while two states, California and South Dakota, have joined it.

Thus, there are now 19 states members of the Compact.

The basic question arises under Article I, Section 10 of the Constitution in language which I am sure would have seemed clear to Mr. Justice Black, that "No state shall without the consent of Congress, enter into any agreement or compact with another state."

The simple fact is that Congress has never given this consent to the Multistate Tax Compact, though that Compact went into effect, by its terms, when seven states had joined it on August 4th, 1967, now more than 10 years ago.

As indicated by the references on page 10 of our main brief, the blue-covered brief, the consent of Congress has been sought repeatedly but has never been granted.

QUESTION: Has it ever gotten out of a committee or -- has it ever been voted --

MR. GRISWOLD: I do not believe it has ever gotten out of any committee nor been passed by either House.

QUESTION: But it has never been voted down on any --

MR. GRISWOLD: It has never been voted down. The consent has never been granted.

QUESTION: Has this Court ever had occasion to address the question of whether an agreement from which a state could withdraw at any time was a compact within the meaning of the clause you are relying on?

MR. GRISWOLD: Yes, Mr. Justice, there are -- no, I am not sure that this Court has ever dealt with that question. I can only say that Congress has dealt with it in a hundred to a hundred and fifty instances and has ratified compacts from which states could withdraw.

Certainly, the practical construction is that that is the practical construction by the legislative branches, that that is a compact within the meaning of the Article I, section 10.

The Three-judge District Court held that the consent of Congress was not prerequisite to the validity of this compact. It also found no merit in the Commerce Clause and Due Process Clause arguments and accordingly, it granted a motion for a summary judgment in favor of the Appellees.

An appeal was taken and this Court noted probable jurisdiction on February 22nd.

Beyond the apparent clarity of the constitutional

language, we rely on the substance of the constitutional provision. This substance is, I think, given meaning by the long-continued practice of Congress and the states in giving effect to the constitutional provision.

In order to put that practice before the Court, we have included two rather lengthy appendices in our main brief. This is the somewhat dark blue brief.

These appear at pages 53 through 120 of the blue-covered brief. The first of these, beginning on page 53, lists in chronological order every compact to which Congress has given its consent from the beginning through the Year 1976. These are listed by title and with their statutory citations. There are something like 150 of them.

I may say that on page 53 there are a number of typographical corrections I would call the Court's attention to. In the first place, the first compact listed, Virginia and Kentucky Compact and the second and third from the last one listed, Virginia and West Virginia Debt Agreement; Virginia and West Virginia Boundary Agreements of 1866 I do not think are compacts at all and I think we should not have listed them.

The first one is the act admitting Kentucky to the Union and the second and third from the bottom are two acts connected with the admission of West Virginia to the Union.

In the second supplement, we printed a list

compiled by the Council of State Governments in a publication which it put out in 1966 and this lists the compacts up to that time in alphabetical order.

To some extent, it duplicates the list which we have in the first supplement but the second list also gives additional information, particularly a list of references to the states which are parties to the several compacts. As I have said, it only goes through 1866.Since we were reprinting it from another publication, we did not feel free to make insertions of the additional ones but the compacts to which Congress has given its consent since 1966 are set out in chronological order on pages 68 through 70 of the first supplement.

And finally, we have included on page 121 a list derived from the Council of State Governments publication showing the compacts which were in operation in 1966 which had not received the consent of Congress.

QUESTION: Now, where at page 121?

QUESTION: The last page of the blue book.

MR. GRISWOLD: Yes, after the blue slip.

Some of these compacts may be invalid for the lack of that consent. I would mention particularly the Southern Regional Education Compact which was, in its origin and effort to get around this Court's decision in the Gaines case involving the education of a negro outside of Missouri when

Missouri maintained a law school for white students exclusively.

The House passed a joint resolution of consent. The Senate debated it extensively over a period of several days and eventually voted to recommit the bill by a vote of 38 to 37 after a suggestion had been made that adoption of the consent resolution would amount to an approval by Congress of the segregation which was implicit in the compact.

In that connection, I would call attention to the fact that the Western Regional Education Compact was consented to by Congress in 1953, only five years later. No question of segregation was involved there.

From this listing, it appears that Congress has given its consent to a wide range of compacts between the several states and that it has given its consent to a very high proportion of the compacts, more than 90 percent, which have been put into operation.

Many of the compacts to which Congress has consented --

QUESTION: Why don't you -- Mr. Griswold, excuse me. You just mentioned, a few moments ago, the Southern Regional Educational Compact and you told us that it may be that several, if not all of the compacts that have not received Congressional approval that are listed on page 121, supplement C of this brief, may be invalid.

Then I looked at page 111 which is, I guess, Appendix B to this brief, supplement B to this brief --

MR. GRISWOLD: Page which?

QUESTION: Page 111.

MR. GRISWOLD: Yes.

QUESTION: Just to cross-refer to the Southern Regional Education Compact and I noticed that it stated there, "Congressional consent: Not required." Whose judgment is that?

MR. GRISWOLD: Well, that is the opinion of the Council of State Governments.

QUESTION: I see. That is what I wanted to know.

MR. GRISWOLD: It represents the same point of view which is represented by the Appellees in this case. That has no --

QUESTION: That is not your submission?

MR. GRISWOLD: That is not my opinion. We have reprinted here this list from the publicaion on interstate compacts put out by the Council of the State Governments in 1966 simply because we thought it would be convenient for the Court and certainly without endorsing those statements.

QUESTION: That was my question. On several of these it says, "Congressional consent not required." But that is not -- you are not submitting that as yours.

MR. GRISWOLD: That is simply reprinting the

listing made by the Council of State Governments.

QUESTION: Thank you.

QUESTION: Mr. Griswold, does that not suggest, though, that perhaps compacts may be submitted for ratification where, in the opinion of the submitting states, ratification may not be required but they just do it in an excess of caution?

MR. GRISWOLD: Yes. Yes, it does and it also suggests, I think, that the time has come when this Court should clarify when it is necessary to submit compacts for --

QUESTION: Well, Mr. Griswold, on that same thing, were all of these compacts listed in Supplement C at 121 actually submitted to the Congress?

MR. GRISWOLD: That I do not know, Mr. Justice. I do know that the Southern Regional Education Compact was submitted to the Congress. I do not know whether any of the others were. In fact, I am sure that the interpleader compact was not because I remember working with Professor Chaffee in the development of that compact and that is an agreement for opening up jurisdiction of courts. Conceivably it should have been submitted.

QUESTION: Do any of the uniform laws fall within a compact? The many uniform laws that have been --

MR. GRISWOLD: Oh, there is no question that uniform laws are not compacts. They can be enacted and repealed

at will. It becomes a little more difficult when you get reciprocal legislation.

"This statute shall go into effect with respect to any state which passes a similar statute."

But I do not have any real trouble with that.

QUESTION: But even that is revocable, is it not? Each of the states under reciprocity is still free to withdraw.

MR. GRISWOLD: Each state is free to withdraw though perhaps with the conditions of notice or things of that kind and being bound as to actions that are taken while it was in effect.

QUESTION: I expect what I am really getting at -- do you suppose that in these several lists we have an exhaustive list of everything that falls within the definition?

MR, GRISWOLD: No, Mr. Justice. I think making an exhaustive list is extraordinarily difficult.

QUESTION: There must be many other types of agreements.

MR. GRISWOLD: These are simply the compacts which were listed in that publication of the Council of States Government. This Court has dealt, to some extent, with uniform laws. It has made passing references that they do not come within the compact clause and in one or two cases, with reciprocal legislation, particularly with respect to taxes on

interstate carriers but this Court has never upheld a multi-state compact involving an administrative agency with delegated powers from the states which has not received the consent of Congress.

Now, let me get back to what moved the court below -- incidentally, I may say that a great many of the compacts which have been consented to by Congress involve relatively small matters. Eighteen of the first twenty-eight involved two-state interstate boundary agreements and I would call attention to the Ohio-Pennsylvania Amendment listed on page 67 of the brief which affects motorboats in Lake Pymatuning and increases the power which may be used from six horsepower to ten horsepower.

The consent of Congress was sought to that agreement and obtained.

I would emphasize how diligently Congress has reviewed the many compacts brought before it. Congress has often imposed conditions and restrictions including time limitations before granting consent and Congress has refused or failed to give consent in a number of instances, including this one.

Well, how, then, was the Multistate Compact sustained by the Court below?

QUESTION: May I ask one other question, Mr. Griswold? How many of these compacts has this Court

struck down or not --

MR. GRISWOLD: This Court has never struck down any compact for not having been consented to by Congress, nor has it sustained any compact involving a multistate agreement with an active administrative agency having extensive powers delegated to it by the states.

QUESTION: Well, is that because they just did not come here?

MR. GRISWOLD: I am sorry, Mr. Justice?

QUESTION: You say we did not sustain any. Is that because there were none presented?

MR. GRISWOLD: No such cases have been presented. Take, for example, the Southern Regional Educational Compact, as things worked out, this Court's decisions in other cases came along and the concern about it disappeared and there was no occasion to attack it. Here, there --

QUESTION: Is not some of the financing of Mahari Medical College in Nashville financed through that compact?

MR. GRISWOLD: Yes, the first clause provided for multistate financing of Mahari Medical School, the objective being that that would then be a medical school for all the state's parties and they could send their students there and not only be within the Gaines case, but have a Congressional enactment which could arguably be contended to be under Section five of the 14th Amendment that that was a valid

result.

QUESTION: And that medical school is still operating and it is still financed in that same way, is it not?

MR. GRISWOLD: The financing of it, I suspect, is very complicated, a great deal of it being charitable and a very large amount of it being federal but I do not know the financing of Mahari.

QUESTION: But Mahari was long before then -- was in existence long before then.

MR. GRISWOLD: Yes. Yes, it was.

The problem arises because of a dictum of this Court in Virginia against Tennessee and it was clearly a dictum, as is shown in our briefs. The Court held that Congress had given its consent long ago informally but effectively and having held that, the Court then said, "It is evident that the prohibition of Article I Section 10 is directed to the formation of any compact attending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States."

Now, I would find out first, not only was that dictum but it was a hard case. It was a case where the boundary line had been established and accepted for 90 years. It involved a one-time, one-place bilateral agreement and the same is true in this Court's more recent decision in New Hampshire against Maine a year ago on which the court below

also relied.

There the boundary was established in 1740 by an order of the Privvy Council in England, more than 200 years ago and the agreement before the Court was simply a stipulation to settle a lawsuit involving a controversy as to the exact location of the boundary over the water and I would have thought that it would have been easier for the Court simply to hold that since the Constitution gives the Court jurisdiction over suits between two states, that a stipulation between the parties settling that case approved by the Court was not a compact to which Article I Section 10 applied.

The essential fact, as I have said here, is that this Court has never upheld the validity of a modern compact and I may say, the modern period in compacts really begins about 1921 with the Colorado River Compact, the Port of New York Authority. Since then there have been a substantial number of compacts involving multistate agreements with administrative bodies and the Court has never given its consent to a modern compact involving many states and creating an independent administrative commission to which Congress has not given its consent.

Indeed, since almost all compacts have sought and obtained the consent of Congress, few questions covering the validity of compacts lacking Congressional consent have reached this Court.

The cases which have come here have all involved one time, one place bilateral boundary agreements and have virtually no application to a wideranging multistate agreement such as that now before the Court.

QUESTION: Each of those two in the latter category you referred to, Mr. Griswold, the Tennessee, Virginia, New Hampshire and Maine, were irrevocable compacts, were they not?

MR. GRISWOLD: Yes, they were, Mr. Justice. Again, I think that really does not make any difference because as long as they are joined together, the compact has an impact.

QUESTION: Well, I am curious, though, as to what consequences are visited upon your client by the existence of this agreement that could not be equally well visited upon them by similar legislation in the party states, separately adopted.

MR. GRISWOLD: I think, Mr. Justice, that I would like to answer that, in part, by reading a sentence from the Third Annual Report of the Multistate Tax Commission:

"The Multistate Tax Compact is, like all compacts, making it possible for states to accomplish cooperatively that which they cannot do severally."

This is really an instance -- I hate to use it because I am not suggesting that the states have been conspiring but under the law of conspiracy if three, four, five

people join together to do something -- and it was recognized 200 years ago that that has -- 300 years ago that that has impact above and beyond what any one of the individual parties might do.

QUESTION: But they join together to audit your corporation's tax returns. I mean, that is no crime, is it?

MR. GRISWOLD: I am not suggesting that it is a crime. I am suggesting that when states join together, they are doing something above and beyond what is done by each of the individual states.

A great many of the compacts which have been submitted to by Congress, many of them approved, some of them with qualifications and conditions and time limits and some disapproved have been invloved advisory arrangements.

This is an agreement with a clout. This compact provides that the Multistate Tax Commission has subpoena powers and that those subpoenas may be enforced by the courts of any state which is a member of the compact; it also --

QUESTION: What if the states refuse to exercise that particular provision?

MR. GRISWOLD: Well, it would be violating the law. The law of its legislature provides that it shall enforce the subpoenas of the Multistate Compact.

QUESTION: Could it be expelled from the compact by the other signatories?

MR. GRISWOLD: It would be reversed by a state supreme court. I do not suppose there would be a federal question so it would be hard to bring it here but I find it hard to -- I think it might well be regarded as a sport and that is unfortunate and we'll go on to the next case, but the law is clear, that the courts of the states which are members of the compact shall enforce subpoenas against a resident of their state issued by the Multistate Tax Compact.

I am also reminded of an experience I had with General Hershey. I tried to get him to do something and he said, "Why, I have no power to do that. All I can do is recommend." And of course, there was nothing that was more emphatic than a recommendation from General Hershey and I would like to call attention to a quotation from an article which is cited on page 10 of our reply brief relating to the Interstate Compact on Oil and Gas. This is an article by Leach cited at the bottom of page 10 with respect to that compact which, incidentally, has been approved by Congress always with time limitations, always with requirements for a report to Congress; more recently with requirements that there be reports to the Attorney General with respect to antitrust implications and Leach says, legally it has no power.

Actually, it is the most powerful and respected agency in the oil and gas industry and so I say here that the

Multistate Tax Compact has an impact discussed at greater length in our brief and that in the language of Justice Frankfurter and James M. Landis who wrote the great article in this field back in 1925, this is something where Congress should exercise its judgment.

Now, they wrote in this article in the Yale Law Journal, "Historically, the consent of Congress as a prerequisite to the validity of agreements by states appears as the Republican transformation of the needed approval of the Crown but the condition plainly had two very practical objectives in view in conditioning agreement by states upon consent of Congress for only Congress is the appropriate organ for determining what arrangements between states come within the permissive class of agreement or compact.

"Even the permissive agreements may affect the interests of states other than those parties to the agreement. The national and not merely a regional interest may be involved."

And here there is a very clear national interest involved as is evidenced by the pending treaty with the United Kingdom, the avoidance of double taxation treatied with the United Kingdom which contains a provision insisted upon by the United Kingdom -- and a number of other countries are also concerned with it -- of preventing the use of one of the practices of the Multistate Tax Commission called

"combination."

It is a little like consolidated returns only it is much broader than that. We have gone into it in some detail in our brief.

The chairman of the Multistate Tax Commission has appeared before the Senate Committee on Foreign Relations in opposition to that provision of the treaty. The Task Force on Foreign Income of the Ways and Means Committee has recommended that this provision be held inapplicable in foreign taxation and a recommendation has been made to the President that this be included in his current tax program.

Now, this seems to me to be the clearest possible illustration of the fact that the activities of the Multistate Tax Commission do impinge upon the powers and authority of the United States and that they ought not to be allowed to be put into effect unless and until the compact has obtained the consent of Congress.

QUESTION: Mr. Griswold, this case was decided on summary judgment, I take it and is all or almost all of the matters that you go through in your brief that you presented here with respect to impact in the record? Or perhaps it is all subject to judicial notice. I do not know but one of the questions that you presented here was whether the case should be decided on summary judgment but you never developed that in your brief at all. You simply prefer us to decide

whether you should have had summary judgment instead of the other party.

MR. GRISWOLD: Whether the case should have been decided against us on summary judgment was a point which we wish to preserve and so we raised it in our question concerning --

QUESTION: You certainly did not argue it very --

MR. GRISWOLD: We did -- well, we wanted to avoid having somebody say, "Well, you never raised that question." That is one of the problems that counsel have."

We did raise, in the District Court, towards the end, the question that in view of the compact clause, the case, the summary judgment should go for the Plaintiffs and our position here is that all of the material is now in the record or is material of which the Court can take judicial notice such as this reference to the treaty with Great Britain, which is pending before the Senate Foreign Relations Committee now and the citation --

QUESTION: Well, it certainly would require us to deal with a lot of things the District Court has never dealt with.

MR. GRISWOLD: No, I do not think that there is any requirement that the Court do that. I think that there is plenty of material in the record so that the Court can hold that this Multistate Compact setting up an administrative

commission with subpoena power, enforcement powers, power to make regulations, is one which is covered by the compact clause and cannot be put into effect without the consent of Congress.

MR. CHIEF JUSTICE BURGER: Mr. Dexter.

ORAL ARGUMENT OF WILLIAM D. DEXTER, ESQ.,

ON BEHALF OF APPELLEES

MR. DEXTER: Mr. Chief Justice and may it please the Court:

There are several issues and questions that have been raised by Mr. Griswold's argument that I think need to be clarified and clarified immediately and the first issue is the one that is implicit in listing compacts or agreements which have been approved by Congress and the reference to the fact that the Multistate Tax Compact was submitted to Congress.

First, it should be realized that two states, in asking for admission to the compact and in enacting the compact, specifically made provisions in their admission legislation for Congressional approval so Congressional approval needed to be sought on that grounds.

Secondly, it certainly was a matter of expediency to do so but the Attorney General's opinions, the opinions of Counsel to the Commission clearly indicated that under the Virginia versus Tennessee test, which has been the

controlling test for a number of years, no Congressional consent was required.

QUESTION: That was the Attorney General's opinion.

MR. DEXTER: The Attorney General of Washington and the Attorney General's opinion of Illinois. Those were two opinions that were issued and there they indicated that Congressional consent was not required.

They looked at the provisions of the compact in light of the history and language of the tests to be employed to determine its constitutionality of Virginia versus Tennessee and decided that this was not the kind of a compact or agreement which needed Congressional consent so we simply say that the fact that compacts are submitted to Congress for Congressional consent are a matter of political expediency.

For instance, the Great Lakes Basin Compact which the Appellants refer to in their brief which was submitted to Congress finally for consent, the statement in the Congressional Record regarding that consent simply says that, "In view of the dispute concerning the necessity for the compact, it seems clear that it would be more prudent to secure Congressional consent rather than to forego consent and thereby throw it out on the validity of the compact and on the commission's activities."

I submit that the taking and the throwing together

all the compacts that Congress has approved and then telling this Court that that is the constitutional test, that is what the compact means under the Constitution, is not appropriate.

We rather believe that the appropriate test to determine the validity of a compact, including the compact in question, is to look at the judicial history concerning that compact clause.

In Virginia versus Tennessee it is true that the language of Justice Fields was dicta. It is also true that he went at great length to explain and understand the purpose and meaning of the compact clause in the United States Constitution and he, in that decision, laid down a test, a standard by which that clause could be interpreted. It was a test for all time. It was a test for all kinds of compacts and then in that decision, he went ahead and applied that test to determine the validity of the compact in question and this Court, in New Hampshire versus Maine followed exactly the same procedure.

The first question is, what does the compact clause mean? Not in the context of a boundary dispute, but in the context of the Constitution and this Court there referred to the Virginia versus Tennessee test and simply gave the compact clause that interpretation and then turned around and applied it to the boundary agreement there involved and found no Congressional consent was required.

Since Virginia versus Tennessee, the state courts have been uniformly for that test and that test simply is whether or not a compact increases the political power of the states in a manner which tends to impinge or encroach upon just federal supremacy.

QUESTION: You say the state courts have followed that decision?

MR. DEXTER: The state courts, Your Honor, have followed that decision and several of the decisions are put forth in our brief. In fact, the earlier case than 1854, Union Branch Railroad Company, a Georgia case cited in our brief, actually ended up with the same kind of standard. It simply said that the compact clause did not mean all agreements, it meant those political types of agreements which would tend to interfere or encroach upon federal supremacy and I think that that decision may well have influenced the decision of Justice Fields in Virginia versus Tennessee.

QUESTION: Well, what about agreements that might encroach upon the supremacy of the United States but which might not tend to increase the political power of the states?

Or do you think that any agreement which tends to encroach would intend to increase the political power of the states?

MR. DEXTER: I would think that any encroachment would intend to increase the political power of the states.

QUESTION: So, really, that is the test?

MR. DEXTER: Yes. There are some cases where this Court has upheld an increase of the power of the states, for instance, reciprocal legislation such as that approved by this Court in Port of New York versus O'Neill, 359 U.S. 1, which I would like to call to the Court's attention and I have not put in my brief.

But in that case, the Court recognized that by reciprocal legislation which was in the nature of an agreement, each court was really extending its enforcement powers cooperatively by agreement in other states and under that case, this Court upheld the extradition of the witness from Florida to New York in a criminal proceeding as a result of reciprocal legislation.

QUESTION: But if you show encroachment, you need not go on and show separately, increase in political power.

MR. DEXTER: No. I think the fact of encroachment is tantamount to indicating that the states are trying to interfere or encroach upon federal supremacy.

QUESTION: The power would necessarily go somewhere. If it left the federal it would not just go in limbo, would it? It would be bound to flow in some fashion --

MR. DEXTER: Yes. Well, today it would have to flow, Your Honor, to the states. That is right. So we think this is the standard that this Court should apply in this

case.

QUESTION: Let's put it another way. Normally if a state wants to find out about the tax basis of a corporation in another state, you have to go to the Federal Government to do it.

MR. DEXTER: Well, there is exchange of information agreements between the states and between the states and the Federal Government. There is an exchange of audit information, and so forth.

QUESTION: And you do not think that is involved in this encroachment?

MR. DEXTER: No, I think that if an agreement by the states to exchange tax information is valid, that basically, the compact does very little more with the joint audit program.

QUESTION: Well, what is your answer to Mr. Griswold's argument in light of what you just said about encroachment in respect to the pending treaty in the --

MR. DEXTER: Yes. In the first place, as we indicated in our brief, there is no provision of the Multistate Tax Compact that has anything to do with combined reporting. The only substantive income tax provision there is contained in Article III and IV. Articles III grant the taxpayer full options. It permits a taxpayer with a minimal presence and sales in a state to use a simplified form of

reporting.

All multistate taxpayers, under Article III, have a right to apportion or allocate their income as an option in accordance with Article IV of the Compact.

Article IV contains the language of the Uniform Division of Income for Tax Purposes Act. That language has to do with the division of income. It has nothing to do with combined reporting and there is no provision in the Compact, there is no rule or regulation the Commission has ever issued. There is no audit that has ever been conducted by the Commission that touches upon the subject matter in the United Kingdom Treaty.

I think we have explained that very definitely in our brief. It is simply a red herring to pull in the U.K. Treaty and indicate that this has something to do with the Compact.

QUESTION: Well, it is not your organization that is planning to enter into a treaty with the United Kingdom, is it?

MR. DEXTER: No.

QUESTION: It is the United States.

MR. DEXTER: Right and the Compact is not mentioned.

Article IX for the Compact would prevent the states from including a foreign United Kingdom parent in a combined return with a U.S. domestic subsidiary.

QUESTION: But if that is inconsistent with some provision of a federal treaty, I take it Missouri versus Holland would invalidate it.

MR. DEXTER: Oh, no question about that, Your Honor, but the treaty has not been enacted and as we indicated in our brief, if it does, that practice -- which is state practice and has nothing to do with the Compact has obviously to be changed.

But the United Kingdom Treaty has absolutely nothing to do with the Compact or what has been done with reference to its administration.

Now, I would like to indicate that this case was here -- is here on a motion for a summary judgment. The United States District Court for the Southern District of New York requires what they call a 9-G statement. In that statement, the party moving for a summary judgment has to set forth what he believes to be the undisputed facts in the cause.

We did that and the Appellants came back, did not deny anything that was set forth there and so those statements in the 9G statement of the Appellees are uncontroverted.

It should further be indicated to this Court that both the three-judge court below and the Supreme Court of Washington in the Hertz case found that what the Appellants

were arguing for is the constitutionality of the Compact on its face. They ask that the Compact be declared void in toto and that its Commission be disbanded.

We submit that this is a matter of law and all that is required is to determine the constitutional test to be applied under Virginia versus Tennessee, look at the provisions of this Compact and see whether or not that test is violated.

The next issue that I would like --

QUESTION: Was your motion for summary judgment ever opposed on the grounds that there were still factual matters to be resolved?

MR. DEXTER: Yes, the argued that there are a lot of factual matters but the lower court, in reference to that argument, simply said this: "No contention is made that the Compact is being administered other than according to its terms." I am reading from 3a of the Appendix -- of Appendix a of the Jurisdictional Statement.

"No contention is made that the Compact is being administered other than according to its terms except that the particulars governed by the substantive tax laws of the respective party states. The constitutional issues posed by this complaint reduce themselves to questions of law.

"Certain of the issues of fact Plaintiffs would seek to raise are purely hypothetical and speculative. As to

these issues, Plaintiffs have not 'Set forth specific facts showing there is a genuine issue for trial.' Rule 50 6E FR Civil Procedure.

"Certain other claimed issues of fact are plainly not material to the determination of the merits of the constitutional arguments raised here."

So, yes, there was an argument that we want more and more discovery and they have drawers of discovery concerning everything that anybody ever conceivably ever said or did in reference to the Compact, including copies of every audit that the Commission has ever made and et cetera.

So we do not believe that there is here any question but what this is a question of the constitutionality of this Compact on its face.

Now, I would like to indicate that Article XII of the Compact contains a severability clause. Under that clause, it is incumbent upon the Appellant to show what provisions, if any, of the Compact are unconstitutional and only those provisions become inoperative under Article XII.

The remainder of the provisions remain in full force and effect so you have to take the Virginia versus Tennessee test of whatever test this Court wishes to apply in interpreting the compact clause and look at it in reference to each of the compact provisions.

I would suggest that the only real issue in this

cause is whether or not the tax administrators of the member states can join together in a cooperative audit program and to authorize the Commission of which they are members to act as their auditing agent in order to enforce their own tax laws.

Now, to understand that this is the only issue, it is necessary to quickly refer to the substantive provisions of the compact.

I have already commented on Article III and Article IV. Those are optional provisions solely for the benefit of the taxpayers. They could in no wise burden interstate commerce and they are no different than reciprocal legislation such as upheld by the Court in Bode versus Barrett and in New York versus O'Neill and need no further comment.

Article V of the Compact grants certain options to multistate taxpayers for sales and use tax purposes. They are for the furtherance of interstate commerce. They are a benefit to taxpayers; could not possibly deny the Appellants any constitutional right and, we believe, raise no serious questions.

The powers of the Commission or the authority, this tremendous authority that the Appellants are referring to in their brief are contained in Articles VII and VIII and in paragraph three of Article VI of the Compact.

Paragraph three of Article VI of the Compact gives the Commission only the authority to study, to recommend and to issue proposals that would aid in the uniform application and the relief of compliance problems in state and local tax matters.

Now, this advisory and recommendatory function of the Commission is no different than discharge by a myriad of organizations between the states or the National Governors Conference or the National Association of Attorneys General, the National Association of Tax Administrators.

It is no different in function than that of the National Conference of Commissioners on Uniform State Laws. They have the power to get together at the state agency to recommend uniform laws that affect the national interest, I suppose and affect the interstate commerce and --

QUESTION: Do any of them have subpoena powers?

MR. DEXTER: No. Now, I would -- the subpoena power of the Commission is in Article VIII and I would address that now although it is a little out of order of what I was going to say.

The Article VIII does grant the Tax Commission, as the auditing agent of a tax administrator to go to the courts of the member states to enforce that subpoena.

Now, this authority is no different than the authority that each individual tax administrator has on his

own account. This led the Supreme Court of Washington in the Hertz case and the three-judge court below to conclude that there was no shift of power among the states by this subpoena power and that there was no encroachment on federal supremacy.

All that the Commission is doing is standing in the stead of the tax administrator of each state as his agent.

Now, it is true that Article VIII of the Compact permits the Commission to go into any member state that has adopted Article VIII and enforce that subpoena but it is submitted that this extension or increase of state power is specifically upheld by this Court in New York versus the O'Neill case, that the courts can make arrangements among themselves and agree to make their courts available to enforce the laws of another state and there is a whole series of reciprocal legislation or agreements in the nature of reciprocal legislation that the states utilize for this purpose.

So we think -- and it should also be realized that that provision of the Compact is severable and it is not necessary for the joint audit program. Many of the subpoenas and court proceedings that the Appellants have referred to in their brief as abuses by the Commission were really subpoenas by the individual state courts asking their courts to

enforce that subpoena that requested that the multistate taxpayers turn their books and records over to the Commission as an agent for all its purposes.

It was state subpoenas that were used that were complained of in the Appellant's brief and this is why we asserted there that such allegations did not involve any authority or power of the Commission.

But we believe even though the subpoena power is severable, not necessary to the validity or working of the joint audit program, that it suffers no constitutional defect.

Now, I would like to move on to the other substantive provision in the Compact, Article VII and it permits the tax administrators of the member states to participate in a joint audit even though it permits the tax administrators of the member states to issue advisory regulations and forms where state laws are uniform or similar.

Now, this is purely an advisory function. The only regulations that the Commission has promulgated at all concern Article IV of the Compact, which is the optional provision. It contains the language of the Uniform Division of Income for Tax Purposes Act promulgated by the National Conference of Commissioners on Uniform State Laws.

Now, this ability to issue advisory regulations that are optional with the states is no different than the ability of any person or entity whatsoever. It is done by

the National Conference of Commissioners on Uniform State Laws. It has been done for years by the National Association of Tax Administrators. It could be done by the American Bar Association, any other group or individual whatsoever. They are purely advisory. They have no force or effect until they are adopted by the state and surprisingly, the only regulation that Appellants are complaining about here has to do with an optional provision under the Compact.

Therefore, before the regulations under Article IV adopted by the Commission can be applicable to a balance, two things must happen.

One, they have to elect to apportion or allocate their income under Article IV and secondly, a state has to adopt those regulations as their own regulation. When they do, it becomes their regulations and not the advisory regulations of the Commission.

QUESTION: In that respect, I suppose you are arguing that this puts it in the same category as the Commission on Uniform State Laws.

MR. DEXTER: Right.

QUESTION: Each member can take it or leave it.

MR. DEXTER: This is precisely true, Your Honor. It has no more binding effect than any recommendation of the Commissioners. But that so-called power in the Commission is one of these great powers that the Appellants attribute

to the Commission and under their argument, contains a lot of abuses, interferes with international affairs, it interferes with the national interests, it interferes with the interests of the nonmember states and interferes with commerce.

Now, this is -- it just cannot be that way. There is nothing of that kind of power involved.

QUESTION: If it is all so simple, you ought to be able to get it approved by Congress, could you not?

MR. DEXTER: We have not sought to get it approved by Congress for a number of years and the reason we do not get -- may not have it approved by Congress leads me to Article VIII and this may explain why we have problems with Congress and why Appellants are bringing this lawsuit.

Article VIII of the Compact, in addition to the subpoena power that we have just discussed does give the Commission the power to audit the books and records as agent of a multistate taxpayer.

This power or authority is not exercised except when a specific state authorizes the Commission, as its agent, to audit the books and records.

The Commission's auditors have no power or fix or determine any tax liability, no authority to fix any policy of any member state in regard to any issue. They act purely as auditing agents of that member state. What the Appellants

are really saying to this Court --

QUESTION: With the power of subpoena?

MR. DEXTER: With the power to subpoena, Your Honor, but only as agents of the tax administrator in carrying that out.

As I said, a comparable power exists even as to the Commission's audits by the administrator himself issuing the subpoena in his name, asking the taxpayer to turn its books and records over to the Commission as that tax commissioner's auditing agent so they are just parallel powers and there is no shift of power to states that would in any way encroach upon federal supremacy as a result of that provision but what Appellants are saying is that each state that wants to audit the books and records, for example, of U.S. Steel must have their auditors lined up at the corporate headquarters of U.S. Steel and wait their turn to conduct an audit.

And when they finally get through the corporate door, they are entitled to pick up information only for that one state.

The basic issue here is whether or not the tax administrators of the members states responsible for administration of state laws can work together in a cooperative audit program.

The Appellants want no part of that and the only reason that we can think that they do not want any part of it

is because this extends the capability of the states to enforce their tax laws and I submit to Your Honors that that kind of capability is in the national interest. It is in the interest of the states and it is in the interest of all the taxpayers.

QUESTION: Now, you said you would tell us why this problem made you difficulties with the Congress?

MR. DEXTER: Because Appellants and Cause and a lot of the multistate taxpayers are opposing it in Congress and want other federal legislation. The Compact arose out of the possibility of restrictive legislation that the Appellants and others were pushing in Congress and this is why the Compact contains beneficial provisions for multistate taxpayers in trying to solve some of the problems.

What we are trying to get is uniformity and compatibility in a state tax system and to help the states enforce their tax laws and they want no part of that.

I would like to indicate the admissions of the Appellants in regard to the effect of the Compact. They say, on page 12 of their brief, "The potential impact of such a compact is not readily determinable."

We suggest that it does not have any potential impact on federal supremacy and that is the reason it is not determinable.

So all we are suggesting to this Court is, examine

the case law concerning the compact clause, look at the specific provisions of the compact clause in the light of the Appellant's argument and we are confident you will come out with the same conclusion that the three-judge court did in its well-reasoned opinion.

We do not believe it adequate for the Appellant simply to throw judicial history out of the window, call it dicta, limit it to boundary disputes and hopefully, in that way, have this Court come up with some different and new standards.

The Constitution means the same thing, regardless of the subject matter involved, whether it involves boundary disputes, reciprocal legislation and so forth.

Now, we believe the reasoning of Justice Felix Frankfurter in the case of New York versus O'Neill is instructive and helpful in resolving this question.

QUESTION: Mr. Dexter, is there anything in the record -- I take it there is not -- as to why these states withdrew?

MR. DEXTER: These states withdrew, Your Honor, as a practical matter, because the Committee on State Taxes of the Council of State Governments composed of 106 of the largest corporations in the United States have as one of their objectives to destroy the cooperative effort represented by these provisions I have referred to you today and

that is why those states have withdrawn.

QUESITON: Is that in the record?

MR. DEXTER: No, those are --

QUESTION: Well, I thought his question was --

MR. DEXTER: No, there is nothing in the record in terms of why the states withdrew. Appellants seem to think they know and they refer to it in the brief. We do not. We do not know. I am simply talking to you as a lawyer to a lawyer in terms of what I understand to be the case.

QUESTION: Of course, whether it is in the record or not, you, representing the Commission must know why they withdrew. You certainly would not be in a vacuum.

MR. DEXTER: Well, yes. There were certainly political struggles and these the people that we were struggling with.

MR. CHIEF JUSTICE BURGER: We have allowed your friend to go a couple of minutes over. Do you care to respond? There would be about two minutes available, Mr. Griswold.

MR. DEXTER: I am sorry. My time is up. I am sorry.

MR. CHIEF JUSTICE BURGER: Yes.

REBUTTAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

MR. GRISWOLD: Thank you, Mr. Chief Justice. I would like to deal with the -- with Mr. Justice Blackmun's

question first. It is an instance of how this Commission pays no attention to the Compact. The Compact provides especially that each state shall have one vote.

California came in on condition that nothing should be passed unless there was a vote of a majority of the population of the states. That gave California almost a veto. Not quite. But California and two or three other states can veto and the legislative history is clear that that is the reason why Indiana withdrew.

The annual reports of the Commission make it plain that the genesis of the Compact was to head off federal legislation with respect to taxation of interstate businesses.

In other words, in its very origin, it had -- its purpose was to interfere with the exercise of federal power.

Reference has been made to UDITPA, the Uniform Division of Income for Tax Purposes Act. UDITPA provides for allocation of nonbusiness income but the Commission, by its regulations, provides that virtually all nonbusiness income shall be apportioned.

Here again, as several commentators cited in our brief have shown, the Commission pays simply no attention to the law. You can say, "Well, they only have recommendatory power" but it recommends to the states that they proceed this way and they do proceed that way, as is evidenced by an item in the record where the Commission recommended to a number of

states that they make arbitrary assessments against corporations which did not comply with the actions of the state commissioners and that this would be a means of bringing about their capitulation.

I would like to refer particularly to an opinion by Deputy Attorney General Katzenbach. In a letter by him in our brief we have mistakenly said, "The Attorney General."

He was later Attorney General but when he wrote the letter, he was Deputy Attorney General, dealing with the Great Lakes Compact in which he pointed out that merely because it was advisory did not mean that it could not have impact on the powers of the Federal Government.

MR. CHIEF JUSTICE BURGER: I think that consumes your additional time, Mr. Griswold.

MR. GRISWOLD: We have limped along too long on Virginia against Tennessee. It is time for the Court to bring the compact clause into the modern age.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:50 o'clock p.m., the case was submitted.]