

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

DAVID A. THOMPSON,

Petitioner,

v.

SUSAN A. THOMPSON,

ATA SUSAN A. CLAY

No. 86-964

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**SUPREME COURT, U.S.
WASHINGTON, D.C. 20543**

Pages: 1 through 34

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID A. THOMPSON, :

4 Petitioner, :

5 v. : No. 86-964

6 SUSAN A. THOMPSON, ATA SUSAN A. CLAY :

7 -----x

8 Washington, D.C.

9 Thursday, October 6, 1987

10 The above-entitled matter came on for oral argument

11 before the Supreme Court of the United States at 11:05 a.m.

12 APPEARANCES:

13 RONAND W. WEISS, ESQ., Tustin, California;

14 on behalf of the Petitioner

15 KENNETH RIGBY, ESQ., New Orleans, Louisiana;

16 on behalf of Respondent

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C O N T E N T S

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ORAL ARGUMENT OF

RONALD W. WEISS, ESQ.

on behalf of the Petitioners

KENNETH RIGBY, ESQ.

on behalf of Respondent

PAGE

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We will hear argument now
4 on No. 86-964, David A. Thompson v. Susan A. Thompson.

5 Mr. Weiss, you may proceed whenever you are ready.

6 ORAL ARGUMENT OF RONALD W. WEISS

7 ON BEHALF OF PETITIONER

8 MR. WEISS: Thank you, Mr. Chief Justice, and may it
9 please the Court:

10 What we have here is a question as to whether the
11 Paternal Kidnapping Prevention Act of 1980, which is
12 28 US 1738A, furnishes a private cause of action in a Federal
13 Court to determine which of two sister states' conflicting
14 custody decrees has failed to comply with the jurisdiction
15 requirements of what I will call the PKPA.

16 The primary issue of all the reported cases appears
17 to be the Congressional intent. Since there is neither an
18 expressed jurisdiction or a prohibition against it, the
19 question is whether there is an implied intent to give a
20 private cause of action.

21 Before we get to that particular point, I feel that
22 it is appropriate to discuss the background of the PKPA,
23 itself, in order to determine what Congressional intent was.
24 First, I think we would have to recognize and discuss what the
25 problem was as Congress saw it.

1 In joint hearing before the Subcommittee on Criminal
2 Justice, Senator Malcom Wallop stated as follows: Every year
3 between 25,000 and 100,000 children of broken marriages are
4 kidnapped by a parent attempting forcibly to obtain custody
5 over a child living with the other one. The emotional cost of
6 child snatching which must be borne in large measure by young
7 persons who have already watched their parents' marriage fail
8 and their family split asunder is overwhelming. What the
9 Congress saw was 25,000 to 100,000 cases of people who were
10 unhappy with custody decrees of one state taking the children
11 from that state and fleeing to other states and obtaining
12 custody decrees. In that situation, there was either no
13 enforcement or little enforcement due to the cost involved in
14 travelling to the new state.

15 These are real problems. In my case, my client
16 hasn't seen his son in seven years. This Court had a case
17 similar to this on a different legal issue in front of it last
18 term: the Samolian case. And that case brought to this Court
19 the issue was a writ of extradition which the California
20 Supreme Court did not honor, the writ being issued by the State
21 of Louisiana.

22 The rationale given by the Supreme Court of
23 California was that there could not have been a criminal act
24 because Mr. Samolian, who was a public defender -- a deputy
25 public defender, excuse me, in San Bernadino, had a valid

1 California custody order.

2 This Court held that the writ of extradition had to
3 be upheld. And Mr. Samolian now is free from the Louisiana
4 Court on a \$20,000 bond and faces a criminal trial in less than
5 two weeks. This is the type of issue that Congress wanted to
6 address and wanted to solve.

7 QUESTION: Mr. Weiss, in your application here and
8 your presentation of the question to us, you appear to have
9 raised only the issue of whether there is an implied cause of
10 action on behalf of your client under this Federal Act. Right?

11 MR. WEISS: Yes, Your Honor. I'm sorry. Yes,
12 Justice O'Connor.

13 QUESTION: You did not raise below or raise in your
14 cert petition, I gather, that there is Federal question
15 jurisdiction in any event quite apart from any implied cause of
16 action.

17 MR. WEISS: Well, we raised under 28 US 1331 that
18 there is Federal jurisdiction.

19 QUESTION: You raised the issue of whether there was
20 Federal question jurisdiction quite apart from an implied cause
21 of action?

22 MR. WEISS: Yes, we did, Justice O'Connor.

23 QUESTION: You didn't present that question to us in
24 the cert petition; did you?

25 MR. WEISS: I don't believe we did, no.

1 QUESTION: No.

2 MR. WEISS: We raised it --

3 QUESTION: And, yet, most of the cases below dealing
4 with this question have gone off on the theory of Federal
5 question jurisdiction: its existence or the lack of it.

6 MR. WEISS: Existence or the lack of it, but most of
7 the cases, as I read them, dealt with the implied provision as
8 opposed to the actual because of the fact that it is a state
9 cause of action.

10 QUESTION: Well, isn't that a form of Federal
11 question jurisdiction and implied cause of action?

12 MR. WEISS: That is a form of Federal question--
13 yes, Chief Justice.

14 QUESTION: Well, I have the same concern Justice
15 O'Connor has. Did you raise Section 1331 jurisdiction in so
16 many words below anywhere?

17 MR. WEISS: Yes, we raised it in our original
18 complaint to the lower court.

19 QUESTION: Did the courts below deal with that?

20 MR. WEISS: As I recall, the lower court just
21 summarily dismissed it saying that there was no jurisdiction
22 whatsoever because it was within a domestic relation exception.
23 And the court, the Ninth Circuit Court held that there was no
24 implied intent on Congress to create a Federal cause of action
25 and further held that the domestic relation exception was

1 involved herein. Those were the two holdings of the Ninth
2 Circuit.

3 The next thing that I think should be looked at is
4 what did Congress do or what approach did they take once they
5 defined the problem. Quoting Senator McGovern in the
6 Congressional Record at Senate page 758 on January 23, 1979, he
7 states that the PK will cause all states will be required to
8 enforce with very few modifications allowed the custody decree
9 of the state that jurisdiction according to the provisions of
10 the bill. And, at present, a parent can take a child, flee to
11 another state and begin court proceedings in that state to
12 regain custody. For several reasons, custody is usually
13 granted. States treasure their independence to make such
14 decisions. The other parent is not present to make the case
15 and the absconding parent may be surrounded by supporters
16 willing to testify on his or on her behalf.

17 Under this bill, the kidnapping parent could not be
18 granted custody of the children by any other state court. This
19 provision would serve a possible kidnapper from taking the
20 child across state lines as there would be no hope of gaining
21 custody of the child in another state.

22 QUESTION: But that is quite consistent with the
23 Ninth Circuit's majority's view that what this is -- the PKPA
24 is a rule of decision for state courts, like the AVLA, rather
25 than creating a separate cause of action in Federal Court.

1 MR. WEISS: Yes, Mr. Chief Justice, if you read it
2 literally, the problem is the Act, itself, speaks in a positive
3 affirmative manner. "The state shall." They shall do this to
4 obtain jurisdiction. They shall not modify if this exists.
5 "It shall."

6 If you take the word, "shall," with the Senator's
7 belief that the states cannot grant custody under this Act, I
8 think it is reasonable to interpret that he meant that this
9 should be a Federally enforced act.

10 QUESTION: All that means is that -- that might make
11 it very clear that -- the Louisiana court, is that the one?

12 MR. WEISS: Yes.

13 QUESTION: That the Louisiana court made a mistake.
14 That could be corrected by coming up through the state system.

15 MR. WEISS: That's one of the arguments raised that a
16 person should travel to the other state court and go through
17 the state system. That does -- that creates a couple of
18 problems. (1) is that you have the practical problem of the
19 total lack of following of the PKPA. The second is that it is
20 almost an impractical problem for most people involved because
21 of the cost. The third problem is that the going to the other
22 state, you submit to their jurisdiction. If you read the
23 UCCJAs in like Louisiana, you submit to their jurisdiction.
24 And then you have a difficult time in challenging the UCCJA of
25 Louisiana.

1 QUESTION: Well, the legislative history, though, is
2 really pretty clear, isn't it, that Congress directly
3 considered this and recognized the problem and simply decided
4 to go slowly in this area and not to make it a matter of
5 Federal question jurisdiction.

6 MR. WEISS: Well, there was discussion of Federal --

7 QUESTION: You seldom see a legislative history this
8 clear, I think.

9 MR. WEISS: There was some discussion by Senator
10 Cranston referring to the attention being directed at the
11 problem in the Federal level. There was some discussion by
12 Congressman Duncan to that effect. There was nothing that I
13 read that specifically rejected the concept of Federal
14 jurisdiction. Some of the cases talk about Congressman Fish's
15 proposal. But, if you look at Congressman Fish's proposal, it
16 is one of five proposals in this area and it is the only
17 proposal that suggests that the Federal courts take
18 jurisdiction to make child custody decisions. It further
19 suggested that we do away with the \$10,000 diversity
20 requirement.

21 This was the only proposal that directly talked about
22 Federal jurisdiction, but it was rejected because the Congress
23 did not want to burden the Federal court with custody
24 determinations. But we are not asking for custody
25 determination here. What we are asking the Federal court to do

1 is to make a determination based on the PKPA as to who properly
2 and correctly applied it.

3 I believe the minority decision in Merrell Dow
4 Pharmaceutical v. Thompson said that the Federal courts are the
5 best equipped to make a decision or an interpretation of the
6 Federal legislation, since they do it on a regular basis. And
7 they further stated the state courts are not as well equipped
8 to do that.

9 QUESTION: Wasn't this Federal suit dismissed for
10 want of personal jurisdiction, also?

11 MR. WEISS: No, it was not.

12 QUESTION: Well, how were you going to proceed in
13 California to get jurisdiction over somebody in Louisiana?

14 MR. WEISS: Well, the Ninth Circuit addressed that
15 problem and talked about the type of acts that Dr. Clay had
16 committed in the jurisdiction. And they concluded on the
17 following: (1) that she and the child resided there for most
18 of the child's life; (2) that she had made use of the
19 California Superior Court by bringing the domestic action in
20 that court; (3) that Dr. Thompson's request was based on the
21 California decree; and, (4) that Dr. Clay left the State of
22 California and went to Louisiana and allegedly enforced the
23 California decree there in Louisiana. Based on that analysis,
24 they felt that there was jurisdiction.

25 QUESTION: Again, in California?

1 MR. WEISS: The child?

2 QUESTION: Yes.

3 MR. WEISS: That is a problem that the PKPA can

4 solve. If we do not get Federal determination of the

5 construction and who properly applied that, we could travel to

6 Louisiana, as was suggested, and we could go through the whole

7 court and then Dr. Clay could then move to another state --

8 QUESTION: How could we get it to the Federal court

9 in California?

10 MR. WEISS: Hopefully with a Federal court order that

11 will be obeyed.

12 QUESTION: What is the order going to be?

13 MR. WEISS: I'm sorry?

14 QUESTION: What kind of order is it?

15 MR. WEISS: Well, if it is determined that California

16 was the appropriate jurisdiction and Louisiana is restrained,

17 then California would, in all probability, issue an arrest

18 warrant like was done in Samolian by the Louisiana State.

19 QUESTION: You would have extradition?

20 MR. WEISS: For Dr. Clay, probably.

21 QUESTION: You would have extradition?

22 MR. WEISS: Yes.

23 QUESTION: To the Federal court?

24 MR. WEISS: No. We can do that through the state

25 court.

1 QUESTION: You don't have extradition in the Federal
2 court. You have removal.

3 MR. WEISS: Through the state court.

4 See, if the court -- if the Federal court finds --

5 QUESTION: I just want to know how you are going to
6 get a hold in.

7 MR. WEISS: We are going to do it by trying to get
8 the state court to issue a writ of extradition for Dr. Clay
9 and, hopefully, she would bring the child rather than go
10 through that.

11 I mean we have tried self-help. Self-help is --

12 QUESTION: The only thing we have here is the
13 jurisdiction of the Federal court.

14 MR. WEISS: That's correct.

15 QUESTION: And I am asking you how can the Federal
16 court pick him up in Louisiana and bring him to California.

17 MR. WEISS: They cannot, but the Federal court can
18 determine that California was the proper court for jurisdiction
19 of the custody case. And once they determine that, then
20 California can issue the child stealing warrant.

21 QUESTION: Well, this is unbelievable to me. I guess
22 I went to school too far back. I mean I thought jurisdiction
23 was on boundary line.

24 MR. WEISS: Well, now, as discussed, what the
25 Congress did was they passed the Parental Kidnapping Prevention

1 Act and they passed it in positive terms. While a state--
2 state courts shall enforce and state courts shall cooperate.
3 They made those mandatory requirements.

4 If the Federal court does not take jurisdiction, the
5 Federal Act, the PKPA, has become nothing but an advisory or an
6 optional act that the states can follow or not follow at their
7 choice.

8 QUESTION: I don't think that is entirely true,
9 Mr. Weiss. Take the example of the Federal Employer's
10 Liability Act. Suits there are brought under that Act in the
11 state courts, but there was a period of time when this Court
12 reviewed a number of state court judgments that came up to
13 through the state court system, laid down some rules as to what
14 the FLEA required. And the state courts henceforth followed
15 those rules. I think the same thing could happen here.

16 MR. WEISS: The problem is that the PKPA, if as some
17 of the writings have suggested is strictly advisory, are an
18 extension of the UCCJA, then in a lot of states there will be a
19 conflict between the UCCJA and the PKPA.

20 QUESTION: But the PKPA is an act of Congress. Is
21 the UCCJA also an act of Congress?

22 MR. WEISS: No.

23 QUESTION: I would think the PKPA would prevail then.
24 One is a state act and the other is an act of Congress.

25 MR. WEISS: That would be my assumption, but it would

1 be up to the interpretation of the state court.

2 QUESTION: Well, not ultimately. As the Chief
3 Justice said, those interpretations, if they are in conflict,
4 can be resolved by the Supreme Court. In other words, there is
5 an intermediate position between saying it is advisory on the
6 one hand. And, on the other hand, it is mandatory and
7 enforceable in Federal courts. That is it is mandatory, but
8 enforceable by the state courts with review of erroneous state
9 court decisions by the Supreme Court. Why doesn't that work?

10 MR. WEISS: I have heard that argument.

11 QUESTION: From the Ninth Circuit.

12 MR. WEISS: From the Ninth Circuit.

13 (Laughter.)

14 MR. WEISS: And from the D.C. or most recent case.

15 The problem there is you are dealing with child
16 custody and you see if a -- if a party steals a child and goes
17 to another state, and we go through your procedure of going to
18 that state and going up through their appellate process and
19 eventually ending up here five -- four or five years have
20 passed. And it becomes almost a worthless act not -- I do not
21 mean that in any derogatory sense, but to the person who is
22 pursuing his child, because he has lost all contact with his
23 child. The child doesn't know him. Very few state courts
24 would say after five or six years, "I'm going to give you
25 custody."

1 QUESTION: Yes, but you cannot presume that every
2 case will be a test case. You can't presume that every case
3 will require resolution by this Court. If you presume that
4 generally state courts will follow the governing law,
5 presumably in this case the Louisiana appellate courts would
6 have corrected the error. And that would not have taken five
7 or six years. Maybe there will be an exceptional case where
8 there is ambiguity in the law and this Court has to lay down
9 the rule of law. But in most cases, why don't you presume that
10 state judges will obey the law?

11 MR. WEISS: Well, in this particular case --

12 QUESTION: Maybe they made a mistake in this one
13 case, but does that mean that they always are going to make
14 mistakes and rule in favor of the local parent?

15 MR. WEISS: Well, it is not even a mistake. It's if
16 you look at the UCCJA of Louisiana, it says that you are not
17 supposed to take custody -- jurisdiction for custody purposes
18 until the child has been there for a period of six months.
19 Looking at the joint appendix --

20 QUESTION: Well, Mr. Weiss, maybe we just need a test
21 case from Louisiana, but I think for you to make the assumption
22 that no state court is going to apply the Parental Kidnapping
23 Act properly is unwarranted.

24 MR. WEISS: I will agree and I am sorry if I made
25 that assumption. My primary concern is that the PKPA sets a

1 Federal standard for a jurisdiction and modification of custody
2 acts. And it is a method whereby if it is applied properly, we
3 will get a uniform standard for jurisdiction between the
4 states. But in order to apply it in a standard manner and an
5 expeditious manner, in order to create what is necessary in the
6 custody, the immediacy of the custody issues, it has to be
7 determined in a standard way by a court that can bind two state
8 courts.

9 Suppose you get conflicting interpretations of the
10 PKPA in two different states. You are no different than you
11 are with the UCCJA.

12 QUESTION: Well, that's why this Court sits: To
13 resolve conflicts like that.

14 MR. WEISS: I understand that, Justice O'Connor.

15 QUESTION: All right.

16 MR. WEISS: Well, if you review the minority decision
17 in the Ninth Circuit, Justice Alcorn makes some comments about
18 the failure to recognize a Federal jurisdiction and I think the
19 comments reflect that he found an intent of Congress to create
20 the Federal jurisdiction. He says, otherwise, it converts an
21 act of Congress into barren rhetoric.

22 The Third Circuit said basically the same thing. Why
23 would the Congress from 1973 to 1980 study and attempt to pass
24 legislation on this problem to correct the problem, acknowledge
25 that the problem exists, that the states will not uniformly

1 apply the UCCJA, which is supposed to be a uniform act, and
2 then not give the courts, the Federal courts the ability to
3 enforce it.

4 QUESTION: Full faith credits that there in the same
5 way.

6 MR. WEISS: Well, full faith, Justice Scalia, the
7 full faith credit statute is a little different in that the
8 PKPA 1738A sets standards. It says, "The state shall."

9 QUESTION: Is not the full faith and credit statute,
10 indeed the full faith and credit provision of the Constitution
11 which says that each state shall give full faith and credit to
12 the judicial decrees of the other states. And, yet, we do not
13 allow for enforcement of that in Federal courts.

14 MR. WEISS: On the full faith and credit, you also
15 have the problem that this is a child custody determination and
16 full faith and credit only has to be given by one state to the
17 other state to the same enforceability that other states order.
18 By that, if there is a change of circumstances, it can be
19 modifiable. So, there is never really a full faith and credit
20 argument.

21 QUESTION: But that is what Congress sought to change
22 in the PKPA; is it not?

23 MR. WEISS: That's -- if you take that position,
24 Chief Justice, then what are we going to do with the
25 modifiability aspect of the child custody decision because full

1 faith and credit is given to a final judgment. And the child
2 custody judgment is never final because it can be modified all
3 the time.

4 QUESTION: But here Congress -- as I understand it,
5 Congress has said in the PKPA, "Even though you don't give full
6 faith -- even though full faith and credit does not permit you
7 to recognize a custody judgment from another state because it
8 is always subject to modification, we now tell you that you
9 should." Is that a misstatement of what the PKPA says wherever
10 it is to be enforced in Federal or state court?

11 MR. WEISS: No, it is not, Chief Justice.

12 One last point, since I see the white light is on.
13 The Merrell Dow Pharmaceutical v. Thompson case talks about
14 implied jurisdiction. In that case, the majority starts with
15 that there is no implied jurisdiction. And they run the
16 four-pronged test of cort, C-O-R-T.

17 Now, the court case has been briefed -- the court
18 test has been briefed by myself, starting with page 8. I
19 believe that the minority and majority decision in that case
20 are very close. They both say that the Smith v. Kansas City
21 Trust is an applicable valid test and that it should be
22 applied. The difference is that the majority found that there
23 was no implied jurisdiction here.

24 I believe if you look at the intent of Congress there
25 is an implied intent here and, as such, the Court should allow

1 the lower Federal courts to hear this matter.

2 I would have nothing further. Are there any
3 questions, Chief Justice?

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Weiss.

5 We will hear now from you, Mr. Rigby.

6 ORAL ARGUMENT OF KENNETH RIGBY

7 ON BEHALF OF RESPONDENT

8 MR. RIGBY: Mr. Chief Justice, and may it please the
9 Court:

10 The basic question is the intent of Congress in the
11 Court v. Ash, Touce Ross, Northwest Airlines, Merrill Lynch,
12 Merrell Dow cases. What was the intention of Congress? Was it
13 to create a private remedy? Now, that private remedy has been
14 interpreted and diagnosed in different terms in terms of
15 Federal question jurisdiction, Rogers v. Platt, the Court of
16 Appeals Circuit, in terms of a private cause or right of action
17 in Thompson v. Thompson, some cases call it a cause of action.
18 Some call it a right of action. But the fundamental threshold
19 question is whether Congress intended to create any private
20 remedy, whether it is called Federal question jurisdiction or
21 whether it is called a private cause of action.

22 QUESTION: Well, do you think that is really the
23 correct way of putting it? Isn't it whether Congress intended
24 to create a private cause of action in the Federal courts?

25 MR. RIGBY: That is the way Thompson, the Ninth

1 Circuit interpreted. The Court of Appeals Circuit in Rogers v.
2 Platt interpreted it in terms of whether Congress intended to
3 create Federal question jurisdiction.

4 QUESTION: Well, I know, but do you agree that this
5 Federal act would be enforceable in a state court?

6 MR. RIGBY: Yes. And it was intended to be
7 enforceable in the state court.

8 QUESTION: How would a parent who claims the benefit
9 of that Act get into a state court to enforce it without having
10 -- without being able to say that: Congress intended me to
11 have the right to enforce this statute in a state court?

12 MR. RIGBY: Because it is a direction to the
13 appropriate authorities of each state: shall enforce and shall
14 not modify.

15 QUESTION: But a parent who claim is a benefit of the
16 Act would have to be able to get into court.

17 MR. RIGBY: Yes, sir.

18 QUESTION: And be able to say the Federal Act intends
19 me to have the right to enforce this in a state court. Is that
20 right?

21 MR. RIGBY: Yes, sir. That's correct, sir. But it
22 is a question of whether or not Congress intended to create a
23 Federal private right of action, not just a right of action.
24 Obviously, Congress intended to create a right of action and
25 somebody to enforce its provisions.

1 QUESTION: Is that even right? Isn't the right of
2 action a suit for custody created by state law and merely the
3 Federal law imposes certain standards to be applied in state
4 causes of action.

5 MR. RIGBY: That may very well be a correct analysis.
6 When you compare it to full faith and credit, itself, because
7 this is an addendum to the full faith and credit statute.

8 QUESTION: In this case, there has been a Louisiana
9 custody order; hasn't there?

10 MR. RIGBY: Yes, sir.

11 QUESTION: And if this parent is told you must
12 enforce this Act if you have any right under it at all in the
13 Louisiana court, he's going to have to go down there and assert
14 some right under this statute to get that custody order
15 overturned.

16 MR. RIGBY: Yes, sir.

17 QUESTION: I don't understand this discussion. You
18 don't have a Federal cause of action just because you have a
19 Federal right.

20 MR. RIGBY: No, sir.

21 QUESTION: For example, it is a Federal right to have
22 Federal -- Federal law supercedes state law. Federal pre-
23 emptio. Correct?

24 MR. RIGBY: Right.

25 QUESTION: But that doesn't give me a cause of action

1 to sue for Federal pre-emption. My suit is whatever, whatever
2 the state cause of action or other Federal cause of action
3 might be: for custody of the child, for torque, for contract
4 and so forth. And in the course of that suit, I am entitled to
5 have Federal pre-emption rules applied. Right?

6 MR. RIGBY: That's correct, sir.

7 QUESTION: We are talking about here whether there is
8 a cause of action to have the PKPA applied or rather whether
9 that is just a rule of law which will be applied in other
10 suits: custody and torque, contract or whatever.

11 MR. RIGBY: I would agree with that analysis. I was
12 not espousing these analyses by the courts, but in addressing
13 Justice O'Connor's original question about whether it is a
14 jurisdictional issue or a cause of action issue, to point out
15 that differing Federal courts have analyzed it differently. It
16 is our position that Congress did not intend that Federal
17 courts enforce PKPA except through seriary to this Court after
18 the exhaustion of state of remedies.

19 QUESTION: So, I suppose then the answer would be to
20 this person that if you wanted to prevent the issuance of this
21 Louisiana custody decree because of this Federal statute, you
22 should have gone to Louisiana and a time and defended on the
23 grounds of the Federal statute.

24 MR. RIGBY: That's right. Defended it --

25 QUESTION: And now, it is too late.

1 MR. RIGBY: No, sir. It's not too late.

2 QUESTION: Well, how will he enforce it now, the
3 statute?

4 MR. RIGBY: Dr. Thompson can bring an action in the
5 Louisiana court based upon his California decree, contend that
6 the Louisiana court lacked jurisdiction under PKPA to enter its
7 decree, which, incidentally, was the --

8 QUESTION: So, he will be asserting his right in that
9 action.

10 MR. RIGBY: That's correct.

11 QUESTION: Under the Federal statute.

12 MR. RIGBY: That's correct. And Congress
13 specifically intended, we submit, from the very exhaustive
14 legislative history, that PKPA, that the onus of enforcement of
15 PKPA be placed on the state courts, not the Federal courts.

16 If I may, very briefly: There were seven factors
17 that have been outlined which I believe all Members of this
18 Court agree upon in one way or the other with respect to
19 discerning Congressional intent in this issue. And that is
20 Congress' perception of the law it was shaping or reshaping.

21 Secondly, the problem which Congress perceived that
22 was not being adequately addressed by that law, the language of
23 the statute, itself, the legislative history of the statute,
24 the likelihood that Congress intended to supercede or to
25 supplement existing remedies and whether implication of a

1 Federal cause of action is required to accomplish Congress'
2 purpose in enacting the statute.

3 The state of the law was this, as Congress perceived
4 it, as shown exhaustively by the legislative history that this
5 Court had not definitively ruled whether or not custody cases
6 were subject to full faith and credit. States had commenced
7 adopting UCCJA, Uniform Child Custody Jurisdiction Act, on a
8 voluntary basis. At the time the Federal legislation was
9 originally suggested, only about 19 of the states had adopted
10 the Uniform Act and the states that had not adopted the Act
11 were still in the language of the legislative history, havens
12 for child snatchers.

13 As the PKPA progressed through Congressional
14 hearings, more and more states adopted UCCJA so that at the
15 time of the adoption of PKPA, nearly all the states had adopted
16 UCCJA. Now, all have adopted it.

17 So, Congress was looking at this legislative history
18 and they were concerned about states that had not adopted UCCJA
19 being admittedly havens for child snatchers.

20 Secondly, the language of the statute, itself, as the
21 full faith and credit statute, itself, provides is directed not
22 at parties but, in this instance, directed at the appropriate
23 state authorities, not courts, as in full faith and credit.
24 All of the language of PKPA is directed at state authorities
25 and what they shall and they shall not do.

1 The statutory scheme was this: Originally, it was
2 proposed to exempt parental kidnapping from the Lindberg
3 Kidnapping statute. Congress reacted to that. The Federal
4 courts should not be in Federal parental kidnapping cases.

5 The Wallop proposal came along originally with three
6 proposals: (1) to impose Federal jurisdictional standards on
7 the state in custody cases; (2) to make the Parent Locator
8 Service, the Federal Parent Locator Service available not to
9 parties, but the language says to the states, make the Federal
10 Locator Service available to the states to locate kidnapping
11 parents and kidnapped children; and (3) was to make it a
12 Federal offense to kidnap your child in violation of a proper
13 court judgment.

14 The third prong is the one that received most of the
15 attention. All the courts and the legislative history is full
16 of the letter from Assistant Attorney General Wald in which the
17 Justice Department opposed it, the FBI opposed it. HEW opposed
18 it. They did not want the Federal courts involved in, to this
19 extent, in this process. So, it was as the sponsors time and
20 time again talk about. A delicate balance between solving a
21 problem which was a legitimate Federal interest and a minimum
22 of Federal intervention in what is traditionally a pure state
23 affair: custody cases. The Federal judiciary does not want to
24 be involved, nor should it be involved in custody cases.

25 So, a committee, the final resolution was that

1 instead of the third prong of the three-pronged legislation
2 being a Federal offense that the Federal Fugitive Act would be
3 made applicable to cases in which a child was taken by a parent
4 from one state to another state in violation of a proper
5 custody award ended in accordance with PKPA. So that under the
6 Federal statute, the party could be brought back and prosecuted
7 under state law.

8 So, as the sponsors themselves said, not in
9 connection with the rejection of the Fish Amendment, which is a
10 different proposition, in which Senator Cranston, for example,
11 said: By reserving the Federal role to the creation of a
12 Federal Parent Locator Service and FBI investigation after a
13 sufficient lapse of time, we hold Federal interference to a
14 minimum.

15 And it is very clear from an extensive legislative
16 history that right or wrong, that Congress deliberately, made a
17 deliberate decision to limit the Federal interference in the
18 process to these two things: making the use of the Federal
19 Parent Locator Service, which at that time was available only
20 for child support purposes, not custody purposes, and,
21 secondly, to permit the use of the Federal Fugitive statute in
22 custody cases.

23 Professor Coombs, who wrote most of this legislation
24 and assisted a great deal in its formulation, said that the
25 legislation in it shows respect for the proper division of

1 roles between the state and the Federal Government and between
2 civil and criminal approaches to the problem.

3 In the exchange between Mr. Conyers and
4 Representative Fish, who had introduced a bill -- there were
5 two bills pending, to confer diversity jurisdiction on Federal
6 District Courts in custody cases so that a Federal District
7 Court could enforce a valid custody award. And in that
8 exchange, the differing approaches and the deliberate
9 Congressional restraint is very obvious.

10 Mr. Conyers, actually Mr. Bennett, that's PKPA.
11 Mr. Bennett would impose the obligation on state courts and you
12 would require Federal courts to give full faith and credit to
13 the decision. And, again, we would be imposing the
14 responsibility of the enforcement upon the state courts.

15 Now, what could be clearer with respect to
16 Congressional intent when the -- when Congress is presented
17 with the contrary proposal that Federal courts be granted -- I
18 grant you it was not Federal question jurisdiction, but
19 diversity jurisdiction, and they expressly rejected it saying
20 at the same time: It is our purpose to impose the enforcement
21 of PKPA on the state courts, not the Federal courts, as you,
22 Mr. Fish, would have it.

23 And in the statutory scheme to explicitly limit the
24 Federal participation to the use of Federal Parent Locator
25 Service and the use of the Federal Fugitive Act for the

1 purposes of doing what? To assist the states in their
2 enforcement of PKPA. To allow them, when they have issued a
3 valid custody decree under the PKPA Federal standards to go to
4 the Federal Parent Locator Service and request that the
5 kidnapping parent and the abducted child be located and when
6 located to then be able to have the FBI to bring the abducting
7 parent back for prosecution in the state court.

8 And that whole statutory scheme is obvious in the
9 legislative history of PKPA. Nowhere, I suggest, did -- has
10 any commentator or court said that the state courts have not
11 done their -- performed their constitutional duty in enforcing
12 the Full Faith and Credit Clause. And this is a form of full
13 faith and credit. It is an addendum to full faith and credit.

14 Congress, many years ago, made a deliberate decision
15 that the implementing statute to the Full Faith and Credit
16 Clause of the Federal Constitution would impose the obligation
17 of enforcing the acts, statutes and so forth of another state
18 on the state judicial systems, not on the Federal judicial
19 system and this Court and the other courts on many occasions
20 have concurred in that deliberate decision.

21 The decision of Congress in PKPA is the same kind of
22 careful deliberate decision. That there was a problem that
23 needed to be addressed by the Federal legislative branch. And
24 it addressed it in a very careful and a very deliberate and a
25 very balancing manner between the Federal intervention and what

1 is traditionally a state -- you know, just uniquely a state
2 problem, custody is. It is -- not just traditionally, but by
3 its very nature is a state problem. And Congress has made that
4 very deliberate decision.

5 What happens if Federal courts get involved? It has
6 been suggested by Flood v. Bratton, which is the Third Circuit
7 case that holds there is Federal jurisdiction, that Federal
8 courts need not get involved in the underlying custody issues
9 in order to resolve conflicting jurisdictional assertions by
10 states.

11 I suggest that that may reflect not a sophisticated
12 understanding of custody cases because as has been pointed out
13 by the District of Columbia Circuit in their very recent Rogers
14 v. Platt, that is the very thing the District Court in the
15 District of Columbia had to do in order to resolve a conflict
16 between the District of Columbia court and a California state
17 court. It had to determine factual issues that go to the
18 question of custody.

19 In the present case, Louisiana recognized and
20 enforced the California decree but suspended the visitation
21 rights of Dr. Thompson because of physical cruelty by
22 Dr. Thompson to his son occurring in Louisiana during the
23 exercise of a visitation privilege. That is permissible both
24 under UCCJA and PKPA.

25 Professor Coombs, whom I have quoted in my brief on

1 the subject, says there is concurrent jurisdiction. Whether
2 there is jurisdiction or not jurisdiction in Louisiana in this
3 case is going to depend upon whether Dr. Thompson did what we
4 claimed he did. And, therefore, whether Louisiana correctly
5 exercised jurisdiction under what has been called the Emergency
6 Provisions of both UCCJA and PKPA. So, courts aren't
7 necessarily going to get involved in the underlying,
8 undergirding factual issues with reference to custody in order
9 to determine which court has jurisdiction under PKPA.

10 Another consideration is -- and I have asserted it in
11 brief and assert it, again. This honorable Court's decision in
12 Webb v. Webb and its thoughtful analysis of why state remedies
13 ought to be exhausted before this Court is called upon to
14 resolve Federal issues in what are basically state causes of
15 action. Questions of comity, maintenance of a delicate balance
16 between Federal and state judicial systems. And, more
17 importantly, the opportunity for state courts to perform their
18 duty and the suggestion that state courts, as a system, will
19 not perform their constitutional duty, I think is
20 reprehensible. There is no suggestion in this case that
21 Louisiana courts will not perform their duty. In fact, I have
22 cited a case in which I lost under almost the identical facts
23 in which a state court enforced PKPA to my client's detriment.
24 Louisiana courts will do their duty. State courts will do
25 their constitutional duty.

1 The opportunity for state courts to develop the
2 record, the Court of Appeal in this case footnotes time after
3 time the incomplete nature of the record. And the state courts
4 ought to have the opportunity to develop the record, to decide,
5 for example, the case on a non-Federal ground. These cases are
6 quite frequently decided by state courts on non-Federal
7 grounds: not PKPA. A state court may say: Under our version
8 of UCCJA, we have no jurisdiction to modify a Texas decree or a
9 New Jersey decree and so forth. And the matter will never get
10 into the Federal courts because it has been decided on a state
11 ground.

12 All of this, of course, reduces the workload of the
13 Federal judicial system which is a consideration. It may not
14 be the paramount consideration. I recognize in this case that
15 Dr. Thompson in brief has argued: It would be useless for me
16 to go to Louisiana. That it is hostile territory.

17 I don't believe it is hostile territory. Our courts
18 administer justice as do the state systems of other states.
19 And I think particularly appropriate is the opinion of this
20 Court in Texaco, in which this Court said that it did not--
21 when a litigant hasn't presented his Federal claims to a state
22 court, the Federal court should assume the state procedures
23 will afford an adequate remedy in the case -- in the absence of
24 unambiguous authority to the contrary.

25 Remember, Dr. Thompson has not made the first attempt

1 to enforce his California decree in Louisiana. The only thing
2 he did was try to, with an armed accomplice, come to Louisiana
3 and try to kidnap his boy instead of following judicial
4 procedures: bring an action on his California decree in the
5 State of Louisiana. He doesn't come with great grace to say:
6 Louisiana won't give me a fair shake. Until he has come to
7 Louisiana and seen what kind of a shake that he is going to do.

8 Secondly, Rogers v. Platt has pointed up an argument
9 which we have advanced as to the peculiar nature of the
10 jurisdiction asserted here. All of the circuits that hold
11 there is jurisdiction concede that there is no jurisdiction to
12 enforce a state custody decree in the first instance. They all
13 concede that because Congress specifically rejected that
14 proposal, the Fish Proposal. They say that Congress intended
15 to confer jurisdiction only when there is two conflicting state
16 custody decrees. That is quasi-appellate jurisdiction. State
17 A, State B, a Federal District Court decides which one is
18 correct as a matter of Federal law. It is appellate
19 jurisdiction of being asserted by a Federal District Court.
20 And at no time, with the one exception of criminal habeas
21 corpus has Congress ever even expressly granted to Federal
22 District Courts appellate jurisdiction over state court
23 judgments. That appellate jurisdiction rests in this Court and
24 this Court, alone.

25 Does the Court have any questions?

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rigby.
2 Mr. Weiss, you have two minutes remaining. You are
3 not required to expend them, however.
4 MR. WEISS: Thank you, Chief Justice.
5 CHIEF JUSTICE REHNQUIST: The case is submitted.
6 (Whereupon, at 11:58 o'clock a.m., the case in the
7 above-entitled matter was submitted.)
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C E R T I F I C A T E

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David A. Thompson, v.

No. 86-964

Susan A. Thompson,
ATA Susan A. Clay

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