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**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: PENNSYLVANIA, Petitioner V. UNION GAS COMPANY

CASE NO: 87-1241

PLACE: WASHINGTON, D.C.

DATE: October 31, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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PENNSYLVANIA, :

Petitioner :

v. : No. 87-1241

UNION GAS COMPANY :

-----x

Washington, D.C.

Monday, October 31, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

JOHN G. KNORR, III, ESQ., Chief Deputy Attorney General of Pennsylvania, Harrisburg, Pennsylvania; on behalf of the Petitioner.

ROBERT A. SWIFT, ESQ., Philadelphia, Pennsylvania; on behalf of the Respondent.

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C O N T E N T S

ORAL ARGUMENT DE:

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JOHN G. KNORR, III, ESQ.

On behalf of the Petitioner

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ROBERT A. SWIFT, ESQ.

On behalf of the Respondent

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REBUTIAL ARGUMENT DE:

JOHN G. KNORR, III, ESQ.

On behalf of the Petitioner

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

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1241, Pennsylvania v. Union Gas Company.

Mr. Knorr, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN G. KNORR, III
ON BEHALF OF THE PETITIONER

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

The question in this case is whether a private party may sue a state for damages in federal court under the Superfund Act.

Now, the parties have briefed and the case could present constitutional issues regarding the Eleventh Amendment and about the continuing vitality of this Court's decision in Hans v. Louisiana. But the first issue is the statutory question of whether Congress intended to subject states to these kinds of actions, and if the Court agrees that Congress did not, then there is no need to reach those constitutional issues.

When the Court of Appeals first looked at the Superfund Act, it found that the statute showed no evidence of a congressional intention to subject states

1 to private liability. They found that the statute was
2 very similar to that construed in the Employees of
3 Missouri case, that is, states were literally included
4 among the universe of possible defendants, but there was
5 not the specific indicia that this Court has found
6 necessary to override the Eleventh Amendment.

7 When on remand from this Court, the Court of
8 Appeals next looked at the statute, they looked at it in
9 light of intervening amendments in an act known by its
10 acronym as SARA, and in light of this Court's decision
11 in Atascadero that to affect the Eleventh Amendment
12 Congress must make itself clear, must express itself
13 with unmistakable clarity in the words of the statute,
14 and the Court of Appeals found that unmistakable clarity
15 in the last clause of an exception to a provision that
16 excludes state and local governments from liability
17 under certain circumstances.

18 When you look at that amendment --

19 QUESTION: Where is that set forth either in
20 the briefs or in the petition?

21 MR. KNORR: The amendment is set forth on
22 pages 3 and 4 of our brief on the merits.

23 QUESTION: Thank you.

24 MR. KNORR: The amendment is codified at
25 Section 9601(20)(D), and when you look at it as a whole,

1 It is apparent that it's not about the Eleventh
2 Amendment at all. What Congress was focusing on here
3 was the very different and very narrow question of what
4 do you do about a unit of government that has acquired a
5 site involuntarily, because under Superfund as it was
6 originally enacted, there is strict liability, and a
7 unit of government could well find itself liable under
8 those circumstances.

9 When the SARA amending act was going through
10 the Senate, the Senate added a provision that would
11 exclude government liability under those circumstances.
12 The amendments then went to a conference committee, and
13 in the conference committee an exclusion or an exception
14 to that exclusion was added which provided that even if
15 a site was acquired involuntarily, if the government
16 unit then did something to cause or contribute to the
17 discharge of hazardous materials, there would then still
18 be liability, and it's that provision that the Court of
19 Appeals fastened upon and in which they felt Congress
20 had, with unmistakable clarity, focused on the Eleventh
21 Amendment.

22 There is, however, no explicit mention of the
23 amendment in the statute. There is nothing in the
24 legislative history that indicates that Congress was
25 even thinking about the Eleventh Amendment or the

1 problems of government immunity in general --

2 QUESTION: So do you think unmistakable
3 clarity means explicit reference to the Eleventh
4 Amendment?

5 MR. KNORR: I think in light of Atascadero, it
6 would certainly be prudent, but I wouldn't go so far as
7 to say that it is invariably necessary in every
8 circumstance.

9 QUESTION: Well, what effect do you give to
10 the second sentence of subparagraph (D) if it is not to
11 impose liability?

12 MR. KNORR: I think that is simply the kind of
13 general liability language, which means that if the unit
14 of government doesn't fit within the first sentence,
15 that is, the exclusion of liability, we are then back to
16 square one with the rest of the statute, and whatever
17 would otherwise control under the statute controls.

18 I think if you look even in isolation at that
19 last clause of the second sentence, the clause that
20 begins "such a unit of government," you wouldn't find --
21 what you'd find are the following characteristics.
22 You'd find no mention of the Eleventh Amendment or of
23 state immunity. You find no mention of state liability
24 to private parties. You find it is part of a statute
25 which does explicitly mention federal liability, to

1 which the Eleventh Amendment is, of course, no bar. And
2 you find that even this narrow clause of the statute
3 includes local governments as well as states.

4 Now, local governments, of course, don't have
5 any Eleventh Amendment immunity, and it seems to me that
6 this is not the kind of language --

7 QUESTION: Well, what's the immunity to or
8 from? It's from being sued in federal court, isn't it?

9 MR. KNORR: By a private party.

10 QUESTION: And is it not, it's not immunity
11 from liability.

12 MR. KNORR: I think it amounts to much the
13 same thing in the case of the states --

14 QUESTION: Well, why is that? I mean, if
15 you're liable under a federal statute, if you can't sue
16 in federal court, you could sue someplace else.

17 MR. KNORR: Well, not in this case. In this
18 case Congress has given exclusive jurisdiction to the
19 federal courts.

20 QUESTION: You mean in this case it's the same
21 thing.

22 MR. KNORR: In other cases it might not.

23 QUESTION: But normally liability and
24 jurisdiction really don't go hand in hand.

25 MR. KNORR: That is true.

1 QUESTION: And, of course, I suppose it hurts
2 you that it doesn't in this case.

3 MR. KNORR: I don't know, in this case it does
4 because --

5 QUESTION: Well, if Congress knew that and
6 said the states are really liable, and therefore,
7 federal courts have jurisdiction.

8 MR. KNORR: But they didn't, they didn't do
9 anything --

10 QUESTION: Well, they didn't expect their
11 liability provision to be empty. Don't you think it was
12 supposed to be recoverable somewhere?

13 MR. KNORR: Oh, it is. States are liable to
14 the United States, and under this kind of a statute,
15 only to the United States.

16 QUESTION: Well, except for the Eleventh
17 Amendment, do you suppose that they could be sued by a
18 private party and rightfully claim liability?

19 MR. KNORR: Well, except for the Eleventh
20 Amendment, certainly.

21 QUESTION: So you agree that the states were
22 made liable.

23 MR. KNORR: There is -- oh, certainly there is
24 liability here. There is liability to the federal
25 government, but because of the fact that exclusive

1 jurisdiction of these causes of action is within the
2 federal courts, since the Eleventh Amendment is a bar in
3 the federal courts, I don't see any circumstances where
4 a state could be held liable to a private party.

5 QUESTION: So you're really saying that the
6 provision in SARA for state liability should be
7 construed as not providing for liability to private
8 parties.

9 MR. KNORR: Exactly. I think it remains, the
10 statute remains very --

11 QUESTION: Even though, even though on its
12 face it would seem to apply to private parties as well
13 as to the federal government?

14 MR. KNORR: I think the statute is very
15 similar to the statute that was construed in the
16 Employees of Missouri case.

17 QUESTION: Well --

18 MR. KNORR: And in that case as well there was
19 certainly literal inclusion of the states among the
20 potential defendants but there was not the explicit,
21 unmistakable clarity necessary, that this Court has
22 found to be necessary to make sure that Congress has
23 specifically and expressly focused on the issue of
24 Eleventh Amendment immunity, that this kind of general
25 language, imposing liability on states, among others, is

1 not enough.

2 And I think the inclusion of local governments
3 in that last clause is very telling. I think that it's
4 very difficult to say that Congress was focusing on the
5 Eleventh Amendment immunity here. Otherwise they would
6 not -- this is not what Congress would have written
7 under those circumstances.

8 And I think the proof of that is to look at
9 what Congress did write virtually, virtually the same
10 day, at almost the identical moment, they were
11 considering amendments to the Rehabilitation Act in
12 response to the Court's Atascadero decision. And what
13 they said there was this. A state shall not be immune
14 under the Eleventh Amendment from suit in federal court
15 for a violation of, and then they list the statutes.

16 That's a clear statement under Atascadero.
17 This language in SARA, we submit, is not even close to a
18 clear statement.

19 As I said, if the Court agrees, there is no
20 need to go any further in this case. But I will not
21 talk about the constitutional issues that we've
22 briefed. Union Gas has asked the Court to re-examine
23 and reverse its -- or overrule its decision in Hans v.
24 Louisiana, and I will get to that in a minute.

25 But I'd like to talk first about the somewhat

1 different question of the proper relationship between
2 Congress's powers under Article I of the Constitution on
3 the one hand, and the Eleventh Amendment on the other;
4 more specifically still, whether under its Article I
5 powers, specifically the Commerce Clause, Congress may
6 unilaterally abrogate the Eleventh Amendment immunity
7 that a state would otherwise enjoy.

8 And when the Court has looked at this issue in
9 the past in cases such as the Parden case, it has
10 employed a two-sided or two-step inquiry: first, did
11 Congress intend to subject the states to liability; and
12 second, is there any evidence of state consent to suit
13 in federal court?

14 QUESTION: This argument, I gather, doesn't
15 relate at all to Section 5 of the Fourteenth Amendment,
16 does it?

17 MR. KNORR: I'm sorry, Justice Brennan?

18 QUESTION: Section 5 of the Fourteenth
19 Amendment.

20 MR. KNORR: No, this does not.

21 QUESTION: Under that, Congress could abrogate
22 the Eleventh Amendment.

23 MR. KNORR: Under that, Congress may
24 undoubtedly abrogate the Eleventh Amendment immunity,
25 but in the Article I context, the Court has in the past

1 locked for some evidence of consent on the part of the
2 state.

3 Now, the consent can be constructive rather
4 than express. Congress may act to induce consent, and
5 Congress may act to define what will be construed as
6 consent, but consent of some kind there has to be. And
7 I think it's important to remember that in this case
8 Union Gas apparently concedes, because they haven't
9 mentioned the issue in their brief, that nothing
10 Pennsylvania did or is alleged to have done can be
11 construed as consent to federal jurisdiction here
12 because everything Pennsylvania is alleged to have done
13 they did before the passage of the Superfund Act.

14 Union Gas doesn't rely on any theory of
15 consent. Their theory is that consent is unnecessary
16 and irrelevant, and they rely to support that argument
17 on the idea that a unilateral ability to abrogate
18 immunity is somehow necessary to vindicate Congress's
19 Article I powers.

20 But this, I would say, is exactly the concern
21 that this Court recognized and addressed in *Ex parte*
22 *Young*. These kinds of Supremacy Clause concerns are
23 exactly what the Court recognized and tried to
24 accommodate in *Young*. *Young* is the Court's effort to
25 balance and accommodate the competing interests of state

1 and national governments.

2 Union Gas's approach, the approach they
3 advocate, reconciles, if you will, those competing
4 interests by simply eliminating the legitimacy of the
5 state side of that balance. It's simply a principle of
6 congressional supremacy. And that, we submit, is not the
7 proper approach for this kind of delicate constitutional
8 problem.

9 They rely next, as we've already discussed a
10 bit, on Fitzpatrick and on the principle that under its
11 Fourteenth Amendment powers Congress may abrogate
12 immunity. But what Fitzpatrick says is that under the
13 Fourteenth Amendment Congress may do what is
14 constitutionally impermissible in other contexts.
15 Fitzpatrick in the Fourteenth Amendment is the exception
16 that proves the rule.

17 What they really seem to be suggesting here is
18 that Fitzpatrick was wrongly decided, or at least was
19 wrong in its rationale. But if you put -- the
20 Fourteenth Amendment is not just another addition, is
21 not just another power given to Congress. It's not just
22 another limitation on what states may do. It changes
23 the very nature of the relationship between the states
24 and the federal government.

25 And it is for that reason, I think, that the

1 Court felt that in order to vindicate that power, it was
2 necessary that Congress be able to abrogate the Eleventh
3 Amendment.

4 But if the Fourteenth Amendment simply stands
5 on the same footing as Article I, then what we are left
6 looking for is some general principle that Congress may
7 set aside what would otherwise be constitutional
8 limitations whenever it wants to. And I don't know of
9 any support for that principle.

10 We believe that Fitzpatrick was correctly
11 decided, and also, that the analysis in Parden is
12 correct and ought to remain a part of the Court's
13 Eleventh Amendment analysis. Consent of some kind in
14 this context is necessary, and consent is entirely, and
15 I believe concededly absent in this case.

16 I'd like to move on now, if I may, to the --
17 to the last question that the parties have presented.

18 QUESTION: Would you say that the only basis
19 for liability of the state is if the state did something?

20 MR. KNORR: The way it ordinarily works is --

21 QUESTION: Well, that's what the statute says,
22 isn't it, that the state has to do something to
23 contribute to the release of whatever it is that
24 shouldn't be released?

25 MR. KNORR: No, not ordinarily. Ordinarily

1 the Superfund Act is a strict liability statute, and no
2 one need do anything particularly to be subject to
3 liability.

4 QUESTION: Well, I know, but the exclusion
5 provided under this paragraph shall not apply to any
6 state or local government which has caused or
7 contributed to the release or threatened release of the
8 hazardous substance.

9 MR. KNORR: Oh, in that case, in the case of
10 property that was acquired involuntarily --

11 QUESTION: Exactly, which is this case, isn't
12 it?

13 MR. KNORR: No, it's not.

14 QUESTION: The state, how did they get it?

15 MR. KNORR: I believe we got it through the
16 ordinary eminent domain process.

17 QUESTION: And is state liability premised,
18 though, on this provision?

19 It is not?

20 MR. KNORR: It's only -- it is not premised on
21 the idea that we acquired the property involuntarily.
22 It's premised on the idea that the last clause of this
23 very narrow amendment is somehow a general abrogation of
24 Eleventh Amendment immunity under all circumstances.
25 And that's why I said that this is part -- that clause

1 is part of a very narrow provision which as a whole was
2 intended to narrow, not to expand the liability.

3 QUESTION: Well, before this was passed, was a
4 state ever liable to the United States in a voluntary
5 situation?

6 MR. KNORR: I don't know if there were any
7 cases, but it would have been.

8 QUESTION: But a private party couldn't --
9 could never have sued a state because of the Eleventh
10 Amendment.

11 MR. KNORR: That is correct.

12 QUESTION: Because they could only sue in the
13 federal court.

14 MR. KNORR: That is correct.

15 Union Gas, of course, has asked the Court
16 again to re-examine its decision in Hans and to overrule
17 it. The attack comes on two grounds.

18 Hans, first of all, is said to have been
19 incorrectly decided as a matter of a historical event or
20 a historical fact. This is something that has been
21 explored in great detail and with great ability,
22 primarily in the opinions of this Court in the past, and
23 I don't know that there is anything for me to add to the
24 detail of that historical argument.

25 I will say only that we submit that as a

1 matter of history there is ample support for the holding
2 in Hans, and it seems to me that when you have a case on
3 which the courts and the Congress and the states have
4 relied for a century now, a case that has become so much
5 a part of the fabric of our law in federal-state
6 relations, you need to do more to undercut it than
7 simply come forward with pieces of historical evidence
8 that could possibly have been read the other way. In a
9 manner of speaking, I --

10 QUESTION: Can you point to specific instances
11 in which the states have relied on Hans v. Louisiana?

12 You say there's a general understanding.

13 MR. KNORR: Well --

14 QUESTION: Can we really say the states have
15 somehow relied on Hans v. Louisiana?

16 MR. KNORR: I think they have relied on the
17 idea that they cannot simply be subjected to suit in
18 federal courts unless there is some abrogation of that
19 immunity by Congress.

20 QUESTION: Well, do you think there's any
21 historical evidence that the states have behaved
22 differently because Hans v. Louisiana is on the books?

23 MR. KNORR: That would be very difficult to
24 prove. I don't know how you would go about proving such
25 a thing.

1 QUESTION: Well, if that's so, would it be
2 fair to say that the states have not, and really could
3 not rely on *Hans v. Louisiana*?

4 MR. KNORR: Well, I think that any legal act,
5 if it is affected by a legal rule that has been around
6 for a century, can be said to rely on it. I would say
7 that in the same way that --

8 QUESTION: But you can point to nothing
9 specific?

10 MR. KNORR: I don't know what there would be,
11 Justice Kennedy, in the way of specific.

12 QUESTION: Well, you could speculate about a
13 lot of things, I suppose, couldn't you? I could say --
14 states might not have gotten into all sorts of
15 businesses that they are now in if they knew that they
16 could be subjected without their own consent to civil
17 liability, liability to private individuals. You might
18 speculate that.

19 MR. KNORR: I might speculate it, or I might
20 speculate that states might not participate in a variety
21 of federal programs if they thought that they would be
22 liable for liability actions.

23 QUESTION: Or you might speculate that the
24 Seventeenth Amendment might not have been supported by
25 the states if they knew that along with it went their

1 inability as states to prevent the assessment of
2 liability to private individuals.

3 MR. KNORR: I might.

4 As I -- I'm not here to --

5 QUESTION: We really don't know, I suppose, do
6 we?

7 MR. KNORR: I don't think that we do, but I
8 think that we do know that it has been a part of our law
9 for an awfully long time, and that the point I'm trying
10 to make is that Hans -- if there is any doubt, Hans
11 should receive the benefit of that doubt.

12 QUESTION: Well, one can also, I assume,
13 presume that the state would generally obey the law, and
14 its policy would be to obey the law. It certainly
15 wouldn't say I'll buy this hazardous piece of property
16 because I know nobody can sue us whereas they might sue
17 a private party. I would assume they are conscious of
18 their obligations to conform to the law, and we should
19 presume they --

20 MR. KNORR: I think we should presume that the
21 states try, at least, to behave in a responsible manner.

22 QUESTION: That they wouldn't take a course of
23 action just because they felt they wouldn't get sued.

24 QUESTION: Well, they would be sued, I take
25 it, by the federal government under this statute if they

1 mismanaged hazardous property.

2 MR. KNORR: They certainly -- I would assume
3 that they would be. They certainly could be. They
4 certainly could be. It's not at all the case that states
5 are getting a free ride under this statute.

6 It's perhaps relevant here to point out that
7 there is not only the question of liability if we're
8 sued by the federal government, but as a programmatic
9 matter under the statute, we are required to pick up 10
10 percent of the costs of the federal government in all of
11 the clean-up activities that the federal government
12 undertakes in our state. That's something that we have
13 to agree to do as a condition of any federal clean-up.

14 So it certainly isn't the case that we're free
15 just simply to ignore the problem.

16 The only final point that I would like to make
17 is that Hans is also attacked on the grounds that it is
18 somehow a harmful decision, that it's a pernicious
19 influence in our law.

20 I think that that is very far from being the
21 case. I think that we've always felt in this country
22 that one of the ways, and maybe the primary way, that
23 you protect a free society is to diffuse governmental
24 power among as many pieces of the government as you can,
25 and I think that Hans, in its way, is a part of that

1 structure. It's a way of preserving to some degree the
2 independence of the states from the federal government.

3 QUESTION: Could I ask you, what was the basis
4 for the third party claim against the state? I mean,
5 what provision allows such a claim, purported to allow
6 such a claim?

7 MR. KNORR: It would be Section 9607 of the
8 act, which provides that any -- and these are all terms
9 of art -- any owner or operator of a facility from which
10 there is a discharge of hazardous material is strictly
11 liable for the clean-up costs.

12 QUESTION: And that covers a suit by a, a suit
13 by a private party against another private party who was
14 an owner.

15 MR. KNORR: Yes.

16 QUESTION: So that's where a private party
17 gets the authority.

18 MR. KNORR: The private party would get the
19 authority from the --

20 QUESTION: Well, now, SARA said that, that
21 amendment said that the involuntary state operator is
22 liable if he contributes to the discharge.

23 MR. KNORR: Or local government operator.

24 QUESTION: Yes, all right, to the same extent
25 as a private party, a private owner would be under 9607.

1 MR. KNORR: That's correct.

2 QUESTION: Now, isn't that on -- doesn't that
3 on its face suggest that the state was to be suable
4 under 9607 to the same extent as a private party?

5 MR. KNORR: It might but for the way this
6 Court has construed similar statutes and employees and
7 but for this Court's Atascadero decision. I think that
8 there is a plausible alternative explanation which is --

9 QUESTION: Because if an involuntary state
10 owner and subsequent discharger is liable to a private
11 party, you would think a voluntary, a state which has
12 voluntarily gotten into that position, would be, too.

13 MR. KNORR: That's where it would lead you,
14 but you are then left back with the fact that there is
15 nothing in the original statute that justifies that
16 reading. That's where you -- that's where that leads
17 you.

18 As I was saying, I think that Hans does play
19 its part in keeping, preserving the diffusion of
20 government power, and I believe that it should be
21 allowed to continue to play that part.

22 And unless any further questions arise from
23 the Court, I will reserve the balance of my time for
24 rebuttal.

25 QUESTION: Thank you, Mr. Knorr.

1 I will hear now from you, Mr. Swift.

2 ORAL ARGUMENT OF ROBERT A. SWIFT

3 ON BEHALF OF RESPONDENT

4 MR. SWIFT: Mr. Chief Justice, and may it
5 please the Court:

6 Congress's purpose in achieving a
7 comprehensive clean-up of contamination sites in the
8 United States will be frustrated if an important
9 participant in the cause of that contamination, the
10 states, cannot be sued for damages by private
11 individuals.

12 In seeking affirmance of the result in the
13 lower court, Union Gas urges this Court first to
14 overrule *Hans v. Louisiana* or, absent that, to rule that
15 Congress was authorized to, empowered and did abrogate
16 state immunity from private suit in CERCLA.

17 Let me address *Hans v. Louisiana* first. *Hans*
18 improperly extended the Eleventh Amendment to bar causes
19 of actions well beyond its plain meaning. *Hans* was
20 based on a pre-constitutional notion that states enjoyed
21 sovereign immunity and that this was incorporated into
22 the Constitution by implication.

23 The Constitution, after all, was a compact of
24 the people to form a nation and create a sovereign
25 power. It was a system of delegated powers in which the

1 people surrendered much of the state's power to a
2 national government. The Constitution assumed the
3 existence of the states by placing prohibitions on them,
4 but it did not grant the states substantive sovereign
5 rights.

6 The Constitution itself contains no express or
7 implied grant of sovereign immunity. The states did,
8 however, retain sovereignty as to matters not delegated
9 to the federal government, but at least as regards the
10 Commerce Clause, state sovereignty was surrendered by
11 the people.

12 Essential to the constitutional framework was
13 that the federal courts, this Court, would have the
14 final say as to the Constitution, the federal laws, and
15 the treaties. Thus, Article III of the Constitution
16 defines jurisdiction of the federal courts in categories
17 of subject matter as well as parties. The federal
18 courts, on one hand, were entrusted with being the
19 interpreters of the Constitution, laws and treaties; and
20 secondly, with being the neutral forum for diverse
21 parties.

22 QUESTION: Excuse me. The notion that the
23 states' compliance with the Constitution has to be
24 enforced by private suits in civil, in federal courts is
25 no stronger, it seems to me, than the notion that the

1 federal government's compliance with the provisions of
2 the Constitution has to be enforced by private suits in
3 federal courts, is it?

4 Is there any reason why the one is more
5 essential to preserving the Constitution than the other?

6 MR. SWIFT: In terms of preserving the
7 Constitution, I think the important part is that both be
8 subject to suit in federal court --

9 QUESTION: But we have a doctrine of federal
10 sovereign immunity, don't we?

11 MR. SWIFT: Well, yes, that's correct, we do
12 have a doctrine, but --

13 QUESTION: And where is, where is that writ in
14 the Constitution?

15 MR. SWIFT: Well, that is implied into the
16 Constitution because the Constitution was what created
17 the United States as the sovereign. It did not create
18 states as sovereigns.

19 QUESTION: I don't see why whether it created
20 them would be the reason for the implication. It seems
21 to me the reason for the implication would be the
22 necessity of the matter. I don't see the necessity for
23 suit in one case any more than the other.

24 MR. SWIFT: It may be then, Mr. Justice, you
25 may be leading to this, that sovereign immunity itself

1 is an outmoded concept; it's a relic of the law. And
2 bear in mind -- I know you're familiar with the
3 academics and the history and the scholars in this area,
4 but when the colonies were originally formed, most of
5 their charters provided that they could sue and be sued
6 in the courts.

7 And when the nation was formed under that
8 Constitution, the states -- the people gave up much of
9 the rights of the states. And certainly the language of
10 Article III, literally read, would indicate that they
11 understood state citizen diversity as being one grounds,
12 and a separate ground for jurisdiction in the federal
13 courts, as well as federal subject matter jurisdiction.

14 What this leads up to, and I think it's
15 appropriate to get to, is the Chisholm case. Chisholm
16 presented the first test of federal court jurisdiction
17 over an action against a state by a citizen of another
18 state for money damages.

19 Now, the facts of Chisholm I know are well
20 known to this Court. They've been discussed in many of
21 your decisions. What is important about Chisholm is that
22 jurisdiction was predicated on the state citizen
23 diversity clause of Article III which was codified by
24 the Judiciary Act of 1789. I submit that Chisholm
25 holding that the Court did have jurisdiction was a

1 correct one.

2 Justice Wilson and Attorney General Randolph
3 who participated in the case had been members of the
4 Committee of Detail that drafted Article III of the
5 Constitution, and jurisdiction was consistent with the
6 literal language of Article III and that Judiciary Act.

7 It follows that the Eleventh Amendment adopted
8 in 1794 which overturned Chisholm was a narrowly drawn
9 jurisdiction preclusion clause which left untouched
10 federal subject matter jurisdiction over the states. If
11 Congress had intended to grant the states sovereign
12 immunity, certainly the last 14 words of the amendment
13 were superfluous. Those 14 words are remarkably
14 congruent with the state citizen diversity clause of
15 Article III.

16 Furthermore, if Congress had intended in the
17 Eleventh Amendment to grant broad sovereign immunity to
18 the states, then it would have restricted its own power
19 to create private causes of action for individuals
20 against the states.

21 QUESTION: Is that an additional argument,
22 that Congress would have restricted its own power to
23 create private causes of action, is that an additional
24 argument in support of your view of --

25 MR. SWIFT: I believe it is, Mr. Chief Justice.

1 QUESTION: Well, was Congress thinking much in
2 1794 about creating private causes of action in which
3 people could sue states?

4 MR. SWIFT: Well, I don't believe Congress was
5 because, as you know, the great expansion in Congress's
6 power and where they enacted a lot of individual rights,
7 came after the Civil War, after --

8 QUESTION: So why would Congress's
9 unwillingness to circumscribe its ability to create
10 private causes of action against states have loomed
11 large to any Congress that was sitting in 1794?

12 MR. SWIFT: Because it would have been
13 consistent with granting substantive sovereign immunity
14 at that time.

15 QUESTION: But why would Congress have
16 worried? I mean, if they weren't thinking about
17 creating any private causes of action against states,
18 why would that have concerned them?

19 MR. SWIFT: Well, I, of course, can't put
20 myself in the shoes of Congress at that time, but
21 certainly at that time they were very concerned about
22 their own jurisdiction in federal subject matter cases,
23 treaty cases, for example, and I believe Congress wanted
24 to leave itself all the powers it needed to exercise its
25 Article I rights.

1 I submit that this Court's Eleventh Amendment
2 jurisprudence built on Hans is unstable and incoherent.
3 Hans' notion that state sovereign immunity is implicit
4 in the Constitution is today assailed by an overwhelming
5 consensus of legal scholars who believe Hans was an
6 error of constitutional interpretation.

7 Hans was also based on a notion that state
8 sovereign immunity was an essential foundation of the
9 Constitution. That notion today is outmoded, and a
10 majority of the states have fully or partially
11 dismantled sovereign immunity in their own states.
12 Pennsylvania is a good example. The federal government
13 is another example of the partial dismantlement of
14 sovereign immunity, where individuals may bring causes
15 of action against the federal government in federal
16 court.

17 QUESTION: Well, I suppose some state may have
18 resisted doing that or been unwilling to do that if it
19 thought it could be sued in the federal court.

20 MR. SWIFT: Well, I'm not sure that I
21 understand Your Honor's question.

22 QUESTION: Well, you say states have
23 dismantled the notion of sovereign immunity?

24 MR. SWIFT: Many have in their own states,
25 that's correct.

1 QUESTION: And have they dismantled it so that
2 they can be sued in federal court despite the Eleventh
3 Amendment?

4 MR. SWIFT: I don't think that whether a state
5 chose to or not can affect their liability under federal
6 law. It's for Congress to make that decision and the
7 Constitution, first, to make that decision.

8 QUESTION: Well, what about other states? Do
9 states allow themselves to be sued in the state courts
10 of other states where they have waived sovereign
11 immunity?

12 I mean, it is one thing to say I'll be sued in
13 my own courts. I, you know, if it's my court I would
14 feel pretty happy about it.

15 (Laughter.)

16 QUESTION: But have the states, have the
17 states allowed themselves to be sued in the courts of
18 foreign states?

19 MR. SWIFT: As a general matter, no, and
20 that's of course the reason for having the national
21 court system, the federal court system whereby those --
22 there would be diversity of citizenship.

23 QUESTION: But when a state so-called
24 dismantles sovereign immunity, does it -- has any state
25 gone on and said well, and you may sue us in a federal

1 court?

2 MR. SWIFT: Not to my knowledge, Mr. Justice.

3 Now, to vindicate --

4 QUESTION: And I suppose, then, and perhaps

5 they wouldn't have been as willing to permit suit if

6 they thought they could be sued in federal courts as

7 well as state courts.

8 MR. SWIFT: well, I submit that the Framers

9 initially contemplated that, and certainly that's

10 consistent both with Chisholm and the passage --

11 QUESTION: Well, that doesn't quite answer my

12 question, but that's all right.

13 QUESTION: I didn't quite understand your

14 answer to Justice Scalia.

15 Are you suggesting that a state is not suable

16 in the courts of another state?

17 MR. SWIFT: No, I'm not suggesting that. I

18 think --

19 QUESTION: Because we held to the contrary on

20 that.

21 MR. SWIFT: I think you have.

22 Now, to vindicate important principles of

23 federalism, this Court has resorted to exceptions and

24 fiction in its Eleventh Amendment jurisprudence. For

25 example, this Court allows actions for prospective

1 injunction -- injunctive relief against state officials
2 so long as the state itself isn't sued. Another example
3 used by Pennsylvania: states can bootstrap this Court's
4 jurisdiction by consenting to jurisdiction. Also,
5 counties and municipalities have no immunity, and also
6 -- and which we'll -- I'll discuss in a moment --
7 Congress may abrogate state sovereign immunity. This is
8 an exception that this Court has created to vindicate
9 those important principles of federalism after Hans.

10 QUESTION: May I ask you on your consent part,
11 do you think a state could consent to diversity
12 jurisdiction if an action was brought by a citizen of
13 another state?

14 MR. SWIFT: I'm not, I'm not sure I understand
15 the question.

16 QUESTION: Well, say a citizen of New York
17 would like to sue the State of Pennsylvania in the
18 federal court in Pennsylvania. Could the State of
19 Pennsylvania consent to that diversity jurisdiction?

20 MR. SWIFT: I think under the Constitution
21 there's a problem; the Constitution being a system of
22 delegated powers, that it isn't up to a state to decide
23 what the jurisdiction of this Court is to be. But that
24 is a doctrine that this Court has used as an exception.

25 QUESTION: I know in a lot of federal question

1 cases, but do you -- but I'm just asking you, under your
2 theory of what, of the proper construction of the
3 Eleventh Amendment, could diverse -- could the State of
4 Pennsylvania consent to a diversity action brought by a
5 citizen of New York?

6 MR. SWIFT: Not under the theory that I have
7 espoused today.

8 QUESTION: So they could --

9 MR. SWIFT: And it's similar, and this is an
10 easy way of thinking of it, to the principle that
11 parties may not by consent stipulate to federal court
12 jurisdiction.

13 By overturning Hans, this Court can instill
14 clarity and fairness in its Eleventh Amendment
15 jurisprudence. Congress has created numerous federal
16 rights since Hans, rights that often can best be
17 vindicated by private action against violators for
18 monetary awards. Prospective injunctive relief is
19 frequently not enough.

20 In certain statutes such as CERCLA, Congress
21 permitted individual actions against states but granted
22 the federal courts exclusive jurisdiction, and this gets
23 to the point that Mr. Justice White raised earlier
24 during Pennsylvania's argument, that this is a statute
25 that is jealous of the interpretation to be placed on it

1 and provided that the federal system was to have
2 exclusive jurisdiction.

3 So Pennsylvania cannot sue -- rather, Union
4 Gas cannot sue Pennsylvania in state court.

5 QUESTION: Or anybody else under this statute.

6 MR. SWIFT: Union Gas can sue other parties --
7 well, that's correct, not in state court in Pennsylvania.

8 QUESTION: Exactly.

9 what is the provision that provides for
10 exclusive federal jurisdiction?

11 MR. SWIFT: I believe it --

12 QUESTION: Is it expressed?

13 MR. SWIFT: -- It's in 112 or 113. I will
14 find it for you in a moment.

15 QUESTION: All right, that's all right. Thank
16 you.

17 MR. SWIFT: It's in 113(b), which is at 42
18 U.S.C. 9613.

19 QUESTION: Thank you.

20 QUESTION: Is it in your brief?

21 MR. SWIFT: Yes, it is.

22 In this case, it would be unfair to prevent
23 Union Gas from recovering a monetary award against
24 Pennsylvania which caused the release of the
25 contamination that Union Gas has now paid to clean up.

1 Overturning Hans will not result in a wholesale change
2 in the result of Eleventh Amendment decisions of this
3 Court --

4 QUESTION: Has Pennsylvania waived its
5 sovereign immunity to tort suits generally?

6 MR. SWIFT: It has partially waived that
7 immunity by statute. In Pennsylvania --

8 QUESTION: Was there any other theory
9 nuisance, Ryland v. Fletcher type of action that this
10 Union Gas could have relied on in this case?

11 MR. SWIFT: Well, not in this case because
12 this was an action begun by the United States suing
13 Union Gas.

14 QUESTION: Yes, but would Union Gas have had a
15 independent right of recovery under state law?

16 MR. SWIFT: Not necessarily because that right
17 may be cut off by the state sovereign immunity act.

18 QUESTION: So the state has not waived its
19 sovereign immunity in this instance.

20 MR. SWIFT: That's an issue that hasn't been
21 litigated. I'm not prepared to concede it one way or
22 another.

23 Overturning Hans won't result in a wholesale
24 change in this Court's Eleventh Amendment
25 jurisprudence. A couple examples I think should

1 suffice. In both Atascadero and Employees, the results
2 in those cases were changed by Congress, in both cases
3 within a year or two after this Court found insufficient
4 evidence of congressional intent to abrogate.

5 As with regard to state law claims, there
6 probably would be no change. Once again, so long as
7 this Court were to continue a requirement that there be
8 some intention stated within the act that states are
9 among those parties that can be sued, that should be
10 sufficient. For example, the clarity that I would
11 suggest would be that which this Court requires in
12 interpreting criminal statutes because I think that if a
13 criminal statute is clear enough to deprive someone of
14 their own personal liberty, certainly there should be no
15 higher standard of clarity when -- in an action seeking
16 monetary damages against the state.

17 Now, but assuming the continued vitality of
18 Hans, this Court should nonetheless treat the Eleventh
19 Amendment as a jurisdiction preclusion clause, not a
20 blanket grant of sovereign immunity. Congress has
21 authority under Article I of the Constitution to
22 abrogate the Eleventh Amendment's jurisdiction
23 preclusion. Congress must have the authority necessary
24 to exercise its delegated powers under Article I. The
25 Eleventh Amendment, after all, places no constraint on

1 Congress. The only constraint is upon the judicial
2 system.

3 For Congress to exercise its delegated powers,
4 the judicial branch must have co-equal power to enforce
5 its laws. This was certainly the view of Chief Justice
6 Marshall writing in *Cohens v. Virginia*. Only if the
7 Eleventh Amendment is construed as a jurisdiction
8 preclusion clause which can be abrogated can the laws of
9 Congress be the supreme law of the land as the
10 Constitution declares they must.

11 I'd like to turn --

12 QUESTION: If we adopted that for this
13 purpose, why wouldn't -- why wouldn't it apply for
14 diversity purposes as well? Suppose Congress says under
15 the Commerce Clause we think it's important that
16 diversity suits against a state should lie?

17 MR. SWIFT: Because that's directly prohibited
18 by the Eleventh Amendment.

19 QUESTION: Oh, but you're saying that that's
20 just -- that's not a jurisdiction preclusion clause.

21 MR. SWIFT: I am saying the Eleventh, the
22 Eleventh Amendment is a jurisdiction preclusion clause,
23 that it precludes citizen state diversity cases but not
24 the federal subject matter cases.

25 QUESTION: Oh, no, when you said it's a

1 preclusion clause, I thought you also meant it's a
2 preclusion clause as to any, any suits by private
3 individuals against the states.

4 MR. SWIFT: No, that wasn't what I meant.

5 QUESTION: Oh, you're not admitting that for
6 purposes of this argument.

7 MR. SWIFT: Absolutely not. In fact, my view
8 is to the contrary.

9 QUESTION: Then I don't see what this argument
10 -- I thought you were.

11 MR. SWIFT: CERCLA is amended --

12 QUESTION: And I take it there's nothing that
13 would prevent the Congress from imposing punitive
14 damages on states?

15 MR. SWIFT: That's correct, within the
16 statutory scheme, bearing in mind that the -- where the
17 states are protected is through their elected
18 representatives in Congress. This doesn't occur in a
19 vacuum, and that, and I don't believe is consistent with
20 this Court's holdings in *Garcia v. San Antonio*.

21 Turning to the --

22 QUESTION: Well, there -- you have no evidence
23 really that state Senators deem themselves
24 representatives of a state as an entity as opposed to
25 the individual constituents? In fact, isn't the

1 evidence the opposite?

2 MR. SWIFT: Well, it's interesting you raise
3 that. Well, you may recall that under the Constitution
4 as originally written and until amended in 1913, the
5 state legislatures actually elected the Senators, so
6 there was --

7 QUESTION: And as Justice Scalia pointed out,
8 when the Seventeenth Amendment abrogated that, *Hans v.*
9 *Louisiana* was on the books.

10 MR. SWIFT: That's true, that's true. But I
11 submit that *Hans* was a case of a different time and
12 political climate, certainly where the Court was very
13 concerned about another secession by the Southern
14 states, very concerned about the states' treasuries
15 being emptied by virtue of the debt collection cases,
16 and also very concerned as it spoke at the end of the
17 *Hans* decision, that it's immoral for states to change
18 their constitutions to prohibit debt collection.

19 I'd like to address the statutory
20 interpretation for a moment, if I may. CERCLA defines
21 persons liable under Section 107 to include states.
22 This is virtually the same definitional language that
23 this Court found to be clear evidence of abrogation in
24 *Fitzpatrick v. Bitzer*, and bear in mind, *Fitzpatrick v.*
25 *Bitzer* came three years after this Court's *Employees*

1 decision and two years after Congress had legislatively
2 overturned the Employees decision.

3 Fitzpatrick v. Bitzer, you'll recall, involved
4 a challenge by the states to liability for monetary
5 damage actions under Title VII of the Civil Rights Act
6 of 1964, and in that statute, the persons who were
7 defined to be liable were governments and governmental
8 agencies.

9 I submit that the language here which uses the
10 word "state" explicitly is clearer than what Mr. Chief
11 Justice Rehnquist wrote about as being clear in
12 Fitzpatrick v. Bitzer.

13 QUESTION: Do you think the language here
14 differs from the language in Employees

15 MR. SWIFT: I do. I think it's stronger, and
16 also Employees, bear in mind, was an amendment to an
17 act. This was an original act that defined states as
18 being liable. In Employees, we had a history under the
19 Fair Labor Standards Act of 30 years where states were
20 not liable, and we had amendments in 1966 which changed
21 that, or appeared to change just the definition without
22 changing the liability aspects.

23 And there is another important distinction
24 which relates to Justice White's question, and that is
25 under the Fair Labor Standards Act, the Department of

1 Labor could bring suit, or private individuals could
2 bring suit in state courts. Here there is no such
3 opportunity. Union Gas can't sue Pennsylvania in state
4 court under this act.

5 QUESTION: Do you rely principally on the
6 definitional section in the amendment?

7 MR. SWIFT: Well, I do, but it was, as you
8 commented earlier, it was amended in SARA, and that
9 language that you singled out, Mr. Justice, was a
10 virtual replication of the language that the federal
11 government used in Section 120 of the act to waive its
12 own sovereign immunity, and if there were ever clear
13 language, I submit this is it.

14 Now, Pennsylvania also commented that nowhere
15 in this act is the Eleventh Amendment referred to.
16 Well, I would refer the Court --

17 QUESTION: What do you make of, what do you
18 make of the 9607(D)(2) which I take it was a part of
19 this same amendment? It says no state or local
20 government shall be liable under this subchapter for
21 costs or damages as a result of actions taken in
22 response to an emergency, but it says this paragraph
23 shall not preclude liability for costs or damages as a
24 result of gross negligence or intentional misconduct by
25 a state or local government?

1 MR. SWIFT: I think that's supportive language.

2 QUESTION: But you've never mentioned that,
3 have you?

4 MR. SWIFT: No. Well, I think, I believe it
5 was mentioned in the court below, but it wasn't one of
6 the things that we briefed. But I think that is
7 supportive language that Your Honor has seized upon.

8 But I think even more important, as
9 Pennsylvania mentioned, there's no reference to the
10 Eleventh Amendment in this statute. Well, I suggest
11 that the Court read Section 159 of the act which deals
12 with citizen suits, and there Congress was very careful
13 to say that people may bring citizen suits, but subject
14 to the Eleventh Amendment.

15 So there is a clear distinction between
16 Section 107(a), which is your general liability clause,
17 and citizen suits, which were specialized suits, not by
18 people who had spent money in a clean-up but people who
19 wanted to sue to enforce an order of a federal agency.

20 QUESTION: Does the section that Justice White
21 just referred to, does that provide for liability to
22 private individuals necessarily, that provision?

23 MR. SWIFT: I don't believe it does refer to
24 it.

25 QUESTION: I mean, that liability could just

1 be referring to liability to suit by the United States.

2 MR. SWIFT: Well, I submit that's not how I
3 would read the act.

4 QUESTION: Well, I'm sure, but --

5 (Laughter.)

6 MR. SWIFT: But after all, Mr. Justice, this
7 was -- the name of this act was the Comprehensive Act to
8 clean up, and this didn't occur in a vacuum. It came
9 after efforts by Congress, several acts which proved --

10 QUESTION: Well, this specific provision puts
11 the state and the local government, speaks of both of
12 them in the same breath.

13 MR. SWIFT: That's right.

14 QUESTION: And yet no one suggests that the
15 local government is immune from suit by a private party.

16 MR. SWIFT: That's right, but you see, the
17 concept of the act is to have a general liability clause
18 with an exception, such as an exception for the sites
19 that are involuntarily acquired.

20 And Mr. Justice, you seized on a point earlier
21 in asking Pennsylvania a question that I'd like to
22 elaborate on. And that is they seize on this exception
23 in the SARA amendment to the definition of owner
24 operator as being indication that states were not
25 intended to be subject to suit under this act.

1 I submit that it's illogical to suggest that
2 they can be liable for sites that are involuntarily
3 acquired where they then cause the contamination but
4 they can't be sued if they buy the property next door to
5 me and contaminate it and it runs off onto my land.
6 That's just an illogical interpretation of the act.

7 I think the logical interpretation is that
8 there's general liability under Section 107 and that
9 this definition provides one exception.

10 QUESTION: Mr. Swift, I'd like to come back
11 because I'm not sure we understood each other, to your
12 argument saying that even if there is Eleventh Amendment
13 immunity, Congress can eliminate it by statute. I find
14 that hard to understand.

15 MR. SWIFT: Well, the argument --

16 QUESTION: We are assuming, I think we have to
17 be assuming for purposes of your argument that the
18 Eleventh Amendment both eliminates diversity
19 jurisdiction over the state's right in federal court,
20 and eliminates, eliminates federal question suits
21 against states.

22 MR. SWIFT: I don't think that necessarily
23 follows. I read the language of the Eleventh Amendment
24 literally, and --

25 QUESTION: Well, that's a separate argument.

1 I mean, that's the different argument. That's the
2 argument that we overrule Hans.

3 I thought this was a supplemental argument
4 saying even if we don't overrule Hans --

5 MR. SWIFT: That's correct.

6 QUESTION: -- the federal government can, by
7 statute, eliminate its effect. Now, that argument has
8 to assume that Hans is right.

9 MR. SWIFT: That's correct.

10 QUESTION: Okay. So you're with me so far.

11 MR. SWIFT: I'm with you.

12 QUESTION: Now, if you can eliminate the Hans
13 portion that you don't like by statute, why can't you
14 eliminate the diversity portion by statute as well,
15 under the Commerce Clause? Congress says under the
16 Commerce Clause, we now decide that it's a good thing to
17 have diversity jurisdiction over states.

18 MR. SWIFT: I don't know that I have a good
19 answer to that, Mr. Justice. But the point that I've
20 harped upon is that Congress must have its core powers
21 unfettered. Those powers include the power under
22 Article I, Section 8, which is the Commerce Clause, and
23 that power -- if Congress determines that in order to
24 vindicate its power it must establish private damage
25 remedies against parties that include states, then I

1 submit that the constitutional scheme permits that.

2 QUESTION: Well, I think that's an argument to
3 the effect that Hans was decided wrong. I don't think
4 it's an argument to the effect that if Hans was decided
5 right we can ignore it.

6 MR. SWIFT: The other point I would make with
7 regard to the statute is that within this scheme where
8 the Congress had legislation that wasn't effectively
9 cleaning up the contamination sites in this country,
10 where in each of those acts it had provided for
11 exemption for the states, the Clean Air Act, the Clean
12 Water Act, the Resource Conservation and Recovery Act,
13 each gave that broad exemption. But CERCLA, coming in
14 1980, did not and I submit that that is strong evidence
15 of Congress's intention with regard to this statute.

16 And another strong indicia is the fact that
17 the federal government waived its own liability, and it
18 didn't just waive it in general terms. It said as to
19 the executive branch, the congressional branch and even
20 this Court can be sued in federal court should it cause
21 contamination.

22 And the concept, the overriding concept is
23 that we all need to pull together, we all need to clean
24 up these sites. It's a matter of the national health
25 and safety.

1 In closing, I'd like to observe that sovereign
2 immunity is a relic that has persisted in the law
3 despite the law's evolution. State sovereign immunity
4 is not required by nor implied in our Constitution. And
5 its persistence undermines basic tenets of federalism.

6 This is the first Eleventh Amendment case
7 before this Court where there is no redress for the
8 state's wrong unless the claim can be presented in
9 federal court. Congress's purposes in achieving a
10 comprehensive clean-up of contamination sites in the
11 United States will be frustrated if an important
12 participant in the cause of that contamination, the
13 states, cannot be sued for damages by private
14 individuals.

15 The means for permitting Union Gas to obtain
16 redress is to overturn *Hans v. Louisiana*.

17 QUESTION: Your time has expired, Mr. Swift.
18 Mr. Knorr, you have five minutes remaining.

19 REBUTTAL ARGUMENT OF JOHN G. KNORR, III
20 ON BEHALF OF PETITIONER

21 MR. KNORR: Thank you, Mr. Chief Justice.

22 I think I can perhaps fill in a gap of
23 Pennsylvania law here. Pennsylvania has enacted a very
24 limited waiver of sovereign immunity in its state
25 courts, but as part of that same statute, expressly

1 preserved its Eleventh Amendment Immunity from suit in
2 the federal courts. That statute is in our reply brief,
3 but it's codified at 42 PA Consolidated Statute, Section
4 8521.

5 QUESTION: If there hadn't been the exclusive
6 jurisdiction provision in this statute, that is, if a
7 private party could have sued in state court, would the
8 waiver of immunity by Pennsylvania cover that suit?

9 MR. KNORR: Well, if Congress had not given
10 exclusive jurisdiction to the federal --

11 QUESTION: Yes.

12 MR. KNORR: -- courts, I think the federal
13 cause of action could very likely have been brought in
14 state courts.

15 QUESTION: The waiver would have covered that.

16 MR. KNORR: Well, as to our own waiver of
17 sovereign immunity, I'm not certain. One of the areas
18 where immunity is waived is in the damages caused by
19 what's called a dangerous condition of real property. I
20 don't know for certain, but I think it's conceivable
21 that that exception might cover this.

22 QUESTION: But they don't exclude, they don't
23 exclude actions against the state arising under federal
24 statute.

25 MR. KNORR: No, not to my knowledge.

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Unless there are further questions, that's all
I have.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Knorr.
The case is submitted.

(Whereupon, at 12:02 o'clock p.m., the case in
the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1241 - PENNSYLVANIA, Petitioner V. UNION GAS COMPANY

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