

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

CAPTION: SEMINOLE TRIBE OF FLORIDA, Petitioner  
v. FLORIDA, ET AL.

CASE NO: 94-12

PLACE: Washington, D.C.

DATE: Wednesday, October 11, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X  
3 SEMINOLE TRIBE OF FLORIDA, :  
4 Petitioner :  
5 v. : No. 94-12  
6 FLORIDA, ET AL. :

7 - - - - -X  
8 Washington, D.C.  
9 Wednesday, October 11, 1995

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 1:00 p.m.

13 APPEARANCES:

14 BRUCE S. ROGOW, ESQ., Fort Lauderdale, Florida; on behalf  
15 of the Petitioner.

16 DREW S. DAYS, III, ESQ., Solicitor General, Department of  
17 Justice, Washington, D.C.; on behalf of the  
18 United States, as amicus curiae, supporting the  
19 Petitioner.

20 JONATHAN A. GLOGAU, ESQ., Assistant Attorney General of  
21 Florida, Tallahassee, Florida, on behalf of the  
22 Respondents.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 94-12, Seminole Tribe of Florida v. Florida.

5 Mr. Rogow.

6 ORAL ARGUMENT OF BRUCE S. ROGOW

7 ON BEHALF OF THE PETITIONER

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

10 One hundred and twenty-one Indian tribes in 23  
11 States have entered into 137 compacts pursuant to the  
12 Indian Gaming Regulatory Act.

13 The act carefully balances the interests of  
14 three sovereigns, the States, the United States, and the  
15 Indian tribes. The act provides the States with an  
16 opportunity to play a significant role in the scope of  
17 Indian gaming within those States.

18 Central to the act is the duty of State  
19 officials to negotiate in good faith with the Indian  
20 tribes regarding gaming, and central to the act is the  
21 ability of the tribes to sue the States in Federal court  
22 if the States have not negotiated in good faith.

23 The decision below held that the Seminole Tribe  
24 did not have the right to sue the State of Florida and its  
25 Governor in Federal court despite Congress' clear promise

1 that that right existed.

2 The court below found that there was no consent  
3 by Florida to this lawsuit, and that under Article I, the  
4 Foreign -- I'm sorry, the Indian Commerce Clause, there  
5 was no power in Congress to abrogate Eleventh Amendment  
6 immunity, and finally, the court found that Ex Parte Young  
7 did not work in this case.

8 Our position is, is that there is the power to  
9 abrogate under the Indian Commerce Clause, and that if  
10 there is not, Ex Parte Young permits Federal rights to be  
11 vindicated and the interests of the Supremacy Clause to be  
12 protected by the suit against the Governor.

13 QUESTION: Mr. Rogow, as a practical matter,  
14 what would the Indian tribes lose by the affirmance of the  
15 judgment of the Eleventh Circuit here? They would  
16 still -- they'd get regulations coming from the Secretary,  
17 which is what Congress could have given them in the first  
18 place.

19 MR. ROGOW: Under the decision of the Eleventh  
20 Circuit, they can go directly to the Secretary if they  
21 cannot sue.

22 If a State raises Eleventh Amendment immunity,  
23 and if a State will not negotiate in good faith, the court  
24 of appeals said they could go directly to the Secretary,  
25 and that is true that the Congress could have kept the

1 States out of Indian gaming altogether.

2 If that decision of the Eleventh Circuit is  
3 affirmed, including the remedy the Eleventh Circuit left,  
4 then the tribes could go directly to the Secretary of the  
5 Interior.

6 QUESTION: Is it clear that the tribes can go  
7 directly to the Secretary? As I recall the Secretary is  
8 supposed to make his decision based on the negotiating  
9 positions of the parties, which precede that step in the  
10 legislation.

11 So there being no negotiating position, what  
12 makes you think that that section of the act subsists when  
13 the portion providing for suit against the States falls?

14 MR. ROGOW: Justice Scalia, it is not clear that  
15 one can go directly to the Secretary. That's what the  
16 court of appeals concluded --

17 QUESTION: Right.

18 MR. ROGOW: -- and indeed, the State has cross-  
19 petitioned in this case complaining about that aspect.

20 QUESTION: So you don't necessarily -- do you or  
21 do you not support the proposition that even if you can't  
22 sue the States, nonetheless the rest of the act stands and  
23 the Secretary can promulgate regulations?

24 MR. ROGOW: Given the alternative, I support the  
25 position.

1 QUESTION: I thought you would.

2 (Laughter.)

3 QUESTION: What, may I ask, could be done if a  
4 State just refused, flat refused to negotiate? Is there  
5 any contempt power against the State, or anything of that  
6 kind?

7 MR. ROGOW: That is covered in the act, Justice  
8 O'Connor, and the tribe could then file the lawsuit that  
9 is envisioned under 27(d) against the State for failure to  
10 negotiate at all, and then the process would occur just as  
11 it would in this case where there was negotiation, but the  
12 tribe --

13 QUESTION: But that's all. It just means you  
14 get to the Secretary. There isn't any other consequence,  
15 is there?

16 MR. ROGOW: It means you get to the Secretary  
17 ultimately. If the State has failed to negotiate at all,  
18 then the court would say to the State, you have an  
19 opportunity now to conclude a compact within 60 days.

20 If the State still refuses to do that, then a  
21 mediator would be appointed. The only compact submitted  
22 would be the tribe's compact, and then that would go to  
23 the Secretary.

24 QUESTION: So is there even a case or  
25 controversy, do you think?

1 MR. ROGOW: Yes, there is. The case or  
2 controversy is whether or not the State has acted in good  
3 faith, has negotiated in good faith, and that discrete  
4 fact is one that needs to be resolved for the rest of the  
5 process to work.

6 QUESTION: Well, we don't have a case or  
7 controversy if two people disagree as to whether the sky  
8 is blue. One person says it's cloudy, and the other one  
9 says it's blue.

10 I mean, that's a controversy, but it's not a  
11 case or controversy within the meaning of the  
12 Constitution. There have to be some consequences that a  
13 court can impose, do there not?

14 MR. ROGOW: There do, and there are  
15 consequences.

16 QUESTION: What are the consequences that the  
17 court can impose?

18 MR. ROGOW: If -- and I think it's important to  
19 look at this on the flip side. If the tribe sues the  
20 State and says the State has failed to negotiate in good  
21 faith, and the State wins, the tribe is absolutely  
22 foreclosed from the gaming that it seeks.

23 If the State loses, and the court holds the  
24 State has not negotiated in good faith, then the  
25 consequences are the State will be given one more



1 opportunity to conclude a compact, but ultimately it will  
2 lose its opportunity to participate in the scope of  
3 gaming.

4 QUESTION: Is there a finding now in this very  
5 case to the effect that the State acted in good faith?

6 MR. ROGOW: There is, Justice O'Connor, and that  
7 is presently being held in abeyance on appeal in the  
8 Eleventh Circuit, because if there was no judicial power  
9 to act in the first place, then that finding would have to  
10 be vacated.

11 QUESTION: Mr. Rogow --

12 QUESTION: And that finding is what?

13 MR. ROGOW: That finding is that the State of  
14 Florida did negotiate in good faith in this case.

15 QUESTION: Well, why -- that leaves the question  
16 why Florida is so interested in having the jurisdiction,  
17 but that's, I guess, not for you to answer.

18 Let me ask you this. Could Congress, without a  
19 constitutional bar, impose -- give the power to the  
20 district court to hold the State in contempt for failure  
21 to negotiate in good faith?

22 MR. ROGOW: Perhaps, but certainly it didn't do  
23 that here, and --

24 QUESTION: What doubt is there, if there's  
25 jurisdiction?

1 MR. ROGOW: Only in terms of federalism and  
2 concerns for federalism, and working with the lightest  
3 hand, being sensitive to federalism, but ultimately, of  
4 course, if Congress said, State, you must do something,  
5 and the State fails to do that, then yes, the contempt  
6 power would come into play, but the way this statute is  
7 constructed, it is sensitive to federalism.

8 QUESTION: And who is held in contempt in that  
9 instance, Mr. Rogow?

10 MR. ROGOW: The public official, the State  
11 official who perhaps would have assumed the duty, but  
12 again, Mr. Chief Justice, that is not this statute, and  
13 that is not this case.

14 What we have is this carefully tailored statute  
15 that says to the State, who must act through State  
16 officials in order to negotiate, negotiate in good faith.  
17 If you do not, you will lose the opportunity to  
18 participate in the scope of gaming because, and this comes  
19 back to Congress' plenary power over Indian commerce,  
20 because we could have done this without you, but  
21 instead --

22 QUESTION: Mr. Rogow, when you were laying out  
23 the alternatives, it seems to me there's a third one that  
24 you didn't get to, and I'm having the difficulty some of  
25 my colleagues did in seeing how you're not better off

1 without this scheme. One scenario is what the Eleventh  
2 Circuit said. That is, you're free of any obligation to  
3 deal with the State. You just deal with the Secretary of  
4 Interior.

5 The other is, that's not the scheme Congress  
6 wanted, so the whole statute falls, and then where does  
7 that leave the tribe? Suppose there is no Gaming  
8 Regulatory Act because it can't work the way Congress  
9 wanted it to work. What then governs?

10 MR. ROGOW: Justice Ginsburg, then we are back  
11 to Cabazon, and the States could engage in the gaming that  
12 the State already allows without any regulation by the  
13 States.

14 QUESTION: The Indians.

15 MR. ROGOW: I'm sorry, the Indians, yes.

16 QUESTION: So aren't they even better off  
17 losing?

18 MR. ROGOW: That thought has crossed my mind,  
19 Justice Ginsburg.

20 (Laughter.)

21 MR. ROGOW: But we take the statute as Congress  
22 has written it, but it is true that if we lose this case,  
23 and if the State can preclude the lawsuit, and if the  
24 remedy of the Secretary going directly to the Secretary is  
25 really not a remedy, then we are back to Cabazon, and we

1 are unregulated in Class III gaming, but we, of course,  
2 are subject to Congress' power just as the States are  
3 subject to Congress' power.

4 QUESTION: So you're really defending Congress  
5 more than you are the tribe in the position you're  
6 presenting, because the tribe, I assume, would rather be  
7 free of any regulation, and if it has to be subject to  
8 some regulation, it would rather have just one instead of  
9 two regulators.

10 MR. ROGOW: That is absolutely true, Justice  
11 Ginsburg and, indeed, the tribes were not happy with the  
12 Indian Gaming Regulatory Act, because they preferred the  
13 Cabazon decision, which allowed them latitude more than  
14 the act does, and so yes, it is true that this argument is  
15 in many ways a defense of Congress' power, but if Congress  
16 doesn't have that power, yes, the tribes would be  
17 unfettered by State regulation.

18 The question is whether or not, under the  
19 statute as constructed, Congress can abrogate the State's  
20 Eleventh Amendment immunity. Our position is, is that the  
21 plenary power of Congress under the Indian Commerce Clause  
22 does give it that power and, indeed, if that power does  
23 not exist, then Ex Parte Young works in this case because  
24 Ex Parte Young is based upon the duty of State officials  
25 to follow a federally enforceable right, and the Federal

1 enforceable right here would be the duty to negotiate in  
2 good faith.

3 QUESTION: Now, do you also rely on that Union  
4 Gas case?

5 MR. ROGOW: We do rely upon Union Gas. Union  
6 Gas is an Interstate Commerce Clause case --

7 QUESTION: Right.

8 MR. ROGOW: -- in which the Court held that  
9 under the Interstate Commerce Clause, Congress has the  
10 power to abrogate Eleventh Amendment --

11 QUESTION: And do you take the position that  
12 this could also be decided under the Interstate Commerce  
13 Clause and Union Gas?

14 MR. ROGOW: We do believe that. We had argued  
15 that below, that the Interstate Commerce Clause was  
16 another basis for Congress enacting the Indian Gaming Act,  
17 but the Indian Commerce Clause, it seems to us, is the  
18 stronger basis for this and, indeed, I think the Indian  
19 Commerce Clause is even stronger than the Interstate  
20 Commerce Clause when one looks at Union Gas in terms of  
21 supporting the abrogation power.

22 The Indian Commerce Clause is a change in the  
23 relationship between the States and the United States and  
24 the Federal Government by giving plenary power to Congress  
25 in the area of Indian commerce.

1 QUESTION: Well, what do you understand the  
2 Union Gas case to stand for, Mr. Rogow?

3 MR. ROGOW: That under Article I, Congress has  
4 the power under the Interstate Commerce Clause to abrogate  
5 State Eleventh Amendment immunity.

6 QUESTION: And it doesn't stand for anything  
7 more than that, does it, because there was no opinion for  
8 the Court?

9 MR. ROGOW: It stands for only the proposition  
10 that I have advanced --

11 QUESTION: Yes.

12 MR. ROGOW: -- yes. It was a 4-1-4 decision.

13 But the Indian Commerce Clause is even more  
14 powerful than the Interstate Commerce Clause. Indeed,  
15 this Court has used forceful and strong language in  
16 talking about Congress' power under the Indian Commerce  
17 Clause.

18 QUESTION: You don't need a negative Indian  
19 Commerce Clause. It's all there, really.

20 MR. ROGOW: That's true.

21 QUESTION: It's actually written down.

22 MR. ROGOW: It's all plenary and exclusive, and  
23 the Court has said that with the adoption of the  
24 Constitution, Indian relations became the exclusive  
25 province of Federal law, and this is important, too.

1           In the Seminole Nation case at 316 U.S. at page  
2 296, the Court talked in these terms: There's a  
3 distinctive obligation of trust towards the Indian tribes,  
4 moral obligations of the highest responsibility and order,  
5 and this language adds great credence to the strength of  
6 the Indian Commerce Clause.

7           Indeed, the State's brief at page 23 concedes  
8 that there are no limitations upon Congress' authority  
9 under the Indian Commerce Clause. Congress' power under  
10 that clause is complete.

11           QUESTION: No limitations as to their power over  
12 Indians, not over States. They don't agree that --  
13 there's no limitation of Congress' power over the States.

14           MR. ROGOW: That is true, Justice Stevens.

15           QUESTION: Yes.

16           MR. ROGOW: They would like to read it only one  
17 way, but the Indian Commerce Clause, when one looks at the  
18 history of it, clearly was a taking from the States of any  
19 role in Indian commerce in favor of the United States.

20           QUESTION: Well, but there's a difference  
21 between assigning powers and functions between the two  
22 branches of Government, in this case all to the national  
23 Government, and from going the further step of saying that  
24 this allows the national Government to order the States to  
25 invoke their political processes in behalf of a national

1 goal. I simply know of no precedent for that, unless you  
2 can show me one.

3 MR. ROGOW: All that the States are being  
4 ordered, Justice Kennedy, is a duty -- is to negotiate  
5 with the tribes to serve, indeed, the State's own goals,  
6 and --

7 QUESTION: Well, but that's maybe something the  
8 States disagree with. They're being asked to invoke their  
9 official processes, their official political machinery in  
10 pursuit of a goal that they may not agree with, and I know  
11 of no precedent for that.

12 MR. ROGOW: I can think of no precedent that  
13 directly addresses that, but to the extent that your  
14 question brings into focus a Tenth Amendment kind of  
15 problem, there is no commandeering here. This is, unlike  
16 the Tenth Amendment cases, which talk about a duty to  
17 regulate, imposing a duty to regulate, or a duty to  
18 legislate, this is a duty to negotiate. This is sensitive  
19 to the etiquette of federalism. This is just the kind of  
20 delicate balancing that falls on Congress' Supremacy  
21 Clause power side to do that which is necessary to fulfill  
22 all of its --

23 QUESTION: Well, I think both the Eleventh --  
24 the Eleventh Amendment and Tenth Amendment seem to merge  
25 somewhat in this area, and I have a problem under Ex Parte



1 Young, too, because it seems to me that, unlike Young,  
2 where you're asking the State to refrain from engaging in  
3 a certain action, here you are commanding the State to  
4 invoke its formal machinery, and that's not Young, either.

5 MR. ROGOW: Young is built on the premise that  
6 there is a Federal duty, and there are other cases --  
7 Morales v. Texas, a Federal Airline Deregulation Act,  
8 Green v. Mansour, Edelman, dealing with welfare rights  
9 laws, in which the Court has utilized Ex Parte Young to  
10 compel a State to follow Federal law.

11 QUESTION: Well, it's somewhat the difference in  
12 mandatory and prohibitory injunctions which is not  
13 particularly satisfactory, but here -- in Young, the only  
14 Federal duty was not to interfere with a right, and that's  
15 quite different from saying that you must participate in  
16 this scheme.

17 MR. ROGOW: Justice Kennedy, here, the Federal  
18 duty is to follow the will of Congress, which has plenary  
19 power, and -- and this is the ironic part of this case --  
20 participate in the scheme. That's why I've said that this  
21 statute is sensitive to the interests of federalism. It  
22 is different from Ex Parte Young, but not different enough  
23 to make a difference in the outcome.

24 I'd like to reserve the balance of my time for  
25 rebuttal.

1 QUESTION: Very well, Mr. Rogow.

2 General Days, we'll hear from you.

3 ORAL ARGUMENT OF DREW S. DAYS, III

4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE PETITIONER

6 GENERAL DAYS: Mr. Chief Justice, and may it  
7 please the Court:

8 This Court has, in a number of decisions,  
9 recognized that the Ex Parte Young doctrine strikes an  
10 uneasy balance between the interest in respecting State  
11 sovereignty on the one hand while on the other vindicating  
12 federally afforded rights. It is an effort to give life  
13 to the Supremacy Clause.

14 We think that the Ex Parte Young doctrine can be  
15 used effectively by this Court to support what Congress  
16 has done in attempting to address a very difficult  
17 question over Class III gaming on Indian lands.

18 What we have here is a federally imposed duty,  
19 and let me underscore the fact that the federally imposed  
20 duty upon the State is to negotiate in good faith. It in  
21 no way requires a State to commit its resources, or its  
22 regulatory, or its legislative institutions to carrying  
23 out a Federal program --

24 QUESTION: Suppose a State law required that all  
25 compacts be ratified by the legislature. Then it would

1 have the effect that you say it doesn't.

2 GENERAL DAYS: Only if the State wishes to get  
3 to the point where it enters into a compact.

4 QUESTION: Well, but I -- the court can command  
5 the State to do this.

6 Could the United States command the State of  
7 California to negotiate with it for the location of a  
8 military base, enforceable by a court order, contempt if  
9 they don't?

10 GENERAL DAYS: Could the United States?

11 QUESTION: Yes.

12 GENERAL DAYS: I think the United States could  
13 require that there be a meeting to discuss that issue,  
14 which is what is --

15 QUESTION: Would you be held in contempt if you  
16 don't go to the meeting?

17 GENERAL DAYS: I think that what we would have  
18 there would be a Tenth Amendment problem, where in effect  
19 what the Government was doing was placing the State in a  
20 position where it was being coerced. There's no coercive  
21 effect under IGRA with respect to the State's involvement.

22 QUESTION: But the question kind of poses the  
23 problem that's here. The United States can take any bit  
24 of land it wants to in the State of California or in any  
25 other State by a process of condemnation for a military

1 base.

2 What is gained by requiring as a matter of law  
3 that California sit down to negotiate? I mean, if they  
4 negotiate they may be able to get a better deal for  
5 themselves than trying the question of value to a jury,  
6 but what is gained by simply dragging them into a process  
7 where they really don't have much leverage?

8 GENERAL DAYS: Once again, there's a question of  
9 whether there's a dragging in here, but we're talking  
10 about a situation where Congress has a responsibility to  
11 see to the development of economic self-sufficiency on the  
12 part of tribes that they are able to maintain their well  
13 being, and that there are strong tribal governments.

14 This arrangement allows the tribes and the  
15 States to sit down and talk about these issues.

16 QUESTION: But if the State says, I'm not going  
17 to -- I don't want to talk, and the tribes can go directly  
18 to the Secretary of the Interior, what is gained by  
19 saying, even if you don't want to talk, you have to talk,  
20 even though you won't get anywhere, and we have superior  
21 power anyway if you can't reach an agreement?

22 GENERAL DAYS: Mr. Chief Justice, all it does is  
23 invite the State to negotiate. If the State does not wish  
24 to participate --

25 QUESTION: But it doesn't invite, it commands.

1           GENERAL DAYS: Well, the direction is that they  
2 sit down, and --

3           QUESTION: Well, it commands them to sit down.

4           GENERAL DAYS: -- allow these issues to be aired  
5 between the State and the tribe.

6           QUESTION: Could you hold the State in contempt  
7 for refusal to negotiate, in your view, if Congress  
8 provided that sanction?

9           GENERAL DAYS: Not under IGRA. There's no  
10 indication that Congress has exercised that authority.

11          QUESTION: No, no, no. Could Congress  
12 constitutionally enact a statute, or amend the statute to  
13 require that Federal courts hold Governors in contempt who  
14 don't go to the meeting?

15          GENERAL DAYS: I think that that would be  
16 possible, yes.

17          QUESTION: I think that would follow from your  
18 position.

19          GENERAL DAYS: Yes.

20          QUESTION: General Days, what remedy do you say  
21 is available under Ex Parte Young here?

22          GENERAL DAYS: What remedy is available?

23          QUESTION: Yes, what --

24          GENERAL DAYS: The remedy available here is an  
25 order from the court that says that there has been or has

1 not been negotiation in good faith. The consequence of  
2 that is that, as my brother has indicated, if the  
3 determination is that the State has negotiated in good  
4 faith, then the tribe cannot have Class III gaming without  
5 agreeing to what the State has proposed. If it's found  
6 that the State did not negotiate in good faith, then the  
7 State gradually loses its opportunity to participate in  
8 the process.

9 QUESTION: You mean, you then -- you just use Ex  
10 Parte Young for that initial failure to negotiate in good  
11 faith and then you go over to the rest of the statute from  
12 there?

13 GENERAL DAYS: That's correct. It's -- what, in  
14 fact, Congress has done in a sense is codify the Ex Parte  
15 Young approach.

16 QUESTION: Well, but it doesn't. I mean, the  
17 fact is that Congress could have used language that  
18 summons up Ex Parte Young, but it really speaks of  
19 initiating a cause of action requesting the State to enter  
20 into negotiations, and it constantly says -- refers to the  
21 State. If the State and the Indian tribe fail to  
22 conclude. It's not using Ex Parte Young language at all.

23 GENERAL DAYS: So does the Fourteenth Amendment,  
24 but this Court in its Ex Parte Young jurisprudence has  
25 indicated that as, for example, in Home Telephone and

1 Telegraph --

2 QUESTION: Sure, but --

3 GENERAL DAYS: -- that States act through  
4 persons.

5 QUESTION: Yes, but we must never forget, it's a  
6 Constitution we're construing when we're talking of the  
7 Fourteenth Amendment. You don't expect it to be in the  
8 detail that a statute is, but this is a very detailed  
9 statute, and it refers to a State and the Indian tribe,  
10 and it seems to me just contrary to the -- you pull in Ex  
11 Parte Young, as our opinions say, when there's no other  
12 way to achieve vindication of the Federal interest.

13 It's -- in fact, however, Congress has specified  
14 how in its view the Federal interest was to be vindicated,  
15 and it seems to me it was by suit against the State.  
16 That's either good or bad.

17 GENERAL DAYS: Yes, well --

18 QUESTION: And if it's bad, I'm not sure that we  
19 are free under Ex Parte Young to invent a different way of  
20 vindicating that interest.

21 GENERAL DAYS: Well, we certainly support the  
22 view that the abrogation by Congress of the State's  
23 Eleventh Amendment immunity is a very clean and, we  
24 think --

25 QUESTION: I understand.

1           GENERAL DAYS:  -- proper way of resolving this  
2 case --

3           QUESTION:  But if --

4           GENERAL DAYS:  -- but this Court has under some  
5 circumstances looked at the Eleventh Amendment issue and  
6 decided that a proper balance can be struck more  
7 effectively by using the Ex Parte Young approach.

8           QUESTION:  No, but do you know of any case where  
9 Congress has made the legislative determination that the  
10 matter should proceed by a suit against the State and we  
11 say, well, that may be unconstitutional, or it is  
12 unconstitutional, but we will let you instead, despite  
13 what Congress provided, proceed by a suit against --

14          GENERAL DAYS:  The answer is no, but in those  
15 instances where the Court has not been clear as to exactly  
16 what Congress intended, or had some doubt about the  
17 effectiveness of what Congress had in mind, it has  
18 resorted to the Ex Parte Young approach.

19          QUESTION:  And what do you do in the case that  
20 we're holding for this case, where Ex Parte Young will not  
21 give you jurisdiction over the only body that is  
22 authorized to negotiate the contract?  I understand that  
23 to be the situation in the Kansas case, where the compact  
24 can only be made by the legislature.  Is that -- are we  
25 going to rehear this same argument for that case, and



1 having used Ex Parte Young to get rid of this one, then  
2 decide for the next case what other theory might --

3 GENERAL DAYS: No. I think that it is a matter  
4 of State determination, State law determination as to who  
5 has the authority to negotiate under these circumstances,  
6 and IGRA would simply respond to that State determination.

7 The process begins by --

8 QUESTION: So there's no remedy so long as the  
9 State does not allow its Governor to enter into a compact,  
10 is that what it comes --

11 GENERAL DAYS: No, that's not the case. The  
12 case is that other parties --

13 QUESTION: Under Ex Parte Young, I mean. Under  
14 Ex Parte Young.

15 GENERAL DAYS: Well, Ex Parte Young doesn't  
16 require that the Governor be sued.

17 QUESTION: Can you sue the legislature under Ex  
18 Parte Young?

19 GENERAL DAYS: I think that it is a way of suing  
20 that official who has the authority to sit down and  
21 negotiate. Whether that person --

22 QUESTION: It's the legislature. The  
23 legislature approves compacts. Can you sue the  
24 legislature under Ex Parte Young?

25 GENERAL DAYS: I know of no situation where that

1 has been --

2 QUESTION: Gee, I'd be amazed if you could  
3 sue the Legislature.

4 GENERAL DAYS: But I do know situations, and  
5 this Court has had many, where the suit has been against a  
6 State official with the understanding that the only way  
7 the rights could be vindicated were by legislative action  
8 within the State, and that particular factor was not  
9 viewed as any impediment to rely upon the Ex Parte Young  
10 doctrine.

11 QUESTION: So you would pick -- in effect you  
12 would pick an appropriate State negotiator, or an  
13 appropriate State official to sue as a negotiator in  
14 Kansas, and you would perfectly well understand that that  
15 gets the statutory process going, even if it would  
16 ultimately -- even if there would ultimately be no compact  
17 on the theory that the legislature wouldn't accept what  
18 the official had negotiated.

19 GENERAL DAYS: Yes, that's correct. That would  
20 be the approach.

21 QUESTION: Like Howell v. McCormick, only you'd  
22 have some stand-in for the State legislature, like the  
23 doorkeeper.

24 GENERAL DAYS: That's correct.

25 Thank you very much.

1 QUESTION: Thank you, General Days.

2 Mr. Glogau. Am I pronouncing your name  
3 correctly?

4 MR. GLOGAU: It's Glogau, Your Honor.

5 QUESTION: Glogau. Mr. Glogau.

6 ORAL ARGUMENT OF JONATHAN A. GLOGAU

7 ON BEHALF OF THE RESPONDENTS

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

10 Congress does not have the authority under the  
11 Indian Commerce Clause to subject the State to suit in  
12 Federal court, nor does Ex Parte Young allow a suit  
13 against the State official when in reality you are suing  
14 the State.

15 Justice Scalia, in answers to your questions,  
16 these cases are in fact against the State. The statute  
17 commands the State to act. The remedy that is provided is  
18 directed right to the State, so just on its surface the  
19 statute addresses the State.

20 QUESTION: Mr. Glogau, would you explain from  
21 your perspective why it makes sense for Florida to be  
22 opposing this scheme when the alternative seems to be no  
23 role for the State at all? Isn't it true that before the  
24 Indian Gaming Regulatory Act the States were out of this  
25 picture because of this Court's precedent?

1 MR. GLOGAU: Your Honor, the State is not  
2 completely out of the picture in that situation. Public  
3 Law 280 allows us to enforce our criminal laws on the  
4 Indian reservation, so in that respect --

5 QUESTION: But you can't stop the kind of  
6 activity, assuming that it meets all your other laws that  
7 are otherwise applicable, you can't say, no casino on this  
8 reservation.

9 MR. GLOGAU: Well, we can say no casino because,  
10 as Judge Marcus found in the district court, casinos are  
11 not permitted in Florida. However, the reason that we're  
12 here is not a gambling issue.

13 QUESTION: That's a fact question -- well,  
14 that's a question on which you're divided, what permission  
15 means.

16 MR. GLOGAU: Well, that -- permitted means in  
17 our --

18 QUESTION: But in the event, to the extent that  
19 gambling is permitted in Florida, the State could have no  
20 control over what is done on the reservation, so how are  
21 you aided by getting out of this process?

22 MR. GLOGAU: Your Honor, we are not aided in  
23 respect to gambling as -- per se, as an issue. The reason  
24 we are here is because this case speaks more to the  
25 question of federalism and the relationship between the

1 States and the Federal Government rather than whether or  
2 not we're going to have gambling in Florida. That's a  
3 separate issue to be litigated, and is being litigated  
4 separately.

5 QUESTION: I had thought from your brief that  
6 your answer to Justice Ginsburg's question was simply  
7 because Floridians are proud --

8 (Laughter.)

9 QUESTION: -- and we'd rather have the Federal  
10 Government write the law than to have us pretend to write  
11 it as a flunky of the Federal Government, subject  
12 ultimately to overruling by the Federal Government anyway.  
13 Isn't that it?

14 MR. GLOGAU: That --

15 QUESTION: Floridians are proud.

16 MR. GLOGAU: That's --

17 (Laughter.)

18 QUESTION: I would understand that if they  
19 weren't also practical. The point is --

20 (Laughter.)

21 QUESTION: -- you did begin to negotiate, and  
22 then saying -- I thought, well, why isn't this just like  
23 the Spending cases, the carrot? If the State takes it,  
24 it's got to play by the Federal Rules.

25 Here, you didn't have to negotiate, or at least

1 that could be the State's position.

2 MR. GLOGAU: Well, Your Honor --

3 QUESTION: But you once -- you were in  
4 negotiation. Then you reached an impasse.

5 MR. GLOGAU: Well, first of all, the State has  
6 to negotiate under the statute. The statute says, you  
7 shall negotiate in good faith.

8 QUESTION: But Florida doesn't accept that under  
9 your argument, right?

10 MR. GLOGAU: No, what we don't accept is -- and  
11 going back to your Spending Clause question, under the  
12 Spending Clause cases, the remedy for not doing what the  
13 Federal Government wants you to do because you've taken  
14 the money is not to give you the money. The remedy given  
15 here is, if you don't do what we want you to do, we will  
16 sue you in Federal court.

17 The Eleventh Amendment and our sovereign  
18 immunity prevents us from being held before a Federal  
19 court without our consent. That is the essence of  
20 sovereign immunity. Without consent, we cannot be sued,  
21 and we have not consented here.

22 Under the idea that we negotiated so therefore  
23 we take the benefit, that's an idea that comes out of this  
24 Court's case in Parden, and I submit that we -- in Parden,  
25 the State of Alabama engaged in the business of an

1 interstate railway years after the FELA had been passed,  
2 and so they could be considered to have looked at that and  
3 said, okay, if we do this business we will subject  
4 ourselves to the jurisdiction of the Federal court,  
5 waiving their sovereign immunity.

6 We don't have a choice here. We're given the  
7 choice of either negotiating in good faith and being sued,  
8 or not negotiating at all and being sued. That's no  
9 choice at all, Your Honor, and so therefore the Parden  
10 type of consent can't be found in this situation.

11 QUESTION: Well, why isn't it this way, that if  
12 you want a role in this process, then you opt into this  
13 regime. If you don't want a role in it, then you just  
14 stay out of it, and then the Federal regulation will take  
15 over, or there will be no regulation and Congress will  
16 write a new statute.

17 But once you opt into it, then why aren't you  
18 stuck by --

19 MR. GLOGAU: Because, Your Honor, we have no  
20 option to opt in or out. The statute says you shall  
21 negotiate in good faith. If you do not, you will be sued  
22 and an order will be issued by a Federal judge saying, you  
23 shall conclude a compact within 60 days. That is the  
24 statutory remedy. We are not given a choice to opt out.

25 QUESTION: And then what happens if you don't?

1 MR. GLOGAU: We are, as Justice Kennedy was  
2 alluding to before, even though the statute doesn't  
3 specifically give the court contempt power, certainly a  
4 Federal court has the inherent power to hold a State  
5 official in contempt if he thumbs his nose at a Federal  
6 court order, which is what you're suggesting that --

7 QUESTION: It's your position that it does have  
8 that power, then.

9 MR. GLOGAU: Excuse me?

10 QUESTION: It is your position that the Federal  
11 court would have that power over Florida if the statute is  
12 valid.

13 MR. GLOGAU: If the statute is valid and the  
14 State can be sued, or if the Governor can be sued under Ex  
15 Parte Young, yes, a Federal judge certainly has the  
16 inherent authority.

17 QUESTION: Right, no question about Young, but  
18 you're saying if, in fact, there is the power under the  
19 Commerce Clause or any other theory, the State itself  
20 could be held in contempt.

21 MR. GLOGAU: I would -- yes. The court has  
22 inherent authority to enforce its orders, and that's the  
23 way I understand a Federal court would enforce an order,  
24 and that is to hold --

25 QUESTION: Oh, I would think you wouldn't want



1 to take that position.

2 (Laughter.)

3 QUESTION: I mean, this might occur, and I can't  
4 imagine that you'd want to stand here and advocate that  
5 the State can be held in contempt under this scheme, which  
6 doesn't provide for it at all. That's not this scheme.

7 MR. GLOGAU: Well, this scheme mandates that the  
8 State act, and so --

9 QUESTION: Yes, but there are no teeth in it.  
10 The consequence of not acting by the State is, it gets to  
11 the Secretary and the Secretary acts.

12 MR. GLOGAU: Well, Your Honor, then, if there's  
13 no teeth in this, and there's no order that can be  
14 enforced, why did Congress provide for a lawsuit? If the  
15 State simply can say, we don't want to play --

16 QUESTION: It's a very peculiar statute --

17 MR. GLOGAU: I couldn't agree with you more.

18 (Laughter.)

19 QUESTION: -- and I think we'd have to ask  
20 Congress about that.

21 MR. GLOGAU: Well, but the point is, Your Honor,  
22 if Congress considered the State to have an option just  
23 not to be involved at all, then there was no point in  
24 having a lawsuit provision. It's merely -- the Congress  
25 should have written a law -- if that was their intent,

1 Congress should have written a law to say, if the tribe  
2 wants to have casino gambling or Class III gambling in the  
3 State, then they approach the State and ask the State if  
4 they want to be involved.

5 QUESTION: Well, I think that this law was  
6 passed at the urging of some States that wanted to have  
7 some say in this process, and under our jurisprudence here  
8 they in fact had no say, and as Justice Ginsburg has been  
9 discussing with you, to engage in the process gives the  
10 States a lot more than they would have if we say the law  
11 is invalid.

12 MR. GLOGAU: That would be true, Your Honor, if  
13 we were given the choice. We are not given the choice  
14 here. We are ordered by the statute to invoke the  
15 discretionary machinery of the State in negotiating a  
16 compact. If we do not, we are subject to the full panoply  
17 of judicial power that is wielded by a Federal judge.

18 QUESTION: In this case it's already been  
19 decided that Florida negotiated in good faith.

20 MR. GLOGAU: Your Honor, the timing of the  
21 decisions is peculiar -- even more peculiar than the  
22 statute. We had -- the motion to dismiss was denied by  
23 the district court. It went on appeal to the Eleventh  
24 Circuit. While it was pending at the Eleventh Circuit we  
25 got an order on summary judgment from the court below.

1 Only after we were found to have complied with the  
2 statutory requirements did the Eleventh Circuit then say,  
3 there's no jurisdiction.

4 But the point is that the reason we're here, as  
5 I said to Justice Ginsburg, the reason we're here is not  
6 because of gambling. We are here because of the sovereign  
7 immunity of the State.

8 QUESTION: But we don't sit to decide abstract  
9 questions of sovereign immunity. I mean, there has got to  
10 be some real life consequences.

11 What's the present status of the finding that  
12 you negotiated in good faith?

13 MR. GLOGAU: That is pending on appeal, which  
14 has been abated pending the outcome of this proceeding.

15 QUESTION: I take it, is there an interest that  
16 the State and its Governor has in 1) not participating in  
17 a regime that they consider an unconstitutional violation  
18 of the Federal scheme and 2) that the Governor has an  
19 interest in not authorizing gambling which is prohibited  
20 by his State.

21 MR. GLOGAU: Well, I think the State has an  
22 interest in both of those things. We have an interest --

23 QUESTION: That's what I'm suggesting.

24 MR. GLOGAU: Right. Well, we have an interest  
25 in protecting the sovereignty of the State by addressing

1 the constitutionality of a statute like the Indian Gaming  
2 Regulatory Act, but on the other hand, you're correct that  
3 we do have an interest in preventing gaming that is not  
4 already permitted in the State.

5           However, we had that authority even without the  
6 Indian Gaming Regulatory Act, as I mentioned before.

7           QUESTION: Don't you think you have it under the  
8 statute as well? Doesn't the -- isn't it your view that  
9 the statute merely authorizes Indian gaming that the State  
10 also authorizes? That's your view of the statute, is it  
11 not?

12           MR. GLOGAU: That is correct. That's the view  
13 of the Ninth Circuit in the Rumsey case which was recently  
14 decided, but the point is that although Congress has the  
15 authority to regulate Indian gambling under its complete  
16 authority under the Indian Commerce Clause, they still  
17 must do it in a way that is constitutional and is  
18 permissible, and our position is that there are a myriad  
19 of ways that could have been done properly that were  
20 suggested in the Court's opinion in New York v. United  
21 States.

22           There are a myriad of ways that the Congress can  
23 cajole the States, or give them the opportunity to take  
24 action like this, but that doesn't mean that because there  
25 are right ways and proper ways to do it, that you can

1 allow them to do it in a way that is unconstitutional.  
2 That's why we're here.

3 QUESTION: Your position is that being required  
4 to negotiate is itself a harm to the State, regardless of  
5 whether, down at the end of the road, if you fail to do  
6 that there are other harmful consequences. That, in and  
7 of itself, is a harm.

8 MR. GLOGAU: That's correct. That's a violation  
9 of the Tenth Amendment, which reserves to the States their  
10 sovereign authorities, and --

11 QUESTION: Not the least of those harms being  
12 that if a gambling establishment is instituted, it ought  
13 to be very clear that it was done by the Federal  
14 Government without the participation of the States if the  
15 States object.

16 MR. GLOGAU: That's correct. The Federal  
17 Government, the Congress in this situation, has avoided  
18 the political responsibility of taking charge of gambling  
19 on an Indian reservation and foisted it upon the State  
20 officials, and that's a clear Tenth Amendment violation,  
21 as the Court wrote in New York v. United States.

22 QUESTION: If, in fact, Congress passed a  
23 statute which said States in certain instances will  
24 recognize labor unions among their employees, and the  
25 State government will, in the case of a disagreement,

1 negotiate in good faith before anyone goes out on strike  
2 or lockout, and that in your view would violate the Tenth  
3 Amendment?

4 MR. GLOGAU: If the remedy is to order the State  
5 to conclude a contract with the employees --

6 QUESTION: And they couldn't turn it over to the  
7 Labor Board and say you will, in fact, find an unfair  
8 labor practice and issue an order, require bargaining in  
9 good faith.

10 MR. GLOGAU: I think that would violate the  
11 Tenth Amendment.

12 QUESTION: Okay. My other question which I  
13 wanted to ask was -- you started off on this, and I'd  
14 appreciate you getting back to it, which was this problem  
15 of Ex Parte Young.

16 To focus it a little bit, I thought that maybe  
17 Ex Parte Young does make the Eleventh Amendment mostly a  
18 formal requirement. It says, you can go sue the officer.  
19 They're all suits against the State in reality, aren't  
20 they? But it reserves one area where you can't, and  
21 that's the area where the Treasury is involved.

22 So to look at it naively, you'd say yes, Ex  
23 Parte Young says sue the officer, not the State. They're  
24 all suits against the State in reality.

25 MR. GLOGAU: Well, Your Honor.

1 QUESTION: But that's what it says, it's there,  
2 and so I could understand a reading of it which says,  
3 sure, go sue the officer except where the Treasury is  
4 involved, because that's too much the State.

5 Now, if I -- what's -- I'm putting this so that  
6 you can tell me why that's wrong and argue against it --

7 MR. GLOGAU: Well, Your Honor --

8 QUESTION: -- which is where you wanted to go, I  
9 think.

10 MR. GLOGAU: Yes. Thank you.

11 (Laughter.)

12 MR. GLOGAU: With regard to Ex Parte Young,  
13 if -- the question of whether it's a case against the  
14 State does not turn solely on the question of whether  
15 we're seeking damages or prospective relief. That  
16 interpretation of the Edelman case has been specifically  
17 disavowed by this Court in two cases, Cory v. White and  
18 the Pennhurst case, and in the most recent, the Hess  
19 case --

20 QUESTION: But I mean, they left a little  
21 curlicue on that, but -- which I don't think is relevant  
22 here, or maybe it is, but why shouldn't you view it  
23 basically that way, with the little curlicue of Pennhurst,  
24 which was pendant jurisdiction, et cetera?

25 MR. GLOGAU: Well, because there are situations

1 where a suit against a State official is an attempt to  
2 invoke the sovereignty of the State and to order the State  
3 to invoke its sovereign machinery the way that Justice  
4 Kennedy suggested.

5 QUESTION: They're all that. Isn't Ex Parte  
6 Young all that? It's telling a State officer, you go in  
7 your capacity as State officer and follow the Federal law.  
8 Follow the Federal Constitution, follow a Federal statute,  
9 do that which Federal law tells the State to do.

10 MR. GLOGAU: Well, I don't see it that way,  
11 because what Ex Parte -- injunctions under Ex Parte Young  
12 tell the State official not to do that which he is not  
13 permitted to do, and I think there's a difference there.

14 And the other thing is that in the balance that  
15 is that makes Ex Parte Young necessary, and Mr. Rogow  
16 referred to it, that balance between the State sovereign  
17 immunity and the vindication of Federal constitutional  
18 rights, where the Constitution is being violated, that  
19 balance tips in favor of allowing the State official to  
20 have his immunity stripped and allowing an injunction to  
21 be issued against him. Where there is no constitutional  
22 violation, that balance tips in favor of protecting the  
23 State's sovereign immunity.

24 In Ex Parte Young, Attorney General Young was  
25 being ordered not to continue activity that was deemed to



1 be unconstitutional.

2 In Young and all of its progeny, from what my  
3 research shows, all of those cases involve violations of  
4 the Constitution, and so the balance in those cases tips  
5 toward stripping the immunity.

6 Without the constitutional violation, the  
7 balance tips in favor of protecting the State's sovereign  
8 immunity. In this case --

9 QUESTION: I thought Young applied to violations  
10 of statutes and regulations as well as the Constitution?

11 MR. GLOGAU: Your Honor, the language in some of  
12 the cases says constitutional or Federal law. However,  
13 when you look at the facts of each one of those cases,  
14 each one of them involves a violation of the Constitution.  
15 That --

16 QUESTION: You say there are no Ex Parte Young  
17 line of cases that involve a statute and not the  
18 Constitution.

19 MR. GLOGAU: Not that I've found, Your Honor.  
20 In Edelman v. Jordan, for example, the Illinois Public  
21 Code set up a method of paying benefits under the AABD  
22 program. The Federal Government had regulations that told  
23 the State how it was supposed to do it. That conflict  
24 between the two sets of regulations set up a Supremacy  
25 Clause violation allowing for --

1 QUESTION: Well, of course there's a Supremacy  
2 Clause issue --

3 QUESTION: Whenever a State disobeys a --

4 QUESTION: If that's --

5 QUESTION: -- there's a Supremacy Clause --

6 QUESTION: -- the constitutional provision  
7 you're relying on, then there is a line of statutory  
8 cases.

9 MR. GLOGAU: Well, I'm -- I'm not --

10 (Laughter.)

11 QUESTION: What was the provision in Young,  
12 other than the Supremacy Clause? I haven't read -- if  
13 it -- wasn't Young arguing about tariff rates?

14 MR. GLOGAU: I think, again, it was the  
15 Supremacy Clause, although I'm not sure.

16 QUESTION: That's what I think it --

17 MR. GLOGAU: However, Justice Scalia, I'm not  
18 sure that the -- and Justice Stevens -- that the cases  
19 where the statutory problem is raised is not also a  
20 constitutional problem. Supremacy Clause cases involve  
21 conflicts between State and Federal law. We don't have a  
22 conflict here. There's no conflict between State and  
23 Federal law. There's no statute or regulation of the  
24 State of Florida that's being alleged to be in conflict  
25 with the Federal law.

1 QUESTION: There will be before the suit  
2 commences. That is, the Federal -- the State will not be  
3 negotiating in good faith as Federal law requires.

4 I thought that your major point about Ex Parte  
5 Young was simply that Ex Parte Young is --has not been  
6 applied as a substitute for a statute which on its face  
7 authorizes suit against the State.

8 MR. GLOGAU: That's true. What -- the use of Ex  
9 Parte Young in this situation is simply an attempt to  
10 circumvent the invalid remedy provided by Congress, and  
11 that's not something that Ex Parte Young is designed to  
12 allow.

13 Ex Parte Young is designed to allow the balance  
14 of sovereign immunity versus the Constitution to be  
15 vindicated. However, in this situation that balance is  
16 not -- does not point toward allowing a suit against the  
17 State official.

18 QUESTION: May I ask a question, because I must  
19 confess I have some difficulty seeing why both of you  
20 wouldn't be better off if your opponent won when you get  
21 all through with the case.

22 (Laughter.)

23 QUESTION: And so it's a little tricky, but  
24 going back to Justice Kennedy's question about the  
25 political responsibility for the decisions, and Florida

1 has an interest in not being forced to take political  
2 responsibility for something that the Federal Government  
3 wants to impose on the parties.

4 But don't you avoid that simply by just staying  
5 out of the process entirely, just saying I won't  
6 negotiate? Don't you then end up with the clear  
7 identification of the political actor who's responsible  
8 for the end product, namely the Federal Government?

9 MR. GLOGAU: Well, if --

10 QUESTION: Don't you have an option to either  
11 take responsibility, or let the Federal Government have  
12 the responsibility?

13 MR. GLOGAU: I don't see how you can read the  
14 statute as giving us an option. It says, you shall  
15 negotiate.

16 QUESTION: Yes, but it tells what happens if you  
17 don't, and the things that happen if you don't end up by  
18 letting the Federal Government run the show.

19 MR. GLOGAU: Except to the extent that if you're  
20 impugning the dignity of a Federal court by ignoring its  
21 orders, you are subject to the full panoply of the power  
22 of the Federal judge.

23 QUESTION: Well, even if you're not, you're  
24 violating a valid Federal law. I assume Floridians don't  
25 go around doing that.

1 MR. GLOGAU: We try not to.

2 QUESTION: The suggestion that was just made to  
3 you suggests that Florida should knowingly violate a valid  
4 Federal law. Florida doesn't do that sort of thing, does  
5 it?

6 MR. GLOGAU: No, we don't.

7 (Laughter.)

8 QUESTION: Well, but you can negotiate in good  
9 faith, quite reasonably just disagree with the outcome,  
10 and then the political responsibility would end up for the  
11 Federal Government.

12 MR. GLOGAU: Well, we could negotiate --

13 QUESTION: In other words, you could negotiate  
14 and say we want no title III gambling other than that  
15 which we already permit in other parts of the State, and  
16 they may say they want more. You have a perfectly  
17 reasonable position. You insist on it, it fails, then the  
18 end result of the process is the Federal Government would  
19 decide one way or the other. I think that's the way it  
20 would come out.

21 MR. GLOGAU: Well, but the statute isn't written  
22 that way. The statute is -- if we negotiate in good  
23 faith, which Judge Marcus below --

24 QUESTION: Said you'd done --

25 MR. GLOGAU: -- found that we had, then the

1 tribe has no opportunity to go to the Secretary of the  
2 Interior. However, the remedy of having an order coming  
3 from a Federal judge ordering us to conclude a compact --  
4 you see, this is different from the labor relations area,  
5 because in the labor relations area, I believe the order  
6 would be, sit down and talk, and you can still come to an  
7 impasse.

8 Here, the order is, you shall conclude a compact  
9 within 60 days. That is --

10 QUESTION: The statute says, and if you don't,  
11 then there's this mediator, and then there's the  
12 Secretary --

13 MR. GLOGAU: Well, here --

14 QUESTION: -- so the statute really isn't  
15 saying, you must conclude a contract. It's saying, you've  
16 got 60 days to do it, and if you don't do it, then we go  
17 on to these further steps.

18 MR. GLOGAU: Well, again, the next step is  
19 another coercive order from the court ordering the State  
20 to provide its last best offer of a compact. Once again,  
21 what if the State simply refuses to do that? Are we  
22 simply -- is the court simply going to say, well, okay,  
23 the State doesn't want to play in this game, or is the  
24 court going to say, you must obey my order?

25 QUESTION: But there's no lawsuit for that. The

1 only lawsuit, as I understand it, is over the duty to  
2 negotiate in good faith.

3 MR. GLOGAU: Well, once the court has  
4 jurisdiction, can't it issue an order -- can't it issue an  
5 order enforcing its previous order?

6 QUESTION: Why can't we read the statute to  
7 avoid any clash by simply saying, and then if the State  
8 doesn't submit its order, the mediator has just one order  
9 before it, and so that's -- why would we want to imply  
10 further coercion into the statute when it's not there  
11 explicitly?

12 MR. GLOGAU: Well, I think it is there  
13 explicitly. It says, shall.

14 QUESTION: It says, shall order. It says, the  
15 court shall order the State and the Indian tribe to  
16 conclude such a compact.

17 MR. GLOGAU: That's correct.

18 QUESTION: Then if you think the statute is  
19 valid, I assume you would have no choice, if you're law-  
20 abiding, except to do what the statute says you are  
21 ordered to do. I don't really think you have an option to  
22 not do it and then no harm ensues, unless you're a  
23 scofflaw.

24 MR. GLOGAU: Well, that's exactly our position.  
25 We are ordered to comply and we have no choice in the

1 matter, and --

2 QUESTION: Well, when you read what Congress  
3 wrote, Congress said shall, and then it said, but if you  
4 don't, then we have another means of -- it doesn't say you  
5 shall do it -- but then it doesn't say the court will hit  
6 you over the head or fine you or anything.

7 You shall, but if you don't, then a mediator  
8 will decide, and if there's nothing for the mediator to  
9 decide, the Secretary will decide, so there's no teeth at  
10 all into you shall reach an agreement. If you don't reach  
11 an agreement, nothing happens.

12 MR. GLOGAU: If the statute had said, you may  
13 negotiate and if you can't come to an agreement then you  
14 may submit to a mediator, and if -- then if you don't  
15 submit to the mediator then the issue can go to the  
16 Secretary of the Interior, if that's what the statute  
17 said, I would agree with you 100 percent, but it simply  
18 doesn't say that. It says, you shall, and I -- the  
19 State --

20 QUESTION: Would it be open to us to construe  
21 the word shall to mean may, because it's the only way the  
22 whole statute makes any sense, to avoid this terrible  
23 constitutional problem here we're being asked to submit an  
24 offer?

25 It really doesn't seem to me there's much at



1 stake here. You figure out what the best deal you could  
2 possibly go along with this, and you put it on paper, and  
3 you --

4 QUESTION: It isn't really just shall-may.  
5 You'll have to interpret order to mean, instead of the  
6 court shall order the State, you'll say the court shall  
7 invite the State. We have to interpret order to mean  
8 invite, which is something of a leap.

9 MR. GLOGAU: I agree with you, Justice Scalia.  
10 I think interpreting shall as may, being the son of an  
11 English teacher, is something of a leap as well. However,  
12 the ability to subject the State to suit in the first  
13 instance, which is the main question that's presented  
14 here, raises serious Eleventh Amendment problems.

15 Going back to Pennsylvania v. Union Gas, that  
16 case, decided on the Interstate Commerce Clause, was not  
17 decided simply on the basis that the State -- the Federal  
18 Government has plenary authority. There was more to it  
19 than that. There was a waiver in the plan of convention  
20 that figured into this fundamental -- the fundamental  
21 structure of the Federal Government and the relationship  
22 with the States, so applying the doctrine from Union Gas  
23 to the Indian Commerce Clause presents problems.

24 In the Cotton Petroleum case, the Court  
25 recognized that these are very different clauses, and in

1 the plan, in the adoption of the Constitution, Chief  
2 Justice Marshall in the Cherokee Nation case said that  
3 they were considered completely separately, so simply  
4 importing this determination that Congress has the  
5 authority under the Interstate Commerce Clause to the  
6 Indian Commerce Clause I think is wrought with difficulty.

7 QUESTION: Well, if the Court were to conclude  
8 that Ex Parte Young fits here, then I guess we wouldn't  
9 have to even address Union Gas.

10 MR. GLOGAU: Yes, that is true, as long as we  
11 agree that you can use Ex Parte Young in an effort to fix  
12 an unconstitutional remedy that the Court -- that Congress  
13 has created, which as, you know, Justice Scalia indicated,  
14 that's not what Ex Parte Young is for.

15 QUESTION: Well, we might not have to use it in  
16 this case, with the exception you've just mentioned, but  
17 in the next case we might have to go beyond Ex Parte  
18 Young.

19 MR. GLOGAU: Right. In the next --

20 QUESTION: That is to say, in the case where  
21 there is no officer who can be sued who has the authority  
22 to conclude the compact.

23 MR. GLOGAU: Well, this is true, and --

24 QUESTION: Like in Kickapoo --

25 MR. GLOGAU: The Kansas --

1 QUESTION: Kansas v. Kickapoo, or something  
2 of --

3 MR. GLOGAU: That's correct.

4 QUESTION: So we would dodge the bullet for one  
5 day, or one term.

6 MR. GLOGAU: You also --

7 QUESTION: If we had to take that case.

8 MR. GLOGAU: Well, yes.

9 QUESTION: I mean, I take it that the Indians  
10 are satisfied with their remedy in that case they won, and  
11 I take it in the future they'll all sue the officers. Is  
12 there any reason -- I mean, I know this is going beyond  
13 this, but I wondered if you have any --

14 MR. GLOGAU: I really -- I can't speak for the  
15 Kansas --

16 QUESTION: No.

17 MR. GLOGAU: -- case, but you are going to be  
18 faced with this question in a different context in the  
19 Merchant Bank case, which has now been petitioned for  
20 cert, under section 106 of the Bankruptcy Act -- does  
21 Congress have the authority under the Bankruptcy Act to  
22 abrogate the State's sovereign immunity? -- so that  
23 question is squarely before you today. It's coming up in  
24 other contexts because of the holding in Union Gas.

25 The holding in Union Gas has encouraged Congress

1 to find the authority to abrogate State sovereign immunity  
2 in any Article I power, and that type of extension of  
3 Union Gas is unwarranted, I think, and in Justice Scalia's  
4 words in the dissent in Union Gas, that --

5 QUESTION: Dissents don't count for a lot.

6 (Laughter.)

7 MR. GLOGAU: Well, actually, in Union Gas maybe  
8 it does, since it was a 4-1-4 decision.

9 QUESTION: Mr. Glogau, I think we can find that  
10 language, but from your perspective, if this whole thing  
11 were voluntary on Florida's part, here's the machinery, if  
12 you want to negotiate, negotiate, if you don't want to,  
13 this is what happens, that would be all right. There'd be  
14 no Eleventh, Tenth Amendment problem, right?

15 MR. GLOGAU: That's correct, if it was truly  
16 voluntary.

17 QUESTION: But it also would give the State no  
18 clout.

19 MR. GLOGAU: Well --

20 QUESTION: In other words, the tribe can then  
21 say, forget it. We're not interested.

22 MR. GLOGAU: Well, in this --

23 QUESTION: We'll get a better deal from the  
24 Secretary.

25 MR. GLOGAU: Right, but the problem is the way

1 you're suggesting we construe the statute also upsets the  
2 balance that Congress thought it was creating in this  
3 statute because the States --

4 QUESTION: Is there any way that Congress can  
5 give the States a role in this that would work?

6 MR. GLOGAU: Well, they could give the option to  
7 the State to be involved in Indian gambling, and  
8 specifically -- specifically require, as in the Parden  
9 case specifically require that if you want to be involved  
10 in Indian gambling regulation, you must submit a waiver to  
11 the constitutional sovereign immunity of the State so that  
12 we can assure that there is evenhanded bargaining at the  
13 bargaining table. That is not what this statute does,  
14 though.

15 QUESTION: Could Congress also provide that  
16 there shall be no gambling unless the State of its own  
17 will makes a compact with the Indians?

18 MR. GLOGAU: Yes. The Congress has absolute  
19 authority over the Indian tribes and absolute control over  
20 what happens on Indian lands. If that is their wish to  
21 create that kind of a regulatory structure, that is within  
22 their power.

23 QUESTION: May I ask just -- I'm really having  
24 trouble sorting all this out, because it is a complicated  
25 statute, but if you should prevail and we buy everything

1 you've argued as correct, would that nullify -- as a  
2 practical matter nullify the entire statute and put you  
3 back in the pre-1988 law?

4 MR. GLOGAU: Well, depending on how broadly the  
5 opinion is written --

6 QUESTION: By every argument you made.

7 MR. GLOGAU: Yes.

8 QUESTION: It seems to me that would hurt you.  
9 it really does.

10 MR. GLOGAU: Thank you, Your Honor.

11 QUESTION: Thank you, Mr. Glogau.

12 Mr. Rogow, you have 4 minutes remaining.

13 REBUTTAL ARGUMENT OF BRUCE S. ROGOW

14 ON BEHALF OF THE PETITIONER

15 MR. ROGOW: Justice Stevens, I'm in a strange  
16 position here, and it must be one of the first times in  
17 history that a lawyer for Indian tribes is arguing to give  
18 the States a chance to be heard, and yet that's what this  
19 statute does, but I argue for it because we think it is  
20 right constitutionally.

21 I'm not here to defend Congress' power. I'm  
22 here to defend the tribal sovereignty, and Congress has  
23 seen fit -- it has exclusive plenary authority over the  
24 tribes, and it does over the States -- has seen fit to  
25 craft this delicately balanced statute.

1           There is nothing -- when one reads the statute,  
2           the tribe and the State --

3           QUESTION: But Congress doesn't have sovereignty  
4           over the States. That is simply fundamentally wrong under  
5           the Constitution. The States are separate, autonomous  
6           sovereignties within their sphere.

7           MR. ROGOW: They are, but --

8           QUESTION: Congress doesn't order States to do  
9           something.

10          MR. ROGOW: The Tenth Amendment which has come  
11          into this case in the argument, I must say first, is not  
12          before the Court. The Tenth Amendment was not raised  
13          below by the State. The Eleventh Circuit refused to  
14          address --

15          QUESTION: Well then, if you want to amend your  
16          statement that subject to any Tenth Amendment reservation  
17          Congress might have some power over the States, fine, but  
18          that's not what you said.

19          MR. ROGOW: What I have said, Justice Kennedy  
20          is, is that in the congressional power, the plenary power,  
21          the Congress does have the power to abrogate State  
22          immunity, and this is, I think, critical. There is no  
23          compulsion here. The compulsion is only to sit down and  
24          talk with the Indian tribes.

25          QUESTION: If there's no compulsion, why worry

1 about abrogating immunity?

2 MR. ROGOW: Because there must be a remedy, and  
3 the remedy is that the rest of the process which Congress  
4 had the power to create would then be triggered. This was  
5 deferential to the States, and that's why I start off by  
6 saying it's an odd and strange position to be arguing in  
7 favor of the States having an opportunity to be heard.

8 One question was asked during the argument, is  
9 what is to be gained by the States, and what is to be  
10 gained by the States is something that they would not  
11 otherwise have had, an opportunity to participate in the  
12 scope of gaming. Is that better --

13 QUESTION: Well, they might well gain in this  
14 case if we found against them, but they're looking down  
15 the road, and the principles that this case would  
16 establish as to what the Federal Government can order the  
17 States to do, and as to when the Federal Government can  
18 permit the States to be sued, are important issues.  
19 They're looking beyond Indian gaming laws.

20 MR. ROGOW: They are, Justice Scalia, but the  
21 precedent is already there for this kind of order from a  
22 Federal court. It is not intrusive.

23 QUESTION: What precedent is that?

24 MR. ROGOW: A host of cases, beginning --  
25 Morales v. TWA, for example, at 112 Supreme Court, which I



1 mentioned earlier, is a case where Ex Parte Young was used  
2 to enforce Federal law, not constitutional law. Ex Parte  
3 Young works in this situation.

4 QUESTION: Was that involved in -- was -- did  
5 Morales discuss in any detail the Ex Parte Young aspect of  
6 that case?

7 MR. ROGOW: It used and cited Ex Parte Young as  
8 being the vehicle for suing seven attorney generals, I  
9 think, to enjoin them from enforcing laws that would have  
10 violated Federal laws, and so --

11 QUESTION: But not the vehicle for patching up a  
12 broken statute, which says you sue the State. It wasn't  
13 the vehicle -- say well, it says the state, but we're  
14 going to use Ex Parte Young instead. That's quiet a  
15 different thing.

16 MR. ROGOW: But the statute isn't broken,  
17 Justice Scalia, if one reads the cause of action against  
18 the State to obligate the State simply to the duty to  
19 negotiate.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rogow.  
21 The case is submitted.

22 (Whereupon, at 2:00 p.m., the case in the above-  
23 entitled matter was submitted.)  
24  
25

## 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:*

SEMINOLE TRIBE OF FLORIDA, Petitioner  
v. FLORIDA, ET AL.

CASE NO. : 94-12

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Ann Marie Federico

(REPORTER)