

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: KENNETH LEE BAKER AND STEVEN ROBERT  
BAKER, BY HIS NEXT FRIEND, MELISSA THOMAS,  
Petitioners  
v. GENERAL MOTORS CORPORATION

CASE NO: 96-653 *e.f.*

PLACE: Washington, D.C.

DATE: Wednesday, October 15, 1997

PAGES: 1-56

**REVISED**

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'97 DEC 19 12:04

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
KENNETH LEE BAKER AND STEVEN :  
ROBERT BAKER, BY HIS NEXT :  
FRIEND, MELISSA THOMAS :  
Petitioners :  
v. : No. 96-653  
GENERAL MOTORS CORPORATION :  
- - - - -X

Washington, D.C.  
Wednesday, October 15, 1997

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

APPEARANCES:  
LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on  
behalf of the Petitioners.  
PAUL T. CAPPUCCIO, ESQ., Washington, D.C.; on behalf of  
the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	LAURENCE H. TRIBE, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	PAUL T. CAPPUCCIO, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	LAURENCE H. TRIBE, ESQ.	
10	On behalf of the Petitioners	53
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: Well, we'll hear  
4 argument first this morning in Number 96-653, Kenneth Lee  
5 Baker and Steven Robert Baker v. General Motors  
6 Corporation.

7 Mr. Tribe.

8 ORAL ARGUMENT OF LAURENCE H. TRIBE

9 ON BEHALF OF THE PETITIONERS

10 MR. TRIBE: Mr. Chief Justice and may it please  
11 the Court:

12 One judge in Michigan, without an adversary  
13 hearing, enters a consent decree as part of a stipulated  
14 monetary settlement between G.M. and an employee, Ron  
15 Elwell. The employee can give testimony about G.M.'s  
16 practices that it considers damaging but is unable to  
17 suppress in the usual manner -- that is, by persuading a  
18 judge that the testimony is inadmissible because of  
19 attorney-client privilege, trade secrets, and the like.

20 The decree permanently enjoins the employee from  
21 being deposed or testifying without the consent of General  
22 Motors as a witness of any kind in State or Federal  
23 litigation brought against G.M. anywhere by anyone,  
24 whether a private plaintiff seeking damages or a public  
25 official enforcing health and safety regulations or

1 criminal statutes.

2 QUESTION: Mr. Tribe, you refer to the Michigan  
3 proceeding as a consent decree. What are you -- what  
4 precisely do you mean by that?

5 MR. TRIBE: What I mean, Mr. Chief Justice, is  
6 that there was no adversary hearing and though consent  
7 decree is sometimes used to refer to a class action, here  
8 it was a stipulated settlement entered on the record by  
9 the judge after --

10 QUESTION: Well, that's true of all settlements,  
11 isn't it, that there's no adversary hearing?

12 MR. TRIBE: Sure. This is not -- we're not  
13 suggesting that there was anything unique or unusual about  
14 it. What's unusual, or at least what some people think is  
15 unusual, is that the request for a subpoena to depose the  
16 employee or to call him as a witness comes from a litigant  
17 who was not a party to and had no notice of the little  
18 proceeding that led to the quite usual entry of the  
19 decree.

20 Now, the district --

21 QUESTION: Well, even if Baker had had notice in  
22 Missouri, I take it your position is he wouldn't have to  
23 go to Michigan.

24 MR. TRIBE: That's certainly true --

25 QUESTION: Well --

1 MR. TRIBE: -- but it makes it, if anything,  
2 worse that they didn't have notice.

3 QUESTION: I take it your position would be the  
4 same if there had been an adversarial proceeding and --  
5 which had resulted in --

6 MR. TRIBE: Absolutely. Absolutely. I make  
7 that point only because at various points in the brief by  
8 General Motors it's suggested that there were some  
9 elaborate findings that this was the only possible way of  
10 protecting privilege. Our position would be the same  
11 anyway, but I just wanted to note the fact. The  
12 district --

13 QUESTION: I thought, Mr. Tribe, that you made  
14 that point to underscore that issue preclusion has no part  
15 in this case at all, because nothing was ever actually  
16 litigated.

17 MR. TRIBE: That's certainly true, Justice  
18 Ginsburg --

19 QUESTION: So --

20 MR. TRIBE: -- and it's in addition true that if  
21 there had been litigation, it's somewhat ironic that a  
22 determination by Judge Hathaway in Michigan that, for  
23 example, some document was privileged in a proceeding  
24 between General Motors and Elwell would obviously not be  
25 binding against the Bakers here, and yet the intriguing

1 thing is that this decree, the injunction, has this  
2 enormous effect on them. The question is, does it matter  
3 that they weren't there?

4 The district court thought it mattered a great  
5 deal, invoked what it called the rights of third  
6 parties -- at page 28a -- and essentially took the  
7 position that the full --

8 QUESTION: This is the district court in  
9 Missouri now?

10 MR. TRIBE: No, I'm sorry, the district -- yes,  
11 the district court below, in Missouri, Mr. Chief  
12 Justice -- took the position that the full faith and  
13 credit statute should not be read to mean that a decree of  
14 this kind, and I quote him, forever defines the rights of  
15 innocent third parties who have a keen interest in the  
16 information that Elwell holds.

17 Now, the Eighth Circuit disagreed, took the  
18 position that the whole point of the decree was to dispose  
19 of what it called these discovery rights of litigants, and  
20 to do so in all of the other lawsuits that the Michigan  
21 judge assumed would follow.

22 Of course, if the Eighth Circuit is right, the  
23 consequences are pretty sweeping. The old maxim that the  
24 public has a right to every man's evidence will need a  
25 footnote saying, unless he has sold his silence --



1 QUESTION: Why is that?

2 MR. TRIBE: -- evidence might expose.

3 QUESTION: Why is that? Isn't the issue just  
4 whether the Baker -- what's the -- the plaintiff --

5 MR. TRIBE: The plaintiffs here are the Bakers.

6 QUESTION: The Bakers --

7 MR. TRIBE: The children.

8 QUESTION: -- would have to go to Michigan and  
9 say, we're not bound by the Michigan decree. Of course  
10 they're not bound by it. So they'd go to Michigan and  
11 they'd say, look, we've never litigated this, and  
12 therefore will you please modify the decree because, after  
13 all, we don't want to ask him about any privileged  
14 information. We don't want to ask him about any  
15 confidential information. We want information that we  
16 have a right to. Your decree is too broad, so modify it.  
17 We were never parties. And they'd be totally right in  
18 that, wouldn't they? So the issue is just what court they  
19 have to go to.

20 MR. TRIBE: Well, that's one way of putting it.  
21 If that were the only issue, then I think this Court's  
22 decision -- really several decisions. Crider v. Zurich, a  
23 decision of this Court, holds that a local venue rule like  
24 the one Michigan has saying that you've got to go to the  
25 original issuing court in order to make a change in a

1 decree or a judgment or an injunction, because that denies  
2 the full faith and credit premise of the equal competence  
3 of the courts of other States to entertain the matter,  
4 that kind of venue rule is not entitled to full faith and  
5 credit.

6 QUESTION: Well, isn't another way to answer the  
7 question to just say that it's not Baker's burden to undo  
8 the injunction, it's G.M.'s burden to show that Baker is  
9 bound, and it can't do that when Baker wasn't a party.

10 MR. TRIBE: That's certainly right, Justice  
11 Kennedy, and in fact --

12 QUESTION: That's precisely the issue,  
13 because -- you might come to this when you want, but  
14 what's worrying me is, if you require the Bakers to go to  
15 Michigan you run into the problem that Justice Kennedy  
16 raised. Why should they have to go to Michigan?

17 MR. TRIBE: Yes.

18 QUESTION: All right. But if you don't require  
19 them to go to Michigan, you run into the possibility that  
20 Elwell, the Elwells of the world, i.e., those under  
21 injunctions, will get under conflicting injunctions, and  
22 then they'll really be in a mess because in -- you know,  
23 you have one State telling them you have to do a thing and  
24 another State saying you can't do a thing --

25 MR. TRIBE: Well, the --

1 QUESTION: -- and that would produce a terrible  
2 practical mess, so between those two evils, it seems  
3 better to send them to Michigan.

4 MR. TRIBE: Well, let me back into that, Justice  
5 Breyer. I certainly don't agree that that's better, and I  
6 also don't agree that it's a hopeless clash of evils.

7 This very settlement took care of that. There  
8 was a side agreement that said that if he is ordered to  
9 testify, then he cannot be sanctioned. He, indeed, has  
10 testified against G.M. in some 30 trials. Not once --

11 QUESTION: This is a really important point in  
12 the case. Let's assume there's no settlement agreement.  
13 Let's just talk about conflicting injunctions. What would  
14 be the answer if there were no settlement agreement?

15 G.M. says, well -- or, Elwell says well, I'm  
16 being told one thing in one State and the other thing in  
17 the other State, and what's the answer to that?

18 MR. TRIBE: Well, I think the answer is that  
19 contempt requires a certain mens rea, and that in that  
20 case he cannot be held in contempt for following the order  
21 of a court that appears to have competent jurisdiction --

22 QUESTION: Well, doesn't the Missouri court also  
23 have the capacity to instruct G.M. not to enforce the  
24 injunction against Elwell in defiance of Missouri's  
25 orders?

1 MR. TRIBE: I think that's certainly right.  
2 G.M. has to be before the Missouri court to create the  
3 problem. In this case, the way it was indeed structured  
4 was with a side agreement that eliminated the very problem  
5 that the Court --

6 QUESTION: But what I'm actually worried is not  
7 this case. I'm worried about custody cases, antitrust  
8 cases, dozens of cases in which very complicated  
9 injunctive decrees could have been entered against  
10 defendants in State 1, and then grandma in Florida in a  
11 custody case, or any supplier in an antitrust case  
12 produces a different action in Florida and puts Alcoa or  
13 Swift or mummy or daddy or somebody under a conflicting  
14 injunctive decree, and that's what I'm worried about.

15 MR. TRIBE: Well, but I do think first there's  
16 obviously a certain wisdom in taking these one case at a  
17 time, and it seems to me very clear that in a case like  
18 this, where it is just wordplay to say that this is not  
19 being used against the Bakers, that they're not being  
20 bound, of course they are. They are being deprived of the  
21 procedures that would otherwise be available to get this  
22 evidence, and the only thing that's being invoked to  
23 deprive them of it, in a sense a legal defense to their  
24 claim, is the Michigan judgment. In that circumstance,  
25 just as in --



1 QUESTION: That's what full faith and credit  
2 always produces, some result like that. Supposing the  
3 Michigan decree hadn't involved testimony. Suppose it  
4 involved a car, and you go to Missouri and you say well,  
5 why should this Missouri creditor be denied the resort to  
6 Missouri courts over this claim to a car?

7 MR. TRIBE: Well, what --

8 QUESTION: And the answer is, full faith and  
9 credit.

10 MR. TRIBE: Well, Chief Justice Rehnquist, this  
11 Court in in personam as opposed to in rem cases, where  
12 there is, in fact, a finite object and it has to be  
13 allocated, and once it is you can't continually relitigate  
14 it, has never held that we can simply let the chips fall  
15 where they may when a judgment has been entered not over  
16 an object but over knowledge in someone's head, a judgment  
17 that says we're going to say you can't testify it.

18 That is, in Martin v. Wilks it could also have  
19 been said in response to your opinion for the court could  
20 also have been said, well, consent decrees often have side  
21 effects and, indeed, the way that General Motors tries to  
22 make this look like anything other than an easy case is to  
23 suggest that the decree is only being enforced against Mr.  
24 Elwell, and that my clients are simply in the wrong place  
25 at the wrong time, or their mother was in that car.

1 Now, that, I think, is sheer sophistry. It's  
2 not true, because unlike a judgment that changes something  
3 physical, it reduces the assets available, it eliminates a  
4 job, this judgment has effect on the Bakers only because  
5 it is used to preclude them from arguing to the court in  
6 Missouri that they are entitled to have Elwell's  
7 testimony. It has preclusive effect. It involves the  
8 absentee adjudication of their rights. That's what this  
9 Court has never allowed.

10 QUESTION: Mr. Tribe, would you distinguish what  
11 the -- we're told by your colleague that this is just an  
12 incidental effect. It's like, creditor 1 sues debtor, and  
13 debtor, paying that judgment, wipes out debtor's fortune.  
14 Creditor 2 comes along, just as good a case, tough luck.

15 MR. TRIBE: Right, and this, Justice Ginsburg,  
16 is nothing like that. A case like that shows that a  
17 judgment can be for some people a natural disaster. The  
18 landscape has changed and you can't reconstruct it. The  
19 judgment in this case didn't change anything physical.  
20 It's not, for example, as though this was a judgment that  
21 Mr. Elwell did something terrible and should be executed  
22 in the State of Michigan which would, of course, render  
23 him unavailable.

24 The only way -- just -- you have to ask  
25 yourself, I think, what the causal chain is. Their

1 argument is, so what, too bad, the judgment in Michigan  
2 has made this fellow essentially unavailable, just as  
3 though he were incarcerated. But of course then, under  
4 the Federal rules, one could at least depose him.

5 The fact is, if you ask, what's the causal chain  
6 by which he was made unavailable, he's unavailable only to  
7 the extent -- and this goes back to Justice Kennedy's  
8 question -- that General Motors' request to the judge in  
9 the State of Missouri that the judgment in Michigan be  
10 treated as preclusive of the rights of the litigants in  
11 Missouri, who weren't there, weren't represented, weren't  
12 privies, had no notice, it's only to the extent that that  
13 request is granted.

14 QUESTION: But if Elwell really is not  
15 available, then couldn't you, on behalf of the Bakers,  
16 introduce Elwell's testimony from the Georgia case, where  
17 he did testify, I think about the same defect.

18 MR. TRIBE: Well, the testimony about the Ivey  
19 memorandum was particularly helpful here, and rather  
20 damning, I think, to General Motors, but certainly one  
21 ought not to be -- it's really -- the idea that there are  
22 second best solutions all build on the wrong premise, that  
23 you can bind them to this decree, bind in a strictly  
24 technical, legal sense.

25 That is, Justice Stevens, for example, in the

1 dissent in Martin v. Wilks came up with a possible way  
2 that a consent decree in a case like that might be used  
3 against the other side without really binding them. That  
4 is, it might bear on the state of mind of the person  
5 subject to the decree. It might help the employer in a  
6 title VII case negate a claim of bad faith.

7 No such indirect use of the decree is involved  
8 here. The decree is being brought to bear fully on the  
9 only people who are hurt by it. It's not being enforced  
10 against Mr. Elwell, who's never sanctioned. The entire  
11 structure of the situation is that General Motors obtains  
12 a settlement in which it has a chance to argue to courts  
13 around the country you ought to prevent the plaintiffs in  
14 these cases from getting this evidence that they could  
15 otherwise get, to which they would be entitled under the  
16 Federal rules, not because you have a right to some  
17 kind of evidence in the abstract, but because you have an  
18 entitlement to use the rules in place.

19 QUESTION: If we were to rule in your favor and  
20 cite the Full Faith and Credit Clause, would we also have  
21 to talk about due process, or would we say that the Full  
22 Faith and Credit Clause is complementary to the basic  
23 principles of the law of judgments, and that Baker is just  
24 not bound under standard principles of the laws of  
25 judgment? Would --



1                   MR. TRIBE: The latter. The latter, Justice  
2 Kennedy. That is, and this Court's precedents make clear  
3 that full faith and credit and the law of judgments and of  
4 res judicata are bound up historically and analytically,  
5 and the only reason you might want to reach

6                   QUESTION: We don't have any square holding.  
7 We've intimated that in some of the cases, I think.

8                   MR. TRIBE: Well, I -- there's certainly  
9 alternative holding in -- some of the earlier cases before  
10 the 1970's, when the Court began positivizing procedural  
11 due process, there were cases, a fair number of them,  
12 including Hansberry v. Lee and others, in which the  
13 language of the Court is that it has been a principle  
14 since time immemorial that people are not bound by  
15 judgments in proceedings that they don't have a chance to  
16 participate in, and occasionally the phrase, full faith  
17 and credit, has entered those opinions.

18                   But that has been axiomatic throughout. You  
19 only reach procedural due process if you think that  
20 Congress for some reason in section 1738 departed from  
21 that normal understanding of full faith and credit and the  
22 law of judgments, in which case we argue that it would  
23 have been a deprivation of property in the form of an  
24 entitlement to invoke the procedural rules, much like  
25 Logan v. Zimmerman, without due process, even considering

1 Justice Breyer's --

2 QUESTION: Excuse me. The property involved  
3 here is the right to invoke the procedural rules?

4 MR. TRIBE: Yes, as in --

5 QUESTION: I thought the property was your cause  
6 of action, which --

7 MR. TRIBE: Well, there are two. There's a  
8 State-created property, Justice Souter, the tort cause of  
9 action, and a second State-created property interest in  
10 the Missouri-created separate cause of action for damages  
11 for aggravated action. It's a kind of punitive damage --

12 QUESTION: I don't think you'll find much  
13 disposition on the Court to enlarge on Logan v. Zimmerman.

14 MR. TRIBE: I don't have any desire to urge the  
15 Court to enlarge on Logan.

16 QUESTION: I think you'd have to to rely on it  
17 the way you said you did.

18 MR. TRIBE: Well, with respect to the federally  
19 created entitlement to invoke the rules, I don't think --  
20 the key point is, we're not talking, Mr. Chief Justice,  
21 about some takings argument. We're only talking about the  
22 fact that when the rules provide a clear right to obtain  
23 or to seek to obtain a subpoena or a deposition, then that  
24 is enough of an entitlement so that it would not be  
25 constitutional for a court to say well, we'll decide that

1 by a flip of a coin.

2 QUESTION: Would you say that it's liberty or  
3 property, or do you have to say that it's one of the  
4 three?

5 MR. TRIBE: I don't think one has to choose --

6 QUESTION: One of the two?

7 MR. TRIBE: -- but it could be -- it could be  
8 either, but I --

9 QUESTION: Does it have to be one?

10 MR. TRIBE: Well, I think it is both. It would  
11 have to --

12 QUESTION: It has to be one, doesn't it?

13 MR. TRIBE: It certainly has to be one of the  
14 three, and it's not life. But it doesn't really in this  
15 case have to be --

16 (Laughter.)

17 MR. TRIBE: -- any of the three, because full  
18 faith and credit doesn't extend in this way, doesn't  
19 extend in this way to judgments that were rendered in a  
20 proceeding that one was an utter stranger to.

21 I mean, whatever you think of the practical  
22 problems that Justice Breyer was discussing, I think you  
23 can rule out as one of the possible solutions a solution  
24 that says, well, the grandmother in his hypothetical, or  
25 the children in mine, will simply have to be bound by a

1 judgment in another jurisdiction. That can't be right.

2 QUESTION: Mr. --

3 MR. TRIBE: Now, if you say, Justice Breyer,  
4 well, I'm not saying they're bound, I'm just saying they  
5 have to travel to Michigan to seek relief, Justice  
6 Brandeis in the Chase National Bank case in 1934  
7 essentially was addressing that problem when he said that  
8 you should have a right to stay at home, mind your  
9 business, and know that the rights won't be affected by a  
10 judgment --

11 QUESTION: Fine. Do you --

12 MR. TRIBE: -- in a district court. Besides --

13 QUESTION: What has surprised me in this --  
14 maybe you can just suggest something I could read.

15 It seems to me in 200 years of history, it must  
16 have come up before that State A enters an injunction  
17 against Smith, and a person in a different State who  
18 wasn't a party and isn't bound would either have to go to  
19 the first State to get it modified or could sue in his own  
20 State and would discover that that person whom the  
21 injunction was aimed at could be made subject to  
22 conflicting injunctive orders.

23 MR. TRIBE: Well --

24 QUESTION: I'm amazed that there isn't something  
25 written that's absolutely clear, explaining --

1 MR. TRIBE: What --

2 QUESTION: -- that it's either the one way or  
3 the other way.

4 MR. TRIBE: Justice Breyer, I hate to disappoint  
5 you, but I have not found anything that is clear enough  
6 that it would bear on an injunction remotely like this  
7 one.

8 QUESTION: Well, but you see, maybe your  
9 injunction is not like what I'm saying, but what's  
10 bothering me is the instance that I'm saying --

11 MR. TRIBE: The effect --

12 QUESTION: -- other injunctions, so is there  
13 something you can point me to that would say why it's  
14 better to have the possibility of conflicting injunctions  
15 than to require the plaintiff to travel to the State where  
16 he's not bound and get the modification.

17 MR. TRIBE: Well, the other party can travel,  
18 but his -- I don't understand why General Motors, given  
19 its vehicular mobility --

20 (Laughter.)

21 MR. TRIBE: -- couldn't just go back to Michigan  
22 and ask for some kind of relief.

23 QUESTION: Mr. Tribe, I thought when you were  
24 concentrating on preclusion principles rather than a due  
25 process personal right that what you were talking about is



1 one State's right to dictate the rules of admissibility of  
2 evidence in another State, and the full faith and credit  
3 is about relations to the -- between the States in the  
4 national union more than it is about personal rights of  
5 individuals, and here there's a question of the allocation  
6 of authority between Michigan --

7 \*QUESTION: Right.

8 QUESTION: -- and Missouri.

9 MR. TRIBE: If I might, Justice Ginsburg, simply  
10 jump to that for a moment, because it seems to me that's a  
11 very important feature of the case that I'm not sure is as  
12 thoroughly explicated in the briefs as it might be, and  
13 that is the following.

14 Set aside for the moment the question of whether  
15 under normal principles of preclusion these children who  
16 were strangers to the proceeding could be bound. I think  
17 the answer to that is clearly no. Secondly, I think it's  
18 clear they're being bound.

19 But the point you make is the one that intrigues  
20 me most in a way, and that is, the whole premise of full  
21 faith and credit in a Federal union like ours is a premise  
22 of mutual respect, the premise that says a State is not to  
23 assume that the courts of another State just can't do  
24 justice as well as its courts can and, indeed, that  
25 premise pervades our system.

1           The Anti-Injunction Act and the Younger doctrine  
2 means the Federal courts can't presume inadequacy on the  
3 part of the State courts, and this Court's decisions in  
4 Donovan v. Dallas and General Atomic indicate, too, that a  
5 State court cannot tell litigants, even litigants in its  
6 courts, that they may not invoke certain procedures in a  
7 Federal court.

8           In General Atomic it wasn't even an antisuit  
9 injunction. They were being told that they could not use  
10 Rule 14 as an impleader.

11           This case is a classic example of that.  
12 Essentially, if the Eighth Circuit's use of the decree  
13 from Michigan is affirmed, it will follow that the courts  
14 of a State can not only make decisions that will have res  
15 judicata and preclusive and sometimes collateral estoppel  
16 effect substantively in the courts of another State, it  
17 will follow that the courts of a State can control who can  
18 be called as a witness, who can be deposed, what evidence  
19 can be introduced in another State or in the Federal  
20 courts.

21           That, it seems to me, is impermissible. I mean,  
22 decisions --

23           QUESTION: But -- you know, this is troublesome  
24 because Michigan isn't telling Missouri what to do.  
25 Missouri can allow Elwell to be called to the stand, and

1 Elwell can say, but I can't testify to this. I decline to  
2 answer. So Missouri isn't being deprived of the --

3 MR. TRIBE: No, Missouri, Justice O'Connor --

4 QUESTION: -- process.

5 MR. TRIBE: Well, Missouri is being told that  
6 it's --

7 QUESTION: Plenty of times witnesses have some  
8 privilege that can be asserted so that the Bakers wouldn't  
9 be entitled to certain testimony. They can call the  
10 witness to the stand. The witness says, sorry, I'm here,  
11 but this is privileged information.

12 MR. TRIBE: But if it's privileged because of  
13 some background rule like the Fifth Amendment privilege,  
14 that's one thing, but if a State can create this kind of  
15 special witness protection program under which it can  
16 decide which witnesses it would be utterly futile to call  
17 in the courts of -- in the Federal courts despite their  
18 own independent interest in the administration of justice,  
19 that would be an interpenetration --

20 QUESTION: Do we know how other courts in  
21 Michigan would treat this injunction? Has it been tested  
22 in another suit against G.M. in Michigan, for instance?

23 MR. TRIBE: There are several cases, Justice  
24 O'Connor, in which judges have washed their hands of it  
25 and have said, under our venue rules go to Judge Hathaway.

1 Even though it was the same court in Michigan, they  
2 treated the venue rule as a kind of rule of personality,  
3 and Judge Hathaway apparently has sort of washed his  
4 hands of it and has said, I put the injunction in place,  
5 so that it appears to be --

6 QUESTION: Mr. Tribe, can I ask you a question  
7 about your understanding of the meaning of the injunction?  
8 There's some difference between the side agreement that  
9 says we won't seek contempt charges if you testify and the  
10 text of the injunction itself.

11 Do you agree that the injunction in effect says  
12 to the -- this witness, if you are subpoenaed to testify  
13 or ordered by a court in another State to testify, you  
14 shall not comply with that order?

15 MR. TRIBE: The answer is yes. I think it  
16 probably means that, but it's ambiguous, and the record  
17 doesn't resolve the ambiguity.

18 QUESTION: Well, if it means that, do you  
19 concede or do you dispute that the Michigan court will  
20 have the power to enter such an order?

21 MR. TRIBE: I dispute that the Michigan court  
22 has the power to enter an order that directly tells  
23 someone to defy the order of another jurisdiction --

24 QUESTION: Well then, if you're right on that,  
25 the order would not be entitled to full faith and credit

1 under elementary jurisdictional principles.

2 MR. TRIBE: Well, I think that's right as well.

3 QUESTION: But you don't seem to make that  
4 argument.

5 MR. TRIBE: Well, we make it indirectly in the  
6 point that I was elaborating to Justice Ginsburg. That  
7 is, if it is true that the courts of the united States and  
8 of the various States are not authorized to put people in  
9 this circumstance and in effect to make inroads in the  
10 internal operation of the systems of other States and of  
11 the Federal Government, then this order is completely void  
12 independent of the nonparty status of the Bakers.

13 QUESTION: So you want us to have some kind of a  
14 standard to say that you can't interfere with the vital or  
15 important interests of the sister State?

16 MR. TRIBE: Well --

17 QUESTION: I mean, is that --

18 MR. TRIBE: No, it's not quite as big as that,  
19 Justice Kennedy. I think as in Prince and in New York  
20 this is a case that's -- that I think, though, there are  
21 much easier ways to decide it. Under normal principles of  
22 judgments, I think it's possible to say --

23 QUESTION: Well, what --

24 QUESTION: What is the standard?

25 QUESTION: Excuse me.



1                   MR. TRIBE: That the internal operations of the  
2 judicial systems of each State cannot be manipulated or  
3 commandeered by the judgments of other States, but I don't  
4 myself suggest that a case that can be disposed of as  
5 simply as this one because of the Bakers' nonparty status  
6 should be the vehicle either for exploring the puzzles  
7 that Justice Breyer raises or for adopting this add-on to  
8 Prince.

9                   QUESTION: What if the Michigan court had  
10 litigated the issue of privilege as between Elwell and  
11 General Motors --

12                   MR. TRIBE: Yes.

13                   QUESTION: -- and had concluded that  
14 information about subject X was privileged, and made that  
15 determination and then said, and you can't disclose that,  
16 Mr. Elwell, anywhere, anytime. Is that entitled to full  
17 faith and credit when Elwell is called then as a witness  
18 in another jurisdiction?

19                   MR. TRIBE: I think as between Elwell and G.M.,  
20 yes, although the Bakers or others like them are not bound  
21 by that determination under standard principles of  
22 preclusion.

23                   QUESTION: That is no. I mean, your answer is  
24 no --

25                   MR. TRIBE: Well --

1 QUESTION: -- in the context of this case.

2 MR. TRIBE: It depends whether there is a  
3 nonparty whom one is seeking to bind.

4 QUESTION: The only point at which the one State  
5 is commandeering the process of the other, I take it, is  
6 the point at which the second State simply will not hear  
7 the third party. The State -- the second State says, I  
8 don't care what you tell me, there is a decree, full faith  
9 and credit, that's the end of the issue. That's the point  
10 at which it commandeers, isn't it?

11 MR. TRIBE: I think, Justice Souter, yes, and  
12 that's what the Eighth Circuit is basically telling the  
13 courts of Missouri to do.

14 I think I perhaps should reserve the balance of  
15 my time.

16 QUESTION: Very well, Mr. Tribe.

17 Mr. Cappuccio, we'll hear from you.

18 ORAL ARGUMENT OF PAUL T. CAPPUCCIO

19 ON BEHALF OF THE RESPONDENT

20 MR. CAPPUCCIO: Thank you, Mr. Chief Justice,  
21 and may it please the Court:

22 There are two reasons why there cannot possibly  
23 be a due process objection to the application of full  
24 faith and credit here and Justice Breyer, your question  
25 raised one of those grounds and, Justice Kennedy, you

1 picked up on it and I'm going to try to answer both of  
2 you, and Mr. Chief Justice, you raised the other ground,  
3 and probably the simplest reason is that ultimately by the  
4 application of full faith and credit here we are just  
5 talking about what court will decide whether or not in  
6 this case Elwell will be allowed to testify.

7 That's the application of full faith and credit,  
8 and that --

9 QUESTION: The application of full faith and  
10 credit as far as I know, in all the history of that  
11 clause, this Court has never even said that full faith and  
12 credit is owed to a decree ordering a person to do an act.

13 Indeed, wasn't it entirely clear under the  
14 regime that existed until the thirties under the First  
15 Restatement of Conflicts that a granting or denying -- and  
16 I'm reading you from the First Restatement section 449 --  
17 granting or denying equitable relief other than in order  
18 to pay money is a matter of discretion, and the decision  
19 of one court to give specific relief will not limit  
20 another court and thus exclude the use of discretion by  
21 the second court.

22 That was talking even as between the two parties  
23 to the first judgment, and here you're saying, oh, but we  
24 can enforce an order to act not only as to the party who  
25 was ordered to act, which this Court has never said comes

1 within full faith and credit, but to -- against a  
2 stranger. Now, that is really asking this Court to take a  
3 giant step.

4 MR. CAPPuccio: Your Honor, I respectfully  
5 disagree. I don't think it is. I think the Restatement  
6 is flatly wrong in what it said. This Court has never  
7 denied full faith and credit to equitable decrees, and  
8 there is no basis for distinguishing --

9 QUESTION: Just give me one citation where this  
10 Court has said State 2 must compel X to do an act simply  
11 because State 1 compelled X to do an act.

12 MR. CAPPuccio: Well, I can give you -- a  
13 custody decree, for example, will require someone to have  
14 or not have the child. A -- Cole v. Cunningham, which was  
15 an antisuit case which went very far --

16 QUESTION: All that Cole v. Cunningham said was  
17 that State 1 can issue an antisuit injunction. It did not  
18 say that State 2 had to pay that injunction any mind.

19 MR. CAPPuccio: But Your Honor, there is no  
20 basis in either the language of section 1738 or any policy  
21 of full faith and credit to treat an injunction or an  
22 affirmative injunction, as opposed to a prohibitory one,  
23 any different. They are both judicial proceedings --

24 QUESTION: I'm simply asking you, has there ever  
25 been such a case in the history of the United States --

1 custody is a status, child custody. Those decrees are  
2 modifiable.

3 MR. CAPPUCCIO: I am unaware --

4 QUESTION: I am not aware -- I am aware of some,  
5 as you no doubt know, the land cases, Fall v. Eastin,  
6 Klopp v. Klopp say even the very actor that was told to  
7 convey a piece of property in State 1 doesn't have to do  
8 it if he's in State 2 and that's where the property is.

9 MR. CAPPUCCIO: Well, I'm not sure that's the  
10 holding of Fall v. Eastin. Actually, the problem in that  
11 case was that the court tried to effect title to land  
12 directly. But I think in that case the husband could be  
13 directed to convey the land, and I think the concurrence  
14 in that case --

15 QUESTION: Well, it's a long extension. I'm  
16 simply making the point that you are asking this Court to  
17 make a ruling that it has never made.

18 You may be right that it should.

19 MR. CAPPUCCIO: Your Honor --

20 QUESTION: You may be right that the Restatement  
21 was wrong and that those cases were wrong, but it is  
22 something very novel you're asking us to do.

23 MR. CAPPUCCIO: Your Honor, two answers to that.  
24 Fall v. Eastin is actually an example for me, because I  
25 think it was Justice Holmes in his concurrence thought it



1 was quite plain that the order requiring the husband to  
2 convey the land was entitled to full faith and credit, and  
3 second, we cite a number of lower court cases in our  
4 briefs, including from the Seventh Circuit, that  
5 established that this is a fairly well-settled issue that  
6 full faith and credit is entitled to injunctions, both  
7 prohibitory injunctions and affirmative injunctions.

8 QUESTION: But in all events, the other problem  
9 is that you're trying to make this applicable to Baker,  
10 and Baker is simply not bound.

11 Now, if G.M. finds itself in the position of  
12 Elwell testifying, and it tries to hold Elwell in contempt  
13 back in Michigan, would Elwell have a defense on some sort  
14 of due process grounds, do you think, that he was ordered  
15 to do what the Missouri court told him to do because due  
16 process concerns and full faith and credit concerns simply  
17 did not allow the injunction to be enforced?

18 MR. CAPPUCIO: No, sir. He would be in  
19 contempt of the injunction. But I understand the problem  
20 here, and the problem here is to 1) ask what sort of  
21 effect is this having on third parties, and is that effect  
22 so great as to violate due process, or does it leave them  
23 with a way to defend their rights in a manner that is  
24 consistent with due process?

25 QUESTION: Well, I'm not sure that we have to

1 address it in the due process context and, frankly, I hope  
2 we don't have to. Can't we just ask whether this is  
3 required by the Full Faith and Credit Clause? Why do we  
4 have to pin it on some due process --

5 MR. CAPPuccio: Well, Your Honor, because the  
6 application of full faith and credit is fairly  
7 straightforward here, and this picks up on another  
8 question you had.

9 The full faith and credit statute says that the  
10 Michigan injunction is entitled to the very same force and  
11 effect that it would have within the State of Michigan.  
12 That's common ground.

13 The Michigan courts, we were fortunate in this  
14 case, have interpreted the force and effect of this very  
15 injunction, and the case that we cite in the red brief is  
16 the Brisborne case, and what second courts who people have  
17 gone to have said is that the force and effect that this  
18 injunction is due is that Ron Elwell is prohibited from  
19 testifying unless and until somebody goes back and  
20 presents their claim to the Wayne County, Michigan court  
21 to allow him to testify.

22 QUESTION: But those people were all within the  
23 jurisdiction of the Michigan courts, were they not?

24 MR. CAPPuccio: They were, and I --

25 QUESTION: And that's different, because the

1 Bakers are not.

2 MR. CAPPuccio: Well, Your Honor, it is  
3 different from -- on the due process question, I agree  
4 with you. It is not different --

5 QUESTION: But as Justice O'Connor was  
6 indicating, it seems to me it's also different because of  
7 the fundamental law of judgments, which is that you can't  
8 apply a judgment or enforce a judgment against a person --  
9 against -- where there was no personal jurisdiction over  
10 that person originally.

11 MR. CAPPuccio: Well, that --

12 QUESTION: It's just a simple personal  
13 jurisdiction.

14 MR. CAPPuccio: That sort of raises the question  
15 as to whether these people are being bound by the judgment  
16 rather than being affected by the judgment in some  
17 incidental way, but I think that bound debate, which the  
18 Court has had in Martin v. Wilks, is just a proxy for the  
19 due process analysis. The question --

20 QUESTION: Mr. Cappuccio, it isn't in this  
21 respect. You know, you gave the creditor 1, creditor 2,  
22 and I followed that, creditor 2 comes too late, and it's  
23 just an incidental effect.

24 But here, the whole purpose of this injunction  
25 was to control litigation not in Michigan but elsewhere.

1 The whole purpose was to say, in effect, Michigan rules  
2 the world. It determines what evidence will be admissible  
3 in courts all across the country, although -- and I think  
4 you'll agree with me that to this extent the Restatement  
5 of Conflicts is right -- each State applies its own rules  
6 to determine the admissibility of evidence.

7 So here is Michigan in effect preempting the  
8 ordinary operation of the rules of evidence of all the  
9 courts in the country --

10 MR. CAPPuccio: Your --

11 QUESTION: -- and I've never seen any decree  
12 quite like that.

13 MR. CAPPuccio: Your Honor, this is just  
14 Michigan deciding something between Ron Elwell and General  
15 Motors and preventing Elwell from hurting General Motors.

16 What makes this apply elsewhere is the Full  
17 Faith and Credit Clause, nothing that the Michigan court  
18 did, and what that says is, we have decided as a Nation  
19 because someone can step over the line and hurt General  
20 Motors just as well in another State, that the -- that  
21 that judgment is enforceable everywhere.

22 QUESTION: May I --

23 QUESTION: Mr. Cappuccio, why isn't it the case  
24 that we say, in accordance with the Restatement rule, that  
25 the Full Faith and Credit Clause does not bind Bakers, who

1 were not privy to that proceeding in Michigan, and that  
2 General Motors' remedy is to go after Elwell for contempt  
3 in Michigan --

4 MR. CAPPUCCIO: Because, Your Honor --

5 QUESTION: -- if he agrees to in fact testify?

6 MR. CAPPUCCIO: Because, Your Honor, with the  
7 Full Faith and Credit Clause requires, again, is that the  
8 Michigan injunction be given the same force and effect,  
9 and at a minimum I would argue that requires --

10 QUESTION: Do you have any authority that the  
11 Michigan courts say that their judgments bind persons who  
12 were not before the court, and over whom the court had no  
13 personal jurisdiction?

14 MR. CAPPUCCIO: I'm sorry, Your Honor, they do  
15 not say that. The Michigan courts --

16 QUESTION: Well then, it doesn't have the effect  
17 that you seek to give it here.

18 MR. CAPPUCCIO: No, I'm sorry, Your Honor, the  
19 Michigan courts' cases simply say that someone who is  
20 affected by the judgment and seeks to reopen it, or seeks  
21 to modify it or challenge it, must go back to the court  
22 that rendered it. It is merely a litigation channeling  
23 provision.

24 QUESTION: If they're already in Michigan.

25 MR. CAPPUCCIO: Well, but by -- that's right,



1 Your Honor, because that rule is just for Michigan, but by  
2 operation -- this is the most important point. By  
3 operation of the Full Faith and Credit Clause, that  
4 Michigan rule applies to govern this judgment. It is --

5 QUESTION: Mr. Cappuccio, would you tell me how  
6 Michigan has the power to drag somebody in Alaska, in  
7 Hawaii, and say you can't -- plaintiff, you can't choose  
8 your own forum. You have to come to Michigan to litigate.  
9 The scene that I get from what Michigan -- what you are  
10 attempting to extract from this Michigan judgment is in  
11 effect Michigan rules the world, like the old story about  
12 Tobago rules the world, only now it's Michigan is going to  
13 decide what evidence comes in all over.

14 MR. CAPPUCGIO: I understand that, and I lay  
15 that at the feet of the U.S. Congress, and they were wise  
16 to have done that. That is what section 1738 does.

17 QUESTION: No, but Mr. Cappuccio, may I ask this  
18 question?

19 MR. CAPPUCGIO: Sure.

20 QUESTION: It only does it if the Michigan court  
21 had the power to enter the order it did enter. You would  
22 agree with that much, I assume.

23 MR. CAPPUCGIO: Jurisdiction over the person or  
24 subject matter, yes, sir.

25 QUESTION: And would you think there is any

1 question at all about the power of a Michigan court to  
2 order a litigant before it to refuse to comply with any  
3 normally lawful court order that might be entered anywhere  
4 else in the country? Does that bother you at all?

5 I'm just looking -- I'm not looking about third  
6 parties.

7 MR. CAPPuccio: I understand.

8 QUESTION: I'm just looking just at Elwell. You  
9 are saying to him if -- under your reading of the  
10 injunction, as I understand it, it in effect says no  
11 matter how lawful the court order may be that directs you  
12 to testify, you must refuse on pain of contempt.

13 MR. CAPPuccio: I agree. He would be in  
14 contempt if he did that.

15 QUESTION: And you think it's perfectly clear  
16 that there's no jurisdictional issue as to the power of a  
17 court to enter such an order as required full -- must be  
18 given full faith and credit.

19 MR. CAPPuccio: I can't imagine what the  
20 jurisdictional issue would be. The court had jurisdiction  
21 over the persons, and the court had jurisdiction over the  
22 subject matter, and they entered an injunction that  
23 prevents Elwell from testifying against General Motors.

24 What makes it extraterritorial in its effect --

25 QUESTION: Well --

1 MR. CAPPuccio: -- is the Full Faith and Credit  
2 Clause.

3 QUESTION: -- as between Elwell and General  
4 Motors I suppose it's a settlement. If it had been  
5 contested he could have appealed through the Michigan  
6 courts, but he can't collaterally attack the decree --

7 MR. CAPPuccio: That's --

8 QUESTION: -- just because it may be improper.

9 MR. CAPPuccio: That's right, Your Honor.  
10 That's absolutely right, and that's an important  
11 distinction here which is separating the difference  
12 between whether this injunction is overbroad, which I'm  
13 not asking this Court to decide -- I'm not trying to  
14 stifle debate as to whether this injunction, by covering  
15 evidence that might not be privileged, is overbroad, and  
16 whether it's entitled to full faith and credit.

17 QUESTION: But you're saying any claim that an  
18 injunction is overbroad in this sense must be litigated in  
19 the court entering the injunction.

20 MR. CAPPuccio: Absolutely, sir, Justice  
21 Stevens.

22 QUESTION: May I propose a variant on Justice  
23 Stevens' question?

24 Let's assume we're simply talking about  
25 proceedings in Michigan. As I understand your

1 characterization of what the Michigan court has already  
2 said, it is that it may bind a -- an individual who was  
3 not party to the original litigation between Elwell and  
4 G.M. as to the opportunity of that third party to seek the  
5 normal process of any Michigan court.

6 As I understand it, you are saying that Michigan  
7 says, no, you may not, third party, now a plaintiff in a  
8 new case against G.M., go into the normal, whatever would  
9 be the normal venue in Michigan and say, I want this  
10 evidence. You are bound by an earlier decree to which you  
11 were not party to come into a different court and raise a  
12 different issue, which is, should I be bound by a decree  
13 between these two other individuals? Isn't that the  
14 predicate for a due process issue?

15 MR. CAPPUCIO: Your Honor, no, because I  
16 disagree with your use of the word bind there, because  
17 the question is, what sort of impact does it have on the  
18 third party?

19 You would -- I assume that the Court would agree  
20 that if it were a merely incidental impact there'd be no  
21 due process problem at all, so the first question you have  
22 to ask is, what is the degree of the impact? Does it  
23 foreclose a property right, which is the question the  
24 Chief Justice asked, and then second, what process are you  
25 given?

1           And I'm saying there's no due process objection  
2 either to the Michigan rule or to the application of full  
3 faith and credit, or, I may add, to what Congress has  
4 mandated, which is the exact same thing in the 1991 Civil  
5 Rights Act in the wake of Martin v. Wilks.

6           Petitioners in their brief cite the statute that  
7 was passed in the wake of Martin v. Wilks, and what  
8 Congress requires is exactly the same sort of channeling  
9 of third party collateral -- not collateral attacks, third  
10 party challenges to consent decrees back to the court that  
11 issued it.

12           Petitioners raised it. Allow me to read the  
13 rule. First of all, Congress precludes certain third  
14 parties from raising challenges -- if they had notice, if  
15 they were adequately represented -- but they recognized  
16 there might be new third parties who came along later who  
17 weren't --

18           QUESTION: In other words, real third parties.

19           MR. CAPPuccio: Real third parties.

20           QUESTION: People who were not in fact  
21 substantially represented the first time. Okay.

22           MR. CAPPuccio: Absolutely, Your Honor, and  
23 Congress says in that section, which is section 2000 --  
24 2000 -- do you have it here? -- it's 28 U.S.C. 2000e-2n.  
25 I have the actual bill.



1           Any action not precluded under this section,  
2 meaning real third parties, the challenges in employment a  
3 consent judgment or order described in paragraph 1 shall  
4 be brought in the court and, if possible, before the judge  
5 that entered such judgment or order, and my position is  
6 the constitutionality here of the effect of full faith and  
7 credit is indistinguishable from the constitutionality of  
8 this provision by Congress, which is plainly  
9 constitutional, because all it does is require parties to  
10 go back to the court that issued it, and then the question  
11 is yours, Justice Kennedy --

12           QUESTION: Let me interrupt you again --

13           MR. CAPPuccio: Sorry.

14           QUESTION: If I just might -- supposing the  
15 order -- they found out he had a lot of documents that he  
16 had in his summer home in Wisconsin, and they were under  
17 subpoena, and the judge in Michigan said, I want you to  
18 burn those documents to protect General Motors from the  
19 unlawful access to those documents, and there was an order  
20 in Wisconsin said he can't, he could only get relief from  
21 that in Michigan, I guess. He'd have to go burn the  
22 documents.

23           MR. CAPPuccio: That order would be entitled --  
24 well, it depends if there were a prior final order --

25           QUESTION: Would that be entitled -- section

1 order be entitled to full faith and credit even though he  
2 had jurisdiction of the person and the subject matter?

3 MR. CAPPuccio: It would be entitled to full  
4 faith and credit, and it would be reversed in a split  
5 second, Your Honor, because it would be an abuse and an  
6 illegal order.

7 QUESTION: Why would that be reversed any more  
8 than this one? They might claim they were privileged  
9 documents.

10 MR. CAPPuccio: Well, but that would be  
11 reviewed, and that's the point. It is not that the  
12 Michigan court has done something that nobody can review.  
13 There are at least two opportunities to review. There's  
14 an opportunity for direct review when it's entered, okay.

15 QUESTION: But you're talking about the party to  
16 it, but this is a consent decree. The parties are not  
17 going to litigate anything. We're talking about the  
18 effect in another forum on that forum and the normal  
19 operation of its courts, and someone who was a nonparty  
20 and can't be required to go any place.

21 I asked you -- I started out asking about the  
22 old Restatement, and you corrected me by saying that's  
23 flatly wrong, but the current restatement has this  
24 interpretation. It's entitled, limitations on full faith  
25 and credit, not about due process.

1           It says, a judgment rendered in one State need  
2 not be recognized or enforced in a sister State if such  
3 recognition or enforcement is not required by the national  
4 policy of full faith and credit because it would involve  
5 an improper interference with important interests of the  
6 sister State, here the important business being  
7 determining for itself what evidence is admissible.

8           MR. CAPPUCCIO: And the cites to that  
9 proposition are dissents, and dicta, and concurrence is  
10 not essential to holding.

11           And I commend to you, Justice Ginsburg, two law  
12 review articles, one written by a man named William  
13 Reynolds in the Maryland Law Review, and one written by a  
14 man named Ron Hecker, I think it -- Hecker in the  
15 California Law Review, and you will see that there is  
16 absolutely no support for the rather inaptly called  
17 Restatement on that point, because in fact all of those  
18 cases --

19           QUESTION: Well, you can quarrel for that one  
20 way or another, and I can say to you, you will see that  
21 there is no decision of this Court saying State 2 enforces  
22 X to do an act simply because State 1 did.

23           MR. CAPPUCCIO: I --

24           QUESTION: You may be right that we should --

25           MR. CAPPUCCIO: Sure.

1 QUESTION: -- do that, but there -- I could say  
2 there is no authority for it and be right.

3 MR. CAPPuccio: Yes, that's absolutely right,  
4 Your Honor, but I come from just the opposite, which is, I  
5 start with 1738, which says they are all enforceable  
6 unless there is a reason to not make them enforceable, and  
7 this Court has never, ever recognized in any single case  
8 an exception based either upon the policy interests of the  
9 forum court, the, worded somewhat differently,  
10 institutional integrity of the forum court, or the nature  
11 of the decree, whether it's legal or injunctive, and I am  
12 saying --

13 QUESTION: Well, didn't Fauntleroy v. Lum say  
14 there wasn't any public policy exception?

15 MR. CAPPuccio: Absolutely, Mr. Chief Justice,  
16 and my position is, in order to rule for petitioners in  
17 this case you would be effectively overruling Fauntleroy  
18 v. Lum, because in that case --

19 QUESTION: Fauntleroy was a question of a  
20 judgment, a litigated judgment, and a determination had  
21 been made, and then in State 2 a party to that judgment  
22 wanted to look behind it, and that's a no-no, and that's  
23 well-established.

24 Here, we're not talking about Elwell. We're  
25 talking about Bakers.

1 MR. CAPPuccio: We are, Your Honor, but I think  
2 the point that the Chief Justice was making with  
3 Fauntleroy is that this Court has never recognized that  
4 the effect on the policy forum is to be balanced against a  
5 final judgment.

6 And what I am saying is, petitioner's  
7 formulation of the exception they're looking for, which is  
8 to interfere or commandeer the judicial process, is merely  
9 a reformulation of the policy interest in Fauntleroy.

10 Certainly the supreme court of Mississippi would  
11 feel that it was being commandeered and its institutional  
12 integrity is being interfered with.

13 QUESTION: Yes, but that went to whether, and a  
14 question that's going to the merits of the holding rather  
15 than the power to enter the decree.

16 MR. CAPPuccio: Excuse me, Your Honor.

17 QUESTION: But that reasoning went to the merits  
18 of the decision rather than the power to enter the  
19 judgment.

20 MR. CAPPuccio: That's correct.

21 QUESTION: And that distinction is very clear in  
22 Fauntleroy, and the question I keep coming back to is the  
23 question of, is there no limit on the power to enter any  
24 kind of judgment whatsoever other than a personal  
25 jurisdiction and subject matter jurisdiction?



1 I agree, just difference in policy, but here  
2 you're asking him to say you must disobey an order that  
3 every jurisdiction in the country would normally say is a  
4 valid order when you subpoena somebody to testify, and  
5 you're saying this decree says, we don't care how  
6 universal the approval is of such lawful order, you must  
7 disobey it.

8 MR. CAPPuccio: Two answers to that. First, the  
9 decree is not saying to disobey an order. There was no  
10 order in place. It is the first judgment --

11 QUESTION: Well, the decree does say you don't  
12 have to interfere with the jurisdiction of the Georgia  
13 court, but presumably that means that any other court's  
14 jurisdiction must be interfered with. That's in the  
15 decree itself.

16 MR. CAPPuccio: It means only that Ron Elwell  
17 cannot testify, and the effect of the Full Faith and  
18 Credit Clause is to extend that extraterritorially.

19 QUESTION: And the question is whether that  
20 impairs the jurisdiction of any of these other courts,  
21 which the decree seems to assume it would.

22 MR. CAPPuccio: Well, it would affect their  
23 ability to have one witness come in. I don't think it  
24 would impair their jurisdiction, but I do not see --

25 QUESTION: Mr. Cappuccio, may I ask in

1 reference --

2 MR. CAPPUCCIO: Sure.

3 QUESTION: -- to Fauntleroy v. Lum there was a  
4 later decision by Justice Stone -- was it Pacific  
5 Employers? -- and I'll just read you what he said some  
6 years after Fauntleroy v. Lum. Perhaps he was wrong, too.

7 It has often been recognized by this Court that  
8 there are some limitations upon the extent to which a  
9 State may be required by the Full Faith and Credit Clause  
10 to enforce even the judgment of another State in  
11 contravention of its own policy.

12 MR. CAPPUCCIO: There is plainly some broad  
13 statements, particularly by Justice Stone, who dissented  
14 originally in Yarborough and threw some dicta in later,  
15 that makes it --

16 QUESTION: This wasn't in a dissenting opinion.

17 MR. CAPPUCCIO: No, I understand it was in a  
18 majority opinion, but in that case it was absolutely  
19 unnecessary to the holding, because that case was a choice  
20 of law case and, of course, this Court has held precisely  
21 because Congress has not litigated the effect of acts, and  
22 because there's a necessity to balance interests --

23 QUESTION: Yes, but this sentence was about  
24 judgments, so you say that was wrong.

25 MR. CAPPUCCIO: It is, Your Honor, one of the

1 quotes that the Restatement relies on, and I am saying  
2 that if the proverbial, as Justice Scalia said once in his  
3 opinion, hapless law clerk goes back through those cases,  
4 in none of those cases does the Court hold that there is  
5 an exception to judgments when the interests of the other  
6 State need to be weighed. There are statements --

7 QUESTION: Let me just clarify one thing --

8 MR. CAPPuccio: Sure.

9 QUESTION: -- because you didn't quite finish  
10 your answer when Justice Gins -- it is your position --  
11 I'm just not looking at authorities or law review articles  
12 or Restatement -- it is your position that there is no  
13 full faith and credit limitation whatsoever, other than  
14 personal jurisdiction and subject matter jurisdiction in  
15 the court entering a judgment?

16 MR. CAPPuccio: Yes, Your Honor, that's it.

17 QUESTION: Well, Mr. Cappuccio, by way of  
18 another example, sometimes we see court orders ordering  
19 a -- an employee or a former employee not to compete with  
20 the employer in situations where the employee and the  
21 first employer get in a dispute and go to court and there  
22 is a covenant not to compete, and that's enforced by a  
23 court order in, let's say, Michigan, and the Michigan  
24 court says, Mr. X, you will not compete for a period of 5  
25 years with this employer number 1, and any contract you

1 enter into anywhere to do that is void and of no effect.

2 Employee goes to State 2 and enters into a  
3 contract with a new employer to go to work in competition,  
4 in violation.

5 Now, I guess on your theory that contract is  
6 unenforceable in the second State in any way for the  
7 employer, the new employer who tries to hire him.

8 MR. CAPPUCCIO: Absolutely, Your Honor, and in  
9 that first judgment --

10 QUESTION: Let's add to the fact that it was not  
11 litigated, so that there's no -- no, you know, res  
12 judicata effect. It was a consent decree in the first  
13 suit.

14 MR. CAPPUCCIO: Yes, sir, and my answer --

15 QUESTION: And you'd still say that the second  
16 court is --

17 MR. CAPPUCCIO: My answer is, is that is  
18 preposterous to think that the person who is affected, the  
19 person who wants to enter into the contract --

20 QUESTION: Mm-hmm.

21 MR. CAPPUCCIO: -- could go into the court of  
22 the second State and say, ignore the judgment. Rather,  
23 they would have to go back to the first court and show  
24 that they had the kind of interest that was affected.

25 QUESTION: Gee, I would have thought that in the

1 second State the new employer could sue the employee who  
2 entered into this contract perhaps when he shouldn't have,  
3 and that the first employer could sue him for breaching  
4 the original order. I mean, what --

5 MR. CAPPuccio: No, Your Honor, I think in that  
6 case the suit in the second case, the first order would  
7 plainly be entitled to full faith and credit and if  
8 somebody wants to go back and claim that that is wrong, be  
9 it a party or a third party, they have to go back to the  
10 original court. That's all full faith and credit is  
11 about.

12 MR. CAPPuccio: But what is the authority for  
13 that? That is -- let me go through exactly the same  
14 question I asked Professor Tribe.

15 In Justice O'Connor's case you have a third  
16 person who was not party to the first action who wants the  
17 services of the employee. We agree that that third person  
18 is not bound, and you agree that the Bakers here are not  
19 bound.

20 Moreover, if the Bakers have a claim to this  
21 evidence, and it sounds as if they do, there's no doubt  
22 they get it. They will get this evidence. Only question  
23 is whether they have to go back to Michigan.

24 Well, similarly, what's the authority? In 200  
25 years, there's never been a case that says that either



1 this employer in the second State, i.e., the third party,  
2 that says either, of course the second State has to follow  
3 the injunction of the first against the employee, not the  
4 employer, so go to the first State, get it modified, or  
5 that says the opposite, and there's never been a law  
6 review article that explores that question deeply?

7 I mean, what I'm looking for is the case or the  
8 law review article in 200 years that went into what I  
9 would think was the most simple basic question under  
10 injunctions and the Full Faith and Credit Clause. Is --

11 MR. CAPPUCIO: Well, Your Honor, there are two  
12 questions, and let me try to answer the first one and then  
13 the second one.

14 The first -- the answer to the first one is, it  
15 does not matter whether you say they are bound or not  
16 bound. That is a legal conclusion about what due process  
17 requires.

18 What matters is the degree of impact on him.  
19 Does it affect a property right, and I agree with the  
20 Chief Justice, you're not going to -- I hope you won't  
21 extend Logan v. Zimmerman. They don't have a property  
22 right here. That disposes of this case.

23 But even if it does, what process are they  
24 entitled to, and the only question is, is it too much of a  
25 burden to send them back to Michigan, and I'm saying no --

1 QUESTION: Back. Back. That's a very revealing  
2 word. They never were there in the first place.

3 MR. CAPPuccio: Okay -- sorry.

4 (Laughter.)

5 MR. CAPPuccio: Whether it's too much of a --

6 QUESTION: You spoke -- in your brief, you spoke  
7 about, you must return to Michigan, and now twice you said  
8 go back to Michigan. Michigan has no power over them.

9 MR. CAPPuccio: I'm sorry, I shouldn't have said  
10 back, but this is the whole issue in this case, is it too  
11 much of a burden, does it violate due process, and I'm  
12 saying no. Because of the important interest of full  
13 faith and credit to avoid conflicting judgments, as  
14 Justice Breyer talked about --

15 QUESTION: So Michigan can rule the world to  
16 that extent.

17 MR. CAPPuccio: The Full Faith and Credit  
18 Clause --

19 QUESTION: It can require anybody from  
20 anyplace -- even though Michigan would have no power over  
21 them, by having a judgment, a plaintiff against defendant,  
22 third party, wherever she may be, will have to go to that  
23 one place to litigate. It sounds very strange.

24 MR. CAPPuccio: That's exactly what Congress did  
25 in the Civil Rights Act of 1991. It's exactly what

1 Congress did by reason of the Full Faith and Credit  
2 Clause.

3 And the burden, Justice Kennedy, is not an undue  
4 burden. It's the same exact burden that a litigant faces  
5 when they want to get an out-of-State witness.

6 QUESTION: I suppose, Mr. Cappuccio, that -- I  
7 also -- it was the exact example that Justice O'Connor  
8 gave which has occurred to me.

9 These injunctions against competition are very,  
10 very common, and I guess they're not worth a whole lot if  
11 they're only enforceable in the particular State.

12 MR. CAPPuccio: Your Honor, I --

13 QUESTION: I would expect a lot of literature on  
14 the other side. I would have expected a lot of lawsuits  
15 in which people simply said, I don't have to obey this  
16 injunction in the other State because your writ doesn't  
17 run this far.

18 MR. CAPPuccio: I would think that it would  
19 be -- the reason we don't have anything is because it is  
20 so plain that that is a final judgment entitled to full  
21 faith and credit.

22 QUESTION: Thank you, Mr. Cappuccio.

23 MR. CAPPuccio: Thank you, Your Honor.

24 QUESTION: Mr. Tribe, you have 2 minutes  
25 remaining.

1 ORAL ARGUMENT OF LAURENCE H. TRIBE

2 ON BEHALF OF THE PETITIONERS

3 MR. TRIBE: Thank you, Mr. Chief Justice.

4 Let me begin by saying that the power of  
5 Congress in response to *Martin v. Wilks* to have a national  
6 venue provision has nothing to do with the power of a  
7 State to say, come back to Michigan though you've never  
8 been here.

9 Congress was not acting in connection with full  
10 faith and credit. What Congress was doing was exactly  
11 analogous to Michigan's in-State rule saying venue is in  
12 the court that did it in the first place.

13 QUESTION: Mr. Tribe, I don't understand one  
14 thing about your position. Is it your position not only  
15 that the -- that courts in States other than Michigan are  
16 not bound by the judgment, but that also, if he complies  
17 with the decrees of these other courts, that Mr. Elwood is  
18 not liable for contempt in Michigan?

19 MR. TRIBE: No. Justice Scalia, if third  
20 parties are effectively bound, that's my problem. I'm not  
21 saying that General Motors could not have arranged to have  
22 sanctions imposed on him as he travels around the country  
23 if he testifies in response to the -- in response to  
24 orders. That would be a matter of contract between  
25 General Motors and this employee.

1 QUESTION: No, no, not by contract. May the  
2 Michigan court cite him for contempt if he complies with  
3 the order of the court of another State and gives  
4 testimony?

5 MR. TRIBE: I think not, Justice Scalia.

6 QUESTION: Okay. That's your position --

7 MR. TRIBE: Right. That's right.

8 QUESTION: -- not only that the State court is  
9 not bound, but also that Elwood is not bound?

10 MR. TRIBE: In all likelihood, though --

11 QUESTION: And what is the principle? Why can't  
12 he be cited for contempt? What's the principle?

13 MR. TRIBE: The principle is that as a matter of  
14 due process one cannot be held in contempt for refusing to  
15 comply with the order of a court. One can --

16 QUESTION: But he could be held in contempt if  
17 he acquiesced, couldn't he?

18 MR. TRIBE: You can waive your right, certainly  
19 Justice Souter.

20 QUESTION: No, but I mean, if he --

21 QUESTION: If he's not subpoenaed.

22 QUESTION: If he voluntarily testifies --

23 MR. TRIBE: Oh, yes, that's -- sure.

24 QUESTION: Or if his objection is a sham --

25 MR. TRIBE: Then there's no --



1 QUESTION: -- then, of course they can go  
2 after --

3 MR. TRIBE: Then there's no problem. Of  
4 course --

5 QUESTION: Or if he goes to that State in order  
6 to be subpoenaed, which is what happened here, apparently.

7 MR. TRIBE: There's no evidence in the record of  
8 what -- of that.

9 QUESTION: All right. Well, let's --

10 MR. TRIBE: And the briefs in opposition don't  
11 even suggest it.

12 QUESTION: Let's hypothesize it, then. Suppose  
13 he goes to that State expecting and hoping to be --

14 MR. TRIBE: Yes. I would think if you have such  
15 a case he could be in contempt.

16 QUESTION: Okay.

17 MR. TRIBE: The opposition to cert didn't  
18 suggest this was such a case.

19 QUESTION: You're not suggesting that it  
20 wouldn't be, just between those two parties, perfectly all  
21 right for General Motors to say, if you are indeed  
22 subpoenaed by somebody --

23 MR. TRIBE: Right.

24 QUESTION: -- then you can't help it, but don't  
25 walk into a place that would otherwise have no power over

1 you.

2 MR. TRIBE: That's right, and I'm afraid my time  
3 is up. Thank you.

4 CHIEF JUSTICE REHNQUIST: The case is submitted.

5 (Whereupon, at 11:01 a.m., the case in the above  
6 entitled matter was submitted.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

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:

KENNETH LEE BAKER AND STEVEN ROBERT BAKER, BY HIS NEXT FRIEND, MELISSA THOMAS, Petitioners v. GENERAL MOTORS CORPORATION  
CASE NO: 96-653

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

BY Ann Marie Fedico

(REPORTER)