

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOHN H. ALDEN, ET AL., Petitioners v. MAINE.

CASE NO: 98-436 c.2

PLACE: Washington, D.C.

DATE: Wednesday, March 31, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN H. ALDEN, ET AL., :

4 Petitioners :

5 v. : No. 98-436

6 MAINE. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, March 31, 1999

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.

13 APPEARANCES:

14 LAURENCE S. GOLD, ESQ., Washington, D.C.; on behalf of the
15 Petitioners.

16 SETH P. WAXMAN, ESQ., Solicitor General, Department of
17 Justice, Washington, D.C.; for the United States, as
18 Intervenor.

19 PETER J. BRANN, ESQ., State Solicitor, Augusta, Maine; on
20 behalf of the Respondent.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 98-436, John Alden v. Maine.

5 Mr. Gold.

6 ORAL ARGUMENT OF LAURENCE S. GOLD

7 ON BEHALF OF THE PETITIONERS

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

10 The question in this case, which we have
11 referred to in our briefs as the Article I State sovereign
12 immunity question, is generated by and can only be
13 answered by reference to the unique sovereignty scheme of
14 our Constitution. That scheme divides sovereignty between
15 the United States and the States, subdivides the sovereign
16 authority of the United States among the three branches of
17 the National Government, makes the sovereign legislative
18 authority of the United States within its sphere supreme,
19 and provides a dual role for the State courts in the
20 enforcement of the entire law, both Federal and State.

21 The question here is predicated on the following
22 case. After their Federal court Fair Labor Standards Act
23 overtime pay case was dismissed on Eleventh Amendment
24 grounds and as specifically provided for in the FLSA, the
25 State employee plaintiffs here began this proceeding by

1 bringing an FLSA case against the State of Maine in the
2 Superior Court of Cumberland County, Maine.

3 Maine in its answer answered entered an
4 affirmative defense of sovereign immunity. The superior
5 court granted Maine's motion for judgment on that defense,
6 and the Supreme Judicial Court of Maine in a 4 to 2
7 decision affirmed.

8 In this Court, Maine's submission in defending
9 the decision below is that the FLSA provision for State
10 employee overtime pay suits against a State in State court
11 is not a valid law because it transgresses a
12 constitutional constraint on Congress' Article I
13 legislative power, one that puts it beyond Congress'
14 authority to provide for the enforcement of a valid
15 Federal statute through State liability rules that
16 override State sovereign immunity rules.

17 The framework for the issue presented is
18 provided by this Court's Garcia decision and its decision
19 in Howlett v. Rose. As to Garcia --

20 QUESTION: Howlett was not a suit against a
21 State, was it, Mr. Gold?

22 MR. GOLD: No. It was a suit against a
23 municipality, and all we argue is that its method of
24 approach frames the question. Then the ultimate question
25 becomes the one that the State raises whether a suit

1 against a State where the State claims sovereign immunity
2 is in a different category or class than a suit against a
3 municipality where the municipality claims State sovereign
4 immunity.

5 And that question turns on -- not on the
6 analytic structure of Howlett, which would treat both the
7 same, but as the State recognizes, on whether State
8 sovereign immunity, when claimed by the State, is of a
9 different and constitutional dimension, a dimension which
10 would make the Federal law invalid and thereby --

11 QUESTION: Well, how -- how is that so? I
12 thought in Seminole Tribe we described other ways of
13 enforcing a Federal law, even though it couldn't be done
14 directly. I suppose there are alternative means of
15 enforcement of the Federal law at stake.

16 MR. GOLD: There -- if Congress cannot provide
17 for private party State court enforcement of this law,
18 given the Court's Eleventh Amendment jurisprudence which
19 also closes the Federal courts to such proceedings --

20 QUESTION: Well, but I suppose that a private
21 person could still sue a State officer under an Ex parte
22 Young type approach.

23 MR. GOLD: That could be done, but it would not
24 be a suit for back pay for the money due and owing, and
25 therefore what you have is if State sovereign immunity is

1 an absolute check on the sovereign powers of Congress,
2 then there can be no private party enforcement of a valid,
3 binding Federal enactment.

4 QUESTION: But I --

5 QUESTION: So that the private party can prevent
6 any future violation of the Federal law, and I assume the
7 United States, if it -- if it wished, if the statute were
8 framed that way, could sue on behalf of the people who had
9 been deprived previously of what they were entitled to
10 under the Federal law.

11 MR. GOLD: Yes, and the -- the State does
12 concede that, and indeed as this Court has made clear, so
13 that we're not overstating anything, the suit by the
14 United States could be in Federal court as well as in
15 State court. There is no bar to that.

16 But the question is whether Congress is
17 constrained by some constitutional principle from
18 providing that which the sovereign can normally provide
19 for enforcement through the usual processes of the law by
20 the right holder in the law created by the sovereign.

21 QUESTION: Well, it is a constitutional
22 principle.

23 Mr. Gold, one -- I just can't conceive of the
24 Constitution being ratified if it were thought that the
25 States could be sued as States in their own courts, and to

1 that extent, I understand the Eleventh Amendment as being
2 confirmatory of the original understanding. Of course,
3 it's an amendment, and we know that amendments are done to
4 change the original understanding. But in this case I
5 think it was the original understanding and that's what
6 puzzles me in this case.

7 And of course, we know the Thirteenth,
8 Fourteenth, and Fifteenth Amendment made a dividing line
9 and federalism for those actions were changed. But this
10 isn't under the Thirteenth and Fourteenth Amendment, and
11 it comes back to this basic constitutional principle which
12 I think teaches something, maybe not very much if the
13 Federal Government can, in effect, get around our opinion
14 by withholding grants in aid or suing on its own. But it
15 seems -- I have -- I have trouble conceiving of the
16 Constitution being ratified under your theory.

17 MR. GOLD: Well, if -- if I can, Justice
18 Kennedy, it seems to me that what we see with regard to
19 the original understanding is two points, and I don't
20 think they lead to the conclusion that there is some
21 implicit constitutional limit on Congress' sovereign
22 authority that runs in favor -- that limits Congress in
23 its sovereign power and runs in favor of the States as to
24 a matter where the State isn't sovereign.

25 I don't want to engage in word play, but what

1 the claim is here, that there is something never seen
2 before, namely, a limit on a true sovereign in favor of a
3 -- an entity who is certainly a governing authority and an
4 important governing authority and a sovereign in many
5 regards, but runs in favor of that governing entity in an
6 aspect of the overall scheme in which the State or that
7 governing entity is not sovereign. That is a wholly
8 extraordinary notion, one which we would think had to have
9 some express understanding, and it's quite different from
10 the concerns and interests that animated what we know of
11 the fidelity to State sovereign immunity.

12 QUESTION: But, you know, you say it's an
13 extraordinary notion, but the whole -- the whole system of
14 -- of dual sovereignty and dual citizenship was an
15 extraordinary notion. I mean, it is extraordinary.

16 MR. GOLD: Right, but -- and as the Eleventh
17 Amendment shows, in making adjustments to deal with the
18 new aspects of that extraordinary situation, there was
19 what I think would have to be seen as an entirely new
20 concept adjusted to the situation to preserve a form of -
21 - or to create a form of State sovereign immunity which
22 would not have obtained by simple extrapolation from the
23 law of nations. And that's the Eleventh Amendment.

24 QUESTION: That -- that -- well, but --

25 MR. GOLD: And --

1 QUESTION: As Justice Kennedy pointed out, the
2 Eleventh Amendment -- our case law has said -- and I
3 understand there's some argument about it, but -- but it's
4 -- it's the law here that it's just confirmatory of -- of
5 sovereign immunity that existed. And the argument you're
6 making now would make a lot of sense if you were saying,
7 you know, really the Federal Government has its hands --
8 hands tied unless this aspect of State sovereign immunity
9 were automatically eliminated by the Constitution.

10 And in fact, it hasn't had its hands tied. It
11 can -- it can achieve its ends in -- in various other ways,
12 and I think it's significant that, you know, it's been 200
13 and -- and what -- some odd years before -- before this
14 issue has even come before us. Apparently the Federal
15 Government hasn't found it very needful to proceed in this
16 fashion in order to achieve its -- its necessary
17 objectives.

18 MR. GOLD: Well, as time evolves and we
19 understand more about what's needed, I would argue to you
20 that that kind of judgment is precisely the kind of
21 judgment that Congress makes, what is proper enforcement,
22 unless there is --

23 QUESTION: Not if hangs on sovereign immunity.
24 We're not going to let Congress decide --

25 MR. GOLD: Well, no.

1 QUESTION: -- what the States will do with their
2 sovereign immunity.

3 MR. GOLD: But a sovereign immunity concept
4 which goes beyond any concept that was understood at the
5 time -- after all, sovereign immunity as an attribute of
6 sovereignty is vouchsafe to the States in State court.
7 Any claim on State law can be met with sovereign immunity.

8 But here we're dealing with a situation where
9 Congress is the sovereign, where the State's sovereignty
10 is diminished by the Constitution. The State is bound by
11 a Federal law in a way which a sovereign -- a total
12 sovereign could not be, and there is no indication that
13 there was anything in history to -- to show that an entity
14 in that situation had sovereign immunity, and the true
15 sovereign --

16 QUESTION: Well, of course -- of course, there
17 isn't because there's never been a preacher like this, and
18 the argument proves too much. It -- it would, carried to
19 its logical conclusion, say that there's no State
20 sovereign immunity of any sort in its courts or in the
21 Federal courts --

22 MR. GOLD: No.

23 QUESTION: -- since the Federal Government has
24 -- has taken over legislative jurisdiction from the State
25 and --

1 MR. GOLD: No.

2 QUESTION: -- and excluded the State from those
3 areas. Therefore, anything goes.

4 MR. GOLD: The -- first of all, for sovereign
5 immunity, it has to be a suit against the State on a
6 Federal law which is valid within the State sovereignty
7 constraints on Federal law, and nothing we say here goes
8 to the special case of the Eleventh Amendment, which is,
9 as this Court has been careful to state, a restriction on
10 the Federal judicial power borne of particular concerns
11 about the Federal judicial power, not a constraint on the
12 sovereign legislative power.

13 In Seminole -- if I could, and then I will try
14 to save the rest of my time -- the Court did not say that
15 Eleventh Amendment sovereign immunity is a limit on
16 Congress' plenary law enforcement powers. What is said in
17 a very careful holding was that State sovereign immunity,
18 as a limit on the Federal judicial power, that separation
19 of powers concepts prevent the legislative branch from
20 expanding the heads of Federal jurisdiction. And
21 therefore, Congress cannot provide for suits in Federal
22 court that are beyond the Federal judicial power.

23 This is a very different situation and it's
24 limited to the enforcement of Federal laws properly
25 binding on the States and enacted by Congress as the

1 sovereign within its proper sphere. And that is not a
2 wide open area. It is an area carefully confined by the
3 basic concepts of the legislative power.

4 QUESTION: Thank you, Mr. Gold.

5 General Waxman, we'll hear from you.

6 ORAL ARGUMENT OF SETH P. WAXMAN

7 FOR THE UNITED STATES, AS INTERVENOR

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

10 When the Founders adopted the Constitution, they
11 conferred the Article I powers upon Congress immediately,
12 but they left it optional whether Federal -- lower Federal
13 courts would be -- ever be created. So, how did they
14 expect that the Article I powers would be effectuated?

15 The answer is provided by the text of the
16 Supremacy Clause, which makes the Constitution and laws of
17 the United States the supreme law of the land and provides
18 that, quote, the Judges in every State shall be bound
19 thereby, any Thing in the Constitution or Laws of any
20 State to the Contrary notwithstanding.

21 In the context of the document as a whole, this
22 must include authority for Congress to provide remedies in
23 State courts, otherwise the great Article I powers would
24 have been written in disappearing ink.

25 The State relies in this case on an asserted

1 constitutional or pre-constitutional right of sovereign
2 immunity in its own courts. But as Justice Holmes
3 explained for this unanimous Court in 1907, sovereignty
4 belongs to, quote, the authority that makes the law upon
5 which the right depends. With respect to Federal claims,
6 the sovereign is not the State. It is the Nation, and
7 therefore, as this Court explained in Hilton, when a
8 Federal statute imposes liability upon the States, quote,
9 the Supremacy Clause makes that law the law in every State
10 enforceable fully in State court.

11 QUESTION: Well, General Waxman, would you agree
12 that there is no case from our Court that squarely decides
13 the issue before us now?

14 MR. WAXMAN: I would agree that no case squarely
15 decides it. I would agree with the Supreme Court of
16 Arkansas in its analysis of this very question that this
17 Court's decisions in Hilton and Howlett, particularly
18 taken together, very strongly suggest the result.

19 QUESTION: Howlett didn't involve a State.

20 MR. WAXMAN: No. Howlett didn't involve a
21 State, but it did -- Howlett stands for the proposition
22 that when the State, on behalf of a -- an arm of the
23 State, an entity that isn't -- that is subject to
24 liability under the Federal statute -- we know that States
25 aren't subject to liability -- are assertedly covered by a

1 State assertion of sovereign immunity -- the Supremacy
2 Clause requires that the Federal law be applied. In
3 Hilton I think --

4 QUESTION: By -- by analogy we've held that
5 under the Eleventh Amendment, counties, Luning against New
6 Mexico, don't participate of the -- of the Eleventh
7 Amendment immunity. It seems to me by analogy you would
8 say certainly counties do not participate of any sovereign
9 immunity that might exist here.

10 But you -- that may not be true of the State. I
11 think you read too much into Howlett.

12 MR. WAXMAN: Well, it may be. I -- I would
13 suggest that Howlett itself announced two principles that
14 we think are quite fundamental to this case and,
15 understood in the context of this Court's decision in
16 Hilton, I think strongly suggest the result. The
17 principles are, number one, that a State court may not
18 deny a Federal right absent a valid excuse. And number
19 two, that an excuse that is inconsistent with or violates
20 Federal law is not a valid excuse.

21 Now, in Hilton, this Court considered the
22 applicability of the Fair Labor Standards Act, whether the
23 fair -- whether a claim could be brought under the Federal
24 Employers Liability Act in State court, when under Welch
25 the Eleventh Amendment barred such a suit in Federal

1 court.

2 And the State argued in its brief and before
3 this Court that because the State was entitled to a
4 sovereign immunity in its own courts of a constitutional
5 significance equal to the Eleventh Amendment, the
6 unmistakably clear principle of Atascadero and Welch had
7 to be applied and therefore the State remedy wasn't
8 available.

9 And this Court rejected that proposition over a
10 strong dissent that adopted the State's argument, and the
11 majority opinion held that, no, the question -- the clear
12 statement requirement that has to be applied in this case
13 is the -- is the requirement in Pennhurst and Gregory v.
14 Ashcroft, that is one of pure statutory construction. And
15 we don't have to apply that pure statutory construction
16 question in the case because pardon establishes another
17 rule of statutory construction, that is, stare decisis,
18 and we therefore hold that that remedy is available.

19 Now, Mr. Chief Justice, you are quite right that
20 this Court's decision in Hilton doesn't decide the precise
21 question that's before this Court, but I suggest to the
22 Court, most respectfully, that the discussion in Hilton
23 about the consequence of denying a right in State court
24 against the -- the Eleventh Amendment backdrop in which no
25 right would be available in Federal court, would be that

1 the plaintiffs would be denied a right at all, and it
2 would have been I think -- I suggest -- rather surprising
3 to the Court to understand that there was some sovereign
4 immunity principle in State court that could trump that
5 concern.

6 QUESTION: Well, the Hilton court respected
7 stare decisis in part, the reasoning of which has been
8 totally undercut by our later cases.

9 MR. WAXMAN: Well, what I think -- I think it's
10 -- it's quite significant, Mr. Chief Justice, that the way
11 this Court concluded its opinion in Howlett was to say,
12 quote, that when a Federal statute does impose liability
13 upon the States -- I'm sorry. Hilton -- the Supremacy
14 Clause makes that law the law in every State fully
15 enforceable in State court, and it cited as support for
16 that proposition the Court's unanimous decision the term
17 before in Howlett.

18 And I suggest that that strongly implies that
19 what the Court concluded was that if the State had, as it
20 claimed it had, a sovereign immunity of constitutional
21 significance, this Court would have been required under
22 its prior decisions to apply the constitutional rule of -
23 - of utterly clear statement. I can't -- unmistakably
24 clear statement as a matter of constitutional law,
25 notwithstanding pardon.

1 QUESTION: I -- I think we -- we can take for
2 purposes of argument here there's little doubt that
3 Congress can pass this -- this statute. But simply
4 because the Congress has the sovereignty to legislate,
5 does it follow that it can prescribe any conceivable
6 remedy?

7 In this case, the Government could sue. Why
8 didn't the Government bring a suit in this case?

9 MR. WAXMAN: Well, I think the answer to the
10 question of whether Congress could prescribe any
11 conceivable remedy is no. Congress is limited in its
12 choice of remedies, if by nothing else, by this Court's
13 holding in McCulloch v. Maryland --

14 QUESTION: Well, and it's limited by cases such
15 as New York in which we say you can't command the State to
16 do something directly.

17 MR. WAXMAN: Exactly right. And my -- and what
18 -- one thing -- a lot of this Court's decisions, beginning
19 with Claflin in 1876 and running all the way down to
20 Howlett, establish and recognize the notion that the
21 Federal courts -- Congress, in order to effectuate its
22 remedies, can't require, for example, the States to create
23 courts. In Claflin, in -- in holding that the State
24 courts did have to recognize the Bankruptcy Act concerns,
25 it said that the State courts must hear the claims, quote,

1 whenever by their own constitution they're competent to
2 take it. And in Howlett, the Court said the requirement
3 that a State court of competent jurisdiction treat Federal
4 law as the law of the land doesn't necessarily include
5 within it the requirement that a State create a court of
6 competent jurisdiction.

7 QUESTION: But if this -- if this cause of
8 action is -- is so important that we must set aside the
9 State's immunity in its own court, why isn't it important
10 enough that the Government itself could have brought the
11 suit?

12 MR. WAXMAN: Well, the Government -- the
13 Government could bring a suit, and we could have a regime
14 which seems to me to run --

15 QUESTION: May I interrupt with a question? How
16 do you know the Government could bring the suit? I do not
17 understand the logic that would say functionally the same
18 suit would be defeated by sovereign immunity if the
19 plaintiffs are the -- are private parties, but if the
20 Government sues in their name, it would not be. I don't
21 understand that reasoning.

22 MR. WAXMAN: Well, I suppose the reason is that,
23 you know, the Federal Government, as the super sovereign,
24 can abrogate a sovereign immunity --

25 QUESTION: Well, you can sue in your own court.

1 MR. WAXMAN: In Federal court.

2 QUESTION: How --

3 MR. WAXMAN: But -- excuse me?

4 QUESTION: But you could not sue in State court.
5 You agree with that.

6 MR. WAXMAN: I don't agree with it because I
7 don't agree that the States have a -- with respect to
8 valid Federal law, acted properly under Congress' Article
9 I authority, I don't think that the States have a
10 sovereign immunity in their own court -- and this goes to
11 Justice Scalia's question -- for two fundamental reasons.

12 This Court explained in Nevada v. Hall,
13 referring back to Kawanakoa v. Polyblank, the
14 proposition that there are -- that the notion of sovereign
15 immunity is really an amalgam of two different types of
16 sovereign immunity. This Court said in Nevada v. Hall,
17 the doctrine of sovereign immunity is an amalgam of two
18 quite different concepts: one applicable to suits in the
19 sovereign's own courts and the other two suits in the
20 courts of another sovereign. The former is absolute. The
21 latter was always a matter of comity, always until the
22 Eleventh Amendment of the Constitution. And the reason
23 for this is the nature of sovereignty. That is,
24 sovereignty is the right to make the substantive law upon
25 which the right depends.

1 Now, with respect to suits in their own courts,
2 which was not the issue in Nevada v. Hall and which is not
3 the issue in any of this Court's Eleventh Amendment cases
4 -- those are all suits about the other kind of sovereignty
5 which doesn't depend on the sovereign being the law giver
6 and which were always a matter of comity until, in the
7 Plan of Convention, it was made absolute by a constriction
8 or an interpretation of the scope of Article III.

9 With respect to the former type of sovereignty,
10 which is at issue in this case, there was a principle in
11 effect at the time the Constitution was decided that
12 States were sovereign, absolutely sovereign, against suits
13 against themselves in their own courts. And that
14 principle of sovereign immunity has not been affected by
15 the Plan of Convention or by the enactment of the
16 Constitution at all. The States --

17 QUESTION: Do you have any of the -- of the
18 Framers who expressed that view? I mean, several of them
19 did express the opposite view --

20 MR. WAXMAN: Well, the --

21 QUESTION: -- that they thought the States could
22 not be -- could not be sued on Federal causes of action in
23 their own courts. I mean, there are some statements to
24 that effect.

25 MR. WAXMAN: Justice Scalia, the only statements

1 of the Framers that I am familiar with and the only ones
2 that are reported in any of the briefs in this case or the
3 Law Review articles I've read were statements that were
4 made that either made the broad statement that the
5 sovereign is always immune from suit in his own court and
6 they were all made in the context of the Eleventh -- the
7 debate about the scope of Federal jurisdiction.

8 QUESTION: Well, but they did make the
9 statement. The sovereign is always immune from suit in
10 his own court.

11 MR. WAXMAN: And -- and we don't dispute that.
12 In fact, I think that principle exists to this day, but
13 the point is --

14 QUESTION: You're saying the States are not the
15 sovereign where Federal legislation is concerned.

16 MR. WAXMAN: The point -- exactly. The point is
17 that the sovereign was always understood -- and Justice
18 Holmes in his opinion in *Polyblank* refers back to the --
19 to law that predates the --

20 QUESTION: They were really deluding their
21 listeners if that's all that they meant --

22 MR. WAXMAN: Not -- to the contrary.

23 QUESTION: -- that -- that a Federal law could
24 be passed which would enable the State -- the State's
25 treasury to be raided so long as the suit was brought in

1 the State courts and not in the Federal court.

2 MR. WAXMAN: Justice Scalia --

3 QUESTION: I don't think that's the point they
4 were making.

5 MR. WAXMAN: Well, I -- I don't think that's --
6 I don't think that there is anything in the
7 Constitutional Convention debates that goes to the
8 question of suits against States in their own courts at
9 all, let alone under Federal law. But we -- what the
10 State is asking for here --

11 QUESTION: But -- but that's the point. It's
12 the dog that doesn't bark argument. And the anti-
13 federalists didn't bring this up either. If the
14 Constitution had contemplated it, certainly the anti-
15 federalists would have made the statement.

16 I see your red light is on.

17 MR. WAXMAN: May I provide a brief response?

18 QUESTION: Yes. Yes, do provide a brief --

19 MR. WAXMAN: The answer to the question could
20 not be clearer and it exists in the Supremacy -- the words
21 of the Supremacy Clause of the Constitution which speak
22 not to Federal judges or Federal courts, but to the judges
23 of the States which must apply Federal law.

24 Thank you very much.

25 QUESTION: Thank you, General Waxman.

1 Mr. Brann, we'll hear from you.

2 ORAL ARGUMENT OF PETER J. BRANN

3 ON BEHALF OF THE RESPONDENT

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

6 There is no compelling evidence that the States
7 surrendered either expressly or necessarily their immunity
8 from suit in their own courts when, as part of the Plan of
9 the Convention --

10 QUESTION: I don't need compelling evidence,
11 just -- just a little preponderance is all --

12 (Laughter.)

13 QUESTION: -- is all we're looking for here.
14 This is a hard question. I'll settle for a preponderance.

15 MR. BRANN: Justice Scalia, the -- this Court in
16 the Blatchford said -- made clear that it's incumbent upon
17 those who are -- who are seeking to abrogate the immunity
18 that there be compelling evidence that arises from the
19 Convention or from the text of the Constitution that the
20 States gave up their immunity. And we submit that they
21 did not do that.

22 QUESTION: Mr. Brann --

23 QUESTION: But you don't rely on the text of the
24 Constitution at all, do you?

25 MR. BRANN: The structure of the Constitution -

1 -

2 QUESTION: The structure is what your entire
3 argument is.

4 MR. BRANN: -- in which we have enumerated
5 powers --

6 QUESTION: I understand.

7 MR. BRANN: -- given to the Federal
8 Government --

9 QUESTION: But you don't have anything in the
10 text is what I'm saying.

11 MR. BRANN: Well, except that the text of the
12 Constitution confirmed through the Tenth Amendment -- and
13 we think this case is fundamentally a Tenth Amendment case
14 as well -- is that we have a Federal Government of limited
15 enumerated powers. And the question is, was one of those
16 few and defined powers the power to abrogate a State's
17 sovereign immunity in its own courts.

18 QUESTION: Now, do I understand correctly that
19 you would agree that the United States could not bring
20 this action on behalf of these employees in the State
21 court?

22 MR. BRANN: We -- that is our position. It
23 is -- it is our --

24 QUESTION: How is it then they can bring it in
25 the Federal court?

1 MR. BRANN: The -- we submit that one of the
2 things that in the Plan of the Convention that States gave
3 up was that -- was the ability of a Federal -- Federal
4 Government to enforce Federal law in Federal court, dating
5 back to the United States v. Texas case of over 100 years
6 ago, that one of the things that's necessary in order --

7 QUESTION: Is there anything in the history of
8 the Convention that explains that? Anything describing
9 that surrender of power?

10 MR. BRANN: The way in which this Court --

11 QUESTION: I think the Convention is equally
12 silent on that point.

13 MR. BRANN: Except that the -- this Court in
14 United States v. Texas took the position -- was that the
15 State consented by virtue of the Supremacy Clause in
16 granting the power -- certain powers to the Federal
17 Government, that what came with that was the fact that the
18 Federal Government, not private individual, but a Federal
19 Government could enforce the Federal statutes.

20 QUESTION: Well, then the Federal courts --

21 QUESTION: How do you get -- get that limit in
22 there just from the structure? I think that's what
23 Justice Stevens was asking.

24 MR. BRANN: We think --

25 QUESTION: It's a peculiar limitation. I think

1 your case would be a lot easier if you would acknowledge
2 that the United States could -- could bring suit in State
3 courts or in Federal courts. I -- you understand my
4 point? It's a clear limit.

5 MR. BRANN: I do, Justice Scalia.

6 One of the -- we think it's somewhat difficult
7 to answer that simply because our experience is the
8 Federal Government always files in Federal court and so
9 it's never arisen in which -- and if they can file it,
10 presumably a State, if faced with it, may or may not even
11 object if they file in State court. So, there's really -
12 - we have very little to go on in that regard.

13 But we do agree --

14 QUESTION: Mr. Brann, how -- how would it work
15 in a case where it's not -- you brought up the Tenth
16 Amendment. In a -- it's a private, say, copyright or a
17 patent claim. It's a private suit. You wouldn't get the
18 United States in there like the Secretary of Labor to
19 enforce the Fair Labor Standards Act. So, with respect to
20 that, if the Federal lawmaker, copyright or trademark, the
21 exclusive lawmaker, the State as the alleged violator,
22 could such a suit be brought and by whom?

23 MR. BRANN: Justice Ginsburg, I think that that
24 actually illustrates the limits on which we are -- of our
25 argument is that in copyright and patent what we have is

1 exclusive jurisdiction that is placed in the Federal
2 courts. The State courts don't have jurisdiction under
3 those statutes, as I understand it, and so that under
4 Seminole Tribe, those people, it was -- it was asserted in
5 -- in Seminole Tribe were left without a remedy which this
6 Court did not find was a compelling reason to --

7 QUESTION: But it wouldn't be the United States
8 that's suing in those cases. It would be a private party
9 who says my copyright is violated or my trademark is
10 violated.

11 MR. BRANN: And in those cases, that is true
12 because the --- but that -- the problem in that case is
13 already posed as a result of Seminole Tribe because of the
14 layer in which --

15 QUESTION: Are you saying that the Government
16 could not pass a statute which said that the Federal
17 Government may -- may sue on behalf of any individual
18 whose copyright has been violated?

19 MR. BRANN: No, Your Honor. The point -- I was
20 answering it based on the current statute.

21 QUESTION: Well, so it could -- right, but it
22 could be remedied, as far as the theory of your case is
23 concerned, by a statutory amendment.

24 MR. BRANN: Under our constitutional construct,
25 that's entirely correct, is that --

1 QUESTION: Did I misunderstand you to say that
2 under your current theory, that there would be room --
3 although there's no room for this lawsuit in State court,
4 there would be room in Federal court for a private party
5 to sue the State in an area where the Federal court --
6 where the Federal legislature has exclusive legislative
7 authority? I thought you told me that.

8 MR. BRANN: If I did, I misspoke. The point
9 that -- that we are making is that we look to whether or
10 not the -- the -- there is power under the -- under the
11 Commerce Clause to abrogate the sovereign immunity. If
12 that power is not present, then -- then they cannot
13 authorize the action either in Federal court or in State
14 court. But we certainly --

15 QUESTION: May I go back to your -- your
16 colloquy with Justice Stevens? You -- you conceded that
17 the -- that the National Government could sue in -- in the
18 Federal court to enforce this. And I'm not sure that I
19 understand why you concede that. Could you explain that
20 to me?

21 MR. BRANN: We believe that under the Plan of
22 the Convention, what this Court referred to in -- in the
23 United States v. Texas case as consent -- one of the
24 things that we consented to when we ratified the
25 Constitution was -- as General Waxman alluded to, was a

1 super sovereign and a super sovereign's ability to enforce
2 its statutes, if they are otherwise valid and under
3 Garcia --

4 QUESTION: Well, didn't -- didn't our Court hold
5 in United States against California back in the '30's or
6 '40's that the Federal Government could sue a State in --
7 in Federal court?

8 MR. BRANN: Yes. This Court has -- has held
9 that time and again.

10 QUESTION: Well, but if the -- if the United
11 States can sue in a Federal court and it can do so because
12 that basically was implicit in the Plan of the Convention
13 and the Eleventh Amendment supposedly reflects that, then
14 why was it not -- why was the same implication not
15 present, that when the National Government is enforcing -
16 - seeking to enforce a valid Federal law, it could sue in
17 a State court? Why -- why was the line of the implication
18 clearly drawn there?

19 MR. BRANN: As I say, the -- the question is
20 difficult to answer simply because it's never really
21 arisen. The Federal Government ordinarily sues in Federal
22 court.

23 QUESTION: It probably don't -- it probably
24 won't either, so why are you fighting it?

25 (Laughter.)

1 QUESTION: It seems to me the weakest part of
2 your case.

3 QUESTION: Well, just in case it matters, could
4 you --

5 (Laughter.)

6 QUESTION: Could you explain that to me?

7 MR. BRANN: We think that the States -- one of
8 the key aspects of sovereignty is the ability to create
9 one's own courts and to ascribe them with their
10 jurisdiction. And one of the things that we do know from
11 the Framers was that when we came to the Constitution,
12 that the States were immune since time immemorial in their
13 own courts. The suggestion, therefore, is that although
14 we may very well have given up the -- to the United States
15 the ability to sue us in Federal court as part of the Plan
16 of the Convention, that does not necessarily mean that we
17 gave up the right to sue in State court.

18 QUESTION: Well, it wouldn't if perhaps -- if
19 you didn't have the Supremacy Clause. But as -- as you
20 point out, certainly it's -- it was a fundamental aspect
21 of State sovereignty to be immune in its own courts, but
22 it was an equally fundamental aspect of State sovereignty
23 to control the law that will be enforced in its courts.
24 And the Supremacy Clause has flatly and unequivocally
25 taken that away so long as the Congress is acting within

1 the scope of its Article I authority.

2 So that if the Congress concededly can take away
3 the authority to make the law, why doesn't it follow
4 rather obviously that Congress can also take away the
5 secondary authority to decide where the law will be
6 enforced?

7 MR. BRANN: Because we think that the --

8 QUESTION: And who may enforce it?

9 MR. BRANN: There -- because of the limits of
10 federalism placed on Congress in passing a statute --

11 QUESTION: Where? Where is it? Where are those
12 limits found?

13 MR. BRANN: The limits are found in -- in the
14 structure of the Constitution and that we look to was --
15 one of the things that the States gave up when the power
16 to regulate commerce among the States -- did that also
17 include abrogation of sovereign immunity?

18 QUESTION: But your point is the structure of
19 the Constitution precludes Congress from enacting a law
20 that would deprive the State of sovereign immunity. If
21 that's true, how can it deprive the State of sovereign
22 immunity in the Federal court or the State court when the
23 United States is a plaintiff? There's no lesser
24 infringement of the right that you say is inviolable.

25 MR. BRANN: We -- we would beg to differ,

1 Your Honor -- is that we think that there is a fundamental
2 difference between when the United States as a sovereign
3 is filing suit than when a private individual is filing
4 suit.

5 QUESTION: Even though the suit is filed on
6 behalf of 10 individuals, it seeks precisely the same
7 remedy and damages on behalf of the individuals as if the
8 individuals sued for themselves.

9 MR. BRANN: But in those circumstances, the
10 United States is still acting as a sovereign. It -- it
11 may be trying to recover damages --

12 QUESTION: It was acting as a sovereign when it
13 passed the statute authorizing the suit to be brought by
14 the individuals. But you say the executive power is
15 greater than the legislative power to invade sovereign
16 immunity.

17 MR. BRANN: No, that's -- that's not -- that's
18 not our argument. Our argument is that what did we give
19 up when we came to the Constitution? And we know from the
20 Framers and from time prior to that --

21 QUESTION: And you're saying you did not give up
22 sovereign immunity.

23 MR. BRANN: We give up -- we did not give up the
24 right --

25 QUESTION: Except in certain circumstances.

1 MR. BRANN: We did give up the right of a
2 private individual to file a damages action against the
3 State.

4 QUESTION: But you did give up the right to
5 control the law that will be enforced in your own courts.

6 MR. BRANN: If this -- if the law is otherwise
7 valid.

8 QUESTION: Yes, if it's -- if it's a valid
9 exercise of Congress' power under Article I, you gave up
10 that right.

11 MR. BRANN: We did.

12 QUESTION: And -- and isn't the -- the question
13 of -- of which party enforces the right, whether it be the
14 National Government or -- or a private individual subject
15 to the law's benefit, secondary to the basic
16 jurisdictional question whether the National Government
17 can make the operative law?

18 MR. BRANN: No. We are not -- we are not
19 challenging the -- the ability of the Government, the
20 United States, to make substantive law. It is simply
21 whether or not one of the powers that came with it, as
22 opposed to the other remedies that are available, the --
23 which were alluded to this morning -- you know, obviously,
24 we've talked about the United States, and there's also
25 been a reference to the Ex parte Young actions and also

cases in which the State is willing to consent. There are other remedies available to enforce that --

QUESTION: Oh, I can -- I'll grant you that you have conceded that.

But the basic problem that both Justice Stevens and I, I think, are having is -- is a problem of finding a coherent theory because if the -- if the theory behind your case is sovereign immunity, then I think it's pretty clear that there is not going to be any exception for enforcement actions by the National Government even in its own courts.

If, on the other hand, your -- your theory is -- is a principle which somehow is reflective of the Eleventh Amendment, it's clear the Eleventh Amendment doesn't apply to State actions.

And we're left, if we eliminate those two possibilities, with essentially the Supremacy Clause argument, and -- and because the Supremacy Clause makes it clear beyond any argument that, within the proper sphere of Article I, the State no longer has a sovereignty to assert as against a Federal law, then it just seems kind of a bizarre exception to say, but that doesn't apply when the -- when the Congress decides who it is who will walk win the courthouse door to enforce the law.

We're looking for some kind of a coherent

1 theory, and I'll -- you know, I'll be honest with you. I
2 don't see it. What am I missing?

3 MR. BRANN: Let me take my best attempt to
4 provide that theory -- is that we granted to Congress the
5 power to regulate commerce among the several States. And
6 there's no doubt that one of the motivating factors were
7 the tariffs and the trade wars and the like, and we gave
8 up that. The States gave that up, that you can regulate
9 that commerce under those circumstances.

10 We -- then we asked ourselves, but did they also
11 give up the right for Congress to pass a law that then
12 gave a private individual the right to bring a damages
13 action?

14 QUESTION: And it seems to me that the answer to
15 that question turns on what the commerce power today
16 includes. There's no question that the -- that the
17 Framers would have been very surprised by the Garcia
18 decision. They didn't expect the commerce power was going
19 to extend, in fact, to the -- to the limit that it has
20 because they couldn't foresee the growth of commerce. But
21 once the Framers had seen that the commerce power goes
22 this far, then I don't see that there's much argument left
23 in -- in the intentions -- turning on the intentions of
24 the Framers not to allow a -- a common and simple
25 enforcement authority to go along with the sovereign power

1 to make the -- the law that regulates the commerce.

2 MR. BRANN: But, Your Honor, I think --

3 QUESTION: I thought we've held the contrary.

4 Is that what you were about to say?

5 MR. BRANN: I'm sorry?

6 QUESTION: I thought we've held the contrary.

7 MR. BRANN: I was about to say that --

8 (Laughter.)

9 MR. BRANN: -- in a slightly different fashion.

10 QUESTION: Here's your chance.

11 (Laughter.)

12 MR. BRANN: That argument, however, is precisely
13 the argument that I think did not carry the day in
14 Seminole Tribe in the sense that Congress' substantive --

15
16 QUESTION: Well, Seminole -- Seminole Tribe was
17 a case about the Article III judicial power, and if
18 Seminole Tribe had turned simply on a theory of sovereign
19 immunity, one thing is clear beyond any doubt, there was
20 no theory of sovereign immunity in the 18th century that
21 included an exception for the United States. Seminole
22 Tribe had to turn on the extent to which a concept, a
23 rough idea of sovereign immunity was embodied in the
24 Eleventh Amendment as a limit on Article III, but there is
25 -- there is no carryover that I can see in Seminole Tribe

1 to Article I.

2 MR. BRANN: The point that I was deriving from
3 Seminole Tribe, Your Honor, was the following, which was
4 that Congress' substantive powers under the Commerce
5 Clause, which certainly have expanded, as we look in the
6 late 20th century --

7 QUESTION: Well, commerce has.

8 MR. BRANN: -- is not the same as whether -- as
9 Congress' power to abrogate, that they are two separate
10 issues and need to be analyzed separately. And when we do
11 that, that takes us back to the Framers.

12 And then we think that it's relevant that the -
13 - in the -- if we remember the Madisonian Compromise in
14 which there were not going to be lower Federal courts
15 necessarily created, we were going to rely again on State
16 courts, the fact that there is no reference whatsoever
17 that in the discussions of a -- of the power to abrogate
18 sovereign immunity in State court when Congress was acting
19 under its lawful --

20 QUESTION: Well, and insofar as there is a
21 perceived incongruity in your concession that the United
22 States can sue, really the Constitution is quite specific
23 that one State can sue another State, and so it surely
24 follows that the United States can sue a State. So, I see
25 no inconsistency there at all. And I thought that should

1 have been part of your submission and your answer to
2 Justice Souter.

3 MR. BRANN: And in --

4 QUESTION: Do you concede that another State
5 could sue Maine in Maine's court if Maine objected?

6 MR. BRANN: No.

7 QUESTION: No, I didn't think so.

8 MR. BRANN: No.

9 (Laughter.)

10 QUESTION: But -- but it's very clear that they
11 could sue in Federal courts. It's in Article III.

12 MR. BRANN: That is -- we agree entirely with
13 the point Justice --

14 QUESTION: Which suggests -- which suggests that
15 Article I's analysis is somehow quite fundamentally
16 different from Article III's analysis even if we accept
17 the premise of Seminole. Right?

18 MR. BRANN: Except that when the debate over the
19 -- whether or not Article III created a forum in which you
20 could abrogate sovereign immunity -- and we have from the
21 statements quoted in the briefs from Hamilton and the --
22 and the other Framers, that it's inconceivable that that
23 could happen. They started with the premise --

24 QUESTION: Well, and -- and Hamilton -- you're
25 quite right, but Hamilton was also talking about a debate

1 over Article III, wasn't he?

2 MR. BRANN: And the -- but the debate over
3 Article III only becomes critical at the moment that -- if
4 you start with the premise that you couldn't file suit in
5 the State courts which, as we recall, were going to
6 constitute the vast majority of the courts that existed -
7 - and so the fact that there is no one, federalist or
8 anti-federalist, as Justice Kennedy alluded to, ever
9 suggesting that one of the consequences of a -- of a -- of
10 ratifying the Constitution is giving up that sovereign
11 immunity in the State's own courts we would submit is --
12 is fairly compelling evidence if that -- that did not
13 occur.

14 QUESTION: If we could go back to the -- get
15 down from the lofty Madisonian plane to the practical
16 implications of what you're saying, I think you told me
17 already that a private individual could not sue the State
18 for a copyright infringement or a trademark infringement.
19 What happens to the FELA cases, the Jones Act cases, if
20 we're dealing with a State-owned vessel or a State-owned
21 railroad? The workers can no longer sue for themselves.
22 Is that --

23 MR. BRANN: Those cases would have to be
24 analyzed on -- on their own terms. We think that the --
25 the issue as to whether or not Congress has the power

1 under the Commerce Clause to abrogate such immunity is
2 missing, and therefore to the extent that they are solely
3 derived from there --

4 QUESTION: I guess you can always ask a question
5 like that where sovereign immunity is at issue. I mean,
6 by definition, it precludes claims that ought to be
7 brought.

8 MR. BRANN: That is certainly --

9 QUESTION: Some people think sovereign immunity
10 shouldn't exist for that very reason.

11 MR. BRANN: Well, that's not our view.

12 QUESTION: Is your -- is that your answer now?
13 Because you started out to say, well, those cases have to
14 be analyzed on their own. Justice Scalia is suggesting,
15 no, they don't, that -- that it's always going to be --
16 have to be a big brother suit, that is, the United States
17 suing for the private individual.

18 MR. BRANN: We would submit not, first, because
19 it's important to keep in mind that there is also the Ex
20 parte Young injunctive actions, and we also have the
21 circumstances where we consent.

22 QUESTION: Let me -- let me home in on money
23 suits, not injunctive suits. To get money, the United
24 States can get money for the sailors and for the railroad
25 workers, but the railroad workers cannot do it for

1 themselves.

2 MR. BRANN: If those are -- if those statutes
3 are passed and the sole source of that is under the
4 Commerce Clause, then the answer to that is yes.

5 QUESTION: So, imagine if you were Rufus King or
6 Charles Pinckney or someone who -- I think one represented
7 Maine. They were at the Constitutional Convention. You'd
8 never have dreamt that the fair labor standards would have
9 applied to -- to State government, but that's what
10 happened.

11 Now, my question is why would sovereign immunity
12 be so important to you that of all important things in the
13 Constitution to you, whether Massachusetts' constitution
14 gives more protection to human liberty than the 10
15 amendments -- if it does, by the way, Congress can
16 abrogate that, can't it?

17 MR. BRANN: Justice Breyer, I think --

18 QUESTION: Well, I mean, Congress can -- we're
19 assuming Congress could abrogate, say, any extra
20 protection that -- that was important to Massachusetts, so
21 it wrote it into its constitution. Congress could
22 abrogate that if it goes beyond the Federal Constitution,
23 otherwise legitimate exercise, couldn't it?

24 MR. BRANN: If I follow -- if I follow --

25 QUESTION: I mean, an otherwise -- all right.

1 So, I'm just -- I'm just trying to point out there were a
2 lot of things that are important, that under Article I
3 Congress could abrogate a lot of things.

4 Now, I say I'm going to make you, Rufus King,
5 foresee everything. All right? Now, I just wonder why -
6 - what would be more important to you. You foresee this
7 future. You say is sovereign immunity so important to you
8 that I'm going to insist, say, in an environmental area,
9 that Congress set up a Federal bureaucracy to tell the
10 States everything about what to do, than let's say to
11 devise some incentive type system that depends upon
12 private citizens bringing sludge control suits in State
13 courts.

14 In other words, why is it more important to you
15 in your -- in your federalist philosophy, that in the
16 future the right way to do it is to set up Federal
17 bureaucracies, but the wrong way to do it is to have
18 individual citizens sue, say, incentive based suits in
19 State courts? You see, I'm saying --

20 MR. BRANN: The dividing --

21 QUESTION: I'm going on the idea of the lesser
22 includes the greater. Why do you want big brother, the
23 Federal Government, breathing down your neck? Why -- why,
24 if you are the most extreme federalist at that
25 Constitutional Convention, are you going to insist upon

1 the principle of sovereign immunity trumping everything on
2 this, what seems a minor issue of bringing suits in State
3 court?

4 MR. BRANN: But it wasn't a minor issue in the
5 Constitutional Convention. The ability of a private
6 individual to bring a damages action against a State was
7 very much on the minds of those who wrote the
8 Constitution.

9 QUESTION: You -- Mr. Brann, you don't challenge
10 the authority of the Federal Government to provide that
11 Federal laws can be -- lawsuits can be brought in State
12 courts against presumably a railroad that's operating in
13 Maine or some polluter that's -- you say it just can't be
14 brought against the State itself.

15 MR. BRANN: Correct. And the -- and there's --
16 and there are --

17 QUESTION: And I suppose you also concede that a
18 State can waive sovereign immunity.

19 MR. BRANN: Certainly.

20 QUESTION: And I suppose you also concede that
21 States often do waive sovereign immunity for suits in
22 their own courts when Congress passes some kind of
23 economic incentive for them to participate in the program
24 and to waive sovereign immunity.

25 MR. BRANN: And indeed --

1 QUESTION: Well, I mean --

2 MR. BRANN: -- we waive it in numerous
3 circumstances as well.

4 QUESTION: Let me be straightforward about
5 what's bothering me. It seems that if you prevail, we're
6 going to get some kind of hodgepodge, that there will be
7 lots of Federal statutes that there's no problem with
8 enforcing, and then there will be some that there is a
9 problem with enforcing. And there will be no rhyme nor
10 reason to that. Rather, in many instances, it will lead
11 to more Federal intervention as they build Federal
12 bureaucracies; in some, it won't.

13 So, what I don't see is, is it clear in the
14 framework of the Convention that the Founders would have
15 wanted that odd hodgepodge of enforceability?

16 MR. BRANN: But there are other factors that can
17 be brought to bear in the -- in those circumstances in
18 that -- in that you have, in addition to -- in dealing
19 with the Federal Government, there are obviously various
20 political aspects of it as well. And in terms of how it
21 can be enforced and the mechanisms, it can be done in a
22 number of different ways, as you -- as you mentioned,
23 Justice Breyer, incentives and the like.

24 There are other -- there are other ways in which
25 we can approach this problem, but the one way which we

1 can't do it is to do it in a way that would violate what
2 was the original bargain, if you will, when the States
3 went into the -- into the Constitution, which was that we
4 were -- although we were giving up our rights, if you
5 will, and our sovereignty to some degree with regard to
6 the Federal Government passing Federal statutes, which are
7 otherwise valid, that did not carry with it necessarily -
8 - and indeed, it did not. There's no one who suggested it
9 carried with it the ability to abrogate sovereign immunity
10 certainly in a State's own court.

11 QUESTION: But isn't that true because no one
12 suggested at the time that statutes of this sort would
13 ever be passed?

14 You -- you mentioned a moment ago in -- in the
15 earlier part of your answer to Justice Breyer that at the
16 Convention there was great concern about individual
17 citizens suing States. That concern, if I understand it
18 correctly -- and you correct me if I'm wrong -- was a
19 concern about bringing common law actions, e.g., actions
20 of debt, suing on the revolutionary debt. There was --
21 there was no -- there was no advertence whatsoever, to the
22 best of my knowledge, to a suit brought -- that might be
23 brought by a citizen in a State court suing under a
24 Federal statute passed validly under Article I. That was
25 absent from the discussion, if I understand it correctly.

1 MR. BRANN: And that is true. But we think it's
2 important to remember, is that in a -- in a system of few
3 and enumerated powers, the question is, did the power to
4 regulate commerce among the States also include this
5 abrogation?

6 QUESTION: Did -- you might just as well ask the
7 question, did the power to regulate commerce among the
8 States, including subjecting the States to the Fair Labor
9 Standards Act? And if you had asked that question at the
10 time of the Convention, the answer would have been, of
11 course, not. That's ridiculous.

12 It's not ridiculous today, and the question is,
13 once the power to act under Article I substantively is
14 conceded, there's nothing left but, in effect, a -- a
15 totally secondary question --

16 MR. BRANN: We think --

17 QUESTION: -- about enforcement.

18 And to say that the one does not follow the
19 other seems very strange. And I -- as Justice Breyer's
20 question suggested, I can't imagine why anyone would have
21 been concerned about the enforcement power who conceded
22 the power in the first place to legislate substantively.
23 And we have to accept that latter concession.

24 MR. BRANN: But, Justice Souter, I think,
25 though, taken -- and we agree with the -- the precise

1 example that you're using, the Revolutionary War debts --
2 is that there was no one who suggested that Congress
3 could pass a statute that would then make it possible to
4 collect those debts which were very -- the fact that --
5 and the fact that no one every suggested that --

6 QUESTION: Right, but to the extent that that -

7 -

8 QUESTION: What did Hans v. Louisiana say about
9 this subject?

10 MR. BRANN: I'm sorry.

11 QUESTION: What did Hans v. Louisiana suggest
12 about this subject? Did -- did Hans suggest that the
13 sovereign immunity that existed in Federal courts was only
14 sovereign immunity against -- against causes of action not
15 created by the Federal Government itself?

16 MR. BRANN: No. I mean, Hans -- you know, it
17 has a much broader scope.

18 QUESTION: Then you're -- then it seems to me
19 you're back with the original problem of coherence. If
20 your argument is going to depend upon an overarching
21 theory of sovereign immunity that is enforceable in the
22 absence of any constitutional text, then I don't see how
23 you can concede that the National Government could sue in
24 a Federal court because that would be as clearly an
25 abrogation of that sovereign immunity as -- as a suit by

1 the National Government or a citizen in a State court.
2 You can't have it both ways.

3 MR. BRANN: Well, we don't think that we're
4 having to have it both ways. What we think is that we --
5 we have agreed by ratifying the Constitution that the
6 super sovereign, the United States, can file suits to
7 enforce action --

8 QUESTION: Where did they think -- where did
9 they think -- to start -- to end with the beginning
10 question, where did the people at that time think that if
11 Congress were to pass a legitimate law that bound a State
12 government to pay some money to some people -- where would
13 have a law like that have been enforced? There were no
14 Federal courts. Did they just think you couldn't enforce
15 it or that there couldn't be such a law?

16 MR. BRANN: I think it's significant that no one
17 suggested that they could pass such a law is the --

18 QUESTION: You're saying they couldn't pass the
19 law. So --

20 MR. BRANN: Well, but that -- or that no one
21 suggested that one of the things that Congress could do,
22 in order to address this issue of the Revolutionary War
23 debts, was pass a law that would then be enforceable.

24 QUESTION: But if they thought they could pass
25 the law, they would have said you can't enforce it.

1 MR. BRANN: It may very well be. Because it's
2 inconceivable to the Framers that a State could be sued
3 without its consent, we don't find it -- which this Court
4 has noted in -- in not only the Tenth Amendment but also
5 in the Eleventh Amendment context. It is not surprising
6 that this debate did not occur at the time of the
7 Convention.

8 But --

9 QUESTION: So, there is no evidence in the
10 debate or is there? Or what would happen?

11 MR. BRANN: No. All of the evidence runs to the
12 following, which is that as the Framers state in numerous
13 circumstances, that it's inherent in the nature of
14 sovereignty not to be amenable to suit. Now, they were -
15 - and they were obviously premised based on the -- on the
16 historical existence of the States' courts, and they --
17 and they were looking to if you can't be sued in State
18 court -- I mean -- then when we create the Federal courts,
19 the Article III courts, does that change the calculus?

20 QUESTION: So, if there is no evidence at all
21 about what the Framers thought would happen to enforce a
22 law that Congress passed to bind the States, how could we
23 know now that given the later -- the greater, they
24 wouldn't have conceded the lesser?

25 MR. BRANN: Because the -- the immunity of a

1 State from suit without its consent from a private
2 individual was a bedrock principle that the Framers took
3 to the Convention. And --

4 QUESTION: Didn't the Framers, by the same
5 token, assume that there would not be commerce power
6 statutes binding and running against the State in its
7 capacity as a State? Isn't that equally true?

8 MR. BRANN: I see that my time is expired.

9 QUESTION: You may give a brief answer.

10 (Laughter.)

11 MR. BRANN: I think so.

12 (Laughter.)

13 QUESTION: Thank you, Mr. Brann.

14 Mr. Gold, you have a minute remaining.

15 REBUTTAL ARGUMENT OF LAURENCE S. GOLD

16 ON BEHALF OF THE PETITIONERS

17 MR. GOLD: Two points, if I can.

18 First of all, the State continues to talk about
19 giving up its sovereign immunity and what it agreed to.
20 The sovereign immunity the State had was premised on some
21 legal understanding. It was sovereign immunity in its own
22 courts on rights under its own law. We have created a new
23 situation in the Constitution in which the State courts
24 have a dual function, one which is different from the one
25 it had before and where the State courts are dealing with

1 laws of another sovereign which are binding without regard
2 to the interests or desires of a State and where --

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gold.

4 The case is submitted.

5 (Whereupon, at 11:03 a.m., the case in the
6 above-entitled matter was submitted.)
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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:

JOHN H. ALDEN, ET AL., Petitioners v. MAINE.

CASE NO: 98-436

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

BY:

Jonathan May

(REPORTER)