

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PORT AUTHORITY TRANS-HUDSON

CORPORATION, Petitioner V. PATRICK FEENEY

CASE NO: 89-386

PLACE: Washington, D.C.

DATE: February 26, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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PORT AUTHORITY TRANS-HUDSON :

CORPORATION, :

Petitioner : No. 89-386

v. :

PATRICK FEENEY :

-----x

Washington, D.C.

Monday, February 26, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

JOSEPH LESSER, ESQ., New York, New York, on behalf of the Petitioner.

RICHARD W. MILLER, ESQ., Islip, New York, on behalf of the Respondent.

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ORAL ARGUMENT OF

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JOSEPH LESSER, ESQ.

On behalf of the Petitioner

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RICHARD W. MILLER, ESQ.

On behalf of the Respondent

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JOSEPH LESSER, ESQ.

On behalf of the Petitioner

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

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 89-386, Port Authority Trans-
5 Hudson Corporation v. Patrick Feeney.

6 Mr. Lesser.

7 ORAL ARGUMENT OF JOSEPH LESSER

8 ON BEHALF OF THE PETITIONER

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

11 The Port Authority of New York and New Jersey
12 was created in 1921 by a compact between the states to
13 which Congress consented.

14 And the principal burden of my argument today
15 before the Court is to demonstrate beyond any question
16 whatsoever that the Port Authority is structured,
17 administered and operated as a direct instrumentality of
18 the compacting states, and is politically and legally
19 accountable as such to the governors and legislatures of
20 the compacting states.

21 It should therefore, I submit, be recognized for
22 what it clearly is: an integral part of the governmental
23 machinery of the two states, completely subject to their
24 control and direction. As a direct arm of the states, the
25 Port Authority should be held, I believe, to share the

1 states' constitutional protections and immunities,
2 including their Eleventh Amendment immunity.

3 Such a holding, I shall show, fulfills not only
4 the underlying purpose of the Eleventh Amendment's
5 conceded deference to state's sovereignty, but also that
6 of the compact clause, by encouraging the states to solve
7 cooperatively their regional problems, thus enhancing, I
8 submit, the vitality of our Federal system.

9 That the Port Authority is unquestionably a
10 direct arm of the states, fully subject to their control
11 and direction is most easily demonstrated. The compact
12 declares that the commissioners of the Port Authority, 12
13 in all, constitute the Port Authority.

14 Six of these commissioners are appointed by the
15 governor of each state, with the advice and consent of the
16 respective state senates. The commissioners are subject
17 to removal after charges upon hearing in New York by the
18 governor of the state, and in New Jersey by the state
19 senate.

20 The governors significantly possess a veto power
21 over all actions which the commissioners of the Authority
22 take. The Authority cannot take any action which is not
23 subject to gubernatorial veto. And the Authority, as an
24 arm of the states, is completely subject to legislative
25 control and direction.

1 The Authority has no autonomous powers of
2 government, like a county or a municipality, which of
3 course, counties and municipalities do not share the
4 states' sovereign immunity from suit. The Port Authority
5 has no such powers. Everything the Port Authority does is
6 authorized by bi-state legislation. And the Port
7 Authority is duty bound to be obedient to the legislatures
8 and to follow their directions.

9 Because of the Port Authority's closeness,
10 intimate relationship to the compacting states, it is not
11 surprising that before 1950 and '51, when the states
12 waived the Port Authority's sovereign immunity, every
13 court that had occasion to pass upon this question, the
14 courts of New York, the courts of New Jersey and the lower
15 Federal courts held that the Port Authority shared the
16 sovereign immunity from suit of the compacting states.

17 As a matter of fact --

18 QUESTION: Mr. Lesser, suppose a municipal
19 corporation had those characteristics. Suppose state law
20 provided that the chief executive officer of a
21 municipality could be impeached by the legislature, and
22 was appointed initially by the -- by the governor. Would
23 that -- would that make a -- a municipal corporation an
24 arm of the state for Eleventh Amendment purposes?

25 MR. LESSER: No, I don't think so. I think this

1 question before the Court is really fact intensive or fact
2 specific. A municipal corporation has autonomous powers.
3 As this Court said years ago, it's too remote from the
4 states. The Port Authority is not too remote from the
5 states.

6 In fact, the only reason probably the Port
7 Authority is not a department of state government was that
8 the necessity of interstate cooperation. It was the
9 necessity to draft a compact between the states creating
10 this agency.

11 In fact --

12 QUESTION: Well, you -- you -- you say that --
13 you say that either -- either governor can veto the -- the
14 action.

15 MR. LESSER: Absolutely.

16 QUESTION: But being able to veto it is not the
17 same as being able to direct it. In the absence of a
18 veto, I assume it's just run by the -- by the governors.

19 MR. LESSER: Well, they -- what the Port
20 Authority does is subject to legislative control. The
21 Port Authority has not inherent home rule powers, as do
22 municipalities or counties.

23 QUESTION: Well, how can it be subject to
24 legislative control when you have to have the two
25 legislatures get together on it? If the legislators --

1 two legislatures disagree, I suppose the Authority does
2 whatever it wants.

3 MR. LESSER: Not -- not at all. It could only
4 do what the two legislatures authorize. It can't do what
5 it wants in the abstract.

6 As a matter of fact, the only time the Port
7 Authority was held to exceed its statutory powers was a
8 case in the early 1950s when the Port Authority thought it
9 had the power to construct a third tube to the Lincoln
10 Tunnel, relying upon a statutory directive that said that
11 the Lincoln Tunnel shall consist of tubes or tube -- tube
12 or tubes within a narrow geographical compass.

13 And the Port Authority thought that the plural
14 meant two or more. But the New Jersey Supreme Court held
15 to the contrary. And the New Jersey Supreme Court said
16 that the Port Authority is bound -- duty bound to be
17 obedient to the legislatures.

18 And with that decision of the New Jersey Supreme
19 Court, the Port Authority subsequently got a specific
20 bi-state legislation authorizing the construction of the
21 third tube.

22 The Port Authority, Justice Scalia, could do
23 nothing that the legislatures do not authorize. Is
24 completely subject to their control in the same way that
25 almost any department of state government is subject to

1 their control.

2 The states originally tried to act cooperatively
3 when they entered into a compact in 1919, relating to the
4 Holland Tunnel. There were separate state commissions in
5 New York and in New Jersey that were acting cooperatively.
6 And that just didn't work. It didn't work efficiently.
7 And therefore, the legislatures, under the compact clause,
8 which as Felix Frankfurter and James M. Landis wrote from
9 the path-breaking article in the Yale Law Journal in 1925,
10 fosters Federalism by encouraging the states to solve
11 cooperatively problems that transcend their state
12 boundaries but yet do not need national solutions at the
13 Federal level.

14 QUESTION: Getting back to the Holland Tunnel,
15 wasn't that supposed to be tax -- toll free at a certain
16 time?

17 MR. LESSER: No, I think that was the --

18 QUESTION: When it was built, wasn't it two or
19 three years, then it was supposed to be toll free?

20 MR. LESSER: No, it was never written into the
21 statute. That was the normal -- that was the normal
22 assumption at the time, that when the --

23 QUESTION: Assumption by whom?

24 MR. LESSER: By --

25 QUESTION: All the people.

1 MR. LESSER: By the general public, yes.

2 QUESTION: Yes.

3 MR. LESSER: And the legislatures --

4 QUESTION: Well, speaking of the general public,
5 is this true that the tunnel -- I mean that your Authority
6 has more funds in its pocket than the treasury of New York
7 State?

8 MR. LESSER: Oh, I would doubt that, Justice
9 Marshall.

10 QUESTION: Sir?

11 MR. LESSER: I would doubt it. As a matter of
12 fact, at the present time, the Port -- the Port Authority
13 was originally funded by the states. The states
14 appropriated money until the Port Authority became
15 self-sufficient.

16 When the Port Authority finally became
17 self-sufficient, now the Port Authority is a source of
18 funds for the compacting states. In fact, the Port
19 Authority in recent years has been subject to legislative
20 direction, has been engaged in providing the states with
21 nonrevenue-producing projects that they -- that they
22 need.

23 The Port Authority's surplus funds are now
24 available, pursuant to legislation and pursuant to
25 gubernatorial veto power, really, at the request of the

1 states and subject to the rights of bondholders.

2 QUESTION: Does the treasury of New York have
3 surplus funds?

4 MR. LESSER: I -- I really don't know. And
5 judging from the newspapers, I would doubt it.

6 QUESTION: Oh, yes, you do.

7 MR. LESSER: I would --

8 QUESTION: You don't read the newspapers?

9 MR. LESSER: I do. I think there's a problem in
10 New York. The Port Authority has no surplus funds as
11 such. The Port Authority funds are subject to legislative
12 control.

13 As a matter of fact, when the states gave the
14 Port Authority the Holland Tunnel, which was a source of
15 -- at least during the 1930s and '40s -- of immense
16 revenue to the Port Authority, they controlled the flow of
17 Port Authority funds.

18 Because the last paragraph in the Authority's
19 General Reserve Fund Act, which the legislatures passed in
20 1931, provides any surplus revenues not required for the
21 establishment and maintenance of the aforesaid general
22 reserve fund shall be used for such purposes as may
23 hereafter be directed by the two said states.

24 And the states, as I mentioned before, are now
25 the recipient of Port Authority funds, all subject to

1 legislative direction and control.

2 QUESTION: Well, sir, I -- I -- I'm not sure
3 what you mean when you say that the -- that the Port
4 Authority can't do anything that isn't authorized by the
5 -- by the legislature. Surely it can do something without
6 a specific bill. I mean, why does it have its own -- own
7 independent executives, then?

8 MR. LESSER: Well, the compact, which both state
9 legislatures adopted, states that the commissioners of the
10 Port Authority constitute a board. They can hire a staff,
11 provide for their compensation, and that they should make
12 plans to be submitted for the better improvement of the
13 terminal transportation of the facilities of commerce in
14 the bi-state port district that should be subject to
15 legislative approval.

16 The Port Authority makes plans, makes
17 recommendations to the legislature --

18 QUESTION: Well -- suppose -- suppose they want
19 to hire more -- more policemen for the tunnel, or suppose
20 they want to paint a bridge. Do they have to get
21 authorization from the legislature?

22 MR. LESSER: Well, they -- when they appropriate
23 -- when the Port Authority adopts a budget, that's subject
24 to gubernatorial veto. As a matter of fact --

25 QUESTION: No, I'm not talking about -- I

1 understand, everything is subject to veto.

2 MR. LESSER: Right.

3 QUESTION: But I'm talking about prior
4 legislative approval.

5 MR. LESSER: Well, the prior legislative
6 approval to appoint a staff has come in the initial
7 compact.

8 QUESTION: Well, then, you can say the same
9 thing about municipalities. I mean, municipalities can't
10 do anything that isn't authorized by the state. If that's
11 all you mean by state authorization, that --

12 MR. LESSER: Only in a very --

13 QUESTION: -- that -- that you need a state
14 statute.

15 MR. LESSER: -- only in a very remote sense.
16 Municipalities can adopt laws not subject to gubernatorial
17 veto. Let me specifically state that this Court has had
18 two cases involving compact agencies.

19 In the first, Petty against the Tennessee-Missouri
20 Bridge Commission, this Court -- this Court assumed that
21 the Commission, which was modeled after the Port Authority
22 -- in fact, I was struck when I looked at the legislation
23 authorizing the Tennessee-Missouri Bridge Commission, that
24 legislation was almost copied word from word from the Port
25 Authority's port compact.

1 And the question that this Court had, in Justice
2 Douglas' opinion was, the question here is whether
3 Tennessee and Missouri have waived their immunity under
4 the facts of this case. And in that case, the only major
5 difference between the compact authorization of that
6 agency and the Port Authority's was, in that agency there
7 was a sue and be sued clause.

8 And Justice Douglas' opinion went into detail whether
9 that sue and be sued clause constituted a waiver of
10 Eleventh Amendment immunity.

11 QUESTION: Mr. Lesser, do the directors of the
12 Port Authority have the power to waive immunity in any
13 suit that they choose?

14 MR. LESSER: No, they do not. The waiver has to
15 come from the state legislatures.

16 QUESTION: Well, if that's the case, then it
17 would seem to me that your construction of what you call
18 the venue permission -- provision -- is unacceptable
19 because then we have to interpret it as a waiver in all
20 cases.

21 MR. LESSER: No, I think -- I think --

22 QUESTION: If -- if -- if it's not a venue
23 provision because there's no authority to waive on a
24 suit-by-suit basis, then maybe the best interpretation of
25 that provision is that it is a waiver.

1 MR. LESSER: I think not, Justice Kennedy.
2 Until 1950 and '51, the courts of both states and the
3 lower Federal courts held that the Port Authority shared
4 the sovereign immunity from suit of the compacting states.

5 In fact, one New York court said, it is hard to see
6 how there could be a clearer instance of an agency sharing
7 the immunity of its creators.

8 And a New Jersey court said, since the Authority is
9 undoubtedly a direct agency of the states, exercising an
10 essential governmental function and is therefore an alter
11 ego of the state, it follows that the present action is,
12 in effect, a suit against the state itself, which will be
13 clothed with sovereign immunity unless a waiver or consent
14 can be found.

15 QUESTION: Now, were these --

16 MR. LESSER: [Inaudible] --

17 QUESTION: I'm asking you a question, Mr.
18 Lesser, if you will just stop for a moment.

19 MR. LESSER: I'm sorry.

20 QUESTION: Were these cases decided in the
21 context of the Eleventh Amendment?

22 MR. LESSER: No, not directly, no. They were
23 decided -- I guess what this Court now calls common-law
24 sovereign immunity from suit.

25 QUESTION: Sovereign --

1 MR. LESSER: No, they were not.

2 With the decision of these cases in 1950 and '51,
3 both legislatures adopted the Port Authority suability
4 legislation. And in that legislation, section 1 of that
5 legislation constitutes the waiver. Section 1 of that
6 legislation states that the States of New York and New
7 Jersey consent to suits against the Port Authority.

8 That's the waiver. That's the giving of
9 jurisdiction.

10 The venue provision to which Justice Kennedy alluded
11 a moment ago states, the foregoing consent is granted upon
12 the condition that venue.

13 So you have to find the waiver of immunity from suit
14 in section one.

15 QUESTION: But it would seem to me that one way
16 to make your interpretation work is if, on a suit-by-suit
17 basis, the directors could determine that they will either
18 waive or not waive. But if they never have authority to
19 waive on their own, then it seems to me that the statute
20 constitutes the waiver.

21 MR. LESSER: I think -- well, I don't know what
22 that statutory venue provision means, that reference --
23 that obscure reference to Federal courts in the venue
24 provision. But it certainly doesn't meet the strict and
25 stringent standard that this Court had said is necessary

1 for there be -- to be a waiver of Eleventh Amendment
2 immunity.

3 This Court has said that only where stated by the
4 most express statutory language or by such overwhelming
5 implication from the text, as will leave no room for any
6 other reasonable construction, will it find a waiver.

7 QUESTION: Well, Mr. Lesser, what is the
8 language, judicial district established by the United
9 States, mean, then, if --

10 MR. LESSER: I --

11 QUESTION: -- if it doesn't mean Federal court?

12 MR. LESSER: That -- that undoubtedly meant
13 Federal court. I think that that reference was probably
14 an ineffectual attempt by the states to limit venue over
15 actions brought against the Port Authority in Federal
16 court, if jurisdiction already existed. I don't think
17 it's effective. Because I think there's a general Federal
18 venue provision that would overrule that provision of
19 state law.

20 QUESTION: Well, it is -- do I understand
21 correctly that the Port Authority has never in fact
22 consented to be sued in Federal court in any case?

23 MR. LESSER: The Port Authority has never
24 knowingly consented to be sued. But when the original
25 statute -- suability statute was passed, the Port

1 Authority has been a defendant in Federal courts.

2 This was in the era, I think, of Pardon against
3 Alabama Dock Railroad, when this Court stated that when an
4 agency is involved in interstate commerce, and Congress
5 regulates that agency, the states, by engaging in such
6 activity, impliedly waive their Eleventh Amendment
7 immunity.

8 But Pardon was expressly overruled by this Court a
9 few years ago in Welch. And since the Welch decision, the
10 Port Authority has always maintained that it shares the
11 Eleventh Amendment immunity.

12 The Port Authority was suable in Federal courts,
13 unknowingly, during the era of Pardon. But with Pardon's
14 being overruled by Welsh, the Port Authority, I believe,
15 shares the Eleventh Amendment immunity. And I think this
16 obscure reference is not the type -- to Federal courts --
17 is not the type of knowing waiver that this Court has
18 required.

19 I don't understand it. The Second and Third Circuits
20 disagreed as to its meaning. And if there is -- and with
21 both decisions, the Second and Third Circuits'
22 disagreement, I don't think either ruling of either
23 circuit could be considered arbitrary or capricious. And
24 then the question is, where does the presumption lie?

25 If the presumption was that uncertain language

1 results in a waiver, then there would have been a waiver.

2 QUESTION: Doesn't the Port Authority own office
3 buildings?

4 MR. LESSER: It operates and owns the World
5 Trade Center, yes.

6 QUESTION: It owns other ones. Doesn't it own
7 10 Columbus Circle?

8 MR. LESSER: No. No, that is probably the
9 Transit Authority. Or the Metropolitan Transportation
10 Agency.

11 QUESTION: The Metropolitan Transit?

12 MR. LESSER: Yes. Not the Port Authority.

13 The Port Authority's operation of the World
14 Trade Center was linked by the legislatures to the
15 operation of the Hudson tubes, the PATH system, which is
16 the focal point of this suit.

17 QUESTION: And that's immune from suit?

18 MR. LESSER: No, the Port Authority is suable,
19 pursuant to the provisions of the bi-state suability
20 statutes that were adopted in 1950 and '51. The Port
21 Authority is fully suable in state court.

22 As a matter of fact, if this Court should hold
23 that the Port Authority possesses the Eleventh Amendment
24 immunity, these petitioners and others have the normal
25 workman's compensation action in state court.

1 In fact, I think these petitioners have an
2 action presently pending against the Port Authority in the
3 Supreme Court of New York County.

4 QUESTION: Mr. Lesser, what is the closest case
5 from this Court that has extended Eleventh Amendment
6 immunities to some body other than the state itself, or a
7 state official?

8 MR. LESSER: Well, I -- I said that this -- that
9 this Court has had two cases, Petty against --

10 QUESTION: There -- there in Petty it was just
11 assumed that there was immunity, was there not? The Court
12 didn't decide it.

13 MR. LESSER: Well, it was -- it was assumed,
14 yes. It was assumed. But Justice Frankfurter, in his
15 opinion -- his dissenting opinion in Petty stated, had
16 there been no sue and be sued clause in the compact, this
17 bridge commission could not have been sued in the Federal
18 courts, despite the fact that it was operating a vessel on
19 navigable waters in interstate commerce.

20 QUESTION: But --

21 MR. LESSER: The Eleventh Amendment would not
22 have permitted it.

23 QUESTION: But that was a dissenting opinion.

24 MR. LESSER: That was a -- but two other
25 justices concurred.

1 QUESTION: Yes.

2 MR. LESSER: The closest case to this --

3 QUESTION: Well, how about a majority case?

4 MR. LESSER: A majority case was the opinion in
5 the Tahoe Regional Planning Agency case. In that case,
6 this Court set forth six factors.

7 QUESTION: But that case did not -- that case
8 ruled against the particular entity in question, didn't
9 it?

10 MR. LESSER: Yes. And I think wisely so.

11 QUESTION: Well, so -- so the Court -- there's
12 never been a holding of the Court extending Eleventh
13 Amendment immunity to any body other than the state
14 itself, or a state official, is that correct?

15 MR. LESSER: That's correct. But the Court has
16 never had a case where an agency closely -- so closely
17 identified with the states as the Port Authority.

18 In the Tahoe Regional Planning case, the Ninth
19 Circuit adopted what this Court has called an absolute
20 rule that any agency that was so important enough to be
21 created by acts of two state legislatures, with the
22 consent of Congress, automatically -- this is what the
23 Ninth Circuit held -- automatically possessed the Eleventh
24 Amendment immunity of the states'.

25 And I think this Court quite properly rejected

1 that absolute rule. This Court set forth six factors in
2 which it can be determined whether an agency is so closely
3 allied with the states as to share their Eleventh
4 Amendment immunity.

5 QUESTION: Mr. Lesser, before you go on to that.
6 In Petty, what was the sue or be sued clause?

7 MR. LESSER: It was contained in the compact
8 between Missouri and Tennessee.

9 QUESTION: And did it say sue or be sued in
10 Federal court?

11 MR. LESSER: It did not. And the -- and the
12 argument --

13 QUESTION: It was -- it was a sue or be sued
14 clause just like yours?

15 MR. LESSER: Just like ours. But it was before
16 this Court required an absolute waiver of Eleventh
17 Amendment immunity in Federal court.

18 QUESTION: So what you're saying is that even
19 under Frankfurter's view in Petty, the sue or be sued
20 clause here would have sufficed.

21 MR. LESSER: No, not under Frankfurter's view --
22 not under the view of the three dissenters in Petty. They
23 said that this Court should interpret the sue and be sued
24 clause as the state courts in Tennessee and Missouri
25 interpreted it.

1 And they interpreted that clause to mean that
2 the agency was not liable in tort. And the majority --
3 Justice Douglas stated that the sue and be sued clause --
4 that when Congress adopted or consented to the compact
5 with the sue and be sued clause, it consented it to the
6 compact in the light of an earlier decision by this Court
7 in the late 1930s involving the Reconstruction Finance
8 Corporation -- Keefer against the Reconstruction Finance
9 Corporation.

10 And in that case, this Court ruled that a sue
11 and be sued clause relating to a Federal agency
12 constitutes a waiver of immunity.

13 And Justice Douglas said that that decision in
14 the Keefer case, involving the Reconstruction Finance
15 Corporation, show that Congress, when it consented to a
16 sue and be sued clause, consented to a full waiver of
17 Eleventh Amendment immunity.

18 But I think, as far as the waiver provision is
19 concerned, this Court has, in recent years, clearly taken
20 a much more stringent view, saying that the general sue
21 and be sued clause does not include a waiver of Eleventh
22 Amendment immunity unless it's absolutely crystal clear.

23 But let me just go through -- Your Honor, the
24 factors listed in the Tahoe Regional Planning Association
25 case. This Court listed six factors. And we think the

1 Port Authority meets all of those six factors to be
2 accorded Eleventh Amendment immunity.

3 First, this Court said, how were the governing
4 officials appointed? Are they appointed by local
5 governing boards?

6 In that case, the local -- the majority of the
7 Lake Tahoe Regional Planning Association Board was
8 appointed by county officials.

9 Then this Court said is there a veto at the
10 state level? There was no veto at the state level in that
11 case. There is a veto at the state level in this case.

12 Then this Court said how is the agency
13 designated in the enabling state legislation? And the
14 Port Authority, in the enabling state legislation, is
15 clearly designated as a joint or common agency of the two
16 states.

17 In fact, in the compact to which Congress
18 consented be -- there was no sue and be sued clause as I
19 already mentioned -- the legislatures, in their preamble,
20 stated that the development of necessary terminal
21 transportation and other facilities of commerce in the
22 region require the cordial cooperation of the states. And
23 this can be best accomplished, said the legislatures,
24 through the cooperation of the two states by and through a
25 joint or common agency.

1 That's -- and there are many similar
2 descriptions in the legislation of the Port Authority, as
3 the common agency of the states.

4 Then the next factor that this Court set forth
5 in the Tahoe Regional Planning Association case was how
6 was the agency funded. And as I previously mentioned, the
7 Port Authority was funded by the state legislatures until
8 it became self-sufficient.

9 And in the early days in its history, when --
10 faced a default on its first bridge bonds. And the
11 legislatures were faced with the problem of a default by
12 an agency like the Port Authority, they turned over to the
13 Port Authority their Holland Tunnel, which, as I mentioned
14 before, was constructed by separate state commissions or
15 state departments, operating cooperatively.

16 QUESTION: Mr. Lesser, to what extent might the
17 general funds of New York or New Jersey be held applicable
18 to the debts of the Port Authority?

19 MR. LESSER: Technically, they're not -- a
20 judgment against the Port Authority is not payable out of
21 the state treasuries. But that doesn't mean that the
22 states are not adversely affected by judgments against the
23 Port Authority in the same way that they're adversely
24 affected by judgments against either state.

25 In fact, the New Jersey Supreme Court recognized

1 that there can be multiple state treasuries in a case
2 involving the Port Authority. In this particular case,
3 the New Jersey Supreme Court was faced with the problem of
4 whether the Authority should have the states' rights to
5 require the uncompensated relocation of private/public
6 utilities in the streets and the thoroughfares of the
7 state.

8 And the New Jersey Supreme Court said that that
9 state rule was equally applicable to the Port Authority.
10 The Port Authority cannot be thus divorced from the
11 citizens and taxpayers it was created to serve. And the
12 New Jersey Supreme Court stated that the general state
13 taxpayer has a tremendous interest in the financial
14 solvency and the operations of the Port Authority.

15 I think there can be no doubt, Mr. -- this
16 Court, that the Port Authority is a direct arm an agency
17 of the states, and it should, therefore, share the states'
18 sovereign immunity from suit.

19 Such a holding will, I believe, foster the
20 principles of Federalism that both the Eleventh Amendment
21 and the compact clause were designed to serve.

22 I'll reserve my remaining time for rebuttal.

23 Thank you.

24 QUESTION: Very well, Mr. Lesser.

25 Mr. Miller.

1 ORAL ARGUMENT OF RICHARD W. MILLER

2 ON BEHALF OF THE RESPONDENT

3 MR. MILLER: Thank you, Mr. Chief Justice, may
4 it please the Court.

5 I'd like to begin, if I may, by responding to a
6 question that Justice Marshall posed. In the legislation
7 governing the World Trade Center, the language is quite
8 specific that the Port Authority is supreme in its
9 operation.

10 All details of the effectuation, including but
11 not limited to, financing, leasing, rentals, tolls, fares,
12 shall be within its sole discretion. And its decision in
13 connection with all matters, including the Hudson tubes,
14 shall be controlling and conclusive.

15 The Port Authority has been described in the
16 enabling legislation as a body corporate and politic. It
17 has been described as a private corporation in the statute
18 that authorizes suit against the Port Authority. It says,
19 as if it were a private corporation.

20 Now the Port Authority has broad powers, which
21 it exercises as it sees fit. It does not go to either
22 state to get second opinions. It does not go to either
23 state to ask their approval for what it wants to do.

24 It owns real estate in its own name. It leases.
25 It operates real property. It operates marine terminals.

1 It issues bonds in its own name. It borrows money. It
2 operates its own general reserve fund. And the decisions
3 have held -- opinion of the attorney general that's cited
4 in the brief -- that the bonds of the Port Authority are
5 not obligations of either the State of New York or New
6 Jersey.

7 It operates commuter railroads, bridges,
8 tunnels, the World Trade Center. It even has its own
9 police department, and they're called Port Authority
10 Police.

11 Now, the best way, I suppose, to find out what
12 the Port Authority really is, is to see how they describe
13 themselves. The Port Authority describes itself in its
14 comprehensive annual financial report in 1987, which they
15 issue every year: Unlike many other authorities and
16 governmental agencies, the Port Authority, by law, must be
17 self-supporting. It has neither the power to tax nor the
18 right to pledge the credit of either state to support its
19 general obligations.

20 The Port Authority pays its own way for
21 operations on capital investment, pooling revenues earned
22 from its facilities through rents, fees, fares, tolls and
23 other user charges. It finances new construction, major
24 improvements and repairs by selling its bonds and other
25 obligations.

1 Now, there is specific -- there is a specific
2 section, 7031, which says that all bonds issued by the
3 Port Authority are deemed to be negotiable instruments.
4 And they are traded widely in brokerage houses and the
5 stock exchange.

6 QUESTION: Mr. Miller, how is it that some
7 degree of independence from the state by the -- this
8 agency mean that the entity, the Port Authority, is still
9 not ultimately controlled by the state, and operate as --
10 as states' agency?

11 I don't see that they're -- that the fact that
12 it has some independence from the states necessarily means
13 that the Authority is not an agency of the authorizing
14 states.

15 MR. MILLER: Well, it doesn't have any of the --
16 the dressings of an agency.

17 QUESTION: Well, do you think it's a political
18 subdivision of the states, like a city or a county?

19 MR. MILLER: It's been described --

20 QUESTION: Is that your position?

21 MR. MILLER: Well, it's been described in the --
22 in the enabling statutes as a private corporation. It's
23 been described as a municipal corporate entity.

24 In fact, I believe the second statute
25 establishing the Port Authority -- the first statute, I

1 believe, reciting the theory of the two states working
2 together to develop the Port Authority. Right in that
3 section, it does not say that it's an agency. It calls it
4 a municipal corporate entity.

5 It's never called an agency in any of the
6 statutes that I've read, and -- or cited in this --

7 QUESTION: Well, I suppose it doesn't matter
8 whether the word is used, because this would be a Federal
9 question. And we have to determine whether in fact, for
10 purposes of Federal law, it shares the sovereign immunity
11 of the states. Isn't that so?

12 MR. MILLER: Yes, Your Honor.

13 I suppose the best answer to your question would
14 be to look at the Tahoe case. In the Tahoe case, although
15 there was --

16 QUESTION: Well, I'm not sure that application
17 of the so-called six factors yields a crystal clear result
18 here. Because some factors exist here on both sides of
19 that question.

20 MR. MILLER: I don't think we have to look at
21 six, Your Honor. I think it's sufficient to use the
22 language in that -- in that case, which says that -- as I
23 -- as -- as -- as I interpret it, the most important
24 factor to look at is the impact on the state treasury of a
25 judgment against the Authority.

1 In this particular case, there is a specific
2 statute involving the Port Authority which obligates the
3 states only to \$100,000 as initial start-up fees and only
4 for a very narrow category of -- of expenses.

5 In other words, they weren't able to be used as
6 -- as the Port Authority see fit. The statute said office
7 expenses, administrative expenses. It couldn't have been
8 used for a judgment.

9 Other than that particular amount, \$100,000 as
10 initial start-up expenses, there was no exposure at all of
11 the state treasury to any judgment.

12 And as I read the Tahoe --

13 QUESTION: That sort of begs the question. If
14 the money of the Port Authority is state money, it's kept
15 in a separate pile, and it's still state money.

16 MR. MILLER: But it's not state money. The
17 monies that are earned by the Port Authority are plowed
18 back into their general reserve fund. From that general
19 reserve fund they continue to operate the Authority and
20 its numerous activities. And they also use it to issue
21 their bonds.

22 And the statute sets out exactly what has to be
23 kept in, what percentage can be used, and the like. But
24 the monies are not turned over to the states from the Port
25 Authority's earnings. They're kept within the Port

1 Authority.

2 QUESTION: Well, what if -- what if a state set
3 up a -- say -- say Massachusetts set up an authority to --
4 to develop the harbor there. And there was no interstate
5 compact involved at all. And they just set up an agency,
6 a department of the state government to develop the -- to
7 develop the harbor.

8 Would that agency share the Eleventh Amendment
9 immunity of the state?

10 MR. MILLER: Well, Your Honor, without knowing
11 some of the specific sections, et cetera -- but I would
12 say you'd, again, have to look at the -- what I consider
13 the most important factor in Tahoe, is the -- what happens
14 if there is a judgment? Is the state treasury insulated?

15 QUESTION: Well, I know, but you -- I -- I don't
16 suppose you can sue a state in the Federal court for an
17 injunction, can you?

18 MR. MILLER: No.

19 QUESTION: Well, in -- in those cases there is
20 nothing -- the -- a state is immune even though its
21 treasury isn't in danger.

22 MR. MILLER: Well, that's handled in the
23 statutes for the Port Authority. I mean, that -- there is
24 a specific section that deals with injunctions, where you
25 can't sue the Port Authority. 7101 says we waive it. You

1 can sue us on any kind of case with certain exceptions,
2 that being one of them.

3 QUESTION: Well, you're arguing waiver now.

4 MR. MILLER: Specific, yes, Your Honor.

5 QUESTION: Let -- let's assume the state creates
6 a statewide police force, a state police, and -- and --
7 and -- and it provides that the state -- that this agency
8 may be sued. And that its liability, however, will not
9 exceed its available funds. And there's a separate
10 funding for this agency which it appropriates the funds
11 every year.

12 The state treasury is not -- not liable beyond
13 what's in the pot for that agency. You would say that is
14 not a state agency, simply because the general treasury is
15 not -- is not liable?

16 MR. MILLER: I would say that is not a state
17 agency that falls within the parameters of the Tahoe case,
18 which said, if there's an impact on the treasury we will
19 consider it.

20 QUESTION: I -- I know that. I -- I know it
21 doesn't come within Tahoe. I mean --

22 MR. MILLER: If --

23 QUESTION: And you think that simply because of
24 the one feature, that the state's general funds are not
25 available for judgments, therefore it is not a state

1 agency?

2 MR. MILLER: I think that's the most workable
3 feature, yes. I think it's the most practical way to
4 approach these -- these problems.

5 QUESTION: That -- that's very risky.

6 Well, it may well be. But I don't think anybody
7 would believe that.

8 MR. MILLER: Well --

9 QUESTION: That if -- if a state creates what,
10 in all other respects, is thoroughly a state agency, the
11 mere fact that the -- that the general state funds are not
12 liable in any suit, although it makes it liable to suit up
13 to the amount of its own -- its own budget, that alone
14 makes it a nonstate agency?

15 MR. MILLER: Well, is Your Honor saying in your
16 question that the question of agency is somehow set out in
17 -- in -- in -- in its description of this police
18 department? Because here we don't --

19 QUESTION: No, I'm just saying that I never
20 thought that the criterion -- the exclusive criterion of
21 whether a body is a state agency or not is whether it can
22 render the state's treasury liable.

23 MR. MILLER: I -- I wouldn't say it is the
24 exclusive factor, Your Honor.

25 QUESTION: But that is what you just said

1 before, I thought. That you don't have to look beyond
2 that.

3 MR. MILLER: I'm saying that under the authority
4 of Tahoe, looking at that factor, appeared to be the most
5 important factor as far as that agency was concerned and
6 as far as this one is concerned.

7 QUESTION: Well, Mr. Miller, a number of states,
8 I believe, certainly those with debt limits, have been
9 following the practice of setting up separate state
10 agencies to fund construction projects. For example,
11 university housing. And they'll structure the state board
12 of regents as an entity to issue bonds for the housing,
13 but not subject the state treasury, independently, to
14 liability.

15 Now, under your view, all those, what I would
16 have thought were state agencies, now have no sovereign
17 immunity. And we might have thought, for example, in the
18 State of Arizona, that the state board of regents was a
19 state agency under those circumstances.

20 But you would say no.

21 MR. MILLER: Well, Your Honor, I think if it's
22 clear from looking at the agency that it is in fact an
23 agency, then I don't think --

24 QUESTION: Well, but, liability of the state has
25 shielded. That's my assumption.

1 MR. MILLER: Yes.

2 What -- what I'm -- what I'm saying here is that
3 in the -- in the case of the Port Authority, it is -- it
4 is not an agency. It is not set up as Your Honor's
5 example. This is set up to run a particular function.
6 It's set up by the two states, and it runs itself. It has
7 its own operating budget. It has its own people. It has
8 its own land. It has its own bonds.

9 It doesn't go to the State of New York or New
10 Jersey for anything.

11 As in Your Honor's example, I -- I would assume
12 that, being an agency, they would be much more closely
13 connected to the state that -- that set them up. Perhaps
14 state officials would be -- would be partially running the
15 -- the Authority.

16 In this case, other than the -- the
17 commissioner, the board of commissioners sits and does as
18 it -- as it wants. It doesn't have to go to the State of
19 New York for approval. And in fact --

20 QUESTION: You could say the same about the FCC
21 here -- here in Washington. You can say the same about
22 any so-called independent agency. Its members are
23 appointed, and once they're appointed, they go off and do
24 what they want.

25 MR. MILLER: But they get -- I believe the FCC

1 gets some appropriations from Congress. I believe that
2 they have reports -- in this particular case, there is no
3 appropriations for PATH.

4 QUESTION: And you think if the FCC were
5 authorized to raise all the funds it needed by assessments
6 of the people using its services, or by imposing a -- a
7 tax on television sets, or something, you think that would
8 make the FCC not a Federal agency anymore?

9 MR. MILLER: No, I don't. No, I don't. I think
10 you'd have to cut the ties a little bit more than that. I
11 think you would have to do something such as they have
12 here, where you have -- the FCC, if it did, as Port
13 Authority did, if it could own its land, if it had its own
14 buildings it ran, whatever, I think, yes, you'd become a
15 lot closer to answering the question that, yeah, there
16 would no longer be an agency.

17 And assuming that they no longer got their
18 funding, they no longer got appropriations, they -- they
19 had their own board of directors or board of commissioners
20 that met and ran it without answering to Congress or
21 anyone, yeah, I think then, at that point in time, you're
22 moving away from it being an agency.

23 Which is exactly what I -- I -- I feel that is
24 -- is the case here with Port Authority.

25 QUESTION: I take it you would -- you would say

1 that the Eleventh Amendment immunity is available if the
2 Port Authority is deemed to be an agency of the state?

3 MR. MILLER: Your Honor is not talking about the
4 waiver issue now? We're not getting into that?

5 QUESTION: No. No.

6 MR. MILLER: (Inaudible) -- yes.

7 QUESTION: Even though -- even though there is
8 no risk to the state treasury?

9 MR. MILLER: Yes.

10 Now, on the question of waiver, it would appear
11 that the two sections must be read together. One section,
12 7101 that says you can sue us in any court, in any type of
13 matter, with a few limited exceptions, injunction being
14 one of them.

15 The other section says we will condition that
16 upon the condition that you sue us in the Port Authority
17 district. Or otherwise, there is no jurisdiction for such
18 a suit.

19 The last part of that section says that is shall
20 be considered a private corporation for such lawsuits.

21 QUESTION: Do you think that the provisions
22 having to do with suit and the venue section meet the
23 standards set out in the Atascadero case for a clear,
24 unmistakable waiver?

25 MR. MILLER: Yes, I do, Your Honor. I believe

1 it's clear.

2 QUESTION: How is that?

3 MR. MILLER: Well, there can be no doubt, for
4 example, that when they say judicial district of the United
5 States they mean the Federal courts.

6 QUESTION: Yes, well, I suppose you heard Mr.
7 Lesser's explanation of what he thought might have been
8 intended by that provision.

9 MR. MILLER: Well, I thought I heard him say at
10 one point in time that he would agree that it meant the
11 Federal courts.

12 QUESTION: The language meant the Federal
13 courts, but he offered an explanation for why that
14 language might have been inserted in there, that was
15 something other than an intent to waive sovereign
16 immunity.

17 MR. MILLER: Well, Your Honor, I can only answer
18 that by saying if -- if it's read in conjunction with the
19 prior statute, and they were passed at the same time, 7101
20 and 7106 were passed at the same time, then you would have
21 to conclude, I believe, that when they say you can sue us
22 in any court for any lawsuit, and the only condition we
23 will impose is it must be within a court, be it state or
24 Federal, within the Port Authority district.

25 I don't believe that there has to be some prior

1 determination of -- of jurisdiction before you -- before
2 you can say that judicial district means Federal courts.

3 I think, in response just to -- to -- to go into
4 a little background -- there was a case called Howell,
5 which is widely cited in -- in the petitioner's brief.
6 Howell was a case that came down in the District Court of
7 New Jersey in 1940.

8 The Second Circuit refers to Howell and says
9 that following that decision there was response by the
10 legislatures, and these two sections, among others, were
11 partially in response to the holding in that -- in that
12 decision, which found that there was sovereign immunity in
13 the Port Authority.

14 The Second Circuit said, partially in response
15 to Howell, these two sections were enacted. The intent is
16 -- is fairly clear, I believe, that Port Authority says
17 you can sue us. We intend for you to sue us as long as
18 you do it in the Port Authority district, be it a state
19 court or a Federal court.

20 QUESTION: Do we have to regard that venue
21 provision as a waiver? Couldn't we regard it as an
22 indication that the state did not consider this entity to
23 be -- to be the state? It just assumed that it was suable
24 in Federal courts.

25 In other words, you're -- you're -- you're

1 assuming the Atascadero test applies. But the Atascadero
2 test is applied to a situation where you know that the
3 entity is the state. Here we have an entity that we're
4 not sure whether it's the state or not.

5 MR. MILLER: True.

6 QUESTION: Why can't one say that the venue
7 provision doesn't have to be a waiver. It can be an
8 indication of whether the states themselves regarded this
9 entity as being suable in Federal court?

10 MR. MILLER: I think --

11 QUESTION: In which case you wouldn't need the
12 Atascadero level of -- of certainty.

13 MR. MILLER: That's true, Your Honor. I would
14 agree with that.

15 The -- I think the -- the -- one way to look at
16 the waiver is that it is simply a -- a further condition
17 to their agreement or waiver of -- of -- of such lawsuits.

18 QUESTION: Do you agree with me you've got to
19 stop calling it a waiver?

20 MR. MILLER: Okay. I will.

21 In conclusion, therefore, I would urge the Court
22 -- I think the holding of the Second Circuit is good law.
23 I think it proposes and found a workable solution to these
24 types of problems presented in this case. I think it's a
25 good solution. I think it's a reasonable decision.

1 And I would ask this Court to affirm the holding
2 of the court below.

3 QUESTION: Do you think it has to be the same --
4 the same -- have the same status in both states?

5 MR. MILLER: I'm sorry, Your Honor, I don't
6 follow the -- your inquiry?

7 QUESTION: Well, are we talking here about New
8 York?

9 MR. MILLER: Well, we're talking about a compact
10 between the two states. We're talking Second Circuit is
11 New York, yes.

12 QUESTION: So you say, if it isn't an agency in
13 New York, it isn't an agency in New Jersey, either?

14 MR. MILLER: Well, it's -- it's -- if it's --
15 it's either an agency or it isn't. If it's not an agency,
16 then it -- it -- it -- it's not an agency in either state.

17 QUESTION: Do you mean the two states -- the two
18 states couldn't have different views about whether the --
19 whether the Authority is an agency?

20 MR. MILLER: Well, the states have always passed
21 parallel legislation. 7101 -- or the -- the general
22 consent to be sued, is just a parallel --

23 QUESTION: So you -- so -- so if the Second
24 Circuit is affirmed -- if we affirm the Second Circuit, we
25 are necessarily disagreeing with the Third?

1 MR. MILLER: Yes.

2 QUESTION: Thank you, Mr. Miller.

3 Mr. Lesser, you have four minutes remaining.

4 REBUTTAL ARGUMENT OF JOSEPH LESSER

5 ON BEHALF OF THE PETITIONER

6 MR. LESSER: Thank you.

7 If there's any doubt any -- the mind of any
8 Justice of this Court that the Port Authority is a direct
9 arm and agency of the States of New York, I would really
10 request that you look at appendix A to our reply brief.
11 Because that appendix sets forth the 150-odd statutes --
12 separate statutes that the states have passed in reference
13 to the Port Authority from 1921 to the present.

14 Those statutes, dealing with major
15 considerations of state public policy to minor
16 housekeeping chores, in my mind, demonstrates beyond
17 question that the Port Authority is a direct agency and
18 arm of the states that created them.

19 This list of statutes, by subject matter and
20 title, I think leaves no doubt in anybody's mind -- should
21 leave no doubt in anybody's mind -- of the status of the
22 Port Authority.

23 It has been -- the Port Authority has been
24 questioned as a state agency. It is referred to in the
25 compact as a joint or common agency of the states. The

1 reason why the Port Authority was created and given those
2 functions was that those problems transcend state boundary
3 lines.

4 The states try to cooperate in the 1919 compact,
5 to which Congress consented, by setting up independent
6 commissions that were really departments of state
7 government to act cooperatively. It wasn't an efficient
8 mechanism.

9 I think the compact clause, with the Eleventh
10 Amendment, would fortify Federalism, would fortify the
11 underlying principles of Federalism by giving the states
12 the power to set up an entity like the Port Authority,
13 which is undoubtedly a state agency.

14 QUESTION: Well, of course, it was called a
15 municipal corporate instrumentality in the compact, wasn't
16 it?

17 MR. LESSER: That was -- yes, it was, in
18 contradiction to a normal municipality. In the same
19 provision of the compact, it refers to ordinary municipal
20 corporations. It was something different. It was unknown
21 at the time what the Port Authority was. It was a major
22 advance, I think, in American public law on government
23 that the states could use the compact clause creatively,
24 to create an agency that would represent them in all
25 affairs.

1 My opponent referred to the fact --

2 QUESTION: What did that -- what were the words
3 after those -- that -- that phrase, municipal corporate
4 instrumentality in the compact? Did it say an
5 instrumentality of the two states?

6 MR. LESSER: It -- it, in other portions of the
7 compact, it refers to the Port Authority as a joint -- a
8 common agency. I just haven't got the phrase right before
9 me.

10 But it distinguishes between ordinary
11 municipality and municipal corporate instrumentality,
12 which is the Port Authority.

13 The Port Authority is assuredly not a
14 municipality. It has no power to tax; it has no general
15 police power; it has no right to enact ordinances; it has
16 no general condemnation power; it has no home law powers.

17 My opponent referred to the provision in the
18 suability statute that the Port Authority should be liable
19 as if it were a private corporation. That provision was
20 inserted to get around the New York Court of Appeals
21 decision in State against Smith.

22 Unless that provision applied, specifically
23 waiving immunity from -- creating immunity -- creating
24 tort liability, the Port Authority might not have been
25 liable in tort, even though it was otherwise suable.

1 The same language, practically, apply -- is
2 found in the New York Court of Claims Act, where the state
3 waived its sovereign immunity for itself in the New York
4 Court of Claims.

5 My opponent also referred to some language
6 saying that the Port Authority, in operating its
7 facilities, shall not -- does not have to comply with
8 rules and regulations of others. That just means --

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lesser.

10 The case is submitted.

11 (Whereupon, at 10:53 a.m., the case in the
12 above-entitled matter was submitted.)

CERTIFICATION

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

No. 89-386 - PORT AUTHORITY TRANS-HUDSON CORPORATION, Petitioner V.

PATRICK FEENEY

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BY Judy Freilicher

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