Congressional Research Service

Report 96-353

State Eleventh Amendment Sovereign Immunity: Seminole Tribe v. Florida, 116 S.Ct. 1114 (1996)

M. Maureen Murphy, American Law Division

Updated April 19, 1996

Abstract. this report summarizes the Supreme Court's decision in Seminole Tribe of Florida v. Florida, __U.S.,__, 116 S.Ct. 1114 (1996), holding unconstitutional the provision of the Indian Gaming Regulatory Act of 1998, Pub. L. 100-487, 102 Stat. 2467, 25 U.S.C., Sections 2701 et seq., that authorized an Indian tribe to sue a state in federal court to compel a tribal-state compact for Class III or casino-type gaming.

Order Code 96-353 A
April 19, 1996

State Eleventh Amendment Sovereign Immunity: Seminole Tribe v. Florida (1996)

M. Maureen Murphy
Legislative Attorney
American Law Division

Summary

This report summarizes the Supreme Court's decision in *Seminole Tribe of Florida v. Florida* (1996), holding unconstitutional the provision of the Indian Gaming Regulatory Act of 1988 (IGRA), P.L. 100-497, 102 *Stat.* 2467, 25 U.S.C. §§ 2701, et seq., that authorized an Indian tribe to sue a state in federal court to compel a tribal-state compact for Class III or casino-type gaming. The Court ruled that the Eleventh Amendment protects states from unconsented suits in federal court.[1] Several methods by which IGRA and, by implication, other statutes with the same infirmity, could be cured were mentioned: suits (with state consent) in state courts with an appeal in federal court; suits in federal courts with state consent; suits against individual state officers; or suits brought in the name of the United States.

Background

IGRA establishes the framework for gaming on lands under Indian tribal authority. Included is a requirement for a tribal-state compact. 25 U.S.C. § 2710(d). The statute authorizes the tribe to bring an action in federal court against the state to secure a compact.[2] It is this provision that the Court found to violate the Eleventh Amendment's pronouncement with respect to state sovereign immunity. Understanding the treatment of state sovereign immunity in *Seminole* requires reference to the extent to which the

[1] The Eleventh Amendment reads: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[2] 25 U.S.C. § 2710(d)(7)(B). The procedure requires the tribe to request negotiations and file suit if the state does not begin negotiations within 180 days. It also permits the court to appoint a mediator to select a compact from those offered by the tribe and the state. If the state does not consent to the compact proposed by the mediator, the Secretary of the Interior is authorized to prescribe procedures for gaming on the tribal lands. 25 U.S.C. § § 2710(d)(7)(B)(III) - (vii).

common law principle of sovereign immunity was recast under the Constitution's allocation of power between state and federal government. The case, therefore, addresses the basic premise of the Constitution as establishing a federal government, sovereign in its sphere of delegated powers, and state governments, sovereign in realms reserved to them, with the power of both derived from the ultimate sovereign, the People.[3]

The case also involves the extent of judicial power established for the federal government. Article III of the Constitution, *inter alia*, specifies:

> The judicial power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority;...to Controversies...between a State and Citizens of another State;...between a State...and foreign States, Citizens or Subjects. U.S.Const., Art. III, sec.2 cl. (1).

Federal jurisdiction based on the phrase, "Cases...arising under this Constitution, the Laws of the United States, and Treaties made...under their Authority," is generally referred to as "federal question" jurisdiction. The provision in IGRA that authorizes tribal suits against a state is an example of a statutory provision providing for jurisdiction on the basis of a federal question, i.e., on the basis of a provision of a federal statute enacted under authority of a constitutional provision.[4]

Article III also provides, for what may be termed federal court "citizen-state diversity" (hereinafter, "diversity")[5] jurisdiction over cases or controversies "between a State and Citizens of another State" as a separate grounds for federal court jurisdiction. In 1793, this language was interpreted to permit the Supreme Court, under the authority of a jurisdictional provision of the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. XX, 1 *Stat.* 73, to entertain a suit brought against an unconsenting state by a citizen of another state. That decision, *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 19 (1793), created such a public reaction that the Eleventh Amendment followed within two years of the decision.[6] The Amendment reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against

---

[3] In Hans v. Louisiana, 134 U.S. 1. 11 (1890), the Court described the Eleventh Amendment as "expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts...."

[4] General federal question jurisdiction is set forth in 28 U.S.C. § 1331(a), which states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Statutes providing for enforcement of federal statutes in federal court are common today although the earliest practice was to permit the state courts to adjudicate federal statutory rights.

[5] U.S.Const., Art. III, sec. 2, cl. (1), also provides for federal jurisdiction over cases "between Citizens of different States," i.e., jurisdiction based upon diversity of citizenship and covered under 28 U.S.C. § 1392.

[6] It was proposed in Congress on March 4, 1794 and ratified on February 7, 1995.

> one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Whether its meaning is confined to overturning the result in *Chisholm* or whether it was intended to reach farther--to prohibit all suits brought by citizens against unconsenting states in federal court--has not been an easy issue for the Court to settle.[7] To some extent the jurisdictional provisions of Article III, the language of the Eleventh Amendment, and the common law notion of sovereign immunity have figured in the Court's Eleventh Amendment decisions.

Although the wording of the Amendment and its proximity to the *Chisholm* decision argue for its being confined to the "diversity" section of Article III and early decisions seem to substantiate this interpretation,[8] after the Civil War, the Court ruled in actions to enforce state debt obligations against state officers that suits by citizens of another state were precluded by the Amendment even if they were brought on the basis of a federal question, in *Louisiana v. Jumel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886); and *In re Ayers*, 123 U.S. 443 (1887). The willingness of the Court to hold the states immune to unconsented suits by citizens was further expanded 1890 in *Hans v. Louisiana*, 134 U.S. 1. In that case, the Court ruled that the Eleventh Amendment precluded a suit brought under the Contracts Clause of the Constitution[9] by a citizen of a state against the state to enforce a state debt obligation that the state had repudiated. The grounds on which the decision rested was not the wording of the Eleventh Amendment but rather the fact that the *Chisholm* decision was so quickly overturned by the Amendment and the inference that suits against a sovereign were unknown at common law and, thus, not within the contemplation of the drafters of the Constitution. It might, thus, be said that a view of common law sovereign immunity informed the *Hans* decision, although there was no careful or extensive analysis of how that principle applied under the federal-state system established under the Constitution.

The Decision

The main issue before the Supreme Court in *Seminole* was whether the Eleventh Amendment bars Congress from authorizing Indian tribes to sue states to enforce the compacting provisions of IGRA. The Court, in an opinion written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas, concluded that although Congress in enacting IGRA had intended to abrogate the state's sovereign

---

[7] "Eleventh Amendment jurisprudence has become over the years esoteric and abstruse and the decisions internally inconsistent one with another and sometimes with the same decision....Because of the centrality of the Amendment at the intersection of federal judicial power and the accountability for the States and their officers to federal constitutional standards, it has occasioned considerable dispute within and without the Court." The Constitution of the United States of America: Analysis and Interpretation. 99th Cong., 1st Sess. 1427, S. Doc. 99-16 (1987).

[8] See dictum in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406-407 (1821) (Eleventh Amendment purpose is to preclude federal courts from enforcing debts against a state and does not preclude federal question suits against states). In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), the Court permitted the Bank of the United States to sue a state treasurer.

[9] U.S. Const., Art. I, sec. 10, cl (1): "No State shall...pass any...Law impairing the Obligation of Contracts...."

immunity, it had no power to do so.[10] To determine how to analyze the question of whether the Constitution conferred power on Congress to abrogate the Eleventh Amendment as in IGRA, the Court looked to precedent and found two provisions of the Constitution that had been held to provide Congress with the power to abrogate state's Eleventh Amendment immunity: the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and the Interstate Commerce Clause, U.S.const., Art. I, sec. 8, cl. 3, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

The Court distinguished abrogation under the Fourteenth Amendment from abrogation under provisions of the original Constitution. It viewed abrogation under the Fourteenth Amendment as grounded both in section 5 of that Amendment, which explicitly gave Congress the "power to enforce [its provisions], by appropriate legislation," and in the fact that the Fourteenth Amendment had so expanded federal power vis-a-vis state power as to alter the balance established in the original Constitution. With respect to abrogation under the Interstate Commerce clause, however, the Court reviewed *Union Gas.* It noted that there was no opinion of the Court in that decision because Justice White, who was the deciding vote in the majority of five justices, wrote a separate opinion that concurred in the judgment but dissented in part from its rationale. The opinion of four justices in *Union Gas*, written by Justice Brennan, saw the Commerce Clause as "incomplete without the authority to render states liable in damages"[11] and found the power to abrogate under the Commerce Clause a function of the state's surrender of their sovereignty in ceding to the central government the authority over interstate commerce.

The Court, in *Seminole*, readily acknowledged that, "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause....clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."[12] It further agreed with the Seminole Tribe that "*Union Gas* allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause,"[13] and, noting various defects in *Union Gas*,[14] overruled it.

---

[10] In reaching this decision, the Court refused to accept the Tribe's arguments that the provision was valid because it only authorized prospective relief, not money damages, or that it was valid because IGRA gave to the states some authority over Indian gaming which they would not have had had it not been enacted.

[11] Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20 (1989).

[12] Seminole Tribe of Florida v. Florida, slip op. at 17.

[13] Id.

[14] Among the defects noted were the absence of a majority adhering to a rationale for deciding the case, departure from Hans and misreading of other precedent, including the misapplication of Fitzpatrick outside the context of the Fourteenth Amendment, and the resulting confusion it spawned in the lower courts.

After citing cases in which the Court had held that a foreign state could not bring a suit against an unconsenting state,[15] citizens could not bring suit against a state based on state law when the remedies sought required state action,[16] and that citizens of a state could not bring an action in admiralty against an unconsenting state,[17] the opinion noted that *Seminole* was the first instance, other than *Union Gas*, in which the Court addressed the question of whether Congress could abrogate a state's Eleventh Amendment immunity. It found no Constitutional authority for such abrogation. It relied not on the limited wording of the Eleventh Amendment, nor on the bare holding of *Hans*. Instead it seems to have attributed to *Hans* the view that the Eleventh Amendment should be interpreted as validating the presumption that must have precipitated the public reaction to *Chisholm*, that the Constitution preserved state immunity to unconsented suits.

The Court rejected the contention that neither *Chisholm* nor the Eleventh Amendment touched upon federal question jurisdiction, raised in a lengthy dissent, written by Justice Souter and extensively covering references to state sovereign immunity at the Constitutional Convention and in the *Federalist* papers, as well as in the courts and in legal commentary. The dissent and the opinion of the Court draw conflicting inferences from the fact that there appears no discussion of sovereign immunity vis-a-vis federal question jurisdiction at the time of the Constitutional Convention or the drafting of the Eleventh Amendment. More important, according the Court, is the absence of any statements by the framers acknowledging a power in Congress to waive or abrogate state sovereign immunity.

Although the Court found that the powers conveyed to Congress to enforce laws properly enacted under Article I did not include the power to authorize citizens to bring enforcement actions against the states, it noted that various enforcement mechanisms were available to the federal government. Congress could: (1) authorize suits in state courts, (2) authorize the Attorney General, or a federal officer, to enforce federal law, (3) induce the states to consent to such suits by offering something in return for such consent; and,

---

[15] Monaco v. Mississippi, 292 U.S. 313 322-323 (1934 (footnotes and citations omitted), holding that a suit against an unconsenting state by a foreign state was not "'a surrender of...immunity in the plan of the [constitutional] convention.'" The Court declared that "neither the literal sweep of the words of Clause one of § 2 of Article III, nor the absence of restriction in the Letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent." Monaco v. Mississippi, at 321.

[16] Pennhurst State School v. Halderman, 465 U.S. 89 (1984), in which the Court presumed that the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Article III. Pennhurst State School, at 88.

[17] Ex parte New York, 256 U.S. 484, 497 (citations omitted) (1921), in which the Court summarized its view of the established law, "That a state may not be sued without its consent is a fundamental rule of jurisprudence, having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state, without consent given; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the 11th Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."

(4) authorize suits to require individual state officers to conform to the requirements of federal law.

The last type of suit is based upon the Court's decision in *Ex parte Young*, 209 U.S. 123 (1927). Such a suit has been held not to violate the Eleventh Amendment so long as what is sought is prospective relief and so long as the suit is directed against individual state officials. *Ex parte Young* involved a suit against a state attorney general to enjoin enforcement of state laws setting rates for railroads that the shareholders of the railroads alleged confiscatory in violation of the Fourteenth Amendment. *Ex parte Young* held the state statutes unconstitutional and, therefore, permitted the suit against the officer.[18]

In *Seminole*. the Court ruled that a *Ex parte Young* suit against a state official could not be maintained on the basis of IGRA's provisions because such a suit is not explicitly authorized and the remedies actually provided are so detailed as to preclude implying an *Ex parte Young* remedy. The implication is that were there an explicit provision authorizing a suit against a state's governor or other individual officer to negotiate a compact, the Eleventh Amendment would not stand as a bar.

Conclusion

While the immediate reach of *Seminole* is confined to IGRA, it affects all of the powers of Congress under Article I except those exercised in reliance on the explicit enforcement authority section 5 of the Fourteenth Amendment. Unless Congress has specifically provided for an *Ex parte Young* type suit against a state official or obtained consent by a state to a suit in federal court, statutes calling for citizen suits against states to enforce federal laws now appear to be unconstitutional.

[18] In Ex parte Young, 209 U.S. 123, 159 (1927), the Court said: "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury for complainants is a proceeding without the authority of [sic] and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because it is unconstitutional."