In the

Supreme Court of the United States

ROSALIND McCLANAHAN, on behalf of herself nad all others similarly situated, Appellant,	)	
vs.	)	No. 71-834
ARIZONA STATE TAX COMMISSION, Appellee.	)	

Washington, D. C.
December 12, 1972

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Washington, D. C.

Tuesday, December 12, 1972

The above-entitled matter came on for argument at 11:39 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RICHARD B. COLLINS, JR., ESQ., P.O. Box 306, Window Rock, Arizona 86515, for the Appellant.

HARRY R. SACHSE, ESQ., Department of Justice, Washington, D. C. 20530, for the United States as Amicus Curiae.

JAMES D. WINTER, ESQ., Assistant Attorney General, 159 State Capitol, Phoenix, Arizona 85007, for the Appellee

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-834, McClanahan against Arizona.

Mr. Collins, you may proceed.

ORAL ARGUMENT OF RICHARD B. COLLINS, JR.

ON BEHALF OF THE APPELLANT

MR. COLLINS: Mr. Chief Justice, and may it please the Court:

This case is here on appeal from the state courts of Arizona where appellant filed suit to recover state income tax withheld from her income. She claims that the State has no jurisdiction to collect its income tax from her on the ground that she is a Navajo Indian who at all relevant times lived and worked within the boundaries of the Navajo Indian reservation.

The state courts of Arizona denied her claim despite an unbroken line of decisions by this Court that States have no jurisdiction over the reservation affairs of Indians.

This Court first interpreted the constitutional relationship between the States and Indian tribes in 1832 in the case of Worcester v. Georgia. Mr. Chief Justice Marshall's opinion reviews in detail the constitutional provisions that relate to Indians and concludes that plenary authority over Indians is conferred by the Constitution on the Federal Government and that state laws can have no force or effect on

Indian reservations.

Subsequent decisions of this Court modified that decision in one area where the affairs of non-Indians only are involved on an Indian reservation and where the Indians are not directly involved at all.

In addition, Congress has exercised its plenary authority on certain occasions to grant to the States authority over reservation Indians.

QUESTION: Mr. Collins, orient me a little bit. Are there vast sums involved in this test case, or is it mainly principle that we are talking about? I realize how important principle is.

MR. COLLINS: Your Honor, the actual amount of tax that appellant sought to regain was $16.20.

QUESTION: Are there other sums other taxpayers are concerned with?

MR. COLLINS: Your Honor, she filed the action as a class action. It never reached any decision as to whether it was properly a class action under State procedures in the State of Arizona. I am sure that the Court decision bears on thousands of Indians in the State of Arizona. Arizona has nearly 100,000 Indians. Most of them live on reservations, and I think it affects them all.

QUESTION: Does the record show precisely what her work was that produced the income that was taxed?

MR. COLLINS: I don't believe so, your Honor, because the matter was decided on a motion to dismiss. The complaint stands alone as an allegation of fact. She worked for a bank on the reservation. I don't know that that's in the record.

QUESTION: One last question. Has the tribe itself ever levied an income tax to members of it?

MR. COLLINS: No, your Honor, the tribe has in effect a sales tax, but it has no income tax.

QUESTION: Thank you.

MR. COLLINS: The decisions of this Court were summed up in the only treatise on Indian law ever produced by Mr. Felix Cohen in 1942. He stated: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."

It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of an express authority conferred upon the State by Act of Congress.

It is our contention that that rule applies here, that Arizona has acted in contravention of that rule, and that this Court should reverse on that account.

Now, that rule doesn't apply to all Indians. There are Indians who were never placed under Federal protection, never got a reservation. There are other Indians over whom

the Federal protection has been ended by Congress, beginning with Oklahoma in the late 19th century. But the Navajos are still fully under Federal protection. In 1868 the United States entered into a treaty with the Navajos under which the Navajos agreed to peace under the protection of the United States and the reservation was set aside for their exclusive use. The treaty specifically provides that outsiders cannot enter the reservation without permission of the Navajos with the exception of Federal agents.

In 1912, 44 years later, Arizona was admitted to the Union. However, the United States honored its treaty commitment to the Navajos by conditioning that admission in the Arizona Enabling Act on the express ground that Arizona agree that the reservation's Indian affairs remain under the exclusive control of Congress.

In 1949 Congress passed a bill which would have ceded concurrent authority over reservation Indians in Arizona -- over the Navajos to the State of Arizona. But President Truman vetoed the bill expressly because he objected to that provision. And today the Navajos have a comprehensive tribal government which rules territory in three different States. It has a full court system that adjudicates all civil matters arising between Indians on the reservation and all misdemeanors as to Indians on the reservation. It has an appellate court that rules as to questions of law as does

this one. It has a bar with Navajo advocates who practice before the courts. It has its own police system. It has many regulatory functions that deal with the things that are important to the Navajo people, such as stock raising, business licensing, and the like. A long list of regulatory services are provided by the tribal government that are comparable to those provided by state and local governments elsewhere. We detail these in our reply brief.

And it does tax its people. There is a gross receipts tax on sales on the reservation, in effect a sales tax.

The governmental functions on the reservation that are not tribal are by and large federal. All health care is delivered by the Federal Government through the United States Public Health Service, roads are built by the Federal Government, and so forth. The Navajos are poor, the federal services are important to them at this time.

Now, we have argued three grounds, independent legal grounds, for reversal of this case. I intend to address myself essentially to one of them, the one set out really in Mr. Cohen's rule that I cited earlier. That dispute focuses on the 1959 decision of this Court in Williams v. Lee. That case also involved the Navajo Indians. In that case a non-Indian brought suit against a Navajo couple in the state courts of Arizona based on a reservation-incurred death. The

Navajos moved to dismiss on the ground that the tribal government alone had jurisdiction over the cause of action. The Arizona Supreme Court denied that claim, ruling that because no Act of Congress expressly forbade the state court jurisdiction, the state court must have jurisdiction. That's the very claim Arizona makes here. We are just having a renewal of the same dispute.

In that case this Court unanimously reversed the Arizona Supreme Court in an opinion which forcefully renewed the Federal protection over reservation Indian governments. This Court referred to the treaty between the Navajo people and the Federal Government in these terms: "Implicit in these treaty terms was the understanding that the internal affairs of the Indians remain exclusively within the jurisdiction of whatever tribal government existed."

Now, the Court went on to acknowledge that decisions of this Court had applied state laws in Indian reservations to the affairs of non-Indians and recited the cases where that had been done, and to that extent that the old case of Worcester v. Georgia had been modified. However, in the very same sentence the Court said, "The basic policy of Worcester has remained," in other words, the policy that the affairs of the Indians themselves on the reservation are under exclusively Federal and tribal authority.

This Court also emphasized the meticulous control

which the Congress has exercised over the years over reservation Indian affairs. The Court stated that Congress had acted consistently upon the assumption that the States have no power to regulate Indian affairs on reservations and that when Congress has wished the States to exercise the power, it is granted them the jurisdiction which Worcester v. Georgia denied the States.

Now, in the face of this unbroken string of decisions, the Arizona court below essentially tried to avoid the effect of the decisions on two grounds:

First, the court below dealt with this Court's decision in Williams v. Lee by distinguishing -- creating a distinction, I would say, between the affairs of the Navajo tribe and the affairs of individual Navajo Indians. The Court seems to say that if the State invasion does not cripple the tribal government, that it's O.K.

However, this Court has on many occasions ruled that the affairs of individual Indians on reservations are subject to the jurisdiction of the tribe and not the States. In The Kansas Indians, a 19th century case, this Court expressly ruled that the State of Kansas could not tax individual Indians in that State. The affairs of the tribe were not involved at all.

QUESTION: What kind of a tax was Kansas trying to levy there, Mr. Collins?

MR. COLLINS: That was a property tax, your Honor.

QUESTION: Property tax.

MR. COLLINS: Yes.

In a much more recent case --

QUESTION: A personal property tax?

MR. COLLINS: I think there were both personal and real property in that case.

In a much more recent case in Kennerly v. District Court of Montana, the Montana Supreme Court made the same sort of ruling. It said that a personal death of an individual Indian is not a tribal affair. This Court overruled that decision in this Court's opinion in Kennerly v. District Court of Montana. And of course, And, of course Williams v. Lee itself really involved the personal affairs of an Indian. The tribe wasn't party to the case. All the tribe did was provide a court where the Navajo contended the matter should have been heard.

Now, the language in this Court's opinion in Williams v. Lee that Arizona relies on is what the briefs refer to as the infringement test. It reads: "The question has always been whether the State action infringed on the right of reservation Indians to make their own laws and be ruled by them."

We suggest that Arizona has badly distorted the meaning of that phrase. Of course the phrase begins with

"The question has always been..." It is not a new rule. In other words the Court was referring to the time-honored rule that reservation Indians are entitled to govern their own affairs. Furthermore the Court states, "...make their own laws and be ruled by them." We suggest what that means is the laws that the Indians make rule rather than state laws.

QUESTION: Do these Indians vote in Arizona elections?

MR. COLLINS: Yes, your Honor.

QUESTION: Are there any reservation Indians in the Arizona State legislature?

MR. COLLINS: There will be shortly, your Honor.

QUESTION: There have been in the past?

MR. COLLINS: I believe one occasion that I know about. There may have been more.

QUESTION: And there will be one or more in the new legislature next month?

MR. COLLINS: Yes, sir, that convenes next year.

QUESTION: So that while they have self-government, they also participate in the government of the State of Arizona by exercising the elective franchise.

MR. COLLINS: That's correct. They do participate in the State government and there is a certain amount of interaction between the reservation affairs and State affairs that has been authorized by Congress. Our contention

is that it's up to Congress to adjust that relationship. It's not up to Arizona. Whenever Congress has wanted to adjust that relationship, it has done so in detail. Congress has specifically said that the States can levy certain taxes against reservation Indians, but not the tax that's at issue here. And we suggest that Congress, I think, can be appealed to with any question of adjustment of the relationship.

QUESTION: I assume back in the days of Worcester v. Georgia they did not vote. Is that a reasonable assumption?

MR. COLLINS: Yes, your Honor. They didn't vote because they weren't considered citizens.

QUESTION: They had no part then, as Mr. Justice Stewart has just suggested, in the overall government.

MR. COLLINS: That's correct. The Indian citizenship was granted by Act of Congress in 1924. But since that time this Court has repeatedly ruled on the question of Federal protection over Indians and has repeatedly rejected the contention that citizenship ends the protection. It's up to Congress to end it specifically, and it hasn't been done implicitly in some Act like the Citizenship Act.

Now, the subsequent decision of this Court in Organized Village of Kake v. Egan had a sentence in it which paraphrased some of the decisions of this Court in earlier decisions of this Court, including Williams v. Lee. And that sentence has also been seized upon by the Arizona court and

some other state courts in an effort to infer that somehow the door is open to State application of their laws on Indian reservations.

We suggest that that sentence has been taken out of context and misread. The Kake case involved Indians not on the reservation who had no comprehensive tribal government, did not rule any distinct territory, and therefore was quite different from the Navajos.

QUESTION: What is the extent of your claim? Are you making the same claim if Arizona sought to tax a reservation Indian on income earned outside the reservation?

MR. COLLINS: If the income were earned off the reservation, your Honor, I think that the question would be one of what sometimes is termed taxing jurisdiction, a due process issue.

QUESTION: What would be your position?

MR. COLLINS: I think it would depend on particular facts. Taxing jurisdiction decisions go into the question of benefit-burden theory of taxation, how much services are received, and that sort of thing.

QUESTION: You wouldn't be making the argument you are making here?

MR. COLLINS: No, sir, I would not. I would not --

QUESTION: You wouldn't think your argument here would be valid in that case.

MR. COLLINS: I think that the Indians, based on the argument I am making here, would be entitled to the same kind of consideration as prevailed in other cases where courts have considered taxing jurisdiction over non-residents, essentially that kind of situation. I think those kind of issues would govern that situation.

QUESTION: And would this argument cover a member of a tribe who lived off the reservation?

MR. COLLINS: No, your Honor, not at all. If the tribal member lives off the reservation, he is subject to State jurisdiction. I think that's long and we're not suggesting otherwise.

QUESTION: Even though he earns his income on the reservation?

MR. COLLINS: Well, that just turns around the taxing jurisdiction question. That makes the tribe have to justify his taxing jurisdiction, I think, if that occurred.

But those cases involve the interaction of two taxing jurisdictions in a way, you know, of cities taxing commuters, and that kind of question of taxing jurisdiction. There is a discussion of that issue in one of the amicus briefs. But I don't think it's relevant to the main question here.

QUESTION: And as well as vote, does the State furnish various services to the tribe? Education or --

MR. COLLINS: The State furnishes a very minor amount of services to the tribe, your Honor. I live in Window Rock on the reservation, and the schools there -- this is not in the record, your Honor, but if this is a relevant issue, we have pointed out the matter should be remanded because it's not of record as to either side. But I live in Window Rock. The school budget in our school district where I live is about 20 percent State supported --

QUESTION: Well, the voting thing isn't part of the record either, is it?

MR. COLLINS: Well, that's a matter of decisional law in Arizona. There is a decision of the Arizona courts that reservation Indians can vote in the State. That is cited in the briefs.

But I would say maybe 10 percent of the support for education on a reservation comes from State sources overall, perhaps 10 percent of the source of welfare money. That's about it. There aren't many other State services of any significance on the reservation. And furthermore, those reservation schools are educating non-Indians. I mean, I could have children in the reservation schools and I pay State taxes. This issue doesn't concern me.

QUESTION: Do you get any support for your schools from Apache County or Navajo County in addition to the State?

MR. COLLINS: There is a real property tax levy,

your Honor, that's local. There are real property interests on the reservation that are taxable. Indian mineral production is taxable under the State system. And Apache County administers that, but the source of money is all on the reservation. There isn't any money that comes from off the reservation supporting reservation schools from Apache County.

QUESTION: But does Apache County with whatever source it may have contribute something to the financing of schools on the reservation?

MR. COLLINS: Yes, it does, your Honor. If you mean in the sense that Apache County derives money from reservation resources and reapplies it to the reservation, yes, that's correct.

I think that the importance of the difference between this case and the Court's decision in Organized Village of Kake v. Egan is shown by the fact that later on this Court ruled in Warren Trading Post Company v. Arizana Tax Commission that again the Navajos are entitled to self-government. There were other issues in that case, but the Court distinctly renewed the commitment to the protection of the Navajo's government. And, of course the Supreme Court of Minnesota has ruled contrary to the Arizona courts in a decision that we think was correct.

I think that an important point is to consider the implications of the State's positior here on the Indians

themselves.

First of all, the State's position -- they acknowledged that Williams v. Lee is right. They have to; it's a decision of this Court. They haven't contended so far that it should be overruled. Now, that means that sometimes they don't have jurisdiction to apply their laws on the reservation. Now, they say sometimes they do, and we have a constitutional question each time you decide. Obviously this is very productive of litigation. I mean, each case has to be taken to an appellate decision.

Well, that's not too serious a problem, but consider the situation, the uncertainty that is created for reservation Indians. There he is sitting there and he receives a letter from some State bureau in Phoenix that tells him he must do something because state law requires it. And he has to decide whether that state law under constitutional principles that they suggest apply conflicts with his tribal law in some way or other.

Well, that uncertainty seems to me to be not warranted. I don't think this Court intended to create that kind of uncertainty when it decided Williams v. Lee. And that's why we contend that Williams v. Lee has been misread.

MR. CHIEF JUSTICE BURGER: We will resume at that point at 1:00 o'clock.

MR. COLLINS: Thank you, your Honor.

[Whereupon, at 12:00 o'clock noon, a luncheon recess was taken, to reconvene at 1:00 o'clock the same day.]

AFTERNOON SESSION

(1:00 o'clock)

MR. CHIEF JUSTICE BURGER: Mr. Collins, you may continue.

ORAL ARGUMENT (RESUMED) OF RICHARD B. COLLINS, JR.

ON BEHALF OF THE APPELLANT

MR. COLLINS: Mr. Chief Justice, and may it please the Court:

At the time we adjourned, I was pointing out that the implications of Arizona's position create great uncertainty for reservation Indians. Each Indian must decide at his peril whether in a particular situation applied to him whether the state law that's being applied conflicts with tribal authority.

And the third implication of the State's position is -- the way the State views this law the State can pick and choose when to come onto the reservation. Now, we see them trying to tax where it's to their advantage. Congress offered States in Public Law 280 the opportunity to assume a broad range of jurisdiction of some sort.' In return the States were to assume certain burdens such as the burdens of manning the courts and police that had been borne by the Indians and the Federal Government. It's clear that Congress' intent was that the burden of these services be borne by the State. And Arizona is attempting avoidance of

that intent of Congress.

QUESTION: If Arizona had accepted that Congressional offer, would that have authorized it to tax, do you think, Mr. Collins?

MR. COLLINS: Justice Rehnquist, that question I am fully aware is the central question of the case to follow this one, and I am not certain of the full reaches of Public Law 280. Since it's going to be fully argued by competent counsel in that case, I would prefer not to comment on it. But it just seems to me clear that in the absence of compliance with Public Law 280, it's absolutely clear that Arizona lacks jurisdiction to tax. The full reach of that Act is an important question.

QUESTION: Can Congress impose duties on the States in this area? What's the scope of that power, if it has that power?

MR. COLLINS: It --

QUESTION: I got the implication that Congress could not require a State to supply these services with at the same time taxing them.

MR. COLLINS: I think what Congress does is, Congress by virtue of its protection of the Indians provides substantial services, quite large services which are detailed from this Court's opinion in Warren Trading Post Company v. Arizona Tax Commission, that Congress has suggested in

certain cases, Public Law 280 is one example, and the termination laws of the 1950's are another, that Federal protection be withdrawn. But that leaves the Indians as ordinary citizens of the State with no Federal protection, no Federal services. That means the States have to provide normal services to them that they are not now providing. In that sense the Congress can impose a duty on the States, yes.

QUESTION: Mr. Collins, I believe one of the State's contentions is that if we accept your proposition here that Indians, at least for this purpose, are a discrete group who are not subject to State taxing power, then when the Indians are seeking the benefit of the equal protection clause to assert that the State has treated them in a discriminatory manner, logically the State could say, well, you know, more or less by their own choice they are different and we can treat them differently. Do you have any response to that?

MR. COLLINS: Your Honor, I think that the economic relationship between the tribes and the States is controlled by Congress. I think on the other hand, Congress has made Indians citizens to the States and they are entitled to the rights of citizens.

This is gone into in detail in our reply brief to which I refer for a complete answer. But our position is that there might be some question about that. The Federal Government provides broad services. If those were withdrawn,

the equities might be grossly altered. But as things stand, the State provides very little services to the Navajos. The State has limited taxing authority from the Navajos. The economic thing is in pretty good balance. I think the State is trying to upset that.

I think if a radical change were coming, it has to come from the Federal Government because it's the Federal Government that's providing the services to keep that economic situation in balance, and it's up to Congress to change this. It's up to Congress to order the arrangement.

But I do answer your question yes, I think they are citizens of the States and entitled to the rights of citizens.

QUESTION: Your theory is basically one of pre-emption, I suppose, in a sense. It isn't a Federal instrumentality theory or anything like that?

MR. COLLINS: I think pre-emption would be a proper word, your Honor, yes.

QUESTION: They just occupied the field, and that the thrust of the law is that the States shouldn't burden.

MR. COLLINS: I think the thrust --

QUESTION: It's statutory. It's purely a result of Federal statutory law.

MR. COLLINS: No, your Honor, I think it's the Constitution. I think that Worcester v. Georgia rules that under the Constitution Indians' affairs are pre-empted by the

Federal Government.

Now, the courts have subsequently ruled that --

QUESTION: Yes, but -- and it's beyond the power of Congress to -- well, it couldn't be beyond the power of Congress to submit them to State law.

MR. COLLINS: No, sir. Congress can -- I agree with that, sir. Congress has the power to cede jurisdiction to the States, and it has repeatedly and in detail done so. I think Mr. Sachse for the United States is going to elaborate on some of the particular laws that are relevant here.

QUESTION: It's constitutional in the sense of supremacy.

MR. COLLINS: Ah -- I believe, your Honor, that the Court's opinions have referred to several constitutional provisions: The Indian commerce clause, the treaty power, and the supremacy clauses all combined leading to the rule of Worcester v. Georgia --

QUESTION: Is that your same argument here with respect to inheritance taxes?

MR. COLLINS: State inheritance taxes? Yes, I would.

QUESTION: And distinguish the Oklahoma case on the grounds that non-reservation Indians were involved there?

MR. COLLINS: Non-reservation Indians and Indians receiving full services from the State were involved in those cases. And that's all the difference in the world. If they're

not on the reservation, they're not entitled to the protection of the Federal treaty, and so forth.

QUESTION: Are there any Indians on reservations that don't have tribal governments?

MR. COLLINS: A few, I think, on very small reservations, your Honor.

QUESTION: Would you make the same argument about them?

MR. COLLINS: I think that it's open to contention that some of this Court's decisions have depended on there being a tribal government in existence. I'm not sure how they would apply. It happens in fact that most of the small reservations are now under Public Law 280 and are governed by that law specifically. Arizona has never complied with Public Law 280 and the States that have not are States with large reservations where there are tribal governments by and large. So I'm not sure that question exists in reality.

QUESTION: I am just trying to find out whether your theory has anything to do with drying up resources for tribal governments.

MR. COLLINS: Yes, your Honor, it definitely does. I mean, the Navajo tribe is quite interested in this case. It filed a brief in support of the jurisdiction --

QUESTION: Well, if there wasn't a tribal government, the question might be different, then.

MR. COLLINS: It might be. I would suppose it might be. I'm not certain. That's a question I can't answer definitely.

In conclusion, we want to urge that we are not asking for a change in the law. We are asking that this Court reaffirm its historic commitment to the self-government Indian reservations, and furthermore that this Court end the uncertainty that has been created by what Arizona has done and a couple of other States in trying to interpret other decisions of this Court as allowing this invasion of the Indian jurisdiction. We are talking about what we contend is a subtle area of jurisprudence. The prior decisions of this Court and Acts of Congress make it clear that the Arizona court below was wrong and should be reversed by this Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Collins.

Mr. Sachse.

ORAL ARGUMENT OF HARRY R. SACHSE, ESQ.

FOR THE UNITED STATES AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

The United States agrees with Mr. Collins' position in this case. I want to try to clarify the position as we see it and then to emphasize the amount of congressional activity that there has been in this area of the law and the

impropriety of allowing a State unilaterally to obtain jurisdiction within an Indian reservation where Congress has not authorized the State to obtain that jurisdiction.

In our view, it has been the law for many years that in the absence of a congressional authorization, or in some situations the consent of the tribe itself, State laws, including tax law, not limited to State tax laws, including State tax laws, have no applicability to Indians within an Indian reservation. This has been the literally hornbook law as we point out in our brief with a quotation to Mr. Felix Cohen's hornbook.

It is also, in our view, the real holding of Williams v. Lee. What's happened is that the Court in the Kake case which had nothing to do with tribal, with reservation Indians, had to make a one-sentence paraphrase of William v. Lee. And the Arizona court seized on that one sentence paraphrased to try to make Lee, as one of the amicus put it, to turn it on its head and make Lee be a decision that allows the States to act without congressional authority within an Indian reservation, whereas in fact the Lee decision is exactly the opposite.

The language that I think is the clearest statement of Lee is the opinion -- the whole case, of course, the opinion of Justice Black -- but at page 220 of 358 U.S. in which Justice Black said, "Congress has ... acted consistently

upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." Then Justice Black cites four or five statutes that are based on this assumption and concludes significantly, "When Congress has wished the States to exercise this power, it hs expressly granted them the jurisdiction which Worcester v. Georgia had denied them."

I think that's a sound basis for the decision in this case, and if we adopt the view of the Supreme Court of Arizona, it will be opening up a can of worms as to what laws do and do not apply to Indians within Indian reservations.

Now, I want to use the time that I have to bring to the Court's attention a number of individual statutes where Congress has chosen whether State laws should apply within Indian reservations and to emphasize the particularity with which Congress has acted in this respect. I will start with tax laws, but the picture is equally clear with general laws.

QUESTION: Mr. Sachse, I take it then that your position is based primarily on statutes rather than the Constitution?

MR. SACHSE: Our position is that the Constitution gave Congress full authority over the affairs of Indians, that Congress has exercized that authority both through -- Congress and the Government -- through treaties and through setting up executive order reservations, that Congress further exercised the authority in the terms of the Enabling Acts of

the Western States, that it has further exercised that authority by from time to time providing small bits of jurisdiction for States within Indian reservations, and that there is no room -- Sir?

QUESTION: You say Congress, the Constitution has given Congress general authority over the affairs of Indians. Would you say that Congress could prohibit a State from taxing or criminally dealing with a non-reservation Indian if it so chose?

MR. SACHSE: I don't know. I don't think so. And certainly that issue is not presented in this case. I think the first law that one would have to look at would be the Enabling Acts of the States and see to what extent the States disclaimed jurisdiction.

Now, Congress has, as to Indians who don't live on reservations, held that they can only be tried in Federal courts. 18 U.S.C. in defining Indian country doesn't --

QUESTION: Does your position leave room for the State to tax non-reservation Indians?

MR. SACHSE: Yes, it does.

QUESTION: Income tax, inheritance tax?

MR. SACHSE: Our position is that we think its correct that as to reservation Indians, you start with the assumption that the State laws have no authority over those Indians, at least as to matters of income that they have earned on the

reservation. As of non-reservation Indians you start with the proposition that they can be taxed like anyone else. If they can show a particular statute that gives them the tax exemption, they then have a tax exemption. For instance, there are many non-reservation Indians who live on allotments. In Squire v. Capoeman, this Court held that the allotment creates a tax exemption.

QUESTION: And that would go, I suppose, for reservation Indians earning income off the reservation, going off the reservation to work. The State could tax that income?

MR. SACHSE: I would think so. I don't know. I don't want to state a Government position on that issue. Certainly if the income is earned off the reservation, it is quite a different case from this case.

QUESTION: Squire v. Capoeman was a Federal income tax, too, wasn't it? It wouldn't necessarily carry over to a State income tax.

MR. SACHSE: No, except in a fortiori sense, that the Federal Government traditionally has had greater taxing powers over Indians than the States because there is no jurisdictional problem with the Federal Government. There is a jurisdictional problem with a State taxing Indians, at least within an Indian reservation.

QUESTION: You say "jurisdictional." Would you be more precise about what you mean? Here I take it it was a

withholding from the Indian's employer which was voluntary. So the State isn't asserting its process on the reservation. Do you mean legislative jurisdiction?

MR. SACHSE: Yes, sir, I mean legislative jurisdiction. I mean the application of State laws to Indians within an Indian reservation. That's what I mean by jurisdiction. The other jurisdictional problem could arise, too. If it were not a situation of a withholding tax, if the State were trying to collect this tax from someone who hadn't paid it, you then would have the question of the State trying to collect a tax --

QUESTION: In other words, it's location plus being an Indian.

MR. SACHSE: Plus tribal government.

QUESTION: Plus tribal government. Because non-Indians on the reservation, you don't have any problem with, is that it?

MR. SACHSE: Well, with non-Indians on the reservation, the situation, as you know, was presented in Kahn in a petition before the Court now that this Court has not acted upon, Kahn v. Arizona Tax Commission. In our view that's a much more difficult case. If Worcester v. Georgia stood in its original strength, then Kahn couldn't be taxed either. And if a reservation were an absolute Federal enclave in which the State can have no authority against anyone including non-Indians, he couldn't be taxed either. But we admit that

Worcester has been weakened to the point of allowing State jurisdiction where it applies solely to non-Indians within the Indian reservation.

So I don't know what I would do if I were a judge deciding the case or --

QUESTION: Unless there was some specific Federal statute that --

MR. SACHSE: Unless there was some specific Federal statute authorizing.

I think in the time that I have left which is not too much, that I would best mention a few of these special statutes. For instance, in 1929, I believe it was, Congress decided it would be a good idea to allow the State motor vehicle fuel taxes to apply to sales of motor vehicle fuel whether it was on any sort of Federal reservation or not and whether it was sold even by a licensed trader or not. And it specifically authorized that tax. And from that date on without decisions of the Court or any kind of serious problem, the States have been able to collect a motor vehicle tax with congressional authority within Indian reservations.

In 1939 when Congress -- at a time when military bases were being built around the country -- 1940, I believe it was actually -- when Congress considered whether it wanted to allow State income taxes and State sales taxes to apply within Federal areas, is the word that was used, debate on this

Act which is called the Buck Act, debate on this Act was very clear that some congressmen proposed that it should apply within Indian reservations, too. The Department of the Interior objected to that and wanted to have Indian reservations totally excluded from the Act, and the conclusion that Congress arrived at was to put in 4 U.S.C. 109 which says, "Though the States may assess income tax within Federal areas, these shall not apply to Indians not otherwise taxed," the standard phrase for Indians living within a reservation or on Indian country.

We don't say, we are not trying to undo the footnote in the Warren Trading Post case that says the Buck Act didn't apply to Indian reservations. But if it doesn't apply to Indian reservations, it was a conscious choice by Congress not to authorize the imposition of State income tax to Indians within Indian reservations.

Similarly, Congress has authorized the taxation of mineral interests within Indian reservations. But in doing so it did it with particularity and only authorized the taxation of mineral interests on unallotted tribally held lands and then provided that the State taxes could not create a lien on the land.

Away from the area of taxation -- I don't think I need to discuss Public Law 280 here. That, of course, is the basic statute in which Congress authorized States to exercise

a broad jurisdiction, though also with broad limits within Indian reservations.

But I want to point out just one particular statute, a very limited statute that was cited in the Kake case. That's 25 U.S.C. 231. Congress in the 1930's decided that it would be a good idea to let State health authorities enter Indian reservations and to allow State truancy officers to enter Indian reservations. Obviously, they considered it took a congressional act to do this. But when Congress acted it did it in a particular way. It authorized the Secretary of the Interior to allow these Federal officers to enter, it didn't direct him to do it, it authorized him at his discretion to do it. It directed him if he does this to write his own rules and regulations to determine the extent to which State officers could come in. And further, as to the truancy part of it, it specifically provided that this could only be done with the consent of the tribal government if there is a tribal government over the area in question.

Now, we submit that this is the way the States should obtain jurisdiction within Indian reservations if they are to obtain it, it should be by congressional act, and though it's not up to me to say so particularly, I think the congressional act should also require consent of the Indian tribe, because when the reservations were created, whether by treaty or by Executive Order, it was certainly the assumption

that the States would have no jurisdiction within those reservations under Worcester v. Georgia which was the ruling law then.

QUESTION: I am still wondering whether your position rests on the fact that there are specific Federal statutes from which you infer congressional intent to exclude the States from the reservation in this case, to exclude --

MR. SACHSE: I don't think it rests entirely on that. I am not able to --

QUESTION: Well, then, are you saying that absent a specific Federal statute granting the power to tax, the Constitution requires the State to stay out of the reservation? Is that it?

MR. SACHSE: I would agree with that except for the word "Constitution."

QUESTION: Well, that's a big except.

MR. SACHSE: I think the Constitution combined with the treaties made with the Indians and the Enabling Acts of the States requires the States to stay out of Indian reservations without congressional approval. But to me, that's not -- I have trouble envisaging this with the Constitution without thinking of the factual situation that we would apply it to, namely, the existence of an Indian reservation. And the Constitution didn't order the Federal Government to create Indian reservations.

QUESTION: If there were no Federal statutes on the question, only the Constitution, could the State tax? I would gather you would say no.

MR. SACHSE: I would say if the Indian reservation existed, it would have to exist by executive order or by statute or by treaty. And if it existed in any of those ways, the State could not tax within that Indian reservation without the consent of the Federal Government.

MR. CHIEF JUSTICE BURGER: Mr. Winter.

ORAL ARGUMENT OF JAMES D. WINTER

ON BEHALF OF THE APPELLEE

MR. WINTER: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether or not the State of Arizona can impose its income tax on income of a Navajo Indian earned on the Navajo Indian reservation, that particular Indian residing on the reservation.

Now, there are a number of cases involving the question of Federal income tax liability of Indians residing on reservations, and those cases have been decided in favor of their tax liability. In the Oklahoma Tax Commission case although that was an inheritance tax case, nevertheless, the decision referred to the income tax cases, and State and Federal income tax liabilities were there equated.

There is the Leahy decision involving the Oklahoma

income tax. This case was decided in the 1930's, and in many ways it is similar to the situation that we have today. Although the opinion is short, the briefs throw considerably more light on the subject. The Osage Indians had a reservation, they had a treaty with the Federal Government, they had a tribal government. As a matter of fact, the United States Congress had passed the law providing for State probate jurisdiction in regard to the Osage before this case was decided, which is an indication that they had a viable tribal government.

Now, in that particular case the Court upheld the State taxation. It appeared to the Court from the opinion that since the Indians received the income and were free to dispose of it as they wished, that there was no reason why they shouldn't be taxed on it.

QUESTION: Where did they earn the income?

MR. WINTER: I beg your pardon?

QUESTION: Where did the Indians earn the income in the Leahy case?

MR. WINTER: In the Leahy case the income came from restricted mineral property. This was property that was owned by the tribe, the Osage tribe.

QUESTION: On the reservation?

MR. WINTER: Now, that is something that I am not clear about because I wasn't able to find anything in the

record that indicated whether it was on or off the reservation.

There are some State court cases now, four of them, that have raised this -- rather, five of them, six of them counting this case -- in which the question is raised and all but one of them, the Brun case from Minnesota, were decided in favor of tax liability. The Ghahate case from New Mexico is the one that is probably most like ours. It involved a Navajo Indian. The only difference between the Ghahate case and our case that I can see is that in the Ghahate case, counsel for the Navajo stipulated that imposition of the income tax by the State of New Mexico did not infringe upon the sovereignty of the Navajo tribe. Counsel were unwilling to stipulate that in our case.

Now, in the Brun case the Court did apply the Williams v. Lee test. The test of validity of State action on an Indian reservation is whether or not it infringes on any rights granted under any Act of Congress or upon the Indian right of self-government. The Court in the Brun case concluded that the imposition of the Minnesota tax infringed on the right of self-government. They simply assumed that it did apparently because of the economic impact of the tax. In other words, if the Indians had to pay this tax to the State of Minnesota, then they would be less able to pay a tax, I suppose, if the tribe should levy a tax.

At any rate, this decision certainly in this respect

is in conflict with decisions in cases like Graves. v. New York and Helvering v. Gerhardt which involved the questions of whether or not State employees had to pay Federal income taxes and whether or not Federal employees had to pay State income taxes. In those cases, the Court concluded that the fact that an employee of a State government or the Federal Government had to pay income taxes to the other government did not impose any sort of substantial burden on that other government.

So we have a test, a practical test, of substantial interference with essential governmental function. The Court in the Brun case obviously did not apply that test.

Now, one other factor is involved in this connection. This tax has been imposed by the State of Arizona since 1957 at least when an Attorney General opinion in the State of Arizona was rendered on that subject, and if this tax really infringed upon the self-government of the Navajo Tribe, it would seem that we should have heard about it before now.

Now, --

QUESTION: (Inaudible.)

MR. WINTER: If the tax is not paid, why, then the State would attempt to collect it. Now, on the question of whether or not the State could levy on the Navajo reservation, I think that the State probably would not attempt to do that because there is --

QUESTION: Are you saying the couldn't do it? Do you think the State could levy on that property, that real property?

MR. WINTER: On the Navajo reservation?

QUESTION: Yes, sir.

MR. WINTER: I don't know, your Honor, but I am inclined to think that the State could not, but I don't know.

QUESTION: Does the State tax the real property there?

MR. WINTER: Under our Enabling Act we cannot tax real property on the reservation; it's specifically excluded, your Honor, from property taxation.

QUESTION: What other tax do you put on?

MR. WINTER: On Indians residing on the Indian reservation?

QUESTION: Yes, sir.

MR. WINTER: Well, the only thing that I can think of is if it came outside of the scope of the Warren Trading Post case, in other words, the Indians involved were not Indian traders and they were selling items on the Indian reservation, why then, I would think that they would be subject to the sales tax.

QUESTION: How many of the Indians living on the reservation have paid the income tax?

MR. WINTER: According to figures that we have, it would be between $2 and $3 million the State has collected

according to a Governor's study that was just completed.

QUESTION: Income tax.

MR. WINTER: Yes, your Honor, income tax. But that's all reservations in the State, and the Navajo reservation, of course, has most of the Indian population in the State because, although the State may have 125,000 Indians, 80,000 or 90,000 of them live on the Navajo reservation.

It's our position that Williams v. Lee which was cited by counsel for the appellee is distinguishable from this case because it did involve infringement upon the right of self-government of the Navajo Tribe. That case involved the jurisdiction of the courts, and there the Court concluded that the State courts did not have jurisdiction over what were essentially tribal matters, matters relating to the liability of a Navajo resident of the reservation in connection with a transaction entered into on the reservation, and that for the same reasons and for the additional reasons a procedural point was involved, we think the Kennerly case is also distinguishable.

Now, various arguments have been raised by the appellants that express congressional authorization was required in order for the State laws to apply on the reservation. This is an extremely narrow question. I think that the United States has already conceded in regards to the Kahn case State laws may apply on Indian reservations to third persons.

Now, I think that State laws as a practical matter do apply on Indian reservations when you are talking about certain benefits, even benefits that are not conferred by Federal statute or by contract under the Johnson-O'Malley Act, and I am talking about such things as the right to vote. When a Navajo Indian votes on a Navajo reservation in a State election he doesn't vote under tribal law or Federal law, he's voting under State law.

Now, the case of Kake v. Egan set down what we considered the rule to be that State laws do apply on Indian reservations with two exceptions -- that they do not infringe upon the tribal government of the tribe or if they do not infringe upon any rights which were granted by an Act of Congress. This is certainly in line with what this Court has held before in Surplus Trading Company v. Cook I believe it was dictum to the effect that State laws have restricted application on Indian reservations, meaning that they do have application. And I think by restricted applications the Court was referring to the exceptions such as the Indian right of self-government. And these laws cannot apply if they are in conflict with Federal laws.

Then in New York v. Martin where the Court said that in the absence of treaty obligations or Federal statutes, the State laws do apply on Indian reservations.

Now, it is our position that no Act of Congress

prohibits application of State income taxes to Indians. The first statute that comes to mind in this connection in chronological order is the State Enabling Act of the State of Arizona, and because there has been considerable confusion about the language, I would just like to read the language that has been the subject of dispute in this connection.

"That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribe, the right or title to which shall have been acquired through or from the United States or any prior sovereignty and that until the title of such Indian or Indian tribe shall have been extinguished, the same should be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

These are what we refer to as a disclaimer in the absolute jurisdiction and control provisions. Now, they don't refer to Indian reservations, although subsequently in the Enabling Act Congress did refer to Indian reservations, but they refer to Indian lands. And the reason for that distinction, as was pointed out in the Draper case was because in the General Allotment Act of 1887 Congress provided that Indians living off of reservations could obtain some

unappropriated public lands that would be subject to the same restrictions as lands that were obtained under allotments. It was the desire of Congress at the time that Arizona was admitted to the Union to protect the rights of the Indians in these lands. And this Enabling Act is like that of many other States. And this language was used, Indian lands were referred to, for that reason. There was no ambiguity at all in doing it. And I think that this is confirmed by a number of State court decisions on the subject as well as the more recent decision of this Court in Kaka v. Egan.

Now, Public Law 280 was enacted in 1953. At that time the policy of the Federal Government was to get out of the Indian reservations, or it was the termination policy. And because this was the concern at the time, the provisions of 280 provided for State assumption of jurisdiction.

Now, there was also some confusion at that time about what the State Enabling Acts meant. This confusion is indicated in a letter that we have quoted from and that was in the committee reports. It's in our brief. So Congress acted partly to clear up this confusion. They wanted to provide a procedure so that the States would not consider these Enabling Acts to be a stumbling block, so that they would assume a full measure of jurisdiction so that the Federal Government could be relieved of all responsibility for it as soon as the Indians were ready for this. Public Law

280 did not deprive the States of any jurisdiction that they already had.

Now, the Civil Rights Act of 1968 amended Public Law 280 in effect to require tribal consent to State assumption of jurisdiction.

There is one more item, and that's the treaty of 1868. That treaty has nothing at all in it about the tax liability of the Indians. It was in 1871 that the Government decided that the Indians were an internal problem, that there would be no more treaties with the Indians. And it would not seem fair to distinguish between the Navajos and other Indians because the Navajos have a treaty that says nothing about taxes. Immunity from taxation is not to be implied. If Congress had intended to except 100,000 Navajos in Arizona from income taxes, they would certainly have said so in clear and unmistakable language.

Now, the Navajos are an unusual Indian reservation. There are about 16 or 18 Indian reservations in the State of Arizona, and the Navajos are not representative, they are an extremely large reservation. They have more resources than the average reservation does, so they certainly require less assistance than the other reservations do, because some of the reservations are so small that they are hardly an economical unit, an economical governmental unit. Some of them may only have a few hundred acres and a few hundred Indians on them and

they can't provide--they can't receive the services from the Federal Government that the State would provide for them, and they are obviously not able to furnish those services themselves.

But even the Navajo Indians require many services from the State. I don't regard it as important, but counsel for the other side mentioned, and I am reluctant to mention it because it's outside the record, but nevertheless, according to the information from our Governor's report, the financial picture that he presented of the relationship of the Indian and the tribe is not at all accurate. The State does have a very substantial stake in the sense that the State spends a lot more money on the Indian reservation than it gets back out of them, and the total runs into millions of dollars.

Now, the income tax on net income is a very fair tax. The rate structure of the Arizona State income tax is a low one. It runs from 1.5 to 8 percent. It's an extremely fair way to balance the burdens of State government.

QUESTION: Counsel, all of those are very good arguments on the economic theory of why they should be taxed, but they don't reach the statutory basis or any constitutional basis, do they?

MR. WINTER: That is true, your Honor. I was only mentioning them because it had been mentioned before and ever

since the Warren Trading Post case, we have felt that the State does make provision for the Indians on the reservation. And, of course the State's role has greatly grown. But, I agree.

I have no further arguments, your Honor, unless the Court has any questions.

MR. CHIEF JUSTICE BURGER: Very well. Thank you very much.

I think your time is up but if you have something important?

REBUTTAL ORAL ARGUMENT OF RICHARD B. COLLINS, JR.

ON BEHALF OF THE APPELLANTS

MR. COLLINS: Excuse me, your Honor, I thought I had a minute.

MR. CHIEF JUSTICE BURGER: Your friend used it up, but we will give you a few anyway if you have something on your mind.

MR. COLLINS: I have only about two or three sentences, your Honor.

May it please the Court:

In reply to Mr. Justice White's question about the Constitution. We definitely do think it's a constitutional allocation of power and that the establishment of a reservation is all the Federal Government formal involvement necessary. I think Mr. Sachse said that.

The Leahy case and other Oklahoma cases are in Oklahoma where there is a law like Public Law 280 and has been and was at the time of the Leahy case committing jurisdiction to the State. It wasn't the same as Public Law 280, it may not have the same scope, but it certainly doesn't apply to the Navajos.

And, finally --

QUESTION: It says the tax there was on the individual share of tribal income.

MR. COLLINS: It was on a mineral share from an allotment, I believe, your Honor.

QUESTION: It says the individual share of income on property owned by the tribe.

MR. COLLINS: Your Honor, it's on what's called the Osage mineral shares which have been ruled to be personal property of the individual Indian. I agree that they are formally shares in the tribe's mineral income, but the shares are inheritable by one Indian from another.

QUESTION: That way.

MR. COLLINS: And finally -- one more sentence. Excuse me.

QUESTION: Am I right in remembering that in the Leahy case, somewhere in the course of that opinion, I think in a footnote, the distinctively different Oklahoma situation was mentioned.

MR. COLLINS: Yes, your Honor. That's correct.

QUESTION: And it is a distinctively different situation, at least by its specific statute, a predecessor, wasn't it, of the more generalized 280?

MR. COLLINS: That's our point, your Honor, that the Oklahoma situation has no application here because it's subject to special laws that don't apply to Arizona.

QUESTION: I would assume that the former Chief Judge of the Court of Criminal Appeals of Oklahoma paid income tax, becuase he was Choktaw Indian, but he was also the Chief Judge. So I assume he paid State income tax. And I don't see where it has got anything to do with this case at all.

MR. COLLINS: I agree with that, your Honor.

I had one more sentence, which is that we contend that as an alternate kind of decision, this Court has construed Public Law 280 to be ruling in this case in the Kennerly case. I don't have time to go into that, but it's in the briefs.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:49 o'clock p.m., the case in the above-entitled matter was submitted.]