In the

Supreme Court of the United States

FRANCIS A. KEEBLE, Petitioner,	)	
v.	)	No. 72-5323
UNITED STATES OF AMERICA, Respondent.	)	

Washington, D. C.
March 27, 1973

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FRANCIS A. KEEBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 72-5323

Washington, D. C.

Tuesday, March 27, 1973

The above-entitled matter came on for argument at 1:20 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:

MARK V. MEIERHENRY, Box 227, Rosebud, South Dakota 57570, for the Petitioner.

RICHARD B. STONE, Department of Justice, Washington, D. C. 20530, for the Respondent.

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 argument next in No. 72-5323, Keeble against the United States.

Mr. Meierhenry, you may proceed whenever you are ready.

ORAL ARGUMENT OF MARK V. MEIERHENRY

ON BEHALF OF THE PETITIONER

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

This case comes to the Supreme Court from the Eighth Circuit Court of Appeals which issued a court decision affirming Judge Nichol of the District of South Dakota. The facts in this case are basically that this crime was committed upon an Indian reservation in the State of South Dakota, the Crow Creek Indian Reservation, by one Indian against another Indian. The indictment was brought under 18 U.S.C. 1153. There was a conviction had on this crime. During the trial of the case the defense requested a lesser-included offense instruction. It was not given.

The Supreme Court on December 4 of year past granted certiorari on the question of whether the District Court's refusal to give that lesser-included offense instruction under 18 U.S.C. 1153 violated the Fifth Amendment due process guarantee.

Now, the lesser-included offense instruction that

was given was the crime of assault to the major crime of assault with intent to do great bodily injury. The defendant in this case has two basic contentions. Number one, that the Act of 1885 intended that Indians be tried in the same manner and in the same courts as other persons committing the same crimes. And the second is that if the petitioner's contention that this is incorrect and Congress did not intend the jurisdiction be present to convict under lesser-included offense instructions, then 18 U.S.C. as applied violates due process because a lesser-included offense instruction is part of a fundamentally fair trial, and Rule 31(c) of the Federal Rules of Criminal Procedure so direct.

Before I launch into the main argument, I would like to point out a correction as I see it in the Government's brief. And that is argument 2, pages 19 to 23. In the petitioner's view, that is not the state of the law at the present time. They speak in their brief of a narrow class of cases which would lead me to believe they think it's 13 major crimes. This is not the state of the law in Indian reservations in the United States. The general laws of the United States apply except -- and 18 U.S.C. 1153 points this out -- if the crime is one Indian against another Indian, if there has been punishment under tribal law, and, number three, if the treaty rights control this particular point -- and a case cited in the Government's brief points this out, which

is the Menominee Tribe v. United States, which is a fishing right under treaties which continues.

An example of this is a case which is not cited in any brief, United States v. Burlin?, 441 Fed. 2d, 1199, and this Court denied cert in that case. That was forgery. And what we are talking about here, when I am talking about the general laws of the United States, is that the Assimilative Crimes Act applies to Indians. That case so held that involved conviction out of Montana for forgery under the state statute. An example of this right now is the occurrences which are in the news at Wounded Knee. I have read the indictments against some of these people. It is under the Assimilative Crimes Act is for violations of postal regulations involving postal things which the Wounded Knee Trading Post is also a post office. So the Assimilative Crimes Act does apply.

Now, the important thing about that in this case is under the Assimilative Crimes Act an Indian would get a lesser-included offense instruction. Only when you are talking about the 13 major crimes does he not get a lesser-included offense instruction. And, as the Government talks about this clear pattern, within the 13 there is one that there is a lesser-included offense instruction included within, which is larseny. And that would be the common thing of petty larseny, larseny under $100, which is included therein.

Now, then, the jurisdictional part, as the Court is

aware, started with Crow Dog which in 1883 said that the United States Government has no jurisdiction over crimes by one Indian against another Indian on an Indian reservation. Out of that decision by the Supreme Court, the Act of March 3, 1885, set up the jurisdictional scheme that we now have on Indian reservations. That said within a territory, which South Dakota was at that time, within a territory, the laws of the territory applied to all persons, Indian and white alike, without any thought of an Indian reservation. Therefore, between the dates 1885 and 1889 in the Territory of Dakota, an Indian would get a lesser-included offense instruction. Upon South Dakota becoming a state in 1889, Indians lost this right because the second part of the Act of 1885 took effect which said that within a state, if it happened within the confines of an Indian reservation, Federal law applied, which at that time there were seven major crimes defined by Federal law. There have since been six added all defined by state law. Now, within that four-year period, an Indian was given lesser-included offense instruction. In 1889 the present scheme came up and ever since then all the courts have held -- and I am the first to admit that the case law on the petitioner's side is miniscule -- no court has allowed, without being reversed, lesser-included offense instructions.

However, the petitioner would point out on page 10 of our brief that the totality of two statutes now recodified

must be looked at. They are 18 U.S.C. 1153 and 18 U.S.C. 3242.

QUESTION: Mr. Meierhenry, let me go back to your main argument. You say that no court ever allowed it without being reversed. Does the Government occasionally ask for a lesser-included offense instruction as well as the defendant?

MR. MEIERHENRY: Yes, your Honor. A close reading,-- in fact, the Government has cited a case, United States v. Jacobs. A close reading of that case reveals that it was the Government in that case that wished to have the lesser-included offense instruction. As I remember, it was rape and carnal knowledge, or something of that matter. But they have in the past, yes.

QUESTION: Mr. Meierhenry, you are not attacking the statute on constitutional grounds, are you?

MR. MEIERHENRY: Your Honor, I am, yes. The first point, if the Court should find that I am incorrect and there is no jurisdiction to give a lesser-included offense instruction, then it is the petitioner's contention that 18 U.S.C. 1153 as applied, meaning not giving a lesser-included offense instruction, violates due process. So if the Court should rule against me on point one, then I would contend that it violates due process.

QUESTION: I wonder why you don't attack it constitutionally head on. Wouldn't your client be better off if you could knock the statute out?

MR. MEIERHENRY: Yes, your Honor. As far as the trial in this case either way, if either point is correct, I believe it would have to be remanded because there was no lesser-included offense instruction given.

QUESTION: But wouldn't it be a violation of due process only because it denies something akin to equal protection?

MR. MEIERHENRY: Yes, your Honor, on the due process --

QUESTION: Otherwise, it's not a violation. Isn't it just that it treats some people different from others?

MR. MEIERHENRY: Yes, your Honor, and as I'll point out again, on the due process part, the Government cites a very recent case.

QUESTION: Would that be the basis for your due process argument?

MR. MEIERHENRY: My basis is that an Indian person, being a United States citizen, is treated differently.

QUESTION: Right. It's Federal equal protection through due process.

MR. MEIERHENRY: Yes, your Honor.

QUESTION: You don't claim any infirmity in the statute other than if it is construed to preclude the lesser-included offense instruction?

MR. MEIERHENRY: My view, your Honor, is that if this

Court agrees with me on point one and said that there is jurisdiction, and you read the statute, the original Act of 1885, saying that when Congress wrote that saying Indians be tried in the same manner and in the same courts, in effect, like everyone else, if you agree on that point, we may not ever get to the due process part of it in this particular case, looking at this particular case. It may come up later, but the Court could not decide that issue and still reverse and remand this case.

Now, on the due process part, your Honors, what I am contending is that this is a racial classification the Government --

QUESTION: There are two ways of assuring that, isn't there? One way is to say that the lesser-included offense instruction is available in this case. And the other way is that it isn't available in any case.

MR. MEIERHENRY: That's true, your Honor. As this Court has held in Sansome v. United States, they talk about it as an entitlement, and the Federal courts have always, or for some time, ruled that it is there not to give --?

QUESTION: That isn't equal protection, is it? That's substantive.

MR. MEIERHENRY: That would be substantive, your Honor.

On the due process part, it's our --

QUESTION: That would be substantive because of the rule.

MR.MEIERHENRY: Well, I say that there has been a violation of due process for two reasons.

QUESTION: ... 31(c) under the Rules entitles him to instruction anyway?

MR. MEIERHENRY: Yes. I have in my brief, your Honor --

QUESTION: And then if it's not to be, certainly on its face it would appear to entitle you to it, wouldn't it? And if you say it's not, for whatever reason, because he's an Indian, then it would be unconstitutional.

MR. MEIERHENRY: Because it's a racial classification. And as the Government points out that the short answer to my contention is that the clause of Section 3242 to which petitioner points simply provides ordinary trial procedures apply in Indian cases is exactly what we are contending here. Rule 31(c) which is a statute says that all persons must be given a lesser-included offense instruction, but they are not given one here.

Now, the Government points out, and we would say that the due process part of this is more akin to McLaughlin v. Florida. They point out in their brief, at page 23 they cite the recent case of McGinnis v. Royster which was decided by this Court on February 21, 1973. They cite language in

their brief. But they don't cite the start of the next paragraph which is the most important part of the case. "When classifications do not call for strict judicial certainty, this is certainly the only approach consistent with proper judicial regards to the judgments of the legislative branch."

My reading of this is that this Court did not feel that this case, the facts which involved good time under parole and pardons needed strict judicial scrutiny. All the cases, McLaughlin v. Florida, and the rest, talk about racial classifications as having that very strict judicial scrutiny. And so the cases that they have cited here are not on point. This Court in Weber v. Aetna Casualty decided in 1972 suggested a test, it is a suggested test that where you have personal rights which we are contending that the right to a lesser-included offense in this case does is a personal right, there is a dual inquiry: What legitimate interest does classification promote? And what fundamental personal rights might the classification involve or endanger?

Now, the Eighth Circuit below in its court opinion said that tribal sovereignty is the thing that must be protected. And I might point out at this time that this tribe, Crow Creek Tribe, is not an Indian Reorganization Act tribe. It operates under the Code of Indian Offenses which is found in C.F.R. 11.1 and following. To my knowledge there are no tribal codes at all. It's all out of the Code of Federal

Regulations. So at least to the Crow Creek Tribe where this happened, the tribal sovereignty is questionable at least to decide this case on that.

But the fundamental personal rights that are endangered of Francis Keeble as an Indian person compared to other Indian citizens tried in Federal courts, it is his contention that he need not carry with him the tribe, but tried as an individual in the courts of the United States. He should be tried as an individual, and he should be given all those protections. Because if he is not given a lesser-included offense instruction, Rule 31(c) is violated and that statutory protection.

He also, as O'Connor v. New Jersey pointed out, at page 21 of our brief, he loses the right to have the jury decide the degree of crime as well as whether the crime itself was committed. And this to me involves the province of the jury, that the jury is lost one element of deciding, and they are the judges of the facts. However, they are ruled by just those instructions given to them by the court.

But there is another thing that is probably more important, and I found this in the trial of these type of cases, is that the petitioner has lost the fact that he can plea bargain. Now, this Court in Santavelo v. New York said that this is an essential component of the administration of justice. Now, he can certainly plea bargain in the sense of

how many years and things like that, but what about the difference between a greater offense and a lesser offense? This doesn't come into play. The Government contends that this is a fair and rational classification. Yet three weeks ago in a case that I tried, there were two major crimes committed -- larseny and burglary. Because larseny is one of the original seven crimes and it's in the statute, he got, this fellow got, a lesser-included offense instruction on larseny, but he didn't on burglary because they said there is no jurisdiction. Now, here are two felonies, same occurrence. On one point he gets a lesser-included offense instruction for which he was convicted, and on the other one he doesn't. He doesn't get a lesser-included offense instruction. The Government would argue that the United States of America never intended for him to get one. Yet, they have made very -- they have been very careful when they passed the Act back in 1885 to add that Indian persons were to be tried in the same manner as all other persons.

Now, the Government further contends that this being a fair and rational classification, is that only in effect twelve crimes that an Indian may be charged with should not get lesser-included offense instruction. As I pointed out, the Assimilative Crime Act which is in effect the state law applied through the Federal Government, those apply on an Indian reservation unless those three things that I have mentioned

18 U.S.C. 1153 excludes, which is Indian against Indian, which is if he has been punished by the local law of the tribe and if there is a specific treaty regulation on this.

QUESTION: In this case, which one of those three? Was it Indian against Indian?

MR. MEIERHENRY: It was Indian against Indian.

QUESTION: That's the only reason in this case that this case wasn't under the Assimilative Crimes Act, is that what you are telling us?

MR. MEIERHENRY: Well, the wording in 18 U.S. 1153, Mr. Justice, is -- they have changed it, and it is Indian or any other person. So for this -- if it had been a white man, if the petitioner had been white, every other fact the same, he would have gotten a lesser-included offense instruction.

QUESTION: Under the Assimilative Crimes Act because 1153 applies only to an Indian defendant, the man charged.

MR. MEIERHENRY: That's right. On the Indian reservation. That's correct, your Honor.

QUESTION: In the Government's brief, reference is made to the Federal statute having to do with assault upon a Federal officer in the performance of his duties, 18 U.S.C. 111. And the suggestion is that this is comparable and that there no lesser-included offense, simple assault, available to the defendant. Do you have any comment about that?

MR. MEIERHENRY: Yes, I do, your Honor. Number one,

applying the facts of this case, there is a case on this where the crime that they speak of is discussed. It's Walks on Top v. United States, which is 372 F.2d 422. In that case the man assaulted was an Indian, either Bureau of Indian Affairs or special officer or something. He was an Indian who was also an officer of the United States. He was assaulted. He was charged under the general law -- the Indian who assaulted the police officer was charged under the general laws of the United States, assault upon a Federal officer. He was also given a lesser-included offense instruction by the way. But to point out what they are getting at is the Federal connection, I assume.

Now, they are saying that, number one, there would be no lesser-included offense. Number one, we have to assume -- and they don't make this clear -- it wasn't on an Indian reservation, or, of course, their example given is incorrect, because then the Assimilative Crimes Act would apply.

But there the connection is this. The Federal connection is that he is a Federal officer. In our case the Federal connection is that it's territorial, it's on land, and that's the connection. So the examples they give is that it's not always an all-or-nothing situation. The Federal jurisdiction here we have to assume for their example, although they don't make it clear, that it's off the reservation. Otherwise, he would be given the lesser-included offense instruction under

this very factual situation that he talks about now.

And on the bank robbers, which is the other example that they put in their brief, again we are assuming, and they don't make this clear, that it's not on an Indian reservation. All they are saying is that all bank robbers are treated the same. In my case is involved a situation where an Indian isn't treated equally as all other persons. If this were any non-Indian, he would have been given a lesser-included offense instruction in our factual situation. In the case of bank robbery, all bank robbers are treated equally. And if there is no jurisdiction for a lesser-included offense instruction, then all persons no matter what race, are treated equally. And we must remember, I think, that Francis Keeble as an Indian has no choice. Celestine v. United States decided that, which is cited, as I recall, on the last page of my brief. At birth he can't make an election. He can't say I now wish to be tried as a white man and be a white man. There are two cases. One says the white man born white can never be Indian, and an Indian person of Indian descent can never be treated as a white man under these Acts. So there is no choice left open. He is treated unequally. He is not given a lesser-included offense instruction.

QUESTION: ... to his advantage, isn't it?

MR. MEIERHENRY: It could have been, your Honor. I think --

QUESTION: It's only in hindsight that it --

MR. MEIERHENRY: Well, this is where the Government starts arguing in their brief along that line that --

QUESTION: I'm just asking you whether it is --

MR. MEIERHENRY: In this particular case, I don't know, your Honor, because I cannot tell --

QUESTION: You mean because you don't know it's unconstitutional?

MR. MEIERHENRY: No, I am saying it's unconstitutional no matter what would have happened. But I am saying in this particular case I don't think that it would have been to his benefit or to his detriment not to have it. All I am saying is I think it violates the United States Constitution --

QUESTION: To treat him differently.

MR. MEIERHENRY: -- to treat him differently. We all know, and I don't think it's within the purview of me as an advocate to --

QUESTION: Well, then, you should say, I suppose, that this whole scheme of things of splitting up 11 or 13 crimes, that whole approach is wrong, is unconstitutional, because it does treat Indians differently from others.

MR. MEIERHENRY: I say that the whole scheme could be unconstitutional.

QUESTION: Well, I would think a fortiori it would be if this is.

MR. MEIERHENRY: Well, perhaps it is. I am saying --

QUESTION: (Inaudible)

MR. MEIERHENRY: Only 12, your Honor.

QUESTION: If you didn't have this statute, you would be treating Indians differently because they would be tried in tribal courts and other people would be tried in United States District Courts.

MR. MEIERHENRY: If you did not have this statute?

QUESTION: Yes. It's unconstitutional if you have it, it's unconstitutional if you don't have it.

MR. MEIERHENRY: Well, in this particular case you would bound from one Federal jurisdiction, or one Federal court into another because we have a CFR for it, which is the judge is a Federal government employee, the police officer a Federal government employee, the jail is Federal government, the food they feed the prisoners is Federal government. The only way you can put an Indian in jail on the Crow Creek Indian Reservation is if the Federal government decides to do it, in effect, because all the arms are the Federal government's.

QUESTION: What if the charge here had been attempted assault?

MR. MEIERHENRY: Attempted assault would not be covered by the Major Crimes Act and would therefore be a tribal crime.

QUESTION: What's CFR?

MR. MEIERHENRY: Code of Federal Regulations.

QUESTION: What kind of a court is a CFR court?

MR. MEIERHENRY: Well, it's a dubious court to say the least. It's by regulations of the Secretary of the Interior.

QUESTION: This would be the tribal court?

MR. MEIERHENRY: This is a tribal court in this factual situation. Sometimes this doesn't apply, and this is where it's confusing in the Government's brief. This is a non-Indian Reorganization Act tribe. It hasn't assumed a lot of the elements of self-government. This particular tribe, as is pointed out in the Appendix at page 415 is a non-Indian Reorganization Act. The people on that reservation voted against it. They decided not to have it. Therefore, the court is not the Crow Creek tribal court.

QUESTION: It's a CFR court.

MR. MEIERHENRY: It's a CFR, a Code of Indian Offenses. I would like to point out --

QUESTION: It's like a treble denial of equal protection.

MR. MEIERHENRY: Well, the Government says this is a fair and effective administration of justice. This is what I am questioning. I don't agree.

One thing I want to point out, too, in this case --

QUESTION: You've got Reorganization Act Indians,

you've got CFR Indians, you've got just plain Indians, and you've got these Major Crimes Act Indians.

MR. MEIERHENRY: And you've also got situations in States where there is State jurisdiction as well. There's a number of them.

QUESTION: But in this particular case, petitioner was subject to what kind of a tribal court system?

MR. MEIERHENRY: Mr. Justice, it is a Court of Indian Offenses, a Federally subsidized court. The Tribal Council, or the legislative body of the tribe has passed to my knowledge no laws. They use what the Secretary of the Interior prescribed their laws to be. If you will note in the facts of this case, our man was brought in by a Federal special agent, he was charged with Section 11.49 of the Code of Federal Regulations for disturbing the peace, and was placed -- and there was a remand on this; this was another part of the case -- he was placed in jail on this Federal misdemeanor charge until the FBI man could come out from Sioux Falls, a hundred miles away, to investigate the felony charge.

QUESTION: And then the tribe could change that and have their own tribal --

MR. MEIERHENRY: They could if they so wished, your Honor.

QUESTION: If they don't, then they automatically

get this or what?

MR. MEIERHENRY: Yes. This is to fill the void until a tribe decides it wants its own laws, its own code. And it varies. In South Dakota there are a number of Indian reservations. I happen to live on Rosebud. It is an Indian Reorganization Act tribe. We deal in that tribal court with laws passed by the Rosebud Sioux Tribal Council. So therefore -- I forget what the coding system is -- we don't refer to this. But on Crow Creek you do, because they have not adopted these laws.

QUESTION: And who are the judges?

MR. MEIERHENRY: The judges are most commonly lay persons hired by the Department of the Interior. Once in a while if the tribe is large and the case load is large, a professional attorney will be hired. But usually a lay --

QUESTION: What difference is that as it is today and what it was in 1880?

MR. MEIERHENRY: In some areas not a great deal, your Honor.

What we are saying is another factor involved here is forcing an Indian to be bounced back and forth which I know this Court has as between Federal and State is one thing, but here we have got a Code of Federal Regulations tribe, what the Government wants us to do is go to Deadwood, South Dakota, 280 miles, try the felony, and then if there is an acquittal, come

back and face the tribal charge. Whereas a non-Indian person no matter what his race, could take care of all of it at once. He could be given the lesser-included offense. One day he will have his justice, no matter what it be. And an Indian defendant is again subjected, as the Government calls it, a fair and rational classification, being bounced around like a tennis ball.

QUESTION: Suppose he would be subject in some circumstances to trial in a Federal court in one city and State court in another city arising out of the same transaction, which an Indian wouldn't.

MR. MEIERHENRY: Yes. I recognize that. No, I won't recognize that. Would you say an Indian would not?

QUESTION: Which an Indian in this particular tribe situation would not be, as I understand it. Are any of the Indians on the Crow Creek Reservation subject to State criminal jurisdiction?

MR. MEIERHENRY: No, except on certain sanitary regulations which the United States Government has given the jurisdiction to the State for certain things like --

QUESTION: What area is this in?

MR. MEIERHENRY: This state is south of Pierre, South Dakota, apprxoimately 60 miles. It's in the lower ? Reservation, either side of the area in which the Federal Government built a dam on their reservation, as such has been

diminished, is right by what is known as the Big Bend Dam on the Missouri River.

QUESTION: Is Rosebud in that area, too?

MR. MEIERHENRY: It's in western South Dakota as well.

QUESTION: Suppose on the site where this crime was committed there was a non-resident Indian from Washington and me from Washington, and we committed a crime. Would the Indian be tried any different from me, the non-resident Indian?

MR. MEIERHENRY: No. To the Celestine case an Indian is an Indian no matter what reservation he's on. If you committed one of the 13 major crimes --

QUESTION: But mind you, non-resident Indian.

MR. MEIERHENRY: Pardon me?

QUESTION: It doesn't apply to a non-resident Indian?

MR. MEIERHENRY: All Indians, all Indians, no matter where.

QUESTION: The two of us go out there and commit a crime, the Indian gets a different trial from the one I get?

MR. MEIERHENRY: Yes. You will be tried under the Assimilative Crimes Act because you're a non-Indian. He would be tried under 18 U.S.C. 1153. You would get a lesser-included offense instruction; he would not.

QUESTION: You won't mind if I ask the Solicitor General the same question, will you?

MR. MEIERHENRY: No, sir.

Thank you. I reserve some time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Stone.

ORAL ARGUMENT OF RICHARD B. STONE ON

BEHALF OF THE RESPONDENT

MR. STONE: Thank you, Mr. Chief Justice, and may it please the Court:

The issue which this case presents is one of a broad range of issues arising in both the civil and criminal context which have required this Court and the lower Federal courts to reconcile in some viable manner the extremely complex conflicting elements of the status of tribal reservation Indians.

QUESTION: Do you have any idea how many cases we have this term, Mr. Stone?

MR. STONE: I recognize there are a couple this morning, Mr. Justice Brennan.

QUESTION: And as many of those as we have had three-judge court appeals.

MR. STONE: Indeed, I understand that. And it's a terribly complex problem. The conflicting elements, at least as they are relevant to this case in their basic form are quite well known. I will not dwell on them. On the one hand, the reservation Indian has historically been regarded as a member of a separate sovereignty, and although Congress within --

QUESTION: Do you agree with what he said that an

Indian and a non-Indian go out there, that they get a different trial when they commit the same crime?

MR. STONE: There is no question, Mr. Justice Marshall, that they get a different trial with respect to the availability of a lesser-included offense charge and it is that discrepancy which I plan to deal with in the course of this argument.

QUESTION: On the other hand, the discrimination could work the other way. If --

MR. STONE: Indeed, it could.

QUESTION: If Justice Marshall and his Indian friend go out here, go out to Indian country, and both commit the same crime, if it is not a crime, one of the 13 listed here --

MR. STONE: Then they cannot be tried in the Federal court and are tried only in the tribal court.

QUESTION: Justice Marshall would be tried in the Federal court.

MR. STONE: No. I --

QUESTION: In the State court, I guess.

MR. STONE: That's right.

QUESTION: Federal court ...

MR. STONE: There are a myriad of splits, Mr. Justice Stewart, between the Federal court, the State court and the tribal court, and they do without question depend upon the racial categorizations. There is no question about that.

QUESTION: Of the defendant, of the person charged.

MR. STONE: That's right. And sometimes with respect to the victim. There are a myriad of very complicated jurisdictional allocations. We deal here with a relatively simple one, and I would like as much as possible to confine this inquiry, I think it would be most useful, to the relatively clear jurisdictional allocation in dispute here.

QUESTION: But if the Indian gets a better break, all I have to do is say I've got a drop of Indian blood, then I get that.

MR. STONE: Well, that's a complicated question, Mr. Justice Marshall. You may conceivably, and I don't think there is any reason to get into this in this case. You may have to not only prove that you have a drop of Indian blood, but more than that, and you might have to prove that you have got the right kind of drop of blood and you're a member of this particular tribe that resides on this reservation. But I think that those questions are much at the periphery of this particular inquiry which is quite important to focus precisely what it is. As I say, this concept of Indian sovereignty is limited to some extent within certain broad boundaries by Congress' power to redefine and narrow the scope of Indian tribal sovereignty through the passage of legislation.

Nonetheless, the Court has consistently recognized for hundreds of years that tribal sovereignty springs from

independent roots, that it retains a life in force of its own, and that its residual effects can only be eliminated through very specific Congressional action. And it was on this basis that the Court decided in Ex parte Crow Dog at 109 U.S. that the Federal court had no jurisdiction absent a specific statute over the murder of an Indian by another Indian on a reservation because Congress had never withdrawn the exclusive jurisdiction over such an offense from the sovereign tribe. And then again as recently as 1970 in the Kennerly case the Court very strictly construed a Federal statute authorizing the tribes to cede their civil jurisdiction over matters arising on the reservation, and, in short, the Court has repeatedly emphasized that those aspects of tribal sovereignty which Congress has not very explicitly withdrawn are still in full force.

On the other hand, and this is where the particular difficulty in this case arises, since 1924 all Indians, including those residing on reservations subject to the jurisdiction of the tribal government and tribal court, have been considered United States citizens who enjoy the same privileges in life conferred by that status which other United States citizens enjoy. The inherent conflict between these two elements of Indian status is obvious enough to the extent that the tribal Indian remains subject to the governmental authority of the sovereign tribal group to which he belongs, he inevitably finds that merely because he is a tribal Indian, he enjoys certain

privileges and incurs certain legal obligations which are not shared by other American citizens.

One example of this we have alluded to already in this argument which seems to be crucially relevant to an understanding of the particular discrepancy with respect to which petitioner complains here is that the tribal Indian who commits a crime against another Indian on the reservation is punishable exclusively in the tribal court unless the crime is one of those with respect to which Congress has specifically delegated jurisdiction to the Federal or the State court, for example, as in the Major Crimes Act. Though Congress has repeatedly found, as I shall discuss shortly, that the preservation of the tribal court system is of great benefit to reservation Indians, subjection to the tribal court's jurisdiction appears to have elements in some cases of both comparative advantage and comparative at least theoretical disadvantage to the tribal Indian. Aside, for example, from the comfort which he may derive from being judged by his tribal brothers in a proceeding that is meaningful and familiar to him and to his culture, the commentators appear agreed that he is likely to receive a considerably smaller penalty if he is convicted in a tribal court. In this case, for example, the penalty which the tribal court imposed for the actions leading to the charge at issue here was 15 days incarceration essentially for public intoxication and a fine of $20.

On the other hand, the tribal court does not offer the panoply of procedural rights and protection which a non-Indian citizen would enjoy if he were being tried for the same offense in a State or Federal court. Indeed, prior to 1968, Congress imposed virtually no requirement whatsoever on the tribal courts and with minor exceptions, the Federal courts held that because of the continued concept of tribal sovereignty this discrepancy did not offend the Constitution.

In 1968, as the Court knows, Congress passed the Indian Bill of Rights which imposed on the tribal court at least a skeletal version the outlines of which have not yet been adjudicated of the right enumerated in the first Ten Amendments to the Constitution. But that was presumably not by constitution mandate but part of Congress' decision to slowly integrate the Indian tribal system into the concept of justice. inherent in the rest of the country. Indeed, the Indian Bill of Rights, we would suggest, is representative of a pattern that has been very wisely followed in the reconciliation of the conflicting elements of Indian status. A few Federal courts of appeals in years immediately prior to the passage of that Act had indicated some impatience at the slow movement of tribal courts in the direction of affording traditional constitutional protection of the criminal defendants and it has been suggested in at least one case that a proceeding in a tribal court might be reviewable in the Federal courts on the ground

that the tribal court was obligated to provide at least some constitutional procedures. It's a rather awkward doctrine for a court to be applying because it applies piecemeal with no ascertainable standard constitutional protections rather than applying them across the board. But it was recognized even in that case that Congress is the appropriate body and is in a less awkward and more appropriate position to determine the details of the plan by which tribal justice can be integrated into the American constitutional system in a manner that preserves to the extent Congress deems desirable both the sovereign rights of the tribal government and the rights owed to Indians as citizens of the United States.

So Congress has repeatedly responded in all areas related to this case not with a mechanical across-the-board application of constitutional requirements on the tribal court system, but with a set of requirements which the Congress considers viable in terms of preserving the basic nature of those courts.

Now, this case presents this Court with another closely related aspect of the problem of reconciling the status of Indians as citizens and their status as members of a separate sovereignty.

QUESTION: Before you get into that, Mr. Stone, I'm having trouble, some problem with the record trying to reconcile the charge with the statutes. The statement of the

case recites at page 3 that the petitioner was found guilty of assault with intent to inflict great bodily harm under 18 U.S. Code 1153.

Now, I turn to your brief, page 2, and 1153 describes the crime as assault resulting in serious bodily injury. So the thrust of the one is intent and the thrust of the other is consequence.

MR. STONE: Yes. This is certainly a problem, Mr. Justice Burger, Mr. Chief Justice. I don't have a full answer to it. It hasn't been raised before. And it has been accepted in this case and in other cases that this particular -- these two offenses are sufficiently related so that the Major Crimes Act confers jurisdiction under South Dakota law to try for assault with intent to commit the crime. I have two answers in litigation of the very obvious objection that there may be an element required in the Major Crimes Act which is not required under South Dakota law, to wit: the element of actual serious bodily damage. And that would be the objection.

First of all, it is not at all fair that the offense in South Dakota of assault with intent to inflict great bodily harm is prosecuted in practice unless there is in fact great bodily harm, and the other answer is to that in this case it is entirely undisputed in the record and I do not believe petitioner would dispute that the actual incident here resulted in great bodily harm. I doubt that the Federal Government

would have prosecuted had it not resulted in great bodily harm. And I simply leave the theoretical possibility of a case in which there was no great bodily harm but perhaps a proof that there was intent unsuccessfully carried out to cause great bodily harm as an open question.

QUESTION: We do have a hiatus here between the statutory base, the allegation of the indictment. You, of course, concede that, don't you?

MR. STONE: I am sorry, I don't understand, Mr. Chief Justice.

QUESTION: The discrepancy here, the statutory authority deals with assault resulting in great bodily harm.

MR. STONE: Right.

QUESTION: Serious bodily harm, and the indictment was assault with intent.

MR. STONE: That's right, because that is how the State statute is defined. But as I say, it is not at all clear that the State statute is ever applicable except where in fact the harm resulted. Indeed, it is interesting, it may work just the other way, because there may well be great bodily harm which would satisfy the wording of 18 U.S.C. 1153 without the requisite intent and simply intent to cause assault at all might agruably be sufficient to carry forward even if no bodily harm were intended, but great bodily harm resulted.

But in the context of this case, I don't think the

issue is raised, not only because it hasn't been raised below, but because there was to everybody's total agreement not only great bodily harm, but death, as a result of the series of incidents that occurred.

QUESTION: Death resulted, I understand, from over-exposure. He lay out on the ground all night.

MR. STONE: Well, that's disputed in the record. But at least it is undisputed that the victim walked out in pretty terrible shape, Mr. Justice Douglas.

QUESTION: Dead the next morning.

MR. STONE: And died the next morning. There is some doubt whether he died of the injuries or overexposure. There was testimony in the record that he probably died of over-exposure, but there was other testimony that he had been very, very severely battered. There was blood splattered all over the room in which he had been -- and I think no question that the event of great bodily harm came. And I think this question that the Chief Justice quite aptly raised really ought to be -- (a) I don't think it would arise because I doubt seriously there would be a prosecution absent bodily harm, but if so, I think that problem should await to a case in which the objection is properly raised and no great bodily harm is present.

QUESTION: He was tried for assaulting with intent. That's what he was charged with, that's what he was tried for.

MR. STONE: That's right. Which adds, incidentally, an element that was not necessarily present in the Federal crime.

QUESTION: Oh, really?

MR. STONE: The intent to cause great bodily harm is not necessarily present in the Federal list in 18 U.S.C. 1153, only the actual causing. Now, clearly some type of intent is necessary, intent to commit a battery at all. But it isn't clear that 18 U.S.C. 1153 would ever require that there be intent of actual great harm.

QUESTION: You mean you would have to show only assault and a resulting bodily harm.

MR. STONE: That's right. Yes, assault which would include some sort of intent to commit the assault, but not a specific intent resulting in great bodily harm.

QUESTION: I suppose an example of that would be if someone simply slapped the face of another person and that resulted in displacing or detaching a retina which is grave, you would have that situation, wouldn't you?

MR. STONE: You could. You could have that situation.

QUESTION: I don't think we need to worry about that.

MR. STONE: It's not present in this case.

QUESTION: (Inaudible) .. grant, don't you think? Particularly because it's a limited grant of certiorari?

MR. STONE: Well, yes. Of course, that raises a

problem, Mr. Justice Rehnquist, because the grant is worded in terms of a constitutional question, and I suppose we can't argue that some preliminary threshold statutory question cannot be considered here that the Court need decide the constitutional question absent some satisfactory determination of the threshold questions that would set that up, for which reason we have not objected, for example, to the statutory argument that the lesser included offense charge is constructively provided in 18 U.S.C. 1153 which petitioner raises.

QUESTION: Mr. Stone, let's assume that what he was indicted and tried for was something clearly not within the reach of the Federal statute.

MR. STONE: Then he clearly would not properly have been tried in the Federal court at all.

QUESTION: Don't you think we have to decide whether this crime is within the range of the Federal statute?

MR. STONE: I think you do have to --

QUESTION: How can we put it aside and leave it for some other case?

MR. STONE: I think you only have to leave it for some other case where in fact the element of great bodily harm is not present, Mr. Justice White.

I understand what the Court's difficulty is inherently, but I think it's a speculative difficulty. There is no evidence that the Government would ever attempt or that South

Dakota law would permit a --

QUESTION: What did the instructions say? Was this a jury trial?

MR. STONE: Yes, it was a jury trial.

QUESTION: What did the instructions say, Mr. Stone?

MR. STONE: The instructions deal with the element of intent and do not specifically require a finding --

QUESTION: So how do you know, the jury may --

MR. STONE: But that is because the sole defense raised at the trial was with respect to the issue of intent and it was admitted throughout the trial that great bodily harm had occurred. It was never in question. So therefore it wasn't raised.

QUESTION: But the Government had only to prove, really, to bring itself within the statute an assault and resulting bodily harm, and that in fact you shouldered the burden of proving intent to inflict, and therefore he got a better break than he is entitled to under the statute.

MR. STONE: We won't necessarily say he got a better break, but that he was put to no advantage because the Government proved with no possible --

QUESTION: The only thing is, one element of the crime was never submitted to the jury.

MR. STONE: Well, I have no further answer to that, Mr. Justice White, except for the fact that it would be -- I

think a reading of this record and attention to both petitioner's charge to himself, requested charge himself, and to the evidence presented would reveal no conceivable question about that. And I recognize the difficulty of assuming a directed verdict type of assumption in the criminal context. I think that the presence of great bodily harm is as conclusively present and undisputed in the context of this case as it could possibly be.

QUESTION: I thought that your footnote 2 on page 4 dealt with this question.

MR. STONE: Well, it deals with it by citation, Mr. Justice Stewart, of the Nardello case which implies that when in a criminal context generally the Federal government incorporates the State definition of a crime that it really only incorporates the substantive definition and not necessarily the labels.

QUESTION: Right.

MR. STONE: I have some question as to how far we can take that in this case to the extent that there really is an underlying substantive definitional problem recited as I recall as a "C" cite, and it is suggestive of a notion that I think is hard to bring too far, except that in the context of this case the element is so clearly present that we really are, I think, only talking about --

QUESTION: You cite Nardello and Sharpnack --

MR. STONE: That's right.

QUESTION: -- and this question would involve construing the meaning of the last full paragraph of 18 U.S.C. 1153. But I thought this issue isn't here because, as you point out, there is no question about the fact of great bodily harm.

MR. STONE: I think that's right. But I have some at least slight reluctance to answer too glibly to Mr. Justice White's suggestion that the element, there's no question about it, but then it wasn't submitted to the jury. And I recognize that it is difficult to --

QUESTION: Was it explained to the jury that he wasn't charged with beating him to death, or even causing him serious injury?

MR. STONE: I don't think he charges -- he doesn't specifically say he was not charged with causing serious injury. He says he is not charged with intent to kill.

QUESTION: You are questioning there is no contention by the Government the beating in question resulted in the death of the victim? In fact, there is no medical testimony to the effect that death was the result of exposure. But then he is not charged with beating, only with intent to beat, to beat with intent to inflict great bodily harm.

MR. STONE: Well, I would submit with all deference that I have no further response to that question except that I think the difficulty which is raised here might be a

difficulty in another case, but is not a difficulty in this case and ought not to deter this Court from reaching the merits of the underlying issue that is presented.

As I say, this case presents the Court with an isolated aspect of the problem of reconciling the status of Indians as citizens and as members of a separate sovereignty. The problem arises because Congress has determined that a tribal Indian who commits certain major crimes against another Indian on a reservation is tried in the same manner subject to the same penalties as a non-Indian committing the identical offense, and yet on the other hand, Congress has determined with respect to all other crimes not listed in the Major Crimes Act a tribal Indian remains subject exclusively to the jurisdiction of the tribal court, even though admittedly his non-Indian fellow citizen who commits the identical offense in the same place goes to a very different procedure and is subject to a very different law applicable in Federal court. I take it the petitioner would not deny the accuracy of this description. He has already confirmed it. And he does not appear to question the constitutionality of the overall jurisdictional scheme even though it creates a significant procedural and substantive discrepancy between tribal Indians and other persons. Indeed, the overall scheme has been confirmed many times by this Court to lend credence to an answer that mere categorization of an Indian in a Federal

statute is unconstitutional. Rather, he attacks one very specific aspect of this discrepancy which results inevitably from the Congressional allocation of jurisdiction between the Federal and tribal courts in this area. Simply stated, if an Indian is on trial in Federal court for one of the offenses enumerated in the Major Crimes Act, neither he nor the Government is entitled to ask the Court for a lesser-included offense charge even if otherwise appropriate unless the lesser-included offense happens to be one of the other offenses specifically enumerated in the Major Crimes Act because the Federal court has no jurisdiction to try and punish an Indian for commissions of any offense not specifically enumerated in the Act. With respect to a non-Indian in the same situation, of course, it may be appropriate and probably would have been appropriate here to instruct the jury if it finds him innocent of the major offense charge, it may still find him guilty of a lesser-included offense.

Now, there are essentially two arguments raised. One, petitioner argues that alternatively the Major Crimes Act itself allows the lesser-included offense charge. I think with my time running short, I shall leave that statutory argument essentially to the brief in which we answer it fully. Basically, it seems to me it's somewhat unusual for the Government to be in the position of arguing a strict construction in non-presence of a Federal crime against a criminal defendant

who argues that something is a Federal crime, but we have, I think, tried our best to bind ourselves by the very strict rule of statutory construction applicable in criminal context generally that crimes ought not to be construed and that a Federal crime should not be read by implication into a very specifically worded statute.

I think that presumption applies with double force in this context where Congress has specifically and repeatedly said that jurisdiction of the tribal sovereignty can only be eliminated by very specific Congressional mandate, and indeed Congress has tip-toed step by step by step in amending the Major Crimes Act to include offenses on a very carefully considered basis, and it would be highly contrary to the history of that Act and its amendments to conclude that any crime is created by mere implication. So with the Court's permission --

QUESTION: But all of this --

MR. STONE: -- I would focus on the constitutional problem.

QUESTION: All of this tip-toeing had nothing to do with Indians at all.

MR. STONE: Mr. Justice Marshall, I am sorry. I don't understand that.

QUESTION: You said they tip-toed in this assimilative statute.

MR. STONE: No, no, not in the assimilative statute, in the Major Crime Act they went step by step with respect to which offenses at each point would be considered serious enough so --

QUESTION: Then I ask the question: Were the Indians considered under the Assimilative Crime Statute?

MR. STONE: I'm sorry, I don't understand the question.

QUESTION: Was this type of case considered, when you had the Assimilative Crimes Statute which allows the States to move, right, was the Indian question brought up in Congress during that consideration of those statutes? The Assimilative Crimes Statutes.

MR. STONE: Well, I assume that those statutes were enacted with regard to the question of what jurisdiction should be left in what places, and to the extent that they involved Indians, they involved consideration of what crimes should be left to the Indian courts, and the essential conclusion was, as reflected in the statutory scheme, that what should be left to the tribal courts are crimes between Indians by and against Indians committed on reservations with the exception of certain major crimes with respect to which Congress felt --

QUESTION: That's what I am talking about, the major --

MR. STONE: That's right. -- with respect to which Congress felt that the crimes were so major that the interest in severe enough punishment -- the assurance of severe punishment of those major crimes was sufficient to withdraw jurisdiction or to withdraw exclusive jurisdiction from the tribal courts for any of those offenses. But with respect to all other crimes, it is quite clear from the history of the Act that Congress very much intended that, for the same reasons they have always left these to the tribal courts, they would be left at this point to the tribal courts.

Therefore, in suggesting that this issue should be considered in the context of the entire statutory scheme by which Congress has attempted to reconcile the conflicting elements of tribal Indian status, a scheme which quite explicitly results in some situations in disparate legal treatment of persons merely on the ground that they are not Indians, we think that the rationale is that of the entire scheme essentially governing the tribal court system and the allocation of jurisdiction. This is one minor example of it, but the entire scheme is preservation of the sovereignty of tribal courts, at least with respect to offenses not enumerated in the Major Crimes Act between and against, by and against Indians committed on reservations. And Congress has included in its passage of the Indian Civil Rights Act of 1968, the Indian Bill of Rights of 1968, Congress has studied carefully

this question and has concluded that the preservation of the tribal court system is essentially of great benefit to Indians, that field studies and commentators have shown that many Indians feel they get a more fair and more equitable treatment. Even though they don't get the full panoply of Federal procedures and constitutional safeguards, they feel that the penalties are more lenient, that the justice is more in harmony with their cultural concept of justice. It is essentially based on a notion of restitution rather than on retribution, and --

QUESTION: This argument, Mr. Stone, really that you can't ever get equal protection through due process, violation --

MR. STONE: No, Mr. Justice Brennan, I don't think we have to go nearly that far, and I think it all --

QUESTION: How far will you go, then?

MR. STONE: Well, in this case I would go, I think, not very far at all because I think the discrepancy between which we deal with here, which is that a lesser-included offense charge is available to a non-Indian defendant in this case but not to an Indian defendant, is a very minor price to pay for upholding the very major rationale that Congress has consistently reinforced preserving tribal sovereignty for a number of reasons. (a) It is in any context very speculative from the defendant's point of view whether a lesser-included offense charge is beneficial to him. Theoretically it's only of benefit if the jury doesn't follow its instructions.

And it may be perfectly proper for the jury to administer mercy in some sorts of situations, particularly where the evidence is marginal which we don't think it was in this case. The evidence was overwhelming that the requisite intent and the requisite amount of damage occurred. But it is in any event a rather speculative benefit from the defendant's point of view anyway. The lesser-included offense charge arose because the prosecutor might be barred by double jeopardy from bringing lesser-included, entirely included offenses in successive prosecutions. And it was to enable him to put the lesser-included offense before the jury so that there would be some sort of conviction if the jury acquitted of major offense.

Now, we don't argue that it's not available and that in some cases it would be reversible error to deny it to a criminal litigant. But the question is in a constitutional context of an equal protection argument, we must ask how important is it. And I think it is a very speculative interest, particularly in this context where, as Judge Kaufman suggested? in the Second Circuit in a related case involving a split between adult and juvenile jurisdiction where a lesser-included offense charge was not available to a juvenile who could be convicted of murder in an adult court but of manslaughter only in a juvenile proceeding. Judge Kaufman suggested something that would have been perfectly applicable here that wasn't asked for, and that could be the functional equivalent of a

lesser-included offense charge, and that is a charge to the effect that even if you, the jury, in this Federal proceeding acquit this Indian of the charge which is brought against him here, he is not necessarily going to go free from the occurrences in this transaction. He can be tried -- there is another tribunal which can try him for any lesser-included offense or other --

QUESTION: Aspects of any kinds of Body? problems and Bartkus problems and everything else, doesn't it?

MR. STONE: Oh, as to whether he can be tried in the -- I think it doesn't, Mr. Justice Brennan. Body and Bartkus, I think, would apply here. In fact, the Body and Bartkus hold separate sovereignty. And we would argue that they are.

QUESTION: They are at least to that extent sovereign, are they?

MR. STONE: That's right.

QUESTION: I've forgotten, don't we have that issue in some case?

MR. STONE: Excuse me?

QUESTION: Don't we have that issue in some case?

MR. STONE: It's been presented on certiorari and certiorari has been denied. And in the case that it was presented, it was not necessarily an issue. It was an alternative issue.

Let me say that even that does not have to be fully

decided in the context of this case because regardless of what the Court would hold --

QUESTION: These are CFR, these aren't sovereign Indians either, are they?

MR. STONE: That --

QUESTION: Does that compensate for Body?

MR. STONE: I don't think so, Mr. Justice Brennan. Those distinctions have not been thought applicable to CFR, and other aspects of Federal participation or assistance to Indian justice have not been thought to remove the underlying sovereign right with which Indian justice is administered.

Let me make a --

QUESTION: How do you get around the individual constitutional right asserted by individual in this Court. By answering it for the greatest good for the greatest number, we forget it.

MR. STONE: I answer it as I would in any context, Mr. Justice Marshall, that discrimination is only unconstitutional insofar as it is invidious and irrational. It is not invidious if it is based on a rational basis.

QUESTION: Is it based on anything other than the fact that this man, the petitioner in this case, is it based on anything other than the fact that he is an Indian, spelled I-n-d-i-a-n?

MR. STONE: Absolutely not, Mr. Justice Marshall.

Neither is the entire Federal regulatory scheme governing Indians.

QUESTION: We are only talking about this one case.

MR. STONE: I don't think you can do that, Mr. Justice Marshall, with all respect.

QUESTION: We can't talk about the one case?

MR. STONE: I don't think you can isolate one case and say here it is speculative that he may have suffered some sort of harm as a result of this classification. I think you have to ask is the classification rational. This is the situation, I think, in every case where the equal protection argument is raised.

I would like to get back for one second to Mr. Justice Brennan's question and say why I don't think the issue of double jeopardy, where this Court has to necessarily decide that for all purposes Indian and Federal jurisdiction are separate sovereignties, though indeed we believe they are. Because in the context of this case, that question is really only important to the issue whether it is true that if acquitted on the major charge in this case, this defendant could be then retried on a lesser-included charge in the tribal court. And I would argue that even if they are not separate sovereignties for all purposes, with respect to that question the answer would be that double jeopardy is inapplicable because that particular branch of the double jeopardy clause

as opposed, say, from the collateral estoppel problem or from the problem of double punishment or two convictions for the same offense, is based on the assumption that a prosecutor ought not to be allowed to go down the line in piecemeal harrassing fashion. And it is designed to prevent him from abusing his discretion to go down the line and continue to try to punish for each successive crime. And that's inapplicable here because he has no jurisdiction to go down the line.

QUESTION: If one believes the same transaction rather than the same offense test, he might reach a different conclusion.

MR. STONE: Conceivably, Mr. Justice.

QUESTION: ... same transaction test as you know.

MR. STONE: That would be -- in that case I must rely on the argument of separate sovereignty.

In conclusion, I would simply reiterate that this case must be viewed, I think, as one isolated and not terribly significant aspect of discrepancies which inevitably arise from this very, very complex effort to accommodate the conflicting and different elements of Indian status that the result of declaring this particular discrepancy unconstitutional would be very short-sighted and unwise from this Court's point of view. At the very least, it would force upon Congress discords of judgment that a rationale which has been

repeatedly upheld by the Federal courts and repeatedly considered, studied, and re-endorsed by Congress to preserve the sovereignty of Indian tribal courts where Congress deems it applicable is insufficient to offset a discrepancy with respect to what is really a very speculative disadvantage that an Indian may, a particular Indian in a particular case, may with hindsight think he has suffered. And I would recommend that the Court affirm this decision.

MR. CHIEF JUSTICE BURGER: Mr. Meierhenry. If you need a little more time than your remaining 2 minutes, we will extend your time here.

REBUTTAL ORAL ARGUMENT OF MARK V. MEIERHENRY

ON BEHALF OF THE PETITIONER

MR. MEIERHENRY: It is unfortunate that the petitioner has taken the case this far and the United States Government has still not gotten all of its forces together and decided between what's going on in Washington and what's going on in South Dakota. There is no such thing as a tribal Indian. If a man of Indian descent is born and raised in Washington, D. C., at age 28 goes on a vacation to the Black Hills, passes through the reservation, commits one of the 13 major crimes, he will not be given a lesser-included offense instruction. Well, one of the 12 major crimes because if he steals something and it's larseny, he will. Now, that's a rational classification according to the Government. The

Government says, "Don't anyone step in here because this has all been thought out."

Yet, the particular crime I have got up here, Congress forgot to even amend 3242 which they did the other 12 times. I submit that Congress has gone at this since 1885 in a happenstance manner. They have never once, as this Court knows, had this issue brought to them. They have added crimes one at a time, but they have never considered this as a whole.

Now, another thing that the Government brings up is let's be strict about this. The facts, and I will say that I did not raise the issue about the discrepancy of the statutory language in the Major Crimes Act and what he was charged with in the indictment. I did raise that, and at this point I don't think I could possibly do so. But I will tell you why the Government uses that statute.

South Dakota has a statute in the assault section about four after this one that is almost exactly like the Federal one. It is called assault by beating, wounding, and kicking. The reason they don't use it is because it has got a 6-months penalty and they want five years, and that's why they don't use it.

QUESTION: (Inaudible)

MR. MEIERHENRY: Your Honor, this is the first trial I ever had and I didn't see it.

QUESTION: Because he may have been tried for a crime that they had no authority to try him for.

MR. MEIERHENRY: That could be, your Honor. If he says this is just a passing thing, I've had nine cases like this in two and a half years, and it is very well raised in all the rest, including a number of the issues that they say are speculative gainsay and everything else that they talk about in the last part of their brief, which I am not saying applies. This man is an American citizen. He has been since 1924. The Federal Government is trying him for a crime. He should be tried as any other man. If Rule 31(c) says that a man should get a lesser-included offense instruction, this Court seems to say he does, then this Indian should as well.

QUESTION: What would have been the penalty on the lesser-included offense?

MR. MEIERHENRY: Well, there are a number of them. Attempted manslaughter in Federal law, six months. Assault by wounding and kicking, I think 118(d).

QUESTION: That's six months.

MR. MEIERHENRY: There are a number of them, your Honor, that can be brought in under the assault.

QUESTION: If the instruction you ask was to be instructed on a crime that really was the only crime that should have been tried under the Major Crimes Act, you really are making the same argument on a lesser-included offense as

you would have been if you said dismiss the indictment, it doesn't charge the right crime.

MR. MEIERHENRY: Yes, your Honor.

I would also point out that I have argued that, that the cases that the Government has cited since then by District Courts in our District have used those, additionally the fact that I could ask a separate sovereign, that I could ask for an instruction to the jury that would say in effect, "If you don't convict him, he can go back to tribal court." The District judges in our District of South Dakota have said that's no different than a prosecutor arguing to the jury, "Convict this man and I'll recommend that he get parole." Both judges consider that to be improper argument. I as an attorney think that it's improper argument. It's no different than me arguing to the jury in State court saying, "All right, in South Dakota, acquit him here because he faces more serious charges in Nebraska." I don't think that's proper.

QUESTION: Who was the trial judge here, Chief Judge Nichol?

MR. MEIERHENRY: Yes, Chief Judge Nichol from Sioux Falls, South Dakota, your Honor.

And on this matter his view was strictly jurisdictional. In our circuit, I don't know if it's proper to express this, but I am sure -- and the Government, as a matter of fact, in their brief says, "Don't give us this power because we may

abuse it." But the petitioner and defense lawyers in our State wish very much that they have because this gives us more latitude. We feel now that many cases you have to take to trial. You plead a man of a felony that you don't feel he is convicted of -- and by the way the grand jury, of course, is the buffer. In the facts in this case, the man was originally charged with manslaughter. Because I didn't know what to do, I demanded a preliminary hearing and got one surprisingly. He was bound over on manslaughter. Later they took it to the grand jury. The grand jury returned assault with intent and so forth, to do great bodily injury. So there is a buffer there. There is no danger, in my opinion, if the grand jury system works and a defense lawyer doesn't know what goes on there, that there be that thing of a prosecutor doubling up, charging a greater crime, hoping to get a conviction on the minor. Because most misdemeanors are, you know, a six-months variety, and the tribal court has that jurisdiction, or CFR does in this case.

Your Honor, we would ask, the petitioner requests that the writ of certiorari be issued and this case be heard.

MR. CHIEF JUSTICE BURGER: Mr. Meierhenry, you were not appointed by the Court in the conventional way here, but representing your legal services in South Dakota you volunteered.

MR. MEIERHENRY: Yes.

MR. CHIEF JUSTICE BURGER: And on behalf of the Court,

I want to thank you for your assistance to the Court and, of course, your assistance to your client.

MR. MEIERHENRY: Your Honor, I also thank you for letting me appear since I don't qualify as a member of the Supreme Court Bar.

MR. CHIEF JUSTICE BURGER: When the three years are up, you can commence the appropriate proceedings.

MR. MEIERHENRY: Thank you.

MR. CHIEF JUSTICE BURGER: The case is submitted, gentlemen.

[Whereupon, at 2:28 o'clock p.m., the argument in the above-entitled case was submitted.]