

In the

Supreme Court of the United States

United States Of America, et al.,)
)
Appellants,)
)
v.)
)
County Of Fresno, California)
and)
County Of Tuolumne, California)
)
Appellees.)

No. 75-1262

Washington, D. C.
November 8, 1976
November 9, 1976

Pages 1 thru 51

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UNITED STATES OF AMERICA, et al., :
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Appellants, :
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v. : No. 75-1262
:
COUNTY OF FRESNO, CALIFORNIA :
and :
COUNTY OF TUOLUMNE, CALIFORNIA, :
:
Appellees. :
:
----- :

Washington, D. C.,

Monday, November 8, 1976.

The above-entitled matter came on for argument at
2:30 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

HOWARD E. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Appellants.

JAMES B. WATERMAN, ESQ., Deputy County Counsel, 4499 East Kings Canyon Road, Fresno, California 93702; on behalf of the Appellee, County of Fresno.

STEPHEN DIETRICH, JR., ESQ., County Counsel, County of Tuolumne, Courthouse, 41 West Yaney Avenue, Sonora, California 95370; on behalf of the Appellee County of Tuolumne.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1262, United States against County of Fresno and County of Tuolumne.

Mr. Shapiro, I think you may proceed when you are ready.

ORAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,

ON BEHALF OF THE APPELLANTS

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

These cases are here on direct appeal by the United States and individual Forest Service employees from two decisions of the California Court of Appeals for the Fifth District.

The sole question is whether a California tax on possessor interests in improvements on tax-exempt land may constitutionally be applied to the occupancy of government-owned housing by employees of the United States Forest Service.

The amounts involved in these tax assessments are relatively small. The principle could be quite far-reaching, in view of the extensive amount of housing which is supplied by the United States to employees, not only of the Forest Service but also of various branches of the Department of Interior and, most importantly, of the military.

QUESTION: Let me put this to you, at the outset,

Mr. Shapiro. Suppose California -- and perhaps it does, but I am not aware of it -- had a provision in an income tax, State income tax law or regulation that provided that whenever an employed person receives housing as part of his or her work, the reasonable value of that housing would be added to the net taxable income of the person for California income tax purposes; would that be a different situation constitutionally from what we have here?

MR. SHAPIRO: Yes, it would, Your Honor. In these cases, the housing is not supplied free of charge. The employee occupies the housing, although as a tenant at will, he pays compensation for it which is deducted from his salary. Now, he doesn't pay in advance for the housing, he pays for the housing he has occupied each two-week period. So that he is -- this is not, in any sense, compensation to the employee.

QUESTION: But, Mr. Shapiro, could Congress declare this interest immune from taxation? Could Congress do it, do you think?

MR. SHAPIRO: We believe that Congress could. It has not done so, because the tax, as we view it, falls directly on an incident of the employment of a federal employee, and is, hence, a tax on the federal function itself. The Constitution, therefore, bars the imposition of a tax under the doctrine of McCulloch v. Maryland.

QUESTION: Well, do you think the Constitution bars

it to the extent that Congress could not permit California to tax it?

MR. SHAPIRO: I believe Congress can waive the immunity of McCulloch v. Maryland. And I think it has in some instances done so.

For example, in -- with respect to national banks, there is some limited taxation of national banks. On the other hand, that statute which permits national bank taxation is quite limited, as this Court held in the First Agricultural credit a few terms back.

QUESTION: So it's not the same kind of prohibition as one would find in the -- under the First Amendment, for example?

MR. SHAPIRO: No. It is within the reach of Congress.

But Congress has given us some indication that it does not intend generally to waive the immunity of instrumentalities of the United States.

In a somewhat analogous area, the Buck Act of 1942 subjects -- or rather provides that certain State sales and use taxes may be imposed in exclusive federal enclaves, and the exclusivity of those federal enclaves is not a bar to the imposition of that kind of a tax. However, the same statute, in Section 107, says: This statute does not consent to the imposition of tax on the -- of taxes, State taxes, on instru-

mentalities of the United States, or the property of the United States.

And it's really that which is our position here, that here we are dealing with a tax on a federal function.

QUESTION: What is the tax? Who is the tax levied on?

MR. SHAPIRO: The tax, Your Honor, is levied on the possessory interest that Forest Service employees have in government-supplied housing, for which they pay --

QUESTION: So long as they are employees.

MR. SHAPIRO: On the government employees.

QUESTION: And it's only for the part of the property that they use as personal property?

MR. SHAPIRO: That's the claim, yes, Your Honor.

QUESTION: Well, isn't it true?

MR. SHAPIRO: Well, that is what the States have contended.

Now, our answer to that -- that is what the Counties have contended. Our answer to that is that the possessory interest of the employee on the residential side cannot be, in fact, separated from the governmental use of this property. And this is reflected, we think, in the findings of the trial court which reviewed the assessments involved.

The two trial courts here, in Fresno County and in Tuolumne County, found that because of the interrelationship

between the residential and governmental aspects of the employee's use and occupancy of this property, they had no possessory interest within the meaning of California law.

Now, the fact that they made this -- the Court of Appeals in this case reversed that, as a matter of California law. But, of course, we're dealing with the impact on a federal interest of a State tax. And so the question of what that impact is is not determined by the State court's decision. This is a question of federal law that has to be resolved.

QUESTION: Well, still it --

QUESTION: Well, we certainly take historical fact resolutions from the highest court of the State, don't we? Even in that situation.

MR. SHAPIRO: Yes. This is not really a very historical determination. The real basis for the imposition of this tax was a California Court decision in 1967, called McCaslin v. DeKamp.

QUESTION: Well, I don't mean historical in the sense of time immemorial, but just determinations strictly of facts as opposed to law.

MR. SHAPIRO: Yes. Well, the basic facts are not disputed here. The conclusion from the facts, which the Court of Appeals drew, is; namely, whether this possessory interest for purposes of determining the impact on -- of the tax on federal function is distinct from --

QUESTION: Mr. Shapiro, let me try again. What is the government's interest in this?

MR. SHAPIRO: The government's interest here is in preventing the imposition of a tax on an incident of federal employment.

QUESTION: On its employees.

MR. SHAPIRO: Well, when I say on its --

QUESTION: The government doesn't pay a nickel of this; right?

MR. SHAPIRO: No, Your Honor, but that has not been the test in this Court's decisions if, in fact, --

QUESTION: That's all, I just wanted to know if you were changing the rules.

MR. SHAPIRO: No, no. I think we're staying within them, Your Honor. The --

QUESTION: Well, I don't understand, that if they had a house with four rooms in it, and one of them was used as an office and the other three were used as a living room, a bathroom and a bedroom, why they couldn't tax the three rooms and not tax the fourth room?

MR. SHAPIRO: Well, the County of Fresno purported to do that. Now, they purported, in making their valuation here, to exclude from the valuation, from the assessment, the office function -- I'll use that term -- and the public area surrounding the house.

The County of Tuolumne did not make that kind of distinction, they did not exclude the office and public areas, they simply limited the assessment on the basis of the term of occupancy.

But, I was about to tell Your Honor that the fact that the United States does not pay this tax out of its pocket is not the test, because this Court's decisions have clearly indicated --

QUESTION: How do you put that in my last question? My question was: If the three rooms were used solely for personal reasons, why that couldn't be taxed as personal reasons?

MR. SHAPIRO: Well, as I shall demonstrate when I go into the facts, Your Honor, --

QUESTION: That's what I'm waiting for.

MR. SHAPIRO: -- the occupancy of the house is really not conveniently divisible into office and --

QUESTION: Why? Because of the 24-hour call?

MR. SHAPIRO: It's partly the 24-hour call. It's partly the --

QUESTION: Aren't you on 24-hour call?

MR. SHAPIRO: I don't live in government housing, Your Honor.

QUESTION: Yes, but aren't you on 24-hour call?

MR. SHAPIRO: Well, in the --

QUESTION: And you still pay taxes on your home, don't you?

MR. SHAPIRO: Yes. Well, the distinction --

QUESTION: And you don't complain, do you?

MR. SHAPIRO: Not in this Court, Your Honor.

[Laughter.]

QUESTION: I just wanted to see how far you would go.

[Laughter.]

MR. SHAPIRO: I think I can illuminate my argument a little better by going into what facts the two trial courts found, and these basic facts have not been challenged.

The courts really found that the employees do not occupy the housing as private citizens, or use it for their own profit. They occupy it as employees of the United States, and their right to occupy this housing is to serve the needs of the Forest Service.

The trial courts found that they did not have --

QUESTION: Do they have a choice whether or not to live in the housing?

MR. SHAPIRO: Some employees do and some do not. Certain employees, who are required to look after special equipment, who are on fire control duty, or who serve the public during certain seasons, must live in the government-supplied housing. They are required to occupy it.

QUESTION: So there is a distinction between those employees and those who could have a choice to live elsewhere?

MR. SHAPIRO: No. There's a reason-- there is a permissive category. However, the Forest Service requires that all of its housing be occupied in order to have people on the forest grounds, so that it will assign employees to that housing. Now, employees of certain categories can refuse, but someone is going to be assigned to occupy that housing. So that --

QUESTION: And all the employees pay something for the housing, don't they?

MR. SHAPIRO: All pay. All are required to pay.

QUESTION: Even those who are sent there and have no choice to -- have no option to refuse?

MR. SHAPIRO: That's right. That is correct. They all pay for the right to use the housing.

QUESTION: Well, let me understand this, Mr. Shapiro. At least as to the forest Service people, every occupant, whether he was one that had a choice to live somewhere else or not, every occupant in effect is required to live where he is?

MR. SHAPIRO: In effect he is required to live there, and that brings us to the burdens of occupancy, which are common to all the employees who live in the houses, whether the houses are required occupancy in the technical sense or permissive occupancy. In a sense, they are all required to

live in them.

QUESTION: Mr. Shapiro, may I ask a question about the computation of the tax? As I understand it, the rental actually paid may be less than the real rental value of the premises. In sum.

MR. SHAPIRO: Well, the formula for determining the rental actually paid is supposed to be on a comparable basis, comparable to the nearest established community. And this is reduced by two factors: One, --

QUESTION: Excuse me, let me -- I don't mean -- I'm not so much interested in how you compute the rental as how you compute the tax.

MR. SHAPIRO: Right.

QUESTION: As I understand it, the tax is computed by capitalizing the economic rental value of the premises, basically; is that right?

MR. SHAPIRO: That's how the --

QUESTION: And if that is correct, am I also correct in believing that the tax would have been the same whether the rent was less, the same as, or greater than the fair market value?

MR. SHAPIRO: That is correct, Your Honor. That is correct.

I should point out that the County of Fresno made an express effort to reduce the -- I did point it out, I think --

to reduce the tax for this office function; the County of Tuolumne did not.

Going into the nature of this occupancy, the first point is that the employees have no fixed right of occupancy or any lease or term of possession. Their possession can be terminated temporarily or permanently at any time the needs of the Service require this. Their right of privacy is sharply diminished. Forest Service personnel on Forest Service business can enter the houses at any time. In fact, there is a common key system. The District Ranger, for example, can walk into a house to inspect it. The District Fire Control Officer can walk into it if it has a radio that is intended to be on 24-hour monitor service.

The result is that the employee has neither a full right of privacy, as someone in private housing would have; his housing is solely for government purposes. The occupancy has no right to a fixed term.

QUESTION: In the City of Muskegon case, the person just had a permit rather than a lease, didn't they, and this Court said it was still taxable?

MR. SHAPIRO: Yes. Muskegon, I think, illustrates the distinction we're making here. In Muskegon, someone had a right -- a private party had a right to use government property in the conduct of a commercial business.

And in the Muskegon case, the Court expressly

reserved the question of what would happen if you were dealing with a servant or agent of the government.

Now, where the legal incident falls on a servant or agent of the government, the legal incidence of the tax falls on the servant or agent, the Court has held that the tax is unconstitutional. That's illustrated in Kern-Limerick v. Scurlock.

QUESTION: You're not saying that as a general proposition, are you? So broadly as to sweep in State income taxes under it.

MR. SHAPIRO: Oh, no, no.

QUESTION: Just in this context?

MR. SHAPIRO: In this context. When I say that the legal incidence falls on a federal function, I'm talking about the -- I mean a federal function, not on a federal -- someone who is a federal employee, for example. The Courts have long passed the taxability of federal income.

QUESTION: Mr. Shapiro, identify that federal function, and indicate in what respect it is impaired or hindered by this tax.

MR. SHAPIRO: All right. The federal function, Your Honor, here is the federal function for which occupancy of the housing is made available, the guardianship of the national forests --

QUESTION: Right.

MR. SHAPIRO: -- and the service to the public within the national forests.

QUESTION: And in what way is that handicapped or interfered with by the tax?

MR. SHAPIRO: Well, the tax can only have a relatively remote effect on the -- in this case -- on the carrying out of that function. We have argued below that it affected employee morale, that it could lead to resistance to assignments because of the imposition of the tax, since one would have to accept this less convenient housing.

QUESTION: Is there any evidence or finding of interference with the operation of the process there?

MR. SHAPIRO: No, there is not, Your Honor.

And our major contention -- there is not such evidence or finding.

Our major contention does not turn on that. Our real argument on that aspect of the case is that if the tax, the legal incidence of the tax is in fact on the federal function, then the Court does not inquire as to whether there is any additional burden or interference.

For example, --

QUESTION: And the federal function is sleeping and eating?

MR. SHAPIRO: Part of it indeed is, Your Honor, in order to keep these people on those premises for the period of

time that's necessary.

QUESTION: And if they lived in a private home, they would pay all of these taxes?

MR. SHAPIRO: Yes, Your Honor. And they would have the greater right of privacy, which is attendant on the occupation of a private home.

QUESTION: And, Mr. Shapiro, if they were not living on government-owned land but were renting an equivalent apartment on private-owned land, at exactly the same rent, they would not pay the tax, would they?

MR. SHAPIRO: If they were renting --

QUESTION: Paying the same rent for the same facilities, but the property were located outside the Forest Preserve, then the man would not pay any tax at all, would he?

MR. SHAPIRO: The renter would not, as this tax is drawn. I think there would, of course, be a property tax on the landowner.

QUESTION: But not on the man -- not on the occupant, not --

MR. SHAPIRO: Not on the occupant, no.

QUESTION: --on the tenant.

MR. SHAPIRO: On the rented property, that is correct.

QUESTION: And your tenant pays a tax that no other tenant pays who does not live on federal property; is that right?

MR. SHAPIRO: That is my understanding.

Now, we haven't claimed here that there is a discrimination.

QUESTION: But the district court did, didn't it?

MR. SHAPIRO: The district court found a discrimination. We have found that -- the discrimination we claimed arose from a discrimination between the treatment of State Foresters and Federal Foresters, and we found that that discrimination didn't exist, so we withdrew our discrimination claim in this respect.

Our brief expressly withdraws that claim.

QUESTION: Now, maybe I misunderstand the tax; but if I understand it correctly, if the forester lived off of government-owned property and had exactly the same premises, paid exactly the same rent, he would not pay this tax. The theory being that the landlord pays it.

And here the landlord doesn't pay it, because the landlord is the United States Government.

MR. SHAPIRO: I believe that is how the tax is drawn.

Now, before I plunge into that --

QUESTION: So that the federal employee, with the same earnings, pays a tax that a non-federal employee does not pay, at least if he lives elsewhere.

MR. SHAPIRO: Of course, what we focused on in this case was the imposition of the tax, as it's drawn, a tax on a

possessory interest in tax-exempt land. And that was the only -- that is the only kind of tax we've been dealing with. It's not comparative to a tax on occupancy of non-tax-exempt land.

QUESTION: Mr. Shapiro, you said the tax was on the employees in the question that I asked you.

MR. SHAPIRO: Well, it's on the possessory interest of the employee in the housing he occupies.

QUESTION: But it's on his interest in real estate, in a possessory interest in a piece of real estate that's on government property.

MR. SHAPIRO: His possessory interest in the improvement; that is correct.

QUESTION: And it wouldn't apply to another piece of land?

MR. SHAPIRO: Well, that -- the tax lies on the possessory interest of the employee's occupation of the tax-exempt land. That is all we addressed our challenge to.

QUESTION: Is any question raised here as to the computation of the amount of tax or the possessory interest?

MR. SHAPIRO: No, the valuation is not in issue here, Your Honor.

QUESTION: And I take it you are not asking that any case, or all of the Michigan trilogy be overruled?

MR. SHAPIRO: No, Your Honor, we distinguish --

QUESTION: You're just content to live with those?

MR. SHAPIRO: We distinguish the Michigan trilogy on the ground that in those cases we were dealing with the use by private parties in commercial businesses of government property, either that had been leased to them or given to them under a permit.

In this case we are dealing with the imposition of a tax on a government employee for his possession and occupancy of government housing for a government purpose. In short, we view that as a tax on a servant of the government for an incident of his employment. We compare the case to Kern-Limerick v. Scurlock, where a contractor, using government property, acquiring government property, was treated as an agent, because those were the terms of his contract. He was acting as an agent of the government. The legal incidence of the tax fell on him, and, as a result, this Court held, in Kern-Limerick v. Scurlock, that the tax could not be sustained.

Even though the economic burden in that case of the tax was the same as an earlier case, Alabama v. King and Boozer, in which a contractor was similarly using government property but was not an agent of the United States. And that's why our point here has been that -- our central point is that the employee's occupation of the government-owned housing here is factually inseparable from their duties as employees of the United States.

QUESTION: So then, I gather it is that they are
servants of the United States, and the tax upon them is a tax
upon the United States?

MR. SHAPIRO: That is correct. And --

QUESTION: Is that your central point?

MR. SHAPIRO: That is our central point.

QUESTION: When is the tax imposed?

MR. SHAPIRO: This tax -- well, it was first imposed
in 1967.

QUESTION: Oh, is it imposed in advance?

MR. SHAPIRO: In advance of --?

QUESTION: Well, is it imposed at the end of the year
or during the year?

MR. SHAPIRO: Well, this tax was imposed during the
year. I think it is an annual tax, and it is intended to be
imposed annually.

QUESTION: So a person with a day-to-day occupancy
pays the tax for the entire year?

MR. SHAPIRO: The occupancy -- the tax is reduced by
his actual occupancy is my understanding. It's measured by
his actual occupancy.

QUESTION: That's why the tax is such a small
amount for each person, isn't it?

MR. SHAPIRO: Well, in computing it -- in fact, our
findings of fact here show that these houses tend to be

occupied three to four years at a time, and this was taken into account in the valuation process by the Counties.

QUESTION: But if some person is transferred in the middle of the year, will two different people be taxed for the use of this property?

MR. SHAPIRO: I assume that would be how it would be applied. Now, we've been litigating the tax since it was -- it's a relatively new innovation. This is the first case -- it was imposed in 1967, this is a 1967 tax we're litigating.

QUESTION: Mr. Shapiro, surely -- I perhaps misunderstood your answer to my brother Brennan's question; but a tax on servants of the United States is not a tax on the United States, is it? There are all sorts of taxes imposed upon government employees.

MR. SHAPIRO: Oh, yes. I only meant servants or employees being tax for an incident of their employment, not their compensation or not any other aspect of their lives, except so much of the tax as falls on their government functions. If, as we contend here, the occupancy of the housing is inseparable from the government duties of the employees, and we think it is, then there is just no basis for trying to distinguish them constitutionally; and, therefore, it's a tax on the employees as an incident of their federal employment. That cannot be done.

If, for example, the County -- and they haven't

attempted to do this -- imposed a possessory interest tax on government employees working in government offices, saying well, five percent of the time you're doing personal business on government time; we'll tax you for that five percent.

We would argue that that's just inextricable from their government functions, and, hence, is a tax on the government employee for an incident of his government employment.

QUESTION: You make a de minimis argument, which is what California makes here, that so little of the use of these buildings is public and governmental use, and so much of it is residential use, that they are entitled to tax you.

MR. SHAPIRO: Well, now this goes to something that the Court of Appeals attempted to do here. The Court of Appeals rejected the findings of the trial court -- or the conclusion of the trial court, because they said that while government business was sometimes conducted from the unit that that business was completely incidental to the main use of the property. So it made the test of taxability turn on whether the government or the residential interest was dominant.

Now, we submit that this is not a proper standard for determining the constitutionality of State taxation of federal interests. It leads to a great deal of confusion, because you have to try and measure which is the -- which is dominant, when the employee is in a house 24 hours.

QUESTION: But he did live there, he had a kitchen and a bathroom and a bedroom among the other rooms that my brother Marshall described, --

MR. SHAPIRO: Yes, there is --

QUESTION: -- his residence and that of his wife, because there was a preference given to married employees -- isn't that correct?

MR. SHAPIRO: Yes, there is a residential interest, without doubt. And we don't deny that.

Our argument is that that residential interest exists solely for the purposes of the government. And he is in the house to serve a government purpose, and --

QUESTION: But he pays rent.

MR. SHAPIRO: He pays rent to use the house, the --

QUESTION: It's not like putting him up in a watch tower or something like that.

MR. SHAPIRO: No, the watch tower would be a work place, and the County doesn't purport to tax the work places.

QUESTION: Right.

MR. SHAPIRO: But this also is a work place, as the findings of the trial court -- in fact, the findings of the Court of Appeals, which agreed with that aspect of it, reflect.

QUESTION: I suppose your answer would be the same to this hypothetical: The government sometimes, but decreasingly so, allows employees who use automobiles to take the automobile

home at night so they can be on call, and if the State of California tried to tax that use from, let us say, six o'clock onward, you'd say they were taxing a federal instrumentality?

MR. SHAPIRO: Yes, because I would assume that the availability of the automobile in the evening would be -- would have to be justified by some --

QUESTION: For the government's purpose.

MR. SHAPIRO: -- government purpose.

So, really, the heart of our contention is that the residential and the governmental functions of occupancy of this housing are just inextricably interrelated.

QUESTION: Well, Mr. Shapiro, you could lose this case without depriving Congress of a power to prevent this tax if it wanted to, couldn't you?

MR. SHAPIRO: Oh, Congress, I think, can always speak directly to the questions in McCulloch either way, they can waive the McCulloch immunity, or they could probably broaden it. There have been indications in the courts' decisions that it may be broadened.

QUESTION: You think that -- if we decided against you, did you think that Congress the next day could say, Well, States may no longer tax this possessory interest of the employees?

MR. SHAPIRO: Yes, they would. But to use this as a standard of constitutional adjudication would mean the States

would have -- that Congress would have to stay one step ahead of the State tax laws in every one of the jurisdictions, keeping any eye out to see what new interest, new federal interest is subject to tax.

Now, Congress instead has done it the other way, as the Buck Act indicates. They have said, Well, we'll start with McCulloch v. Maryland, which bars State taxation of federal instrumentalities and federal functions, and then we'll decide when we want to waive it. That's been the approach, and that's what the Buck Act, I think, strongly reflects. In fact, that was the basis of the Court's decision in the Mississippi liquor case two terms ago.

QUESTION: Do you think this case would govern the taxation of military personnel living on government bases?

MR. SHAPIRO: We believe that it could. I hesitate to go into that, because our record doesn't develop the facts --

QUESTION: I see.

MR. SHAPIRO: -- but the reason we're here, in large part, is because of our concern that this kind of possessory interest tax will be extended to the military, which is the biggest body of government-supplied housing.

MR. CHIEF JUSTICE BURGER: Mr. Shapiro, I think you may be covering up your five-minute signal there.

MR. SHAPIRO: Yes, sir. I'd like to reserve the remainder of my time, then.

MR. CHIEF JUSTICE BURGER: Mr. Waterman.

ORAL ARGUMENT OF JAMES B. WATERMAN, ESQ.,

ON BEHALF OF APPELLEE, COUNTY OF FRESNO

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

My name is James B. Waterman, Deputy County Counsel for the County of Fresno, California, one of the appellees in this matter.

I would like to take a few minutes to answer some of the questions that were asked of Mr. Shapiro. I guess I'm a little more familiar with the taxing situation in California.

There was a question as to whether or not an employee who resided in a private home or who rented a private home outside of the forest would pay tax; and the answer to that is he would pay tax, but not directly. He pays -- any time a person owns private property and leases it, they try to recover, of course, all their cost. The tax is assessed to the owner of the real property. And, as part of that income, that tax that the lessor would pay would be included in the rental amount. And I think that's the answer to that.

QUESTION: So your real problem is to get some tax on that government property?

MR. WATERMAN: Yes, sir, because it is -- the government property itself is exempt, there's no question --

QUESTION: You just want to tax the United States

Government property?

MR. WATERMAN: No, sir.

QUESTION: I thought you said yes, when I --

MR. WATERMAN: No. If I said that, I misstated it.

QUESTION: Isn't that what you're after?

MR. WATERMAN: No, sir; we want to equalize the obligations of people.

QUESTION: Well, if the federal government had paid taxes on this property, you wouldn't bother the tenant, would you?

MR. WATERMAN: As a matter of fact, the federal government --

QUESTION: Isn't that right?

MR. WATERMAN: Yes, sir.

The federal government, in effect -- this wasn't brought out, but there was a finding that, and there is a regulation that the federal government, where they do not have governmental housing sufficient to staff their people in the national forests, they do have the option to go outside the rent private housing at the prevailing rates, and thereby put their employee into that house.

The employee does not thereupon pay the same rate, he pays the rate that's determined by the rental survey and all the things that Mr. Shapiro mentioned concerning accessibility and amenities and this sort of thing. But --

QUESTION: But, Mr. Waterman, --

MR. WATERMAN: Yes, sir?

QUESTION: -- if -- take your example of one just off the reservation and one on the reservation, they both pay \$100 a month rent, or so. You say the man who is living in a privately owned home, in effect, is paying tax because he reimburses the landlord for his tax?

MR. WATERMAN: Yes, sir.

QUESTION: Well, why isn't the same true as to the man on the reservation?

MR. WATERMAN: Because taxation of possessory interest in California --

QUESTION: Because the government is immune from taxation.

MR. WATERMAN: That's correct. Because the government does not pay taxes --

QUESTION: But both tenants have exactly the same economic burden.

MR. WATERMAN: Right.

And if this tax is upheld, the government employee will pay his fair share of tax, whereby he does not necessarily now.

QUESTION: So he will pay like \$105 and the man who lives on private property will pay \$100?

MR. WATERMAN: That's correct, but it's built into

the rate --

QUESTION: Simply because he lives on government property?

MR. WATERMAN: That's correct. That's a fact.

Now, I would like to address the McCulloch vs. Maryland argument.

In California, possession of tax-exempt property for your own personal beneficial use is a form of property and is so defined by the California statutes.

McCulloch vs. Maryland prohibited only a State tax against an operation or a function or an activity of the federal government.

MR. CHIEF JUSTICE BURGER: We will resume there the first thing in the morning, at ten o'clock.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Tuesday, November 9, 1976.]