

IN THE SUPREME COURT OF THE UNITED STATES

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 UNITED STATES OF AMERICA, et al., :

Appellants, :

v. :

No. 75-1262

COUNTY OF FRESNO, CALIFORNIA :

and :

COUNTY OF TUOLUMNE, CALIFORNIA, :

Appellees. :
 ----- :

Washington, D. C.,

Tuesday, November 9, 1976.

The above-entitled matter was resumed for argument
 at 10:07 o'clock, a.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:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in United States against County of Fresno.

Mr. Waterman.

ORAL ARGUMENT OF JAMES B. WATERMAN, ESQ.,

ON BEHALF OF APPELLEE, COUNTY OF FRESNO -- Resumed

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

I wish to deal this morning with Title 16 of the United States Code, Section 480, in which Congress did express its intention that there should be a dual jurisdiction in the national forests between the federal government in so far as crimes against the United States are concerned, which were left to the United States, and reserving to the State wherein the national forest is located its jurisdiction, and it did not deprive the inhabitants thereof of their rights and privileges as citizens or be absolved from their duties as citizens of the State.

Now, our contention is that one of those duties is the payment of the local ad valorem real property tax. And, as has been expressed, since we're talking about property that is in the public domain and tax-exempt, the only means by which such a tax can be paid is through the possessory interest tax.

In other words, the tax on the beneficial use and occupation of tax-exempt property. And that is --

QUESTION: Do the States levy a sales tax on transactions within a national park, like Yellowstone Park?

MR. WATERMAN: I believe -- I think it's Johnson vs. Yosemite, where that specifically was excluded. You're correct, Mr. Chief Justice.

However, we do -- the State of California does levy a sales tax on retail sales in the national forest areas. So that has not been precluded.

However, we're mainly talking about an increment of local property tax, which benefits those inhabitants, and I'm speaking specifically now to the increment that goes to the local school district tax. That is based, in California, primarily on the local real property tax.

Now, there was some testimony, or statement yesterday that some of these people have resided in these government homes in the national forests for two or three years. There is evidence in this record that in one case an employee had been in the same single-family residence for fifteen years. Now, during that period -- and of course this would be prior to 1968, when we started imposing this tax -- in effect he would have paid no increment whatsoever to the local school tax.

If he had a six-year-old child when he moved into that home, that child would have gone through the local school district to the elementary schools, the high school, and

two years of the community college, if that were the case, being a hypothetical situation.

QUESTION: Could the State not charge him tuition as a non-resident?

MR. WATERMAN: No, sir.

QUESTION: They couldn't?

MR. WATERMAN: In a public --

QUESTION: What would prevent that?

MR. WATERMAN: The public school system of California provides for no direct payment for non-residents.

QUESTION: Oh, I say could the State -- does it have legal power to say to someone living in a federal enclave?

MR. WATERMAN: I would think not, Your Honor. I think -- obviously they are citizens of the United States, they are citizens of the State, I think that they could not. I think it would be a denial of equal protection if they tried to impose that type of thing.

Now, it's different at a higher level of education, of course, universities do charge an out-of-State --

QUESTION: I take it you're not attempting to tax where the United States reserves exclusive jurisdiction?

MR. WATERMAN: No, sir. That is -- it is not allowed in California by regulation, where --

QUESTION: Well, while I have interrupted you, does California attempt to apply this tax to anyone else besides

United States Government employees? What about -- are there other kinds of classes of people in this same position, like ministers or --

MR. WATERMAN: Well, we do not -- to my knowledge, we don't apply it to ministers, even though they may be residing in a manse on tax-exempt property. However, for every tax-exempt special district, such as irrigation districts, Corps of Engineers -- I might just give the Court a couple of instances as to how this case is going to affect other possessory interests.

QUESTION: Well, what about other instances where property is tax-exempt, besides that which is owned by the federal government?

MR. WATERMAN: Right. County property -- let me give you that for instance, if I may. We charge a possessory interest tax to our road supervisors in the County of Fresno who reside in county-owned residence, for --

QUESTION: Do they pay a rent?

MR. WATERMAN: Yes, sir. They pay rent and the possessory interest tax. Where there are State forests --

QUESTION: And income tax, too?

MR. WATERMAN: Well, we don't have a county, they pay a State income tax.

QUESTION: I mean a State income tax.

MR. WATERMAN: Yes, sir. That's correct.

Where there are State forests, -- we do not have any in Fresno County -- but they also, and this was one of the original contentions in this case, was that there was discrimination because we didn't, the State didn't charge its own employees a possessory interest tax. That is not true. It is charged. They pay it on the same basis that we have been asking the federal employees to pay it. So it is non-discriminatory from that standpoint.

QUESTION: Does your answer to Justice White's question about exclusive jurisdiction answer the government's suggestion that next time you will be here trying to tax people in post housing on military bases?

MR. WATERMAN: I believe it does, Justice Rehnquist. After all, the California regulations -- we would have to change our regulations, and I think, if we did that, to meet Congress's expressed intention to be the exclusive taxing -- if there is to be any tax, in an exclusive military enclave.

Now, I just don't foresee the State of California ever trying to tax any military in that situation.

QUESTION: Counsel, how does the constitutional issue become any different simply because California has not elected to try to impose the tax on exclusive federal property? If your theory is right, you'd have the power to do so, I would think.

MR. WATERMAN: No, I think the -- the question was

asked yesterday whether Congress would have the power to exempt this type of property. But we --

QUESTION: No. I mean, assuming Congress has not done anything one way or the other. Would your theory not permit you to tax the occupancy of barracks on a military reservation?

MR. WATERMAN: Not under the existing definition of possessory interest, Your Honor, and I --

QUESTION: Not under your existing regulation, but --

MR. WATERMAN: No.

QUESTION: -- but constitutionally you could amend the regulations and do so, if you're right; couldn't you?

MR. WATERMAN: We would have to amend our definition of possessory interest also, Your Honor.

QUESTION: But is there any reason, any constitutional reason, if you're correct, why you could not do so?

MR. WATERMAN: Well, I'm sure we could. I'm sure we would be right back in court if we did, though, Your Honor.

I think, as far as the case law, and we have, of course, cited the Michigan cases as authority for this, the imposition of this tax. We believe that Graves vs. New York, which allowed the State income taxation of federal employees to be the closest. And I could read the language from -- there has been a claim here that somehow this tax burdens the federal government.

One, we do not admit that these employees in their private housing which is furnished by the government, for which they pay a rent, we do not believe that they are an instrumentality of the federal government for that purpose, and therefore the tax is permissible.

However, the government, who is also a party plaintiff in this matter, alleged that there was a burden against the United States by reason of the imposition and collection of this tax.

There was absolutely no evidence in the trial of these matters of any burden whatsoever. The government does not get a tax bill. The government is not assessed. The tax bill goes to the individual employee. And, aside from 1967, to my -- it's my understanding that these tax bills have been paid to the county without protest since that time. I could be in error on that.

QUESTION: But, if it were not for these federal enclaves, the bill would go to the federal government, wouldn't it?

MR. WATERMAN: No, I don't think we have any right to bill the federal government for taxes on --

QUESTION: I say, if it were not for the federal enclave point, the billing would go to the owner of the building; right? The landlord.

MR. WATERMAN: No, Your Honor, we are taxing the

person in possession in this situation on tax-exempt property.

QUESTION: But if the building was outside of the enclave, and was owned by Mr. U.S., --

MR. WATERMAN: Yes, sir.

QUESTION: -- Mr. U.S. would pay the taxes.

MR. WATERMAN: We would not assess that property if it was owned by the United States.

QUESTION: I said Mr. U.S., I didn't say the United States.

MR. WATERMAN: Oh, I'm sorry, I thought you were referring to the United States, --

QUESTION: That's right.

MR. WATERMAN: -- as an individual.

QUESTION: But if it was owned by the United States, then you would tax the tenant.

MR. WATERMAN: That's correct, sir.

QUESTION: But you really are shooting for the landlord.

MR. WATERMAN: That's -- yes, we don't divide the imposition of the tax in California, other than in the tax-exempt properties situation. The real property itself is security for the real property tax in California, and there is not a separate assessment to a private lessee from a private lessor.

This is correct.

I started to mention that we do have other federal land within the County of Fresno, which -- in which we are imposing this possessory interest tax. We do have a rather substantial veterans hospital there, which has private residences -- well, there are single-family residences for several doctors and the administrator. They are very nice, high-valued homes.

If -- we are concerned that if this Court does not uphold the District Court of Appeals, they will feel that they no longer have to pay a possessory interest tax; and I think that would be the effect of such a decision.

The Corps of Engineers also has a facility in Fresno County, at Pine Flat, where they built a rather nice dam. They maintain maintenance people there in private, like private homes but on the federal property. We charge --

QUESTION: Does Fresno County raise a considerable sum from this possessory tax?

MR. WATERMAN: Dollarwise, no, Your Honor, it does not. I cannot give you an absolute figure, but it is not a substantial amount of money, I would have to admit that. However, the --

QUESTION: Approximately how much?

MR. WATERMAN: At the time, in 1968, I think the total amount at issue here is \$178 for 17 individual plaintiff owners, or residences, yes.

QUESTION: An aggregate of \$178?

MR. WATERMAN: That's correct. But that was based upon a one-year tenancy at that time, and we are now, because of the experience that we've had, we are now imposing a longer period to capitalize the income. So it is more. But I can't give you an exact figure. Sorry.

QUESTION: How about the possessory interest tax generally? Well, it just applies to this kind of housing, doesn't it? Otherwise it's a tax imposed on the landlord; correct?

MR. WATERMAN: That's correct, Your Honor.

I do have some figures as to 1976 values in the forest land. Now, we tax other, you know, private business enterprises who lease from the federal government. That tax yield in dollars in 1975 was \$89,622.

We have a tax rate of \$7.35 per \$100 of assessed valuation in the Sierra National Forest. Those are the figures that I'm giving you now.

Now, all of those, obviously, are not -- as a matter of fact, a very small percentage of that tax yield would be from federal housing. We have a lot of family cabins that are located on 99-year leases, and there is where the bulk of that valuation would come from.

QUESTION: The issue is the same, the constitutional issue is the same with respect to your taxing commercial

enterprises who lease from the federal government, as it is here?

MR. WATERMAN: No, I think it's different. I think -- and I think this is the contention that the United States is making, that all the precedent up till now, except for the Graves case, has been where a private contractor, a corporation has been using government property for its own beneficial use and enjoyment. I don't think there's any real question there.

QUESTION: But you do put your possessory interest tax on those enterprises?

MR. WATERMAN: Yes, sir, we do.

QUESTION: Does that raise a good deal of money for the county?

MR. WATERMAN: I believe -- well, commercially, for land and improvement -- these are commercial excises now, it's \$36,395 as of last year.

QUESTION: But you think you could lose this case and still maintain your right to tax on the commercial enterprises?

MR. WATERMAN: Yes, sir, we do.

Thank you.

QUESTION: Mr. Waterman, could I ask --

MR. WATERMAN: Yes, sir.

QUESTION: --just two very brief questions. Is this

tax unique to California, this possessory interest tax?

MR. WATERMAN: No, I understand that -- I think Michigan had a similar type of tax. It's probably not -- I think they called it a use tax of a sort there.

I'm not aware of any other States that have it, Your Honor.

QUESTION: The other question I had, does the imposition of the tax depend on the character of the possessory interest? In other words, if it had not been a lease arrangement but, rather, had been some kind of a license just to, like you go into a hotel room or something like that; would that be enough to impose the tax?

MR. WATERMAN: It has to be an exclusive possession under our definition.

QUESTION: I see.

MR. WATERMAN: And this is what the Court found it was here.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Waterman.

MR. WATERMAN: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Mr. Dietrich.

haven't sold their souls, as it were, to the United States.

I can't make a distinction between the 12 Forest Service personnel we have here and the many, many more Forest Service personnel who work in the Stanislaus National Forest in our County, who reside off federal premises. They either purchase homes, and many do, or they rent property.

When they purchase a home they must pay a property tax as a homeowner; when they rent they are indirectly paying property tax unless they have a landlord who doesn't want to recoup his payment of taxes.

And if these particular individuals living in the Forest Service housing are allowed not to pay a tax or if you rule the tax is unconstitutional, they are really getting a better deal than their counterparts living out on the economy, as it were.

QUESTION: Mr. Dietrich, --

MR. DIETRICH: Yes, sir?

QUESTION: -- which services other than the public schools are provided these residents by the county?

MR. DIETRICH: They use our county roads, they use our county mental health services -- if they wish; I'm not saying they all do -- the schools, and all the other services that the County provides, the County Hospital. If they should qualify, they may take part in our welfare system.

QUESTION: Do they have any fire protection or police

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QUESTION: Do they have any fire protection or police

protection from the county?

MR. DIETRICH: Yes. The Sheriff's Department provides it in the unincorporated area in our County, and the County is -- in our County at least, anyway, we're just starting to get into a countywide fire protection program.

QUESTION: Does the County Sheriff have any jurisdiction within the forest?

MR. DIETRICH: Yes.

QUESTION: How many people in the Ranger Service are on welfare?

MR. DIETRICH: I haven't the slightest idea, Your Honor.

QUESTION: Well, why did you say so?

MR. DIETRICH: Well, they would be -- they may qualify. The rules are always changing. I don't think any of them do yet, but it's -- the rules change so fast, my Welfare Director can't keep up with them. Perhaps a particular factual situation might allow them to qualify. I don't think there are any on it now.

QUESTION: Well, would you mind if that doesn't persuade me, anyway?

MR. DIETRICH: That's -- yes, Your Honor.

QUESTION: All right.

QUESTION: Mr. Dietrich, I didn't quite follow you. Just before we started questioning, you said that those who

live on the enclave would get a better deal than those who lived off. I thought it would be just the reverse. Because if they both paid the fair rental value of the property, the one on the -- the Forester would also pay the tax; the other one would not.

MR. DIETRICH: But they both would end up paying the tax, and I think it was testimony in our case or the County of Fresno that the federal government really doesn't take into consideration taxes -- that's right, I recall that -- take into consideration taxes in their formula. So actually the Federal Government, I suppose, is turning a profit.

It might, dollarwise, balance out in your case, I think.

QUESTION: I see.

MR. DIETRICH: But the end result is they wouldn't support our services.

The way we look at it is these people are making a private beneficial use of this property. They are living there as a home. They are not \$100,000 houses, but the testimony in the case was that people living in the homes found them quite adequate for themselves and for their families, and they didn't think they were getting that bad of a deal.

We believe that these people should help pay for all those services, excluding welfare, that they may be using just like I use and just like all the rest of the Forest

Service personnel in the Stanislaus National Forest use.

QUESTION: Do you agree with the proposition that what you are really doing is, since you can't collect the money from the owner, the landlord, you collect it from the tenant.

MR. DIETRICH: That's what, in effect, we are doing, yes. We could not collect it from the United States.

QUESTION: And so you are collecting it from the tenant?

MR. DIETRICH: No, it comes from the individual.

QUESTION: From the tenant.

MR. DIETRICH: From the tenant, right.

QUESTION: And it's really aimed at the landlord.

MR. DIETRICH: No, it's for the individual --

QUESTION: Well, what is the other one?

MR. DIETRICH: Pardon me?

QUESTION: What is your regular ad valorem tax?

MR. DIETRICH: It's on the property itself.

QUESTION: Is that aimed at the tenant?

MR. DIETRICH: Well, if the landlord lives there, it's aimed at him; it's the owner of the property.

QUESTION: That's right. But you want -- you really want to collect the ad valorem tax on government property.

MR. DIETRICH: Because of their private beneficial use of the property.

QUESTION: That's right. But you want it on the

ad valorem property owned by the federal government.

MR. DIETRICH: Right.

QUESTION: Mr. Dietrich, you identified the services that these people get. Are there other taxes that the County imposes that these people pay?

MR. DIETRICH: Yes. We have quite a bag of ways to gather taxes: sales tax, property tax or possessory interest tax, hotel-motel tax. We get an awful lot of subvention funds from both the federal government and from the State of California.

QUESTION: Gasoline tax.

MR. DIETRICH: Gasoline tax.

QUESTION: Cigarette tax.

MR. DIETRICH: Cigarette tax.

QUESTION: Liquor tax. You name it.

MR. DIETRICH: If it moves, we try to tax it.

[Laughter.]

MR. DIETRICH: I have nothing further.

QUESTION: Now, for a person who is renting property, just the ordinary property outside the Forest, Federal Forest area, you don't worry about putting a use tax on him, because you have collected real estate tax on the house.

MR. DIETRICH: That's correct, Your Honor.

QUESTION: So that in that sense, Justice Marshall's suggestion would appear to be that this is a substitute for

that tax.

MR. DIETRICH: That's correct, yes.

QUESTION: Or to put it another way, doing indirectly what you can't do directly.

MR. DIETRICH: We think we can do this.

Thank you, Your Honor.

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

You have about three minutes left, Mr. Shapiro.

REBUTTAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. SHAPIRO: Thank you, Your Honor.

QUESTION: Mr. Shapiro, if you have a minute, if we could get what you think about the exclusive enclave.

MR. SHAPIRO: Yes, Your Honor.

QUESTION: I gather, we've been told that at least Fresno's regulations do not apply this tax to, say, the military living in housing on an exclusive enclave; but he does say that constitutionally he thinks it can be done.

MR. SHAPIRO: Yes, Your Honor.

We are informed by the Department of the Navy that Humboldt County in California is attempting to tax Navy housing. So that the potential for the imposition of this tax on the military exists.

Now, with respect to this specific case, I should point out that 16 U.S.C. 480 provides that State civil and

criminal jurisdiction continues to apply in national forest areas, so that we're not dealing with an exclusive federal enclave when we talk about national forests.

However, 16 U.S.C. 480 is not a waiver of this immunity of the United States, its instrumentalities or its officers in connection with their duties, from the imposition of State taxes.

Now, there's a second major point I'd like to make. The Counties claim they are simply seeking to make up revenues lost because national forests are non-taxable since it's United States property.

16 U.S. Code, Section 500 provides that the counties shall receive 25 percent of the receipts from the national forests located in their jurisdiction to be applied for roads and schools, so Congress has enacted a kind of "in lieu" tax because the national forests are not themselves directly taxable.

Now, there's one other point. Because the tax is on a federal function, in our view, there is no requirement that a burden or interference of any other kind be shown than that the tax has been imposed. This Court has held that national banks are not taxable by States, except to the extent there's been a waiver. Even though there's no burden on the United States.

QUESTION: Of course, if a military base were

involved, you would be arguing that the States have absolutely no jurisdiction inside the borders of the enclave.

MR. SHAPIRO: That would be our contention on any exclusive military enclave.

QUESTION: Yes. That's --

MR. SHAPIRO: Now, there are military bases which are like national forests, in the sense that the federal government hasn't ceded all civil and military -- or has not taken back all civil and military jurisdiction.

In those, again, we would argue that the tax is like a tax on the Post Exchange or Military Officers' Club involved in the Mississippi liquor case. We would say it's still falling on a federal instrumentality or a federal function. And once we establish that, then that's the end of any demonstration, any need to demonstrate burden. There's no great burden on the United States, if military personnel pay a tax on their liquor. But the Court has held that that is nonetheless unconstitutional.

The same is true for national banks or the Red Cross, for example.

Thank you, Your Honors.

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

The case is submitted.

[Whereupon, at 10:30 o'clock, a.m., the case in the above-entitled matter was submitted.]