In the

Supreme Court of the United States

c.4

UNITED STATES OF AMERICA,

PETITIONER,

v.

ANTHONY ROBERT WHEELER,

RESPONDENT.

No. 76-1629

Washington, D. C.
January 11, 1978

Pages 1 thru 50

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UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 76-1629
ANTHONY ROBERT WHEELER, Respondent.	:	

Washington, D. C.,

Wednesday, January 11, 1978.

The above-entitled matter came on for argument at 11:38 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

STEPHEN L. URBANCZYK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner.

THOMAS W. O'TOOLE, ESQ., Federal Public Defender, District of Arizona, 230 North First Avenue, Room 6425, Phoenix, Arizona 85025; on behalf of the Respondent.

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C O N T E N T S

[Afternoon Session - pg. 21]

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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 76-1629, United States against Wheeler.

Mr. Urbanczyk, you may proceed whenever you're ready.

ORAL ARGUMENT OF STEPHEN L. URBANCZYK, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The issue presented is whether double jeopardy clause of the Fifth Amendment bars federal prosecution of an Indian defendant under the Major Crimes Act because of his prior conviction in tribal court of lesser included offenses arising out of the same conduct.

The United States submits that the double jeopardy clause does not bar such a federal prosecution.

The facts of the case are not in dispute.

An incident involving a young Indian woman occurred on a Navajor Indian Reservation on October 16, 1974. Respondent was immediately taken into custody by an Indian policeman, and, two days later, he pleaded guilty in Indian tribal court to two minor offenses proscribed by the Navajo Tribal Code.

The Navajo Tribal Court sentenced the respondent to sixty days in jail or to pay a fine of $150.

Thereafter, a federal grand jury returned an indictment which alleged or which charged that during the event of October 16, 1974, the respondent had in fact assaulted the young Indian woman with an intent to rape her. Now, that indictment was dismissed on grounds that are not relevant here, and a subsequent indictment was entered for contributing -- for carnal knowledge of a female Indian under the age of 16.

Now, that indictment was dismissed by the district court on the ground, quote, "that the defendant has already once been placed in jeopardy for the same offense", close quote.

That is, that the federal offense of carnal knowledge was dismissed because of respondent's prosecution and conviction in the Trial Court of the minor offenses under tribal law.

The Court of Appeals affirmed. The principal component of its decision and the principal issue before the Court today is that the dual sovereignty principle which has applied in the federal-State context, to allow prosecutions by each governmental authority for the same offense, does not apply in the tribal context.

I should point out that there are two other components of the court's reasoning that was essential to the decision in that case: one was that the Navajo offense of contributing to the delinquency of a minor was a lesser included offense of the federal offense of carnal knowledge; and the second is

that the double jeopardy clause inevitably bars the same sovereign from prosecuting the person for a greater offense after a previous conviction for a lesser offense.

Now, we have not challenged the first of those components, we have not raised any question as to the relationship of the specific tribal crime and the federal crime that's at issue in this case.

We have, however, as an alternative submission, suggested that there should be an exception in this case, in the circumstances of this case, to the general rule that would bar the subsequent prosecution. But the main submission of the government today, and the issue that I would like to discuss primarily in my argument, is that the double jeopardy clause is wholly inapplicable in the federal-tribal context, as it is wholly inapplicable in the federal-State context.

The Court of Appeals rested its contrary holding on the proposition that tribes did not have the sovereign status of States. Now, the Court recognized that although Indian Tribes were a separate people that had powers of internal self-government, that the Tribes were not States because the federal government has plenary control over the Tribes.

These same kinds of themes appear in respondent's brief.

Our disagreement with the Court of Appeals analysis is not with the premises but with the conclusion that it reaches.

We agree that Tribes do not have the sovereign status of States. Precisely because the federal government has plenary control over the Tribes, whereas the federal government's control ovar States, although supreme within certain defined limits, is not plenary.

But, we submit, that we disagree with the respondent's and the Court of Appeals' conclusion from that, that it follows the Tribal Courts are merely arms of the federal sovereign and therefore that the dual sovereignty principle cannot apply. That conclusion rests on a gross oversimplification of tribal -- of the status of Tribes in this country. And also on an unjustifiably narrow reading of the dual sovereignty principle.

To state it generally at the outset, it is our position that the Court can apply the dual sovereignty principle in this context, without embracing a concept of tribal sovereignty that gives the Tribes a measure of independence against the fedsral government or that elevates Tribes to the status of States.

The Tribes are not independent from the federal government.

And there's only two sovereigns in this country, in the true sense of that term; that is, the United States and the States.

As I will explain, however, the concept of residual sovereignty is historically and analytically a correct way to

understand powers that -- the retained powers of the Tribes. And on the basis of this concept, together with the undesirable consequences that would follow if the Court of Appeals' holding were affirmed in this case. We contend that the doctoral and policy justifications that underlie the dual sovereignty principle apply in the tribal context, even though the Tribes are not States.

QUESTION: Can you answer me one question: Who pays for the Tribal Court?

MR. URBANCZYK: Who pays for the Tribal Courts?

QUESTION: Yes.

MR. URBANCZYK: The Tribal Courts -- tribal judges are paid by the Tribe. Tribal Courts, the buildings --

QUESTION: Are you sure they're not paid by the federal government?

MR. URBANCZYK: No, they are paid in the -- this is not in the record, but the Navajo Tribal Court, their judges are paid by the Tribe.

Now, I should point out, and this is also not in the record, that the Tribe receives from the BIA appropriations.

QUESTION: Yes, that's what I thought.

MR. URBANCZYK: Which go towards the payment of judicial salaries --

QUESTION: And it's not broken down, so it wouldn't help, anyhow.

MR. URBANCZYK: Well, the point I want to make with that is that there are, as I understand it, no conditions imposed on payment of these appropriations for judges.

When you're dealing with the kind if Tribal Court which we describe in the brief, called C.F.R. courts, the courts of Indian offenses, those are the qualifications and the involvement to the Secretary of the Interior or the Commissioner of Indian Affairs, with regard to the appointment of those judges, and the payment of those judges is set forth in the regulations at 25 C.F.R. 11.3, I think.

But the point is that the Navajo Tribal Court is not a court of Indian offenses.

Now, let me then briefly describe the considerations underlying the dual sovereignty principle, and explain how they apply in this case.

The key cases, of course, are Abbate and Lanza. Those two cases set forth both a doctrinal explanation of the dual sovereignty principle and a policy justification which animates that principle.

Now, the doctrinal explanation for the dual sovereignty principle and unremarkable. It is that the Fifth Amendment, quote, "applies only to proceedings by the federal government", close quote; and that what is prohibited by the double jeopardy clause of the Fifth Amendment is two prosecutions by the federal government for the same offense. That is why, in Lanza

an Abbate, the double jeopardy clause was held not to apply. There was only one prosecution by the federal government; the other one was by the State, whose courts do not derive their authority and their jurisdiction from the federal government.

QUESTION: Mr. Urbanczyk, does -- would it impair your argument in any way if we were to decide in the Suquamish case that was argued earlier this week that the Indian tribal right to prosecute is dependent upon an affirmative grant from Congress?

MR. URBANCZYK: I think that would about finish the principal submission of the government here that the dual sovereignty principle applies precisely because that is not the case, because the tribal power is a retained power which has survived conquest, and which the federal government continues to recognize.

QUESTION: Well, you don't suggest, do you, that you cannot find any statutory authority in any Act or in any treaty that gives a Tribe any criminal jurisdiction?

MR. URBANCZYK: I would suggest that respondents cannot point to any statute, any Act of Congress, --

QUESTION: Let's assume you could. Let's assume you could find either express or implied in some federal statute --

MR. URBANCZYK: Well, if you found --

QUESTION: -- tribal power to prosecute for some kinds of crime?

MR. URBANCZYK: If you found express or impliad an affirmative grant from the federal government of authority, a vesting of the judicial power of the United States in Tribal Courts.

QUESTION: You mean a power which the Tribe didn't possess before?

MR. URBANCZYK: That's --well, that's correct.

QUESTION: Of course I didn't say that, but I just said that if you --

MR. URBANCZYK: No, I suppose that even if you conceived that the Tribes had this power, but you find that the federal government terminated its power, abrogated Tribes, as they may well have done at the time that they subdued them, and then re-established a form of tribal government as a creation of federal law, then I suppose we'd have a tough time with our primary argument here.

QUESTION: And not only -- and expressly in a statute that said it did have certain kinds of criminal jurisdiction?

MR. URBANCZYK: Well, saying that they have certain kinds of criminal jurisdiction may simply be a description of thekind of criminal jurisdiction that the federal government has left to the Tribe to handle on their own, on the basis of their retained power.

QUESTION: But it nevertheless is a federal statute

that says -- that is express or implied and it says the Tribes may do so-and-so but they may not do something else.

MR. URBANCZYK: I think in -- Waller vs. Florida may provide a contrast to the kind of statute which you may have in mind, Mr. Justice White, the kind of statute which I would concede would hurt us here.

The Florida Constitution, as part of the sovereign exercise of sovereignty by the State, established municipalities and vested -- and it was quoted in Waller vs. Florida -- vested the judicial power of the State of Florida in, among other things, municipal courts.

It is our point here that -- and I think this is really consistent with the entire course of judicial decision in this area -- is that Tribal Courts are not creations of the federal government in that sense.

And so I would submit to you that there does not exist a federal statute which creates the Tribal Courts or gives them jurisdiction, although there may well be statutes and treaties which recognize that the Tribes have this power.

Well, the Navajo Tribe has existed for more than 200 years, hasn't it?

MR. URBANCZYK: That is correct.

QUESTION: And 200 years ago it was totally sovereign, was it not?

MR. URBANCZYK: That's correct, it was in every sense

a sovereign nation.

QUESTION: It presumably had some method of dealing with violators of their code.

MR. URBANCZYK: That's correct. Again this is not on the record, but I understand that there is rudimentary institutions of justice, I think they were called family courts, I think crimes of violence were not too well known to the Navajoes until the introduction of alcohol by non-Indians, and I don't think that was much of a problem. So they had informal institutions of justice, that's correct.

QUESTION: That is, as part of their own tribal self-government?

MR. URBANCZYK: That is correct.

QUESTION: This Mr. Wheeler is a member of the Tribe, there's no question of that?

MR. URBANCZYK: No question about that. I should point out there's no question here that we are dealing with a crime committed by an Indian against an Indian in Indian country.

QUESTION: Over which the Tribal Court clearly had jurisdiction.

MR. URBANCZYK: No question. And whatever the Court might decide about the scope of the tribal jurisdiction, I think it's been recognized by this Court and by the federal government consistently that, with the exception of the Major

Crimes Act, federal -- tribal jurisdiction over those offenses is exclusive.

The point I'm trying to make, Mr. Justice White, is --

QUESTION: And we're not involved here with Public Law 280?

MR. URBANCZYK: No. Arizona is not a Public Law 280 State. It may be only in the sense of asserting jurisdiction over some environmental aspects of reservations, but not in a way that affects this case, at all.

It is that respondent simply is incorrect when he says that, quote, "The Navajo Tribe exists and functions only because it was created by the United States as an instrument of congressional policy." The Navajo Tribe exists and functions not by virtue of enabling federal legislation, but because in a treaty the federal government recognized its continued existance, and the fact that it retains certain powers of its original tribal government.

Now, I think that, as I said, that this is established by the course of judicial decisions, and I would think, I guess that the courts, from Kagama to Mazurie, have talked about the powers that the Tribe has as attibutes of sovereignty. I think this point is no better illustrated, for our purposes anyway, than in Talton vs. Mayes, which I would submit to you has perhaps a dispositive impact on this case.

In holding there that the Fifth Amendment did not

apply to the Cherokee tribal proceedings, the Court rested on two propositions: one was that the federal -- first, that tribal powers of self-government are not created by nor do they spring from the federal government; and, second, that the existence of the federal government's plenary authority over the Tribe does not render tribal powers, or does not make them into federal powers.

QUESTION: Mr. Urbanczyk, may I interrupt you for just a second? Under your submission, could the Tribe re-try Wheeler for the same offense under tribal law?

MR. URBANCZYK: It could have before 1968, --

QUESTION: Before 1968.

MR. URBANCZYK: -- Mr. Justice Stevens; that's right. The Fifth Amendment, or the Bill of Rights, the individual liberties given to them, did not act upon tribal courts, because tribal courts were not created by the Constitution. The power to establish tribal courts existed prior to the Constitution, and that is the essential holding of Talton vs. Mayes, a holding which has not been overruled and which has not been, I think, cast into any serious doubt by subsequent legislative or judicial decision.

QUESTION: And Congress could not abolish the tribal court?

MR. URBANCZYK: Oh, Congress could abolish the tribal courts tomorrow.

QUESTION: I thought there was a treaty.

MR. URBANCZYK: I think that it has been established by statute and by convention that Congress can, by statute, abrogate treaties. I'm not certain of that.

QUESTION: Then we're in trouble now. I mean, you can abolish this sovereign school?

MR. URBANCZYK: As I suggested, Mr. Justice Marshall, at the outset, we think that the federal government's authority over Indians is plenary, and that includes abolition.

QUESTION: That's why you used the term "residual sovereignty", is it not?

MR. URBANCZYK: That's correct. That's -- the powers that the Indian tribes exercise today are powers which they have retained because the federal government recognized --

QUESTION: With the permission of Congress.

MR. URBANCZYK: Well, with the permission, perhaps, is the correct way of saying it.

If we are right -- oh, and I should point out that one of the things that respondents suggest as having undermined subsequent legislation, for example, the Indian Civil Rights Act, and I think far from undermining Talton, the Indian Civil Rights Act is based on the premise that Talton is good law. And that without some sort of affirmative congressional enactment, the tribal courts, which are not a creation of the Constitution, are not operated upon by the Constitution. And so

Congress imposed these many -- many of the civil liberties in the first Ten Amendments, upon tribal courts.

Now, if we are right that Talton is valid, I think it establishes that notwithstanding federal authority, plenary federal authority, the proceedings of the Navajo Tribal Court against respondent in this case was not a prosecution under the authority of the federal government. Indeed, if you would not agree with that proposition, I would submit that you would have to overrule Talton vs. Mayes.

And, on the other hand, if you do agree with that proposition, I think it follows under the doctrinal justification for the dual sovereignty principle that the tribal prosecution was not a federal prosecution, and should not be construed as barring federal prosecution that we're talking about in this case today.

Now, that brings me to the policy justifications which animate the dual sovereignty principle, which I think have their most concise statement in Mr. Justice Brennan's opinion for the Court in Abbate.

Without such a principle, without the dual sovereignty principle, the Court said there, there evitably would be a conflict between two independent governmental authorities, each lawfully asserting jurisdiction over thesame subject matter, yet sometimes the assertion of jurisdiction by one thwarting the interest and prosecutorial interest of the other.

The predicted result of such a conflict is that one governmental authority would be made to relinquish its jurisdiction in favor of the other.

Now, in the Federal-State conflict, it was assumed that in such a conflict and the resolution of such a conflict might call for the States to give way. That is, that the Congress could displace State power to prosecute crimes based on Acts which might also violate federal law. But the Court rejected that as a desirable solution to the problem, called it an undesirable consequence, and I think basically that that was the motivating factor for the reaffirmation of the dual sovereignty principle in this concept.

The consequences of not having the dual sovereignty principle, I think, would be a substantial reallocation of the responsibilities for criminal law enforcement between the federal government and the State government.

Now, these same considerations, I submit, apply in much the same way in the tribal context. We have two governments lawfully asserting criminal jurisdiction in Indian country. In the case of a crime against an Indian committed by an Indian, such as we have here, tribal jurisdiction normally is exclusive, with the exception of the Major Crimes Act. As to those the Federal Government has asserted jurisdiction, and generally the Tribes do not assert jurisdiction.

The Navajo Tribal Code, for example, does not assert jurisdiction over over offenses similar to those in the Major Crimes Act. Generally, relatively more minor crimes proscribed in the Navajo Tribal Code.

So we have two governments, each asserting substantially different jurisdictions in the same country. Both governments are seeking to pursue separate interests: the Tribe, to protect the peace and dignity of their Tribe and tribal members against relatively minor offenses, which otherwise probably would not be, and I guess under existing structure could not be prosecuted by anyone else; and then we have the federal government, whose asserted jurisdiction over major crimes which threaten the peace and dignity not only of the Tribe but of the nation and the country as a whole, the Major Crimes Act I think is an expression of Congress's intention or of its view that prosecution of these major offenses is in the area of --

QUESTION: Is there concurrent jurisdiction as between the major crimes and the tribal crimes?

MR. URBANCZYK: Concurrent jurisdiction over the exact same offense? Well, of course, the Tribe has jurisdiction only over Tribal Code offenses, and the federal courts would not assert jurisdiction over Tribal Code offenses. But I would think that when you have an Indian defendant committing a crime against a non-Indian, so that instead of prosecuting under 1153, the Major Crimes Act, we were prosecuting under 18 U.S.C.

1152. That there might well be offenses which are brought to bear on the Tribes by federal enclave law, which are similar to, you know, tribal offenses. I can't give you a specific example, but I could safely speculate that there may well be such a case.

QUESTION: Does the Indian Civil Rights Act protect against double jeopardy?

MR. URBANCZYK: The Indian Civil Rights Act, and I -- yes. The Indian Civil Rights Act has a double jeopardy provision, which pertains, I believe, to intra-Tribe -- two tribal prosecutions.

QUESTION: If these prosecutions had occurred in inverse order from the order in which they did occur, would the respondent have been entitled to relief under the Indian Civil Rights Act?

MR. URBANCZYK: I think not, Mr. Justice Rehnquist.

Now, in short, the existing arrangement on the Navajo Reservation consists of two governments, each asserting jurisdiction over the same subject matter, same territory, yet each pursuing different though overla-ping interests.

Now, if the Court of Appeals is correct, I think, in holding that the dual sovereignty principle does not apply, I think we can anticipate, or at least there is a potential for a conflict, a serious conflict between these governmental interests.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock, Mr. Urbanczyk.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:02 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. O'Toole, you may proceed whenever you're ready.

ORAL ARGUMENT OF THOMAS W. O'TOOLE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. O'TOOLE: Thank you, Your Honor.

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

The respondent Wheeler submits that the Court of Appeals was correct when it held that successive prosecutions in tribal and federal court are barred by the double jeopardy clause.

The decision is correct for two basic reasons: The double jeopardy clause, dual sovereignty exception has never been applied outside of the federal and State arenas; and, secondly, Indian Tribes are in no way sovereign-like States, so as to allow the application of this exception to excessive tribal and federal prosecutions.

Additionally, the petitioners claim that the fact of the respondent's case calls for the application of other already recognized exceptions to the double jeopardy clause must fail for the simple reason that the facts of this case do not support the application of any of these exceptions.

Before going any further, key facts must be noted. These facts fully support the decision of the Court of Appeals

and the respondent's claim that Tribes are in fact arms of the federal sovereign.

From the arrest of the respondent Wheeler through his prosecution in the district court seven months later, the Bureau of Indian Affairs, which is a federal agency, was in direct control of the investigation. Before the respondent was charged with the lesser included offense of contributing to the delinquency of a minor, the Bureau of Indian Affairs had already investigated the possible violation of the Major Crimes Act offenses. In fact, the pervasive federal influence of control over all of the aspects of the tribal life is strikingly evidenced by the fact that the crime scene was in the compound of the high school run by a federal agency, the Bureau of Indian Affairs.

QUESTION: Well, would that have much to do with -- jurisdiction?

MR. O'TOOLE: Well, Your Honor, this is merely an example of the pervasive control of the federal government over all aspects of tribal life.

QUESTION: Well, it's historically true that there's been pervasive control in many, many respects, but that doesn't really go to the heart of jurisdiction, does it?

MR. O'TOOLE: Well, I submit, Your Honor, that the key to this case is whether Indian Tribes are sovereign-like States in the federal government. And the very --

QUESTION: Well, they are not sovereign like the federal government or like States.

MR. O'TOOLE: Well, as this Court has long recognized, the dual sovereignty exception never has been applied out of a context of successive State and federal prosecution. In fact, it hasn't been extended to the Territories of the United States, which this Court has recognized very recently as being -- exercising powers of self-government similar to Indian Tribes. In fact, exercising these powers with independence much greater than the Indian Tribes in the Territories.

QUESTION: But the Territory doesn't have any residual sovereignty, does it?

MR. O'TOOLE: Excuse me?

QUESTION: A Territory has no residual sovereignty --

MR. O'TOOLE: That is correct, it emanates --

QUESTION: --in the first place?

MR. O'TOOLE: That is correct, it emanates from a grant of power from the Constitution --

QUESTION: In what case did we recognize that Territories had powers just like Indian Tribes?

If that was your statement.

MR. O'TOOLE: Well, I don't think the language of any of the cases of this Court has said that, but the language of this Court in Puerto Rico vs. The Shell Company, in which it

describes the local powers of self-government of the -- of Puerto Rico, as well as the more recent language in the Flores de Otaro case reflects both that the Territorial Courts have substantial powers of local government -- in fact, I think the Court characterized the Territory of Puerto Rico as State-like. Yet the doctrine of dual sovereignty has not been extended to the federal Territories.

QUESTION: But no one denies that the Territories and their courts are creatures of federal statute, do they?

MR. O'TOOLE: No, I don't contend that they are not.

QUESTION: And I take it that there is some difference of opinion with respect to whether Indian Tribal sovereignty, in all its aspects, is a creature of federal statute?

MR. O'TOOLE: Well, obvously, the contention of the petitioner in this case is that they have residual sovereignty which pre-existed any recognition by this government. However, I think that misses the point.

The point is: are they sovereign-like States? So as to exercise powers of sovereignty independent of any recognition by the federal government.

In fact, I dispute the very contention the petitioner makes, that the Tribes did have a residual sovereignty unless they were first recognized and allowed to exist by an applicable Treaty.

QUESTION: Is there a specific federal statute that

you can point to that authorized the Navajo Nation to adopt its Tribal Code?

MR. O'TOOLE: Your Honor, I can't point to the specific statute, but it is clear that this was the case, and I believe the case of Dodge vs. Nokki?, or -- I believe it's -- excuse me, it's the Udall case which I cite in my brief, recognizes that the Tribal Code was enacted and modeled after the Bureau of Indian Affairs model penal code.

QUESTION: Yes, but who enacted it?

MR. O'TOOLE: The Tribal Court, Your Honor, but --

QUESTION: Well, what authority did they have to enact it?

MR. O'TOOLE: They were recognized by Treaty of the federal government as existing.

QUESTION: Well, I know, but what -- they just recognized the Tribe, but what authority did the Tribe have to provide some criminal law for the -- for Indians or anybody else?

MR. O'TOOLE: I submit, Your Honor, that the power was delegated --

QUESTION: Where did it come from?

MR. O'TOOLE: The power was delegated by the --

QUESTION: Where? Where? That's what I would like to find out.

MR. O'TOOLE: -- Department of Interior --

QUESTION: Where was it delegated?

MR. O'TOOLE: Well, Your Honor, I can't point to the specific statute, but I would submit that it is contained in Title 25 and the general language of Title 25 giving the Secretary of the Interior the right to govern and manage all aspects of Indian life, and --

QUESTION: Well, he didn't issue this Tribal Code.

MR. O'TOOLE: Under his authority, Your Honor, I believe that they were issued, and approved.

QUESTION: Well, they just approved, they just couldn't become effective without his approval.

MR. O'TOOLE: That's correct, and necessarily the federal government has, as the government concedes, complete plenary control over the tribal operations.

QUESTION: Well, that's different, that's something else. If they exercised it, I suppose they could displace any Tribal Code, but they haven't, have they?

MR. O'TOOLE: Well, the various legislative enactments, Your Honor, historically have terminated Indian Tribes and that's reflected by the statutes --

QUESTION: I agree, yes, that's right. But I still would like to know the source of the Tribe's authority to issue this Code.

Was it -- you deny that it was some aspect of any residual sovereignty in the Tribe?

MR. O'TOOLE: Your Honor, the only sovereignty of the Tribe, I submit, was the Treaty which the Tribe engaged in in 1868, which this Court characterized in McClanahan as less than an arm's length agreement between equal parties. I think, in fact historically, and as I point out in my brief, the Court has recognized long ago, over a century and a half ago, that the Indian Tribes were subjected to cession, conquest by the federal government, and entered into Treaties and Agreements to enable their survival and existence.

QUESTION: Well, the mere fact that this Indian Tribe, as distinguished perhaps from some others, but specifically this one is exercising sovereign power over its own members, --

MR. O'TOOLE: Well, I think that --

QUESTION: -- in criminal affairs, suggests that there is a residual sovereignty there recognized by the United States.

MR. O'TOOLE: Well, Your Honor, although I don't certainly want to over-simplify it, I think the use of the phrase "sovereignty", as this Court recognized in McClanahan, is confusing, and that the appropriate method of determining powers of self-government is by examination of applicable Treaty statutes and law, including the federal regulations.

As this Court characterized the Indian Tribe in the recent case of Antelope, they characterized it as "once sovereign", and necessarily that suggests to me that they are

no longer sovereign.

QUESTION: Well, I would actually think that could, with equal ease, be read as "once totally sovereign", rather than "formerly sovereign".

QUESTION: Mr. O'Toole, you can't have criminal law without a sovereign, can you?

MR. O'TOOLE: That's my submission, Your Honor, and --

QUESTION: Sir?

MR. O'TOOLE: Yes, that is correct.

QUESTION: Well, how are you going to get around that? If the Tribe has criminal law, it's a sovereign.

MR. O'TOOLE: Well, Your Honor, I --

QUESTION: It's a sovereignty, is it not?

MR. O'TOOLE: It is the respondent's submission that the criminal law was an exercise of the congressional plenary control over the Tribes, allowing them criminal jurisdiction over certain areas --

QUESTION: You won't say allowing them sovereignty?

MR. O'TOOLE: No, I won't concede that.

QUESTION: Well, how can you have criminal law?

MR. O'TOOLE: For purposes of limited powers of self-government, Your Honor, and I would analogize them to the powers of self-government that the Territory of Puerto Rico has exercised, which includes local powers of prosecuting criminal matters.

QUESTION: Well, I don't think you have a Supreme Court of the Navajoes, do you?

MR. O'TOOLE: Pardon?

QUESTION: You don't have a Supreme Court of the Navajo Tribe, do you?

MR. O'TOOLE: Yes, there is a Supreme Court of the Navajo Tribe.

QUESTION: And lower courts, too?

MR. O'TOOLE: Yes, there is. It's a very structured and perhaps the most up-to-date and complete judicial system of any Tribe in the country.

QUESTION: And still not -- it's not a sovereign Tribe?

MR. O'TOOLE: That, I submit, is the correct proposition.

QUESTION: Well, I don't think you -- when you try to put a person in jail you need a sovereign, do you?

MR. O'TOOLE: Well, Your Honor, certainly local and State governments have the power to put people in jail, but I think the source of the power is the key that this Court has to examine to determine, first of all, when they have even residual sovereignty, let alone sovereignty --

QUESTION: Well, my brother White has been trying to get you to say where it came from.

MR. O'TOOLE: Well, --

QUESTION: You admit it's there.

MR. O'TOOLE: Pardon?

QUESTION: You admit the sovereignty for criminal purposes is there.

MR. O'TOOLE: The power of self-government, Your Honor, and I think that --

QUESTION: Well, the power -- I'm only talking about the power to put a man in jail.

MR. O'TOOLE: That's correct.

QUESTION: Now, where did the Navajo Tribe get that power?

MR. O'TOOLE: Again, as I indicated to Mr. Justice White, I cannot specifically put my finger on the statute, although I believe it is in my brief, and if the Court would like I could indicate the appropriate statute which, in essence, says that the --

QUESTION: Oh, "in essence".

MR. O'TOOLE: Well, without quoting it, Your Honor. -- indicates that the Department of the Interior, through the Director of the Bureau of Indian Affairs, has the power to control Tribal Courts, law and order, police, judges, and so forth. And necessarily, I submit, the regulations in 25 C.F.R., which exist --

QUESTION: You mean that the federal government sits on each one of these cases? The answer is no.

MR. O'TOOLE: No, Your Honor, they do not. The judges of the Tribe sit on the cases over tribal matters, but I submit that this sitting on cases is because this power has been granted to the Tribes by the federal government; not because of any pre-existing and unrecognized --

QUESTION: Well, who tried them before 200 years ago?

MR. O'TOOLE: Well, Your Honor, if they had trials in the traditional American justice system, such --

QUESTION: Well, who maintained justice in the Navajo Tribe 200 years ago?

MR. O'TOOLE: The members of the Tribe, Your Honor.

QUESTION: And who did it 100 years ago?

MR. O'TOOLE: In 1868, the Treaty was passed, and I would assume after the Treaty the Tribe continued to exercise --

QUESTION: And that's true up until today.

MR. O'TOOLE: That's correct.

QUESTION: So it didn't come from Congress.

MR. O'TOOLE: Well, Your Honor, I respectfully disagree. Again, without belaboring the point, I submit that only by Treaties do the Tribes have these powers to exercise. And I think it would be interesting if the Court were to examine the Navajo Treaty of 1868, which reflects that the Tribes were not given title to their lands, that the Tribes, at the time the Treaty wasentered into, were a conquered and isolated and exiled people, and that only because of the grants

of independence, so to speak, by the Treaty were they allowed to possess certain lands. And the language of the Treaty is very clear to show that they have no title to these lands, and that they are subject to the control of an Agent of the federal government.

Now, from that Treaty, the Tribe has continued to grow and expand and to become more sophisticated in their powers of self-government, but this has been only under the direct supervision of the Bureau of Indian Affairs and with the approval of the Secretary of the Interior.

QUESTION: You think it would not be correct to say that the Tribe has all the sovereignty that they originally had except that which was taken away from them by right of conquest by the whites?

MR. O'TOOLE: Well, Your Honor, for purposes of this case, I think that submission is academic. Because, unless they have the attributes of sovereignty as derived from the Constitution, like States have, I certainly don't think that any residual sovereignty is going to carry the day to allow an unprecedented extension of the dual sovereignty exception.

QUESTION: Now, why do you say that? Because you've referred several times to the right of self-government. I would have thought the right of self-government, which I took it you conceded, would include the punishment by the Tribe of one of its own members.

MR. O'TOOLE: Well, --

QUESTION: You concede that exists, but you say it exists only under the auspices of the federal government?

MR. O'TOOLE: That's correct, perhaps my choice of the word "rights" is inappropriate. The power, they have powers of self-government which is a result of federal recognition.

Now, not to digress too completely, Your Honor, I think the language of the Indian Civil Rights Act, which was the subject of questioning by the Court before the lunch recess, has a very telling statement in it. And I refer this court to Section 1301 of the Act.

QUESTION: Where is it?

MR. O'TOOLE: Title 25, Section 1301. I don't have the specific language in this Court, Your Honor, but I think it's telling, and I would like to quote it to the Court. It says that an Indian Tribe, and this is Congress speaking of course, means any Tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.

The statute then proceeds to define powers of self-government and Indian Courts.

Certainly it seems reasonable to submit that this statute is essentially a restatement of the position of the respondent in this case, that recognition of the federal govern-

ment of Indian Tribes is a concomitant to their very existence.

QUESTION: Mr. O'Toole, may I ask a question about the situation immediately before the 1968 statute was passed. I asked the same question of your opponent, I would like your views.

Did -- was it permissible in 1967 for a Tribe to try a tribal member twice for the same offense?

MR. O'TOOLE: According to the only cases that are recorded on this, Your Honor, I would have to answer no.

QUESTION: Well, then, where does the -- how does -- when did -- where does the constitutional right come from, then, that you're asserting today?

If there was no constitutional right for that identity of offenses in 1967, when did the Constitution change?

MR. O'TOOLE: Well -- perhaps I misunderstand the question. You're talking about successive prosecutions within the Tribal Court?

QUESTION: By the Tribal Court of a member of the Tribe.

MR. O'TOOLE: I don't have an answer to that question, Your Honor, I don't know --

QUESTION: It seems to me if you concede that there was no constitutional objection to that, you have to be conceding that that kind of prosecution was not for an offense against the United States.

MR. O'TOOLE: Well, I don't think I --

QUESTION: If it wasn't an offense against the United States in 1967, how could it be today?

MR. O'TOOLE: Well, I can't go so far as to make that concession, Your Honor. However, there is a lack, to my knowledge, of any cases that deal with that issue.

QUESTION: What about Talton v. Mayes?

MR. O'TOOLE: Well, Your Honor, Talton vs. Mayes I think has to be read very carefully in light of the basic premise of that case, which the Court announced initially in the opinion that it wrote; that the existence of the Cherokee Tribe is based upon Treaties and statutes, and the Tribe exists under the paramount authority of the United States. And from that point forward, the Court examined these Treaties and statutes to reach the conclusion that the Indian who was in the federal court on a habeas corpus petition was not being denied any constitutionally guaranteed right, that his lack of being indicted by a grand jury in conformance with the federal grand jury law was merely, as the Court said, an argument of inconvenience.

QUESTION: Yet if he had been prosecuted by the federal government, or under its auspices, as you contend your client was here in the Tribal Court, surely he would have had that right to be indicted by a grand jury.

MR. O'TOOLE: That is correct. But at that point in

time, Your Honor, I think in 1896, the Fifth Amendment grand jury requirement applied only as a limit on the powers of the federal government.

QUESTION: Well, didn't -- the Court expressly said, though, that the offense there was not an offense against the United States.

MR. O'TOOLE: Now, that is an interesting question, Your Honor, because prior to --

QUESTION: Well, I'm just saying what the Court said.

MR. O'TOOLE: That's correct. But --

QUESTION: Well, what if we accepted that statement?

MR. O'TOOLE: I think the statement is incorrect, and I would like to explain why.

QUESTION: I know, but what if we accept it?

You're then in big trouble, aren't you?

MR. O'TOOLE: Well, as the government has indicated in its argument, they turn this case on Talton, and I respectfully submit that Talton is not good law.

One point that is significant, and I don't have the answer to it, I can't find any authority to explain why, prior to 1896, when Talton was decided, the federal government had enacted the Seven Major Crimes Act as a result of the case of Crow Dog, and that Seven Major Crimes Act withdrew or took exclusive jurisdiction over the offense for which Talton was indicted by the Tribal Court.

Now, I haven't been able to examine and read the Treaty under which the Cherokees existed, as to whether that Treaty might be an exception under 18 U.S.C. 1152, but I submit that's the only possible reason that might be argued as supporting this Major Crimes Act prosecution by the Tribe.

The silence of the Court on why the exclusive jurisdiction of the federal government didn't attach to this murder prosecution is mysterious, I don't know the answer.

QUESTION: Mr. O'Toole, were you here on Monday to hear the argument in the Oliphant case?

MR. O'TOOLE: Yes, I was, Your Honor.

QUESTION: Do you feel that we must decide this case and that one the same way?

MR. O'TOOLE: No, I do not. I believe I make that statement in my brief, and I'd like to explain.

In this case the government is asking the Court to recognize Tribes as being sovereign-like States. In Oliphant, the majority opinion in Oliphant recognized that Tribes only have plenary powers and limited powers of self-government and base their decision on the residual sovereignty that the Tribes retained absent any controlling or contrary federal legislation.

So, assuming for purposes of argument that the Tribe does have residual sovereignty which allows the Tribe to prosecute non-Indians, this certainly doesn't raise them to the level of being sovereign-like States so as to allow the dual

sovereignty exception to be extended to Indian Tribes.

So, necessarily, I don't see any great inconsistency, although I do disagree with the suggestion that Oliphant is good law.

QUESTION: Well, the shoe can pinch the other way, can't it, too? Because in this case you have an Indian Tribe trying a member of the Tribe under the traditional self-government role, and in Oliphant you have the Indian Tribe trying a non-Indian.

QUESTION: You might have residual sovereignty for one purpose but not another.

QUESTION: Yes.

MR. O'TOOLE: Well, in addition to the arguments that I've been making, I would submit, as I have attempted to do up to this point, that the notion of residual sovereignty is no longer valid and that any notion of sovereignty, as this Court recognized in McClanahan, has been merely used since Worcester vs. Georgia, when Justice Marshall first stated it, only as a means of resolving State and Tribal conflicts. And, as the Court stated in McClanahan and as it has done in the cases since McClanahan, it has avoided a reliance on what it characterizes as a plutonic notion, not a means of resolving disputes, and has instead looked to applicable Treaties and statutes.

Now, for example, in United States vs. Missouri, which

was mentioned in the arguments on Monday, this Court examined the relationship of that particular Tribe and the federal government, and found that the Tribe exercised powers of control over liquor on the Reservation, not because of any inherent sovereignty, but because of a delegation of that authority by the federal government.

In United States vs. Keeble, the Court was asked by the Solicitor, as it is being asked in this particular case, to rely on the notion of inherent sovereignty to prevent an Indian member from asking the Court for a lesser included offense when it was clearly marital, and they reasoned that the fact that the Tribe had exclusive jurisdiction over that particular lesser included offense, it prevailed over that Indian member's right to have a lesser included offense in the federal court.

Instead of relying on that reasoning, or even rejecting it, I believe the Court merely looked at the applicable Treaties and Federal Rules of Criminal Procedure and found that all of the Indians prosecuted in the federal court should be treated equally as any other defendant prosecuted in the federal court.

And recently in this Court's opinion in Antelope, the Court again, as I indicated earlier, said that the Indian Tribes were once sovereign, and that any attributes of sovereignty and powers of self-government were the result of the exercise of this Congress's and the federal government's plenary authority

in furtherance of the ward-guardian relationship that exists between the Tribes and the federal government.

QUESTION: Well, cannot that be read as meaning such sovereignty as the Congress has allowed them to retain?

MR. O'TOOLE: Well, again, Your Honor, semantically, I don't think the word "sovereignty" for purposes of this case is an appropriate means of describing that particular relationship.

QUESTION: Well, as Justice Marshall suggested, they have enough sovereignty to prosecute some of their people for some of their crimes.

MR. O'TOOLE: Well, that's not disputed, Your Honor, but I think that for this Court to recognize them as sovereign, like the States are sovereign, is unprecedented. The very doctrine which the government wants to engraft upon successive federal and tribal prosecution has never been applied outside of the State and federal arena, and, in fact, as this Court recognized in the recent case of Rinaldi, the government itself pays very close attention to this Court's continuing concern and apparent distaste for successive trials; and the injustice and unfairness that results from these trials.

The --

QUESTION: Mr. O'Toole, I may have already asked it, but I've got this -- I'm kind of preoccupied with one thought now, and I'd like to put it on the table so you can discuss it

fully and point out where I'm wrong.

It seems to me that if prior to the 1968 Civil Rights Act, the Indian Civil Rights Act, a tribal member could have been tried twice by the Tribe for the same violation of the Tribal Code, that necessarily that a violation of the Tribal Code by a tribal member was not an offense within the meaning of the Fifth Amendment. If that was true then, I would think it's still true now.

What's wrong with that analysis?

And that the issue really isn't one of sovereignty, but whether or not the violation by a member of the tribe of the Tribal Code is an offense within the meaning of the Fifth Amendment.

I think if they could be tried twice in 1965 or so, which I guess they could, because Congress had to pass this provision, it must have been on the assumption it was not an offense.

MR. O'TOOLE: Well, I think, Your Honor, the Indian Civil Rights Act renders that particular --

QUESTION: Well, that doesn't amend the Constitution.

MR. O'TOOLE: Well, I think it recognizes --

QUESTION: It recognizes that we needed such a statute to protect the Indian from that particular kind of abuse.

MR. O'TOOLE: Well, nevertheless, I think this Court

is going to have to confront that particular aspect of the Indian Civil Rights Act, if it wants to turn this case on the reasoning that you just proposed.

QUESTION: Well, that action talks about the Indians in exercising their power of self-government. Now, the second prosecution by the federal government is not covered by the Indian Civil Rights Act.

MR. O'TOOLE: Well, Your Honor, --

QUESTION: Maybe there's something wrong with it, but that's the way the case seems to add to me right now.

MR. O'TOOLE: The --

QUESTION: Well, I --

MR. O'TOOLE: -- government -- excuse me.

QUESTION: Well, isn't brother Stevens right, that the premise for that Civil Rights Act was that there really was a need to protect people subject to tribal laws?

MR. O'TOOLE: I think that that might be --

QUESTION: In that criminal proceedings before a tribal agency were not proceedings within the meaning of the Constitution.

MR. O'TOOLE: Well, Your Honor, as I indicated earlier, I can find no cases that dispose of this problem. I think the --

QUESTION: Except the one that you would not -- you don't think -- that you think has to be read very carefully.

Mayes.

MR. O'TOOLE: Talton vs. Mayes, that's correct. And I think it is significant to point, that the government concedes in their brief and Oliphant, their amicus brief in Oliphant, footnote 19, they say: In view of the Civil Rights Act enactment, that Talton vs. Mayes is moot.

QUESTION: You mean not necessary?

MR. O'TOOLE: Perhaps. They use the word "moot", Your Honor.

QUESTION: Mr. O'Toole, did you tell us that the Seven Majors Crimes Act had been enacted at the time that Talton was indicted?

MR. O'TOOLE: That's my understanding, it was enacted in 1885.

QUESTION: And he was indicted in 1893, right?

MR. O'TOOLE: That's correct.

QUESTION: And you have no explanation as to why?

MR. O'TOOLE: I have no explanation, except the language of the Cherokee Treaty, which I have been unable to obtain --

QUESTION: Yes.

MR. O'TOOLE: And I think under 1152, Treaty enactments may accept the applications of the Major Crimes Act.

QUESTION: Yes.

MR. O'TOOLE: I would like at this point, Your

Honors, to discuss the other exceptions that the government urges as being applicable to this case, even if the Court does not find that the dual sovereignty exception should prevail.

Initially the government would argue that a second prosecution is allowed when the facts necessary to the greater charge in this case, either assault or rape, under the Major Crimes Act were not discovered despite the exercise of due diligence before the respondent was prosecuted in Tribal Court. Well, as I've already indicated earlier, the BIA was on the scene and had all facts in hand prior to the Indian defendant going to Tribal Court and pleading guilty.

And I submit that any lack of due diligence was the fault of the government and not that of the respondent.

A further indication, I think, of the real problem that involves -- that brought this case to the position that it's at today, is indicated by the fact that it took seven months to even bring this case to a federal indictment, and the fact that the Indian Reservation is far removed from the U. S. Attorney's office in Phoenix, there's a constant problem of logistics and communication, which is a very serious problem because of language barriers with Indians, and these all add up to real problems which occasionally cause this type of a problem to arise, where an Indian is convicted in the Tribal Court, prosecuted in the federal court without the

government first becoming aware of the earlier prosecution.

I might also digress for a moment to point out that Judge Duniway, who wrote the majority opinion in Oliphant, also authored the opinion in Colliflower vs. Garland, which recognized that, for double jeopardy purposes at least, Indian Tribal Courts and the federal district court are arms of the same sovereign.

And with that in mind, that is part of the reason that I can see a consistent decision of Oliphant and this case in favor of the Indians in both instances.

MR. CHIEF JUSTICE BURGER: Your time is up, but we've used a little of it, we'll give you two more minutes if you have something.

MR. O'TOOLE: Well, I would merely -- thank you, Your Honor -- I would merely conclude by saying that under the very facts of this case, none of the other exceptions that the petitioner urges as being applicable so as to allow a second prosecution applies. I think what the government is trying to do in this case, Your Honor -- and I command them for their ingenuity -- is to ask this Court to enact congressional policy where the Congress hasn't acted at this moment.

I think it would be a -- if this Court was to allow the dual sovereignty exception to be applied to successive tribal and federal prosecutions, it would necessarily raise

the very serious question of whether the Court's pronouncements in Wallex and particularly in Puerto Rico vs. The Shell Company, prohibiting successive prosecutions within the federal Territory, is any more -- whether these cases are valid at the present time.

And one final note, Your Honor, I submit that the case that most thoroughly discusses and disposes of the various claims of the petitioner is United States vs. Kagama. There's been no indication by the government that that case is overruled, or that the language of that case is anything but dicta; I submit that it is very controlling, and that case itself recognizes that Indian Tribes have been subsumed into the Territory of the United States and exist only because of the political will of Congress.

Thank you vexy much.

QUESTION: Mr. O'Toole, if you lose this case, what effect, if any, will it have on the Navajo judicial structure and its operation? In your opinion.

MR. O'TOOLE: Well, I think it will have -- as far as the tribal structure itself, the Tribe will obviously lose its posture as being a self-governing independent entity and that way -- necessarily will hurt the Tribe.

And I think it's also significant to note that no amicus briefs are here today on behalf of the Tribe, as they were on Monday in the Oliphant case.

They're worried about losing this case. I think that affirmance of the Wheeler decision improves tribal sovereignty and gives final finality to Tribal Courts' decisions as well as federal court decisions.

I've nothing further.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Urbanczyk, do you have anything further?

REBUTTAL ARGUMENT OF STEPHEN L. URBANCZYK, ESQ.,
ON BEHALF OF THE PETITIONER

MR. URBANCZYK: Just one or two very short points, Mr. Chief Justice. Thank you.

In answer to questions by Mr. Justice Rehnquist and Blackmun concerning the relationship of this case with Oliphant, I want to make the government's position on that point clear.

This Court could rule for Oliphant and still rule for the United States.

QUESTION: Or vice versa.

MR. URBANCZYK: I think that if the government -- if the Court rules for the Suquamish, I think the government would have a very -- I think you would have to have reaffirmed, as you have in all other cases, the concept that whatever powers are retained by the Tribes, are retained as an attribute of their sovereignty. And I think if you do that, then you have gone a long way towards deciding this case in favor of

the government.

But if you rule for Oliphant, I think there are several grounds for decision that are available to you, and I think there's only one of those grounds that would hurt us substantially in this case. And this is what I understood Mr. Justice Rehnquist's question to be to me earlier.

That is, if you ruled in Oliphant that there was no longer any notion of tribal sovereignty, and that the Tribes exist simply as a creation of the federal government, and that was the general holding, then I think our principal submission in this case would be in trouble, because I think we would have a hard time arguing that these Tribes were not creations of the federal government and that the prosecutions under them were not under the authority of the federal government.

But any other holding in favor of Oliphant in this case, the statutory ground I think would not affect the disposition of our position, or would not be adverse to the government's position in United States v. Wheeler.

One final point concerning a statement by the government in the amicus brief in Oliphant that Talton has been mooted, that footnote suggests simply that there is an open question, at least, that hasn't been decided by this Court, whether 1153 rests exclusive jurisdiction in the federal courts, or whether or not the Tribes would also have concurrent

jurisdiction.

Two things about that. First of all, the Navajo Tribe -- and I want to make this clear -- does not assert jurisdiction now over any major offense, like those in the Major Crimes Act; but, secondly, I would suggest that the Indian Civil Rights Act moots the question of whether or not there's concurrent jurisdiction with respect to major Tribes in one sense, and that is, that after this Indian Civil Rights Act, which imposes substantial limitations on the power to sentence Indians for major offenses, that that effectively disables them from punishing major offenses; in that sense it moots that question. But it certainly doesn't moot Talton vs. Mayes, and we submit Talton vs. Mayes is still good law today.

QUESTION: Does the Navajo Court system assert jurisdiction over (a) non-Navajoes or (b) non-Indians?

MR. URBANCZYK: It is my understanding, based on the 1970 version of the Navajo Tribal Code, that they do not assert criminal jurisdiction over non-Indians. They assert the rights to exclude non-members and non-Indians from the Tribe -- from the Reservation.

QUESTION: Yes.

MR. URBANCZYK: And they have a proceeding which is actually undertaken under their executive branch of government to determine whether or not a person should be excluded. He

can be excluded for everything from a contagious disease to committing a crime.

QUESTION: Yes.

MR. URBANCZYK: I am not aware of what the current status of the Navajo jurisdiction is, however.

Thank you.

QUESTION: Mr. Urbanczyk, before you sit down, can you tell me if you're familiar with any cases discussing the question whether a violation of the Tribal Code by a tribal member is an offense within the meaning of the Fifth Amendment?

MR. URBANCZYK: No, I'm not aware of any cases that suggest that doctrine.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:38 o'clock, p.m., the case in the above-entitled matter was submitted.]

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