ORIGINAL

In the

Supreme Court of the United States

STATE OF WASHINGTON; COUNTY OF YAKIMA, ET AL.,	)	
Appellants,	)	
v.	)	No. 77-388
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,	)	
Appellee.	)	

Washington, D. C.
October 2, 1978

Pages 1 thru 65

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STATE OF WASHINGTON; COUNTY OF YAKIMA, ET AL :

Appellants :

vs : No. 77-388

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION :

Appellee :

- x

Washington, D. C.

Monday, October 2, 1978

The above-entitled matter came on for argument at 10:05 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the Supreme Court
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:

SLADE GORTON, ESQ., Attorney General of Washington, Olympia, Washington; on behalf of the Appellants

LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; Amicus curiae

JAMES B. HOVIS, ESQ., Hovis, Cockrill and Roy, 316 North Third Street, Yakima, Washington 98907; on behalf of the Appellee

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The first case on for argument this morning is Number 77-388, Washington and others against the Confederated Bands and Tribes of the Yakima Indian Nation.

General Gorton, you may proceed whenever you are ready.

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GORTON: Mr. Chief Justice and may it please the court:

The Yakima Reservation is an extensive tract of land in Central Washington of more than 2,000 square miles, almost the size of the State of Delaware. Four-fifths of that land is held in trust or restricted status by the United States for the benefit of the Yakima Nation. The other one-fifth has been removed from trust status and sold almost entirely to non-Indians.

Most of the fee land is located in the Northeastern portion of the reservation, as shown in gray on the map which is Exhibit 34 in the record.

The population of the reservation was stipulated in the pretrial order in this case to be about 25,000, of which 3,000 were members of the tribe. Since the date of that pre-trial order, the members of both groups have increased.

Indians and non-Indians live together on most of the inhabited portions of the reservation, but most of the non-Indians live on fee lands near the Yakima River. The Indian population is scattered more evenly throughout the non-forested portions of the Reservation.

Two small cities, Toppenish and Wapato, are located entirely inside the Reservation borders. Each of those cities has an Indian population of slightly less than ten percent, and each of them is located almost exclusively on fee land.

QUESTION: Do some non-Indians live on non-fee land?

MR. GORTON: Yes. Some of the non-fee land is in agricultural use and has been leased to non-Indians.

QUESTION: By the Tribe?

MR. GORTON: Yes.

In addition, to City police officers in Toppenish and Wapato, the law enforcement system includes about 40 deputy sheriffs, almost twice the number who were on the force at the time of the trial, a considerable Tribal police force, and a State patrol detachment with headquarters at Toppenish. The Under Sheriff of the County is a member of the Yakima Tribe.

Working relationships among those agencies are extremely close. All deputy sheriffs and all State patrolmen are cross deputized by the Tribe. All Tribal police are cross-deputized by the Sheriff with authority for arrest within the exterior boundaries of the Reservation.

And many of the officers of each carry Federal commissions from the BIA as well.

Thus the bugaboo of checker-boarding and the use of tract books which is a constant refrain of the Tribe and the Solicitor General is therefore just that, a bugaboo. As several of the Sheriff's deputies testified almost any law enforcement officer can make an arrest anywhere on the Reservation for any criminal offense; whether the offense is to be tried by a Tribal Court, a State court or a Federal District Court is decided later by lawyers.

QUESTION: But does it not depend on what laws are applicable, whether there has been a crime?

MR. GORTON: Yes, it does.

QUESTION: Well then, the arresting officer must know three sets of laws?

MR. GORTON: The arresting officer in at least 99 percent of all cases is not going to need to know three sets of laws at all. Generally speaking a traffic offense is going to be an offense against each of the two. It would not be in violation of the --

QUESTION: But it does depend on what law is applicable, whether there has been a crime?

MR. GORTON: It does depend on what law is applicable, whether there has been a crime.

QUESTION: Is there anything in the materials that

have been submitted to us indicating what percentage of kinds of conduct might be a criminal offense under one or more of these laws and not be under the other?

MR. GORTON: I do not believe that there has been. Obviously, by far the fewest offenses would be offenses of Federal Criminal Code offenses, because those are only the major crimes.

The largest number of offenses would presumably be State offenses because its jurisdiction is the broadest.

The Tribal offenses, of course, are limited to minor crimes with the penalty of not more than six months in jail.

QUESTION: But anything that readily comes to mind such as assault and battery or stealing or larceny would presumably be an offense under both State law and County Code?

MR. GORTON: Yes. And so the Deputy Sheriff can arrest and if it is under the jurisdiction of the Tribal Code, the lawyers will decide that that is where the offender goes. If it is under the State Code, the offender will go to a County jail and be tried in a County Superior Court or District Court.

Yakima County, however, does have some difficulty in making arrests on much of the trust land because the portion of the Reservation west of the line roughly like that is closed by Tribal action to non-Indians.

Perhaps it goes without saying that this is not a racial discrimination case. The trial court found no discriminatio

against Indians in the State program of law enforcement, a judgment which is based in part on the explicit testimony as to the absence of such discrimination from the Chief of the Tribal police force himself.

The complaints of the Yakimas about inadequate law enforcement protection are identical to those of non-Indians in Yakima and throughout the Nation. There is not enough of them. Why is there never a police officer around when you really need one?

As the court is aware, we do not regard the order noting probably jurisdiction as encompassing the assertion of the Tribe and the Solicitor General that Washington was required to amend its constitution in order to assume jurisdiction under Public Law 280. Your order omits that question, of course, for the very good reason that you have already decided it in our favor on three different occasions: in Makah, Tonasket and in Comenout.

Nevertheless, that disclaimer cause argument represents the principal submission of our opponents, occupying some 60 percent of the 162 pages of argument in their three briefs.

Our reply brief for this reason demonstrates that your three decisions on the subject were correct. Even before one reaches the argument, however, that the enabling Act and our State constitution still prohibit our assumption of jurisdiction, one must first decide just what lands are covered geographically

by the disclaimer clause language as well as what type of governmental power or jurisdiction the State was mandated to disclaim in 1889.

QUESTION: General Gorton, you have just referred to these dismissals. In your brief on page 17 I read:

"These dismissals constitute rulings on the merits, which the court should now reconsider."

MR. GORTON: We refiled the correction changing the "W" to a "T".

QUESTION: Well, we didn't get one.

MR. GORTON: Under the enabling act language in our State constitution, Washington disclaims and I quote:

"All right and title to all lands owned or held by any Indian or Indian tribes. And until the title thereto shall have been extinguished by the United States, said Indian land shall remain under the absolute jurisdiction of the United States."

The United States title to fee lands on the reservation has been so extinguished. The disclaimer clause thus is not applicable to those fee lands. And even the Tribe and the Solicitor General concede that Washington has acted to assume full jurisdiction over fee lands.

Fee lands are, therefore, not covered by the disclaimer clause or by a debate over the existence or validity of partial jurisdiction.

Next what substantive forms of jurisdiction are covered by the disclaimer clause. In an 1896 decision, Draper almost contemporaneous with our enabling act, this Court held that enabling act disclaimers do not encompass the type of criminal and civil jurisdiction envisaged by Public Law 280 at all.

Draper arose in Montana, which shares the same enabling act with Washington. These arguments are, of course, academic because you have three previous decisions chosen by Washington to assume jurisdiction under Public Law 280 were correct.

This is not to say that we entirely disagree with a basic premise of the Solicitor General in this case. We agree with him that the Congress could have required a popular referendum as a prerequisite to assumption of jurisdiction by an enabling act atate or for that matter by any other state if it had wished to do so in 1953.

We also agree with the Solicitor General that Congressman Westland and others involved in the drafting of Public Law 280 assumed that Washington would be required to amend its constitution in order to assume jurisdiction.

But we disagree that those two facts lead to the conclusion advanced by the Solicitor General and the Tribe. They contend that Congress added to a law designed to facilitate the assumption of jurisdiction by the State an independent Federal requirement that the handful of those States do so only

by a popular referendum. That haphazard requirement applies under their theory only to eight states in the entire nation. But it was to apply to them even if no such requirement existed under State law. That theory is consistent neither with the goal of Congress of 1953 nor with what it actually said in Public Law 280.

The Congress' goal in 1963 was to have the states assume jurisdiction over Indian reservations. In the words of the Solicitor General in this case that goal was and I quote:

"To pull down the reservation fences that kept out State law."

We agree. Congress passed Public Law 280 to enable the States to pull those fences down by removing every Federal impediment, not to build new fences.

In fact, some States were required to assume jurisdiction without either legislative or popular approval. Some other states had constitutional amendments tied to their enabling acts. Those enabling act impediments were removed and Congress authorized the amendments of those State constitutions to which they were tied two important words as a qualification and I quote: "Where necessary."

Obviously that phrase "where necessary" implies that in some enabling act states a constitutional amendment was not necessary.

The phrase is clearly inconsistent with the contentions that the Congress intended to add the requirement of a

constitutional amendment as a Federal requirement even when no such requirement existed under State law. In fact, the counsel for the Subcommittee which drafted Public Law 280 explained that that Section 6 granted states permission to amend their statutes or constitutions where state courts deemed such permission to be necessary.

Still other states, those in which neither a constitutional nor a staturoty amendment was necessary were required to take affirmative legislative action not including a popular referendum to show their willingness to assume the burden of law enforcement on Indian reservations.

But the Congressional purpose was consistent throughout all three categories of states, to encourage state assumption, to remove impediments and roadblocks, but not to create them.

In 1959 the Washington Supreme Court decided that no constitutional amendment was necessary, and has repeated that conclusion on at least three more occasions. The Ninth Circuit agreed in the Quinault case.

QUESTION: Well now, the Washington Supreme Court decided that as a matter of State law.

MR. GORTON: Yes.

QUESTION: Did it deal with the claim now being made with the Tribe in the Solicitor General that as a matter of Federal law it was?

MR. GORTON: Yes. It dealt directly with it and found that it was the legislative history of Public Law 280 together with its precise language and the "where necessary" clause made it a State law question.

QUESTION: And further held it as a matter of State law; it was not necessary.

MR. GORTON: Exactly. I am coming to that with my next point.

The State court's rationale --

QUESTION: Excuse me. Did you finish your answer?

MR. GORTON: Yes.

QUESTION: I want to be sure, in 1957, as I recall, the State took jurisdiction with the consent of nine of the tribes as to nine tribes.

MR. GORTON: In 1957 the State legislature passed a statute to take jurisdiction on any reservation from which there was a tribal request.

QUESTION: And there were eight or nine tribes who made such a request?

MR. GORTON: Yes.

QUESTION: Is the Solicitor General's argument applied to those tribes as well as to the Yakima Tribe?

MR. GORTON: Yes. Half of his argument does; his argument that we were required to amend our constitution.

The State court's rationale, Mr. Stewart, was that, though it is technically irrelevant here, the people of

Washington speak through their legislature, just as the people of the United States speak through the Congress. Our constitution's Article XXVI has not been repealed, but the disclaimer portion has been rendered ineffective, just as the Congress rendered ineffective the enabling act provision on disclaimer without repealing it or even amending it in express terms.

This is just what Congress seems to have had in mind back in 1889 when it passed the single enabling act for Washington, Montana and South Dakota.

South Dakota's equivalent to our Article XXVI states that the consent of its people is to be "expressed by its legislative assembly", although a long portion of the Solicitor General's brief is designed to show that Congress meant that these amendment act changes would have to be made by a popular referendum. But the President of the United States --

QUESTION: Or be made by however the State constitution provides it. The constitution itself can be amended, was that not it?

MR. GORTON: No, his argument -- the Solicitor General's argument based on extensive quotes from the Congress in 1889 was that Congress was applying a Federal requirement.

QUESTION: Of a State constitutional amendment?

MR. GORTON: Of a State constitutional amendment by the action of people. Yet South Dakota rejected that in writing its constitution; said the legislature could do it and the

President of the United States approved South Dakota's constitution as being in total conformity with the enabling act. If the Solicitor General's argument is correct, one star should come out of the flag because South Dakota is not validly in the Union.

This is exactly what our State Supreme Court interpreted our constitutional disclaimer to require. By 1968, of course, Congress knew both of our State Supreme Court decisions and of the similar Ninth Circuit Court decision in Quinault. The Solicitor General himself agreed that the Ninth Circuit was correct in a brief submitted to you in Quinault.

The Congress has listened at length to both the legal and policy arguments of the Yakimas and their supporters on the subject. Congress knew that Washington's assumption under Public Law 280 was both the most significant and the most controversial of all of the option states, but the Congress consciously and explicitly in 1968 confirmed pre-existing assumptions of jurisdiction and obviously meant to include Washington.

Next, the Tribe and the Solicitor General assert that Public Law 280 did not authorize what they characterize as Washington's partial assumption of jurisdiction, but Washington did not obligate and bind itself to use the terms of the Act to merely partial jurisdiction but to full jurisdiction.

In fact, it did so twice, in 1957 and in 1963. The

Solicitor General quarrels with the manner in which the State assumed the jurisdiction in 1963. That year the State obligated and bound itself to assume full jurisdiction, but it did not exercise full jurisdiction on the Yakima Reservation because it made that exercise subject to the consent of the Yakima Tribe.

We did what Public Law 280 required of us, even if Public Law 280 required a State commitment to assume full jurisdiction, a requirement which is evidenced neither on the face of the statute nor in its legislative history.

By now incidentally, it should be abundantly clear that while the formal position of the Tribe and the Solicitor General is that the State exercises too little jurisdiction, their actual grievance is that it exercises too much.

At any rate, the Ninth Circuit not only upheld the 1963 State statute in Quinault, it characterized it as we do, as an undertaking to assume full jurisdiction as authorized by Public Law 280. That court also focused on the question of whether or not the State could condition its exercise of full jurisdiction on tribal consent and decided that it could do so.

When the Quinaults attempted to bring that decision before this Court in 1967, the Solicitor General filed a brief here agreeing with us that Washington's assumption of jurisdiction was valid, even though he characterized it as partial. The

Solicitor General still believes that the phrase "in such manner" in Section 7 of Public Law 280 permitted the State to condition its assumption of jurisdiction in its entirety on tribal consent. We can see nothing in that phrase which forbids state by state flexibility in dealing with the extent to which each authorizes a tribal option.

For that matter, the phrase does not seem to bar even a true assumption of only partial jurisdiction, a course which is actually adopted by five option states. After all, the 1953 Congress wished to facilitate the assumption of jurisdiction by the states and itself provided for a form of partial jurisdiction in all but one of the mandatory states.

It knew less about the situation in the option states, while it was actually working in drafting Public Law 280.It is thus difficult to believe that Congress was not willing to permit flexibility in those states and impossible to find such an unwillingness in the language of the statute or in its legislative history.

QUESTION: Does Washington law permit the amendment of the Washington constitution by a convention as well as by a referendum?

MR. GORTON: What the Washington constitution does not permit an amendment of our constitution by an initiative. It permits the legislature to call a constitutional convention after an affirmative vote of appeal, which can then deal with the

constitution as it will.

QUESTION: At some stage though there is a public referendum on the proposed amendment to the constitution?

MR. GORTON: Yes.

Washington thus did not violate Public Law 280 by the manner in which it obligated itself to assume jurisdiction. By 1968 the Congress knew of the details of the Washington system. It knew that the Yakimas and their supporters objected to that system strenuously. Those tribes pressed vigorously for the right of unilateral retrocession.

The Congress knew of the Quinault decision, validating the Washington system. It knew that the Department of the Interior believed in the validity of that Washington system and the Interior asserted that partial jurisdiction was not only a good concept but was authorized by Public Law 280.

Congress heard other witnesses, on the other hand, who felt that the option of partial jurisdiction was such a good idea that it should be expressly spelled out in the statute. In 1968 with this knowledge Congress rejected the Yakimas' demand for unilateral retrocession, ended the argument over partial jurisdiction by expressly authorizing it, and confirmed pre-existing assumptions of jurisdiction, of which Washington had been pivotal during the debate leading up to those 1968 amendments to Public Law 280.

QUESTION: General Gorton, let me take you back a few

steps. Do I understand from your answer to Mr. Justice Rehnquist that the constitutional amendment in the State of Washington must first go through a constitutional convention called by the legislature and then subject to the vote of the people?

MR. GORTON: No, Mr. Chief Justice.

QUESTION: Which is it?

MR. GORTON: The constitutional amendment in the State of Washington in the normal sense is proposed by the legislature and acted on by the people.

QUESTION: Then in what circumstance --

MR. GORTON: The legislature may also call for a constitutional convention which, if it is approved by the people, then meets and presumably can write an entirely new constitution.

QUESTION: Then there is delegated power to the convention?

MR. GORTON: The action that a convention would have to be approved by the people.

QUESTION: I thought you said to Mr. Justice Rehnquist that even after the convention drafts the amendment, the people must pass on it by a referendum?

MR. GORTON: That is true. If a constitutional convention is called into being in the State of Washington, its actions, if any, would be subject to the approval by the

people. Our point in connection with this case is that Article XXVI which includes the disclaimer clause has in it the preamble that it is a compact with the United States, which cannot be changed without the permission of Congress and the people of the State.

It is that phrase, "the people of the State", which our State constitution has interpreted as meaning the people of the State acting through their legislature, exactly the way that South Dakota more expressly provided. In other words, we have not amended the Article XXVI of our constitution, our disclaimer clause, any more than Congress has amended the enabling act. But Congress said "not withstanding the enabling act" you can do what you need to take jurisdiction. We have done what we needed to take jurisdiction and we did not need to amend Article XXVI in order to do that.

QUESTION: General Gorton, I have a little problem with "by the people". Could the legislature amend the constitution?

MR. GORTON: No.

QUESTION: Is that right?

MR. GORTON: Correct.

QUESTION: So "by the people" means not the legislature?

MR. GORTON: No.

QUESTION: Well why did it not say that it could be

by the legislature? Why did it say "by the people and the Congress"? Why could it not have said "the legislature and Congress"?

MR. GORTON: Legislation is often preceded when it passes the legislature by the people of the State that acts -- hereby enacts the following Code of law.

QUESTION: I'm not talking about that. I'm talking about a legislative document talks about one legislative body, Congress, and then says the people and talks about the other group. If they meant the legislature, could not they have said the legislature in Washington and the legislature of the United States?

MR. GORTON: The enabling act was, of course, passed by Congress. The United States neither then or today has any power of referendum or any submission directly to the people for votes.

QUESTION: But in this instance the legislature of Washington can in effect amend the constitution?

MR. GORTON: No, I am not.

QUESTION: What are you saying?

MR. GORTON: Public Law 280 -- in Public Law 280 Congress took -- gave its permission. It wiped out its side of the contract under which the states were forbidden to take jurisdiction in its entirety. It says "notwithstanding the enabling act". And that means notwithstanding the reference to

Congress and notwithstanding the reference to the people; notwithstanding the enabling act, a State may amend its constitution where necessary in order to take jurisdiction.

Now the same phrase appears as a preamble to Article XXVI. The State Supreme Court in interpreting Article XXVI, not the enabling act -- in interpreting Article XXVI said that under the laws and constitution of the State of Washington, the people speak through the legislature.

Now Congress approved that thinking in 1889 because they accepted it from South Dakota.

QUESTION: Then you think that in Washington -- the Supreme Court of Washington said that the State can speak through its people through the legislature?

MR. GORTON: Yes, in connection with removing any impediment to take jurisdiction on an Indian reservation.

QUESTION: So then the State of Washington says that any provision for the protection of the Indians in the constitution can be amended by the legislature?

MR. GORTON: No. If that Article of the constitution had not had such a preamble which authorized the legislature to act presumably as long ago as 1889 when Congress had given its consent, that answer would not have obtained in the State Supreme Court.

QUESTION: I guess we are bound by the State of Washington interpretation of what is meant by --

MR. GORTON: The question here is whether or not there was an independent Federal requirement. Yes, you have always allowed State Supreme Courts to interpret State constitutions. The question here is whether or not this was a Federal requirement. Our position is the Federal requirement was totally wiped out by the Congress when it passed Public Law 280.

What it wanted to do, it gave the State the permission to do whatever State law required to get rid of its disclaimer clause language.

The failure of the Solicitor General to join the Tribe in defending the Ninth Circuit Panel's decision overturning the State law on equal protection grounds speaks volumes. As the Solicitor General said in his memorandum preceding your noting probable jurisdiction --

QUESTION: Mr. Attorney General, you are moving to the constitutional argument?

MR. GORTON: Yes.

QUESTION: I did not understand you to urge that the statutory question was not here at all.

MR. GORTON: I did urge that.

QUESTION: And why do you say the appellees are not entitled to rely on it?

MR. GORTON: Well, excuse me. There is a statutory question before you very clearly. The statutory question is before you without any doubt whatsoever and is whether or not

Washington assumed jurisdiction in the manner required by the Congress in Section 7 of Public Law 280.

QUESTION: Well, why is that here?

MR. GORTON: That is because --

QUESTION: You did not bring it here, did you?

MR. GORTON: Partial jurisdiction is listed in the question as you noted probable jurisdiction. That question is noted. We cannot win;actually the decision of the Ninth Circuit from which we are appealing went off on equal protection grounds. The Ninth Circuit had previously said that we were right on this partial jurisdiction.

QUESTION: En banc it had said that.

MR. GORTON: En banc they said that we were fine on partial jurisdiction. Then a three-judge panel said that we lost because we denied equal protection by the method in which we took jurisdiction.

The statutory interpretation question is here because it is necessary for us to win that as well as the equal protection question in order to validate our act.

QUESTION: Even if that was not raised in the briefs of the petitioner, or even if it was not presented as a part of the question presented in the appeal?

MR. GORTON: It is in your order noting probable jurisdiction.

QUESTION: In your jurisdictional statements you list

on page 8 only one question.

MR. GORTON: Yes, we do, but when the United States replied and when the Tribe replied to us, they brought up these additional questions. They did not want to be limited to the rather weak equal protection argument.

QUESTION: The court on its own motion listed two questions.

MR. GORTON: And so you, in effect, listed two, not listing the disclaimer clause question.

QUESTION: Correct.

But your opponents made no cross appeal?

MR. GORTON: No, they did not.

In fact, the State choice was not only not irrational; it was both reasoned and logical. It tied the tribal option -- the tribal choice of law to Indian lands or to lands under Indian control. Most non-Indian residents and businesses on the Reservation are located on fee land; most transactions between Indians and non-Indians, like those involved in your cases of Williams versus Lee and Kennerly take place on fee land, as no doubt do most Indian claims against non-Indians for consumer fraud.

Most traffic offenses and minor crimes by both Indians and non-Indians which affect one another in an integrated society take place on fee land. Thus, it was on fee land -- with fee land that the legislature was most concerned about

establishing a uniform system of law.

Obviously that concern affected Indian lands as well, especially in the field of traffic offenses and various social programs administered and financed by the State, but there the Indian desire for tribal self-government was a major countervailing consideration. So in the classic manner of all legislative bodies, the Washington legislature compromised the demands of those who wanted plenary State jurisdiction everywhere and the tribes who wanted no State jurisdiction anywhere.

The Ninth Circuit Panel decision from which this appeal is taken found as a basis for its equal protection holding that a Yakima Indian living on trust land received no law enforcement protection from the State while his Indian neighbor on fee land did. That is a fatally erroneous view of the effect of the State law.

State law does protect a member of the Yakima Tribe on trust land from anyone except a fellow member of the Yakima Tribe, and that omission is due solely to the choice which the Tribe has made.

Even in that situation the Tribal member is treated exactly as is a non-Indian on trust land who also lacks State law protection as against a member of the Yakima Tribe. The distinction is not based on a difference in the need for legal protection by the State, but on the State's concern in 1963 for the preservation of a maximum of tribal self-government.

In Antelope less than two years ago this Court held that the use of land status is the basis for the choice of which criminal law is applicable to an Indian did not constitute a denial of equal protection. It was simply of no consequence that the Federal Criminal Code differed from that of the surrounding State.

In Antelope that choice of law worked to the detriment of the Indian defendant. In this case it works to the advantage of the Indian who prefers Federal or Tribal jurisdiction to that of the State.

And in footnote 13 of Antelope you recognized that a similar choice of law question would be involved on almost any military base. Actually scores of military reservations throughout the United States are divided into not two but three types of jurisdiction: exclusive Federal, exclusive State and concurrent jurisdiction, depending on the date and circumstances under which the United States acquired its title.

That haphazard mixture is apparently of no constitutional significance and in addition to that it seems to work. There are, of course, some limits to the tribal option offered by the State even on Indian land, the eight subjects enumerated in RCW 37.12.010. The Tribe attacks that form of what it calls partial jurisdiction as well as the geographical distinctions based on trust status as an unconstitutional depravation of equal protection and due process.

I have already discussed the rationale for the State's handling of those eight subjects on trust lands, but that same rationale caused the Congress in 1929 and again in 1946 in 25 U. S. Code 231 to authorize the states partial subject matter jurisdiction on Indian reservations over health regulations and compulsory school attendance.

And in 1968 the Congress amended Public Law 280 expressly to permit partial subject matter jurisdiction with consent over any subject. By reason of those 1968 amendments to Public Law 280, partial retrocession is also possible, but to the best of our knowledge no such request of the State legislature has ever been made by the Yakima Tribe.

Clearly the tools now exist for a flexible approach to State jurisdiction and it is difficult to conceive that their use to accommodate both Indians and non-Indians either now or in the past would constitute a denial of equal protection or due process to either group.

Finally, the subject matter of this controversy has, of course, been before the Congress almost continuously for two centuries, and will without doubt be considered there again and again.

The Solicitor General and the Tribe, therefore, ask you to frustrate the obvious intention of both the 1953 and the 1968 Congresses and of the Washington State legislature. They assert that the practical effects of such a determination would

be minimal. They can make that assertion only by ignoring reality and by assuming, as the Ninth Circuit Panel did, that only the tribe is affected by this controversy.

The 1963 legislature in contrast with what we believe was a considerable better understanding of the way in which an integrated society actually operates was concerned with the welfare of all of its citizens. It sought a stable legal system which recognized the legitimate aspirations of both Indians and of their non-Indian neighbors. Instead of wiping out tribal self-government in the jurisdiction field entirely, as the Solicitor General believes the State had to do under Public Law 280, the State substantially preserved it.

Instead of ignoring the desire of reservation non-Indians for the right to be governed by their own laws -- a demand not unfamiliar to those who live in the District of Columbia -- the legislature granted that right, but not to its maximum extent without the consent of the tribes whose members are also voting citizens of the County and the State.

Washington did what it was authorized to do by Public Law 280 and did it well.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.

AS AMICUS CURIAE

MR. CLAIBORNE: Mr. Chief Justice, and may it please the court:

With the Court's permission I will concentrate my

argument on the disclaimer point, that is, the proposition that the State of Washington could not assert any additional jurisdiction over Indian reservations within its borders without first amending its State constitution.

QUESTION: On what grounds do you present this issue?

MR. CLAIBORNE: Mr. Justice White, we take the view, I hope correctly, that an appellee is entitled to defend the judgment in his favor under Section 1254.2 of the Judicial Code on any Federal ground.

QUESTION: Well, what if your ground, if you succeeded, if it were sustained would give considerably different relief?

MR. CLAIBORNE: Mr. Justice White, there might be a problem. The relief here, however, would be identical whether that judgment is sustained on the ground reached by the Panel.

QUESTION: I thought that if you invalidated on the ground that you are about to urge, it would invalidate the entire law, would it not -- Washington's entire statutory scheme?

MR. CLAIBORNE: But Mr. Justice White, so did the Panel decision in this case.

QUESTION: On equal protection grounds?

MR. CLAIBORNE: Finding impossible to sever the permissible and not permissible portions, the Ninth Circuit struck down the entire Washington law.

QUESTION: That is the way you interpret it?

MR. CLAIBORNE: That is so, Mr. Justice White.

We deal with this matter of jurisdiction, that is, the propriety of the appellees raising these statutory grounds on page 15 and 16 of our brief and particularly our footnote 9 thereof.

If I may in the shortness of time turn to the substance of the argument. May I begin in this way: The suggestion has been made that the propositions put from this table frustrate the true intent of Congress. I suggest to the Court that far from weaving any fine spun arguments or erecting any technical obstacles to defeat what everybody knows Congress intended in 1953, we on the contrary are faithful to that Congressional intent in 1889, in 1953 and in 1968.

That is demonstrable in at least two ways, but for Congress' recognition that Washington had what appeared to be an impediment in its State constitution, it is predictable with some assurance that Washington would have been treated as her neighbor, Oregon, and as four other states -- that is, would have been subjected to automatic or mandatory coverage.

That is because the five states that were so treated in Public Law 280 were those where the responsible officials had consulted both the State authorities and the tribes. And, therefore, the Department of the Interior was in a position to say to Congress, "These States want jurisdiction; the tribes either acquiesce or wish to be exempted."

QUESTION: Do you not have some problem with the equal

footing clause in the distinction between the five states you are talking about and the other states so that Washington was not given equal footing when it was admitted to the Union if your construction is correct?

I mean, to what extent can Congress impose a limitation on a state sovereignty that is not imposed on other states and have it survive the adoption of the State constitution of the submission to the Union, like your Coyle case where Congress prescribed where the capital of Oklahoma should be located?

MR. CLAIBORNE: Mr. Justice Rehnquist, I take it that there would have been no constitutional difficulty in Congress' including Washington with the other five, making it six, just as they did in the case of Alaska, a disclaimer state.

QUESTION: Well, there would have been some difficulty in treating Oregon and Washington differently, would there not?

MR. CLAIBORNE: But they did. I am not suggesting that Public Law 280 is unconstitutional because Oregon was immediately given jurisdiction, whereas Washington was not.

QUESTION: But how about the constitutionality of the enabling act?

MR. CLAIBORNE: Mr. Justice Rehnquist, I am obviously missing the thrust of your question. I take it as clear that Congress could have overridden the disclaimer and indeed the State constitutional disclaimer in Article XXVI, just as it did in the case of Alaska which had those impediments and it

could have treated Washington as it did Oregon by giving it immediate --

QUESTION: My question goes further back in that, and what I am referring is the doctrine of the Coyle case which is 221 U. S. 559, where the Court said that even though Congress could insist that a State put something in its constitution as a condition for coming into the Union, the State may later repudiate that if the result of not repudiating would be to give it less of an equal footing than the other states that were admitted without it.

MR. CLAIBORNE: Well, I am not in the least attempting to take on the Coyle case, Mr. Justice Rehnquist, but since here Congress gave permission to the State to remove this obstacle, the Coyle problem would seem to disappear.

But my suggestion was, Mr. Justice Rehnquist, that but for Congress' recognition that Washington like seven other states have an impediment in its consitution because it had consulted with the State officials in Washington -- and we have Congressman Westland's word for it in the Congressional Committee that Washington wants to come in on jurisdiction, the Indians had been consulted and two of the tribes had indicated their objection.

What is more, the Department of the Interior indicated that they would at least tentatively recommend exemption of those two tribes and one of those two tribes is the Yakima Tribe.

So that if Washington had been treated like Oregon, the result would have been that Washington would have been fully covered, except only for the Colville and Yakima Indians, who like the Warm Spring Indians in Oregon would have been exempted and this problem would never have arisen.

Now that is how Congress treated every objecting tribe with respect to whom the Department of Interior indicated that they had a functioning law and order system. No reason to believe the Yakima would not have been similarly exempted.

So we begin there that it is a fluke, as it were, that the question even arises with respect to the Yakima. What is more, and this is conceded by the State of Washington, it is clear that if anybody walked in on the Congressional hearings on this matter in 1953, they would have come away with the conviction that every member sitting thought Washington could not take jurisdiction until and unless it had amended the constitution.

And for that reason -- and for that reason alone -- Congress wrote Section 6 of Public Law 280. And not only did it write Section 6, it provided the proviso to Section 6 to the effect that jurisdiction under this Act shall not take hold until after the appropriate amendments have been made.

So the Congressional understanding was that Washington would not now be free to assume jurisdiction, having failed to take any action to amend its constitution.

QUESTION: Do you think in view of the language of Section 6 that, even though a statutory amendment had required -- had been required under State law, that would nonetheless have to have been by the people rather than by the legislature?

MR. CLAIBORNE: Mr. Justice Rehnquist, had the obstacle only been statutory, the legislative history is ambiguous. I think it is probably right to say that in that event it would have been in view of those writing of Public Law 280 a matter to be determined by State law.

QUESTION: And yet the language is exactly the same in the law as written.

MR. CLAIBORNE: But one must -- I suggest, Mr. Justice Rehnquist -- look at it in this way: The words "where necessary" are introduced for one of two reasons we suggest; either to simply identify those states with disclaimers, it meaning nothing more than that, or as we suggest in our brief, it may mean where there are only statutes, not constitutional provisions, and in the view of the State court it is nevertheless necessary to remove that obstacle by popular referendum.

It was so suggested by Committee counsel in the hearings. And that is, we suggest, the only reason why the words "where necessary" were introduced.

To read it otherwise is to make Section 6 wholly surplusage. And to read out the proviso which says such jurisdiction shall not obtain until and unless the appropriate

amendment has been made.

QUESTION: Mr. Claiborne, I am not sure that completely answers Justice Rehnquist's question because both in the proviso and in the introductory portion of 6, there is a reference of the people amending the constitution or statute as the case may be. In both cases the word "people" would seem to encompass acts by the legislature.

Do you agree or disagree with that? I am not clear.

MR. CLAIBORNE: Mr. Justice Stevens, I think the choice of the word "people" was because of the recognition that a constitution, in the case of Washington as everywhere else, has to be by popular referendum.

But that word does do double service. It includes the legislative amendment of the statutes.

QUESTION: So you would agree that the word "people" as used in both parts of Section 6 can refer to acts by the legislature without a popular referendum?

MR. CLAIBORNE: Insofar as it addresses statutory -- only statutory impediments. I think that is the best we can do, Mr. Justice Stevens, in attempting to parse out what was in the Congressional mind.

QUESTION: I agree it is the best you can do.

MR. CLAIBORNE: Now certainly the question whether Congress acted on its understanding, right or wrong, that the Washington constitution was an impediment that only popular

referendum could erase is a Federal question, if Congress acted on that understanding and wrote Section 6 in the proviso thereto with that understanding, that is binding even if as a matter of State law the impediment could have been erased by legislature.

We think Congress did act on that understanding, whether or not it was a misunderstanding and that, as a matter of Federal law, the State must do what Congress thought to be necessary in order to take jurisdiction.

QUESTION: Do you think that after Congress acted on that assumption Washington amended its constitution so as to make amendments adoptable just by the legislature?

MR. CLAIBORNE: Mr. Justice White, that is an interesting in between situation which, fortunately, we do not have to face.

QUESTION: Well, I do not know. Since that time the Supreme Court of Washington has interpreted its constitution not to require a referendum.

MR. CLAIBORNE: Had they amended their constitution to so provide, we might have a closer question. I would still argue that the State was bound by the conditions imposed by Congress. It would have been perfectly clear if Congress had said the States of Washington and the other seven shall not assume this jurisdiction until they have by popular referendum amended the provisions of their constitution which we rightly or wrongly view as a bar to their taking jurisdiction.

No one would argue in those circumstances that it mattered what the State law situation were.

QUESTION: If the language had been simply "by law", there would be no problem, would there?

MR. CLAIBORNE: Indeed. And we say that construed in the light of its legislative history that is what the court is confronted with in Section 6.

Now we do go on to say that Congress was correct in assuming that the obstacle in the State constitution, because it derives from the enabling act, which was -- and therefore was written in the Congress for a Federal purpose, must as a matter of Federal law be construed as not erasable by any means.

QUESTION: But your contention that Congress was correct in its understanding is not really a necessary part of your argument, is it?

MR. CLAIBORNE: Mr. Justice Stewart, it is exactly so. It is not a necessary part.

QUESTION: Because your basic argument is whether Congress was right or wrong about the necessity of providing what it did, it did in fact so provide.

MR. CLAIBORNE: Indeed, Mr. Justice Stewart.

One last word, if I may, the result which we suggest is rightly reached in this case. It does conform with the Congressional policy in 1968 to compel the parties, the tribe and the State, to reach accommodations at arms length and,

therefore, to reduce the friction and the inefficiency of a law enforcement system where the parties are at odds.

The parties should now return to the bargaining table as free agents and work out an accommodation.

QUESTION: Mr. Claiborne, before you sit down, I would like to ask you one further question on the jurisdictional problem that Justice White identified.

Is it not correct that if we accept your theory, as opposed to the theory of the Court of Appeals, that will invalidate the assumption of jurisdiction with respect to the nine tribes who consented to a full exception of the jurisdiction, whereas the rationale of the Ninth Circuit did not?

MR. CLAIBORNE: Mr. Justice Stevens, you are certainly correct that our submission would -- perhaps not in this case -- but the logic of our submission would invalidate those assumptions with respect to tribes between 1957 and 1963 for full jurisdiction.

And it may be that that is not the consequence of the Panel's decision, except only if one reads the '63 Act and the '57 Act as part of a whole; and I suggested to Mr. Justice White that that is how I read the opinion of the Panel.

QUESTION: Well, the opinion of the Ninth Circuit just dealt with the one section.

MR. CLAIBORNE: I think I stand corrected.

QUESTION: And how about, Mr. Claiborne, how about the

State jurisdiction over non-Indians, over whites? What about whites against Indians?

MR. CLAIBORNE: Well there, I think, the Ninth Circuit did hold that one could not pass it out.

QUESTION: Well, they dealt with only one section. That section dealt only with Indian defendants.

MR. CLAIBORNE: Well, I had thought -- I may be wrong, Mr. Justice White -- that what the Ninth Circuit held was that the 1963 Act is unconstitutional. They perhaps left standing the '57 Act, if one can read it as an independent legislation, which of course historically it was.

QUESTION: Well, it said we invalidate Section 37.12.010. And 37.12.010 cited in its footnote -- it just deals with Indian defendants, does it not?

MR. CLAIBORNE: But if one looks at the jurisdictional statement at page 35, Mr. Justice White, on the right-hand column, can the invalidated portion of Section so forth be separated from the remainder of the statute or does the whole statute fall?

The Washington legislature could have severed these provisions, but we cannot do so. The statute contains no severability clause. We are unable to attribute to Washington a willingness to include more jurisdiction than it undertook partially to assume. And I read that perhaps too hurriedly as indicating that all of the 1963 statute with its discrimination

between trust and non-trust land and its discrimination between cases in the eight categories which are within State jurisdiction even over trust land and even over Indian dependents, that that whole complicated structure must fall.

QUESTION: But that is just the 1963 Act.

MR. CLAIBORNE: Mr. Justice Stevens, as I think I indicated, I must withdraw the answer I gave to Mr. Justice White and agree that to that extent the results appear to be different.

QUESTION: Well then the question that raises -- and I do not know the answer to the question that raises -- does that affect our jurisdiction to entertain this particular argument?

MR. CLAIBORNE: The result may be, Mr. Justice Stevens, that while the successful appellee can hardly be deprived of his judgment when he had no standing to bring the case here and is therefore entitled to defend it on any Federal ground, perhaps the judgment cannot go further than it would have gone -- than it was in his favor below. He merely defended the judgment and he cannot go further. I would make that submission.

QUESTION: In any event, it is sort of a housekeeping rule, is it not?

MR. CLAIBORNE: Indeed, Mr. Justice White. And, of course, this Court itself indicated its willingness --

QUESTION: And reaching statutory questions first is

also housekeeping.

MR. CLAIBORNE: And it is the reason, of course, without any disparaging the other argument that we put the statutory questions first and foremost.

MR. CHIEF JUSTICE BURGER: Mr. Hovis.

ORAL ARGUMENT OF JAMES B. HOVIS, ESQ.

ON BEHALF OF THE APPELLEES

MR. HOVIS: Mr. Chief Justice, and if it pleases the court:

If I could just take a moment to respond to the last question, this 37.12.010 has only to do with Indians and, as Justice White has pointed out, right in the first part it says "assumes jurisdiction over Indians only and it does not assume any jurisdiction over non-Indians by the 37 12.010."

The State's assumption of jurisdiction over non-Indians within the Reservation fall from the McBratney and the Draper exception.

QUESTION: Well when did Washington -- under what statute did Washington rather than the United States have jurisdiction over non-Indians committing crimes on an Indian reservation?

MR. HOVIS: The McBratney exception where it is non-Indian against non-Indian which is a case of this court that --

QUESTION: Yes. How about a non-Indian against an

Indian?

MR. HOVIS: Non-Indian against an Indian, that is in Federal court except where --

QUESTION: Well, has not Washington purported to assume jurisdiction over non-Indian crimes against Indians?

MR. HOVIS: Yes, it is purported to assume jurisdiction in some cases. It depends on what prosecutor you are talking to. The fact is a rather confusing one for all of us to deal with because --

QUESTION: Well, does the old '53 Act that is involved in this case deal with non-Indian tribes -- non-Indian defendants or just Indian defendants?

MR. HOVIS: It just deals with cases in which Indians are involved.

QUESTION: And what Act, if any, deals with crimes by non-Indians on Indian reservations or is there such a Washington Act?

MR. HOVIS: There is no such Washington Act. And I am just going from the plain reading of the statute 37.12.010. The State has interpreted different prosecutor by prosecutor in different areas. It depends on who does not want to do the job when the complainant comes to the particular prosecutor.

But I direct your attention to the plain reading of the Act as to whether it affects Indians or non-Indians.

In the Treaty in 1855 the Yakima Nation was reserved

explicitly and implicitly the right to control its internal affairs by its own laws and by its own government. And for a good number of years the Yakima Nation exercised that right with responsibility.

At the time in 1953 they were exercising that right of control within the exterior boundaries of their Reservation with responsibility and Congress, because of other areas of the country which were not exercising their responsibility, passed Public Law 280. This Act provided directly for state jurisdiction in five listed states and provided for assumption by statute in ten other states, and in Washington and seven other states provided for assumption of state jurisdiction by the amendment of the State constitution.

In 1955 in the first legislative session after that Act, the proponents of State jurisdiction over Indians tried to get a constitutional amendment through their legislature. They did not amend their constitution.

In 1957 they provided by legislative act that the tribes who wished jurisdiction could petition for jurisdiction. Ten did and others did not.

It is interesting to note, however, that even the tribes who have given it a fair trial and who wished jurisdiction because of their experience they have had for the lack of adequate protection are petitioning this court in the amicus brief to be removed from State jurisdiction in the State of Washington.

We came to 1963 and unilaterally and without amendment of their State constitution the State of Washington passed 37. 12.010. And this Act allowed the State to assume full jurisdiction over non-trust lands and assumed partial jurisdiction over trust lands for eight non-specified or non-defined or non-referred categories.

The rest of the jurisdiction over Indians and Indian matters remained with the tribe and with the Federal government. And so we had about four different systems underneath this Act for law enforcement officers to become familiar with.

Now the result of this unilateral action by the -- on the part of the State of Washington, contrary to the Treaty promise to the Yakimas, has been law without order on the Yakima Reservation. The record is clear in this case that the system is not adequate to handle the problem.

The State has admitted that their system is not adequate in two reports and to which we have referred to. And it is particularly -- and our biggest problem -- it is particularly discriminatory and causing a lot of problems as regards our Indian youth.

The problem is that the State and County have neither the inclination or ability to provide law and order that they so unilaterally assumed over our objection. Mr. Gorton had his map here and he pointed out the vast area of the Yakima Reservation, over 2,000 square miles. And there is deeded and

non-trust land sprinkled throughout even in the closed area, but if you will notice from the record that in 1971, which was the last available figures at the time this case was heard in 1972, the State made two felony arrests outside of the cities and towns, out in this vast area, and 17 misdemeanor arrests.

Unfortunately, gentlemen, the Reservation law and order system under Washington system does not either meet any national standards; it does not meet any parity state-wide standards. Sure, we have as good law and order as they do in some other bad parts. It has no parity with cities, and it has no parity, if you please, with the -- with other parts of the County.

You notice that, while they are talking about 40 deputies assigned to the County, at the time of the trial there were 29 and, even though the whole area of the County is only 4,700 square miles, only two were principally assigned to the Reservation, which is over half that area, and only seven were assigned to the entire lower valley which has a bigger population than the rest of the rural areas.

Now what has happened here has been a decline of arrests of over 2,000 percent above and beyond the time when the Indians -- when the Federal government was handling the responsibility and the juvenile situation is a scandal and that is our biggest problem.

Washington in its reports agrees to the lack of

that adequacy as you see in the record. And the County officials, particularly in the testimony, particularly agreed that it was discriminatory, that there was more factors available for non-Indian youth than there was for Indian youth.

Now if there is going to be law and order on the Yakima Reservation, we must regain our law and order and we are here today to see whether underneath the law it is ours.

The Yakimas throughout all of this time, and are today, have been very responsible on this, in spite of the unwarranted intrusions into their jurisdiction, they are spending per capita for each and every member more for law and order than any other community in the United States, even though they have not got the total responsibility.

Washington, as I said, in contrast refuses to meet any reasonable standards. Now as I understand my duty to this Court, and it is first my duty to indicate to this Court why I believe that 37.12.010 should not pertain to the Yakima Indian Nation before I get into the constitutional grounds.

Now I think that can be easily demonstrated, gentlemen. It is undisputed by all the parties here that the treaty with the Yakimas explicitly and implicitly reserve the Yakima powers over their internal affairs to be governed by their own laws and by their own government.

QUESTION: Just one question -- kind of a broad question, I guess -- but you emphasized there were only two

felony arrests by the State. In the felony area, is it not true that the replacement was the State instead of the Federal authorities, because there was no tribal jurisdiction anyway. Is that not right? And so the grievance -- is it not between the Federal and State sovereigns rather than it is between the Tribe and the State on this portion of the law enforcement?

MR. HOVIS: Yes, but the record shows that prior to the State coming in in 1963 that there were some 17, I think it was, felony arrests. In other words, the felony arrests increased by 2,000 percent.

QUESTION: But there were 17 arrests by Federal authorities? We are not talking about tribal enforcement now, are we?

MR. HOVIS: Most of the enforcement, if you please, was by tribal authorities which turned them over to the Federal government for prosecution.

QUESTION: I see.

And they were disabled from doing that with respect to the states? Could they do the same thing? The Federal government had the responsibility before but the tribe more or less volunteered to help out? Are they prevented from doing that now?

MR. HOVIS: No. We are doing the job now. We are doing the job now.

QUESTION: Well then, how is the situation in the

major crimes area really any basically different than it was when it was the Federal government that prosecuted?

MR. HOVIS: Well, in the first place, let me take first for a victim -- let me take a victim. Who does he go to? Who does the victim go to? Does he go to the State and call the State? Does he call the Tribe? The County does not even have a telephone for -- you have to call long distance to get the County Sheriff. Who do you go to? Do you go to the tribal authorities and so forth?

Once the tribal authority goes out and investigates, he --

QUESTION: How is it different than when he had the same question before? Who does he go to, the FBI or to the Tribe?

MR. HOVIS: He went to the Tribe usually and the FBI accepted it. We had a lot more cooperation.

QUESTION: And can we do the same thing now? That is what I am asking.

MR. HOVIS: You can arrest a person, but you cannot get him prosecuted.

QUESTION: Well, unless the State agrees, but was that not true also when the Federal government was the prosecutor?

MR. HOVIS: Yes, but the Federal government prosecuted and the State does not.

QUESTION: So it is not with the arrest, but with the

failure to prosecute where an arrest has been made by the Tribe?

MR. HOVIS: Well, the biggest problem is that the people, the victims are so confused that they do not know where to go to, they do not know what the law is. The police officers do not know what it is. They do not know what category; what is the domestic relations --

QUESTION: I have trouble with this. Why is it any more confusing now than it was before when it was the Federal rather than the State? That is what puzzles me.

MR. HOVIS: Now generally, practically among law enforcement officers, they tend to respect each other's jurisdiction. For example, the FBI would not any more be going into a matter -- getting away from the Indian situation, would no more go into a State and start investigating a crime until they were requested by another department. That is just one of the ways that it works.

Departments respect other department's jurisdiction. So they give the other department the first crack at it. That is the first thing that happens. That is the reason.

Then we have got the tract system. No one can tell on the Reservation whether it is deeded property or trust property. These tracts are all interspaced and non-Indians live on the Indian lands or trust lands, and Indians live on deeded lands.

No one knows just exactly what the title of the land

is. Now that is the next problem. And then we get into the problem of the eight categories. What are the eight categories? What is, for example, domestic relations? What kind of a crime does domestic relations involve? You cannot even find a definition of what domestic relations is in a law dictionary.

Is it a domestic relations problem? Is this kind of problem -- it is frankly -- I suggest that it is confusing enough for me;as the Prosecuting Attorney testified at the trial, he said every Prosecutor interprets it in a different way.

QUESTION: Could I ask you -- let us assume that your position prevails here. Then let us assume that there is a crime by an Indian on the Reservation.

Now if it is a major crime, under the major crimes act, the Federal authorities have to prosecute.

MR. HOVIS: Yes, they do.

QUESTION: Now what if it is not a major crime, but it is not a misdemeanor either? Is not there an Assimilative Crimes Act in which event the Federal law incorporates State law for that purpose?

MR. HOVIS: If it is a misdemeanor -- you see, if we have jurisdiction -- if it is a Federal crime, the Federal government has exclusive control over the 13 major crimes.

QUESTION: I understand that. Now let us take a major crime. They have exclusive jurisdiction over it.

MR. HOVIS: Yes.

QUESTION: One of the major crimes. Now, what is the role of the Assimilative Crimes Act? That is in the event of crime that is not a major crime?

MR. HOVIS: That is correct.

QUESTION: Now in that area the crimes are defined by State law, I take it?

MR. HOVIS: Yes, they are.

QUESTION: And then there is a third category of crimes that are covered by tribal law?

MR. HOVIS: That is correct. All crimes are coverd by tribal law where the Federal government has not taken exclusive jurisdiction.

QUESTION: So if the Federal does not prosecute, we can still prosecute, not for a felony, but at least we can prosecute? At least, the person just does not beat the police officer back to his home?

QUESTION: But there is a limitation upon the maximum punishment that can be imposed by the Federal court.

MR. HOVIS: There is. Unfortunately, there is a limitation on the maximum of --

QUESTION: Six months, is it not?

MR. HOVIS: Yes, six months and $500.

And we think that is unwise on the part of Congress but there it is.

But if it is a crime that calls for a greater

punishment than that, the Tribe has no jurisdiction over it, I think.

QUESTION: The Tribe does have jurisdiction but under the Wheeler decision the Federal government can then prosecute for the same conduct.

MR. HOVIS: Correct.

QUESTION: But it is barred by double jeopardy.

MR. HOVIS: But underneath the Court's decision here we have no concurrent jurisdiction whatsoever. And the only thing we can do is to prosecute Indians on trust grounds except for the eight undefined and unreferenced categories.

QUESTION: Well I thought it was your plan that you had concurrent jurisdiction?

MR. HOVIS: No, it is our claim that we --

QUESTION: That was not decided in this case below --

MR. HOVIS: Yes, it was decided.

QUESTION: -- by the Court of Appeals.

MR. HOVIS: Not by the Court of Appeals.

QUESTION: That is what I mean, the judgment being reviewed here, but you ask that this Court -- even if we disagree with the Court of Appeals -- that we proceed to decide the question of whether or not that jurisdiction is concurrent.

MR. HOVIS: Yes.

QUESTION: That is what I understood your brief to say.

MR. HOVIS: Yes, sir, that is correct.

But what I am saying is we do not have it now because of the --

QUESTION: The District Court's opinion.

MR. HOVIS: -- District Court's opinion.

Now with all of the problems we have, having these treaty powers and having them taken away, does this Public Law 280 affect the Yakima Tribe? And we think it does not. That is the first problem that we think the way the Court handle this question.

Now we do not think that this law affects the Yakima Nation. And let me explain to you why not. We have those explicit and implicit powers to govern our people in our own way by our own government.

Now Washington has contended that Congress has the power to -- the absolute power to abrogate these treaty powers and these treaty provisions. We disagree. We think that this Court has said that this power is not absolute;to abrogate the treaty that Congress must act in a constitutional manner, number one; and two, must specifically and explicitly abrogate the involved treaty provisions.

QUESTION: Why? Number one, what do you do with Lone Wolf against Hitchcock?

MR. HOVIS: Well, as I understood this Court's decision in Weeks versus Delaware,they said that Lone Wolf versus Hitchcock has been ignored by this Court for some 50 years, and it

was about time that this Court said so.

QUESTION: Well, it was cited in DeCoteau in a case as recently as two years ago.

MR. HOVIS: I suggest that this -- I was hopeful in the reading of Weeks that this Court had determined that Congress when it came to doing away with treaty provisions would have to act in a constitutional manner and in that regard. And that is the way I interpreted the decision of this Court in Weeks versus Delaware.

And also in Menominee, I understood this Court to say that you must specifically and explicitly abrogate treaty rights. You cannot do it by implication. And it must be done clearly.

So it is clear in this case that Congress knew neither explicitly or implicitly abrogated these treaty rights, and it is also clear that, as the Solicitor General pointed out, that Congress clearly intended to exclude the Yakimas because of the hurried manner in which this Act was put together, and I suggest that neither the Federal Act or the State Act is any specimen of good legislation drafting, but in the hurried enactment of that legislation, the Yakimas were not excluded. If they had been one of the named states, they would have been excluded. Their law and order was satisfactory and it was recommended to Congress that they be excluded.

Now Washington has contended in this case that Washington

assumed jurisdiction over the Yakimas in any way or manner that Washington in its sole judgment determines. They were saying that it was up to the State to determine whether they could ignore the mandatory provisions of their constitution.

And I want to point out to the Court that that is what they have done. They have ignored -- they did not even amend Article XXVI of their constitution even by a legislative act. It still sits there. Whatever amendment to Article XXVI there is, it is by implication only.

QUESTION: Well, of course, that question has been decided for us, has it not, by the Supreme Court of Washington. And even we, sitting on the side lines, might think it is a very wrong decision, it is none of our business and we have nothing to do with it. Is not that correct?

MR. HOVIS: I do not think that is true. I think that is an issue here. First, I think it is an issue in interpreting what Congress did.

QUESTION: Well, that is a Federal question.

MR. HOVIS: That is a Federal question. In other words, for the State of Washington to have different rules in amending sections that apply to Indians and allowing it to be done by implication, where you have another section that applies to the rest of the populace or other problems, they have to go through the mandatory amendment procedures. For the Supreme Court to come up with that kind of a decision, I think

is a lack of due process.

QUESTION: Well, is that argument made here?

MR. HOVIS: Yes, it is. It has been made all through this case, if the Court please. And also I think it shows that the Congress is right when they ask this Court -- when they ask the State of Washington to amend their constitution.

QUESTION: If necessary. That is a matter of State law, is it not?

MR. HOVIS: It is necessary as a matter of Federal law and as a matter of constitutional law.

QUESTION: Now whether or not it is necessary to amend the Washington constitution in order for the Washington legislature to do this, that or the other thing, is not that wholly a matter of State law?

MR. HOVIS: Whether the State --

QUESTION: Matter of State constitutional law.

MR. HOVIS: It is a matter of State constitutional law, but the State no matter has to follow the constitutional provisions of the United States and they must things in a due process and with equal protection way.

QUESTION: Without question.

MR. HOVIS: Yes, whether it is the constitution or whether it is the statute. And they have not done that. They have not accorded this due process in the amendment of the constitution. If that is due process, that is something I did

not --

QUESTION: Can Congress tell the State of Washington how it may and may not amend its constitution?

MR. HOVIS: Congress cannot tell them how they may amend their constitution, but this is the power that was solely with the United States of America, the relationship between the Indians and the jurisdiction.

QUESTION: I know what you are driving at. Can Congress say that if Indians are involved, a state cannot amend its constitution by the legislature?

MR. HOVIS: Congress can say we are delegating this Federal power to you over Indians, but before you can accept this Federal power over Indians, you must amend your constitution in the way that we say you must amend it.

And it is clear in this case that Congress --

QUESTION: That it is different from my question?

MR. HOVIS: It is different.

Congress cannot tell the State how to amend its constitution, but if they are going to delegate the powers to the State, like in this case, they can tell them what to do. And they did. They told them they had to do it by the people. And that is what they have done.

I really question in this case that the matter is up whether Congress could make such an unfettered delegation anyway. These legislative and judicial powers that are

definitely Federal are vested with the Federal government and not with the State government. And such a loose delegation, as counsel would argue, that it was said to the State to do it any way that you want to or any way that your laws permit is not what I think Congress did nor something that I think Congress can do.

I think to delegate this exclusive Federal power in such an unfettered manner is not within Congress' powers.

Finally, we reach the question of the Circuit Court decision of this being unequal protection underneath the laws of not providing protection based on the title of the land. And the Circuit Court said that that provision was not equal protection and, therefore, that portion of the section under 1963 would be stricken as unconstitutional.

Now I think the court was very clear on that. They did not go into whether there would be strict scrutiny or not. They said there was no rational basis.

I want to point out to the Court, however, that the rational basis that the State has come with here at this very late date is the very -- is new, never been brought into this case before, and is inconsistent from their present position, and inconsistent with their position before this Court in Docket 78-119. In that case in the fishing matter, the Supreme Court of the State of Washington is saying that in regards to Indians and non-Indians -- in regards to the treaty

rights that there can be no differentiation or it is a violation of equal protection of both State and Federal constitution. So the State is trying to have it this way in this case and the other way in the other case. And it is certainly a new rationale that they came up with.

I would like to have the Court consider also in this matter that strict scrutiny should apply. It is true that this is not a racial situation, but certainly my clients are discreet and a minority, and certainly the rights involved -- the rights to protection of person and property are most fundamental.

And if necessary, I would like to have the Court give that consideration. I do not think that even this new fancied rationale that the State comes up with at this late stage, which is inconsistent from any position that they have ever taken, that the Court will be necessary to reach that question.

There is no question that the clearest and easiest way to reach this question is on the constitutional disclaimer problem. I certainly think that that is most clear.

Thank you very much for your time.

MR. CHIEF JUSTICE BURGER: General Gorton, did you have something further.

REBUTTAL OF SLADE GORTON, ESQ.

ON BEHALF OF THE APPELLANTS

MR. GORTON: Thank you, Mr. Chief Justice, and may it

please the court:

Mr. Justice White, you were inadvertently, I am certain, totally 100 percent misled by the answers of both Mr. Claiborne and Mr. Hovis to your question on the scope of RCW 37.12.010.

That statute -- under that statute the State of Washington obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, counties, lands, the whole works. It is of course from that statute that we derive our jurisdiction to try a non-Indian for assaulting an Indian, which we did not have under U. S. v McBratney. Precisely every prosecuting attorney in the State knows that.

QUESTION: Well, your opponent suggests that Washington has never assumed jurisdiction over crimes by non-whites.

MR. GORTON: That is simply nonsense. My co-counsel here is the prosecuting attorney of Yakima County. He literally does that every week.

In any event, that source of jurisdiction is -- as a matter of fact, it is because of that reading of 37.12.010 that I indicated to you what I did.

QUESTION: I picked this up from your brief. You indicate that if you do not prevail here, the State's jurisdiction over whites, over non-Indians will be invalidated and that the

Federal government will assume that.

MR. GORTON: Absolutely, except for the McBratney exception.

QUESTION: But that would not expand the relief to the other side? That was covered by the Ninth Circuit?

MR. GORTON: The Ninth Circuit does that totally and without condition. The Ninth Circuit may not have invalidated the 1957 Act, but the 1957 Act is not applicable to the Yakimas.

QUESTION: Mr. Gorton, you said except something.

MR. GORTON: Except for the McBratney exception.

QUESTION: Yes, a non-Indian against a non-Indian?

MR. GORTON: Exactly. In any event, that statute is what gives to Indians and non-Indians on both fee lands and non-fee lands, on trust lands, exactly the same measure of protection. They have total protection on fee lands; both the Indians and the non-Indians have protection on trust lands against everyone except for a member of the Yakima Tribe. The Indian and non-Indian are in exactly the same situation.

QUESTION: What about Indians committing crimes on fee lands within the reservation?

MR. GORTON: On fee lands within the reservations are totally subject to State jurisdiction.

QUESTION: And so there is a difference as to who prosecutes misdemeanors? It depends where they were committed.

MR. GORTON: Yes, it does.

Now I did not answer your first question to me on my Direct as well as I should have. Actually, that police confusion is practically non-existent because the tribal code is practically identical in all of its definitions to the State Criminal Code. That is simply a practical matter, however.

The other matter which really amounted to retrying this case, which Mr. Hovis stated here even though he did not prevail in the trial court, has to do with this outrageous use of arrest figures.

Mr. Justice Stevens really answered that question. What has happened, Mr. Justice Stevens, is that those arrests now are being made by the tribal police under their deputization from the County Sheriff. The same number of people are being arrested. They are not being arrested by the Deputy Sheriff because the tribe keeps us off of two-thirds -- you know, has closed two-thirds of the reservation to entry by non-Indians.

QUESTION: Well, if the tribal policeman is acting as the County Deputy Sheriff, would not the arrest figures show that the arrest was made by the Deputy Sheriff?

MR. GORTON: No. The arrest figures that were given there were arrest figures by the County Sheriff.

QUESTION: Not by the Deputy?

MR. GORTON: Not by anyone else; not by the State Patrol, which among other things had four times as many arrests

as the County Sheriff did, and which is also cross-deputized by the tribal police.

Now back to the submission of the Solicitor General in this matter. The Solicitor General wishes that the phrase "where necessary" were not in the statute. And it would make his case a great deal easier and mine a great deal more difficult, but he says, well, maybe it just is a reference to the fact that these are disclaimer states, or maybe it applies only to statutes.

But, of course, it does not. That phrase appears right after the word "amend" -- "to amend where necessary its constitution or statute." And what it means is quite obvious. It means that the State determines under State law whether it is necessary to amend the constitution or a statute. If it is not necessary under State law, the State is a Section 7 rather than a Section 6 State.

Congress was not interested in building up extra fences, making additional federal requirements which did not pre-exist. I simply wish to go back to the point which I made. A great deal of the Solicitor General's brief has to do with the fact that this requirement of a vote by the people was made way back in 1889, but when in 1889 South Dakota said, no, sir, it is not by the people, the President of the United States accepted that as total compliance with the same enabling act.

South Dakota, Washington, Montana were admitted

pursuant to the same enabling act. That debate actually was all over South Dakota -- Dakota and its division into two separate states; 40 states in the country -- 35 states rather very clearly have neither enabling acts nor were required to take jurisdiction on a mandatory basis.

Yet they were given the choice to determine under state law what jurisdiction they wished to take. The problem with this entire argument: We would not be here before you at all because of the fact that you have already decided the enabling act question, except for the fact that we were more considerate of the tribal desire for self-government than was any other state that dealt with Public Law 280.

Their argument is you could not give the tribes that option. That is what it amounts to. We took full jurisdiction, Mr. Justice White. We exercised full jurisdiction over everything that was covered by the enabling act even when the enabling act was in full effect. Fee lands, as I said earlier and in an argument that was not answered here, fee lands are not covered by the enabling act at all, and over them we took full jurisdiction. On those lands in which the Indians have the greatest interest the ones which they own or which are held in trust for them we deferred to them -- to the Tribe.

QUESTION: Except in eight categories?

MR. GORTON: Except in eight categories.

We agreed to take full jurisdiction. That is what

we are required to do. But that statute, Section 7, also says "at such time as the State legislature may determine." That time is when the Yakima Tribe agrees.

We gave them the choice, a generous choice, and we should not be penalized for it.

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

(Whereupon, at 11:40 a.m., the above-entitled case was submitted.)