

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1717  
TITLE AMERICAN BANK AND TRUST COMPANY, ET AL.,  
Petitioners v.  
DALLAS COUNTY, ET AL.  
PLACE Washington, D. C.  
DATE March 29, 1983  
PAGES 1 - 34



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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   AMERICAN BANK AND TRUST COMPANY,         :

4       ET AL.,                                     :

5   Petitioners         :

6   v.                                 :    No. 81-1717

7   DALLAS COUNTY, ET AL.                         :

8   - - - - -x

9

10   Washington, D.C.

11   Tuesday, March 29, 1983

12

13                   The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 2:03 o'clock p.m.

16 APPEARANCES:

17 MARVIN S. SLOMAN, ESQ., Dallas, Texas; on behalf of  
18       the Petitioners.

19 ERNEST J. BROWN, ESQ., Tax Division, Department of  
20 Justice, Washington, D.C.,; on behalf of the United  
21 States as amicus curiae.

22 CARROLL R. GRAHAM, ESQ., Assistant City Attorney,  
23 Dallas, Texas; on behalf of the Respondents.

24 EARL LUNA, ESQ., Dallas, Texas; on behalf of  
25       Respondents.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
MARVIN S. SLOMAN, ESQ., on behalf of the Petitioners	3
ERNEST J. BROWN, ESQ., on behalf of the United States as amicus curiae	9
CARROLL R. GRAHAM, on behalf of the Respondents	15
EARL LUNA, ESQ., on behalf of Respondents	22
MARVIN S. SLOMAN, ESQ., on behalf of the Petitioners - rebuttal	30

P R O C E E D I N G S

1  
2 CHIEF JUSTICE BURGER: We will hear arguments  
3 next in American Bank and Trust Company against Dallas  
4 County.

5 Mr. Sloman, I think you may proceed whenever  
6 you're ready.

7 ORAL ARGUMENT OF MARVIN S. SLOMAN, ESQ.,  
8 ON BEHALF OF THE PETITIONERS

9 MR. SLOMAN: Mr. Chief Justice and may it  
10 please the Court:

11 This case involves a state property tax on the  
12 shares of state and national banks, authorized by Texas  
13 statute but imposed and calculated by local taxing  
14 authorities. In the case before the Court the banks  
15 have paid the taxes as agents for the shareholders and  
16 they and the shareholders seek to have the tax  
17 assessment declared to be in violation of Revised  
18 Statutes Section 3701 as amended in 1959 to prohibit  
19 every form of taxation that considers United States  
20 obligations in the computation of the tax.

21 The Respondents calculated the taxable value  
22 of the shares of each bank according to the bank's net  
23 worth. That is, as the court below put it at Appendix  
24 page 183, by taking the total assets of the bank other  
25 than real estate, which is taxed separately to the bank

1 itself, and deducting the bank's liabilities, to come up  
2 with a net worth or equity capital or a number of names  
3 as it's known on call statements, financial statements  
4 or the taxing authorities, but in an accounting sense it  
5 is the net worth, the assets less the liabilities other  
6 than real estate.

7           Now, among those assets were various amounts  
8 of United States obligations that went into that net  
9 worth that was used to determine the taxable value of  
10 the shares. Petitioners contend that Respondents  
11 thereby "considered" United States obligations in  
12 computing the taxable value of the shares, in violation  
13 of Section 3701.

14           Thus, at the center of the case is the effect  
15 of the word "considered" as used in that statute. The  
16 word is given no special definition in the statute.  
17 Now, of course the word "consider" can be used in two  
18 senses: One, which is the sense relied on by  
19 Respondents, and they repeatedly refer to the state of  
20 mind of the tax assessors, refers to a subjective state  
21 or a mental process inside the mind. "In my considered  
22 judgment" or "This Court considers a case for  
23 decision."

24           But that sense of the word cannot be involved  
25 here because the word as used in the statute is

1 addressed to and defines a prohibited form of taxation,  
2 which is incapable of a mental process.

3 Another sense of the word "considers" deals  
4 with an objective state of facts, which the statute  
5 itself purports to do, as reflected in the dictionary  
6 definition of "to take into account." The general law  
7 of relativity considers the effect of gravity on light  
8 or takes into account the effect of gravity.

9 This is the meaning that makes sense in the  
10 context of Section 3701, so that, substituting the  
11 dictionary objective meaning, the statute prohibits  
12 every form of taxation that takes into account United  
13 States obligations in the computation of the tax. And  
14 this is the sense in which this Court and the Texas  
15 courts and other authorities have described the  
16 computation of a share tax measured by net assets that  
17 included United States obligations.

18 For example, in Des Moines National Bank  
19 against Fairweather, cited in our brief, this Court was  
20 dealing with a share tax that was computed just exactly  
21 like the one at bar. That is, assets, which included  
22 United States obligations, less liabilities resulted in  
23 a net worth that was the basis, the base for the tax.

24 At that time Section 3701 was in the form  
25 before the 1959 amendment and only prohibited taxes upon

1 United States obligations and not those which considered  
2 United States obligations, and the Court upheld the tax  
3 without a deduction for United States obligations on the  
4 familiar distinction that a tax upon a shareholder's  
5 interest is not a tax upon the corporation or the  
6 corporation's assets, even though, as this Court said in  
7 describing the tax there, "controlling consideration" is  
8 given to those assets in the computation of the tax.

9           The Court in its holding said Section 3701  
10 left no authority for taxing a United States obligation  
11 to the bank, to the bank itself, "but only for taking it  
12 into account in valuing the shares of the  
13 stockholders."

14           So that this Court in its description of this  
15 very kind of tax recognized that the tax considers  
16 United States obligations, takes them into account, but  
17 under the former form of the statute that was  
18 permissible because the tax was only upon United States  
19 obligations, whereas since the 1959 amendment taxes are  
20 prohibited, every form of tax that considers those  
21 obligations.

22           We cite in our brief at page 14 Texas  
23 authorities that have used similar language and a  
24 similar approach in describing the very share tax that's  
25 before this Court. The assessment in the present cases

1 take into account the bank's assets which include United  
2 States obligations and therefore come squarely under the  
3 statutory prohibition against considering United States  
4 obligations in the computation of the tax.

5 Respondents, however, would read an implied  
6 exception into the prohibition of the statute in spite  
7 of its apparent application. But any implied exceptions  
8 are foreclosed by two specific exemptions that the 1959  
9 amendment itself provided from its expanded  
10 prohibition.

11 Under the pre-1959 version of Section 3701,  
12 when only taxes upon United States obligations were  
13 prohibited, this Court had upheld share taxes, as in Des  
14 Moines against Fairweather and other cases, and it had  
15 upheld franchise taxes, and it had upheld death taxes or  
16 succession taxes, where the tax was measured by assets  
17 that included United States obligations.

18 And in each of those cases, which are cited in  
19 our brief and which cross-refer to one another -- the  
20 franchise tax case refers to the share tax case, and so  
21 forth -- in each of those cases the tax was upheld  
22 because it was not upon United States obligations by  
23 which the tax was measured, but rather upon the  
24 shareholders' interest or the franchise or the death  
25 transfer.



1           Now, when Section 3701 was amended by Congress  
2 in 1959 into its present form, on which Petitioners rely  
3 and which is before this Court, Congress specifically  
4 excepted franchise taxes and specifically excepted death  
5 taxes from the expanded prohibition of the tax.

6           QUESTION: What about gift taxes? What about  
7 gift taxes?

8           MR. SLOMAN: Gift taxes are not mentioned,  
9 Your Honor.

10          QUESTION: Well, what happens then? Do we  
11 have one rule for estate taxes and another rule for gift  
12 taxes, even though they, in the old days anyway, used to  
13 be inter-related?

14          MR. SLOMAN: Certainly in the view of the  
15 Solicitor General that's so. No gifts are involved in  
16 the case before the Court. But it would appear that,  
17 not being excepted from the statute, that they would be  
18 covered.

19          Now, having made no exception for any kind of  
20 property tax, share taxes or otherwise, but having  
21 excepted franchise taxes and death taxes, it would be  
22 quite unwarranted to infer an exception or imply an  
23 exception, as Respondents would do, for share taxes.  
24 Respondents' several arguments end with Section 3701  
25 having no substantive effect, at least as to banks. But

1 the meaning of the statute is plain and its prohibition  
2 is clear, irrespective of who owns the exempt  
3 obligations.

4 I reserve the balance of my time for rebuttal,  
5 Mr. Chief Justice.

6 CHIEF JUSTICE BURGER: Very well.

7 Mr. Brown?

8 ORAL ARGUMENT OF ERNEST J. BROWN, ESQ.

9 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

10 MR. BROWN: Mr. Chief Justice and it it please  
11 the Court:

12 I should like, on behalf of the United States,  
13 to refer the Court particularly to the circumstances,  
14 the background leading to the 1959 amendment, which is  
15 of course central here. I think that in light of those  
16 circumstances one can conclude, in the terms used just  
17 two months ago in the Memphis Bank opinion, that it can  
18 be determined that this statute is another manifestation  
19 of what the Court called the long-established  
20 Congressional intent to prevent taxes which diminish in  
21 the slightest degree the market value or the investment  
22 attractiveness of obligations of the United States.

23 The legislation resulted from a presidential  
24 message, supported by an appearance of the Secretary of  
25 the Treasury, before the Ways and Means Committee,

1 seeking what both called assistance in the management of  
2 the national debt, assistance by lifting the debt  
3 ceiling, by raising the interest ceiling, or I should  
4 say removing the interest ceiling, which was then 3.26  
5 percent on savings bonds and -- the figure seems strange  
6 to us today -- 4.25 percent on obligations of a maturity  
7 of more than five years.

8           The Secretary told the Committee that the  
9 Treasury was unable to market 4.25 percent bonds and so  
10 was necessarily financing the Government on very  
11 short-term obligations and Treasury bills. Also asked  
12 was what both the President and the Secretary referred  
13 to as other technical assistance, and that of course is  
14 what is referred to here in the exemption, or the  
15 further exemption or to clarify the exemption, of  
16 national obligations, Government bonds.

17           The Congress did lift the debt ceiling. It  
18 did increase the savings bond ceiling. But it did not,  
19 after extended discussion of interest rates, whether  
20 they were inflationary or not -- some of them have echos  
21 even today, of whether higher interest causes inflation  
22 or inflation causes higher interest -- but it did not.

23           So it was the more important that the impact  
24 of state taxes on the federal bonds be carefully  
25 observed. Both the President and the Secretary informed

1 the Congress that the state obligations had a very  
2 highly preferential position. Federal taxes were high  
3 then, as some think them now, and the state exemption  
4 made them very attractive, highly marketable.

5 As a matter of fact, the Secretary informed  
6 the Committee that state obligations in the 12 postwar  
7 years had increased from \$16 billion to \$59 billion,  
8 which led to strenuous competition for the federal  
9 obligations in the market.

10 The Secretary used as an illustration to the  
11 Committee an Idaho tax which was in force seeking to  
12 reach interest on Government bonds. The justification  
13 was the tax was on the individual, measured by the  
14 interest on the bonds.

15 QUESTION: Mr. Brown, let me interrupt you  
16 right there, because that Idaho example raised a  
17 question in my mind. Supposing you had a corporation  
18 that was subjected to a state income tax and some of its  
19 income was derived from income on Government bonds.  
20 Would the dividend income of that corporation be exempt  
21 from tax to the extent that it reflected interest on  
22 Government bonds?

23 MR. BROWN: The dividends distributed by the  
24 corporation --

25 QUESTION: To the shareholders, yes.

1 MR. BROWN: No, Justice Stevens.

2 QUESTION: Why wouldn't that be indirectly a  
3 tax on income, just as the tax on value of the shares is  
4 a tax on the underlying Government bond?

5 MR. BROWN: Well, it hasn't been thus far.  
6 The regulations under Section 312 of the Internal  
7 Revenue Code say that it doesn't carry over. I may  
8 quote Justice Holmes in Miller and Milwaukee saying that  
9 the corporation is usually an insulator which separates  
10 the nature of the corporate income.

11 QUESTION: But in this case you're arguing the  
12 corporation is not an insulator.

13 MR. BROWN: Well, no -- yes, after the statute  
14 I am arguing that it's not.

15 QUESTION: That it's an insulator for income  
16 purposes, but not for asset purposes.

17 MR. BROWN: Well, I don't know that I would  
18 make that classification if it's not essential here.

19 But I would like to point out that I think  
20 what's central here is not the insulation, but the use  
21 of the "or measured by" device, which has been  
22 frequently used in taxes, sometimes with unpredictable  
23 results. Justice Harlan -- the Idaho case was used as  
24 an example, but perhaps a better example would have been  
25 the case decided by this Court just four years before,

1 the Cleveland case, Society for Savings, where the tax  
2 on financial institutions was on their capital and  
3 surplus.

4 But the Ohio court said, though this was a  
5 mutual savings bank, that the tax was on the interest of  
6 the depositors, measured by the assets of the bank.  
7 This Court did not agree. Justice Harlan pointed out  
8 that at times it was very hard to distinguish for  
9 practical purposes, Justice Stevens, the difference  
10 between a tax on the assets and a tax on the shares when  
11 the tax on the shares was "computed by."

12 So this "measured by" device which didn't  
13 succeed there sometimes does. It's hard to predict.

14 I might mention that just six months before  
15 this statute this Court held that a Virginia tax on the  
16 assets, what purported to be a property tax, could be  
17 measured by gross receipts, though Justice Brennan  
18 pointed out in a separate opinion that if it were  
19 measured by the property it would come to \$7,000; on  
20 gross receipts it came to \$126,000.

21 In any event, the Treasury in this case  
22 thought it would do away with this "measured by"  
23 device. So it --

24 QUESTION: Mr. Brown, let me be sure I follow  
25 you. I take it you feel that the amendment to 3701

1 broadened the exemption on Federal --?

2 MR. BROWN: Yes, I do, I do.

3 QUESTION: And intentionally so on the part of  
4 Congress?

5 MR. BROWN: Yes, I feel that's clear. Some  
6 people thought maybe the earlier statement was more  
7 universal than its application warranted, and they may  
8 have referred to clarification. But that would hardly  
9 be justified when you looked at the decisions.

10 So this statute then, I take it, eliminates  
11 any computation, and in my view the word "computation"  
12 is the operative word here, which takes into account,  
13 reaches directly or indirectly the bonds of the Federal  
14 Government or the income from those bonds. And it is  
15 clear that in this case the computation, as in the  
16 Georgia case which is pending, did include those bonds.

17 I would like to turn briefly, if I may, also  
18 to one other federal statute much relied on below, Rev.  
19 Stat. 5219, a later version, which is relied on as  
20 saying there could be taxes on these shares. Well, no  
21 one disputes that the shares could be taxed. This Court  
22 said so in M'Culloch and Maryland. The National Bank  
23 Act said nothing in this statute shall prohibit it.

24 What is objected to here is the method, and  
25 certainly that is subject to objection. If I may take

1 the Memphis case, in this context suppose this property  
2 tax had included the federal bonds but excluded the  
3 state bonds. I take it that the share tax would have  
4 been as discriminatory there on the property, on the  
5 share, as it was held, a somewhat different tax, was  
6 held to be discriminatory two months ago in the Memphis  
7 case.

8           So I think that 5219 has no bearing on this  
9 case at all. It is certainly not carte blanche to tax  
10 the shares of a bank or any other corporation which is  
11 equally involved in this case, may be equally involved  
12 in this case, in any fashion that is desired.

13           So it seems to me that it's quite clear, and  
14 the background in Congress makes it clear, that this  
15 statute meant to eliminate computation of estate tax,  
16 any form of tax, which directly or indirectly used the  
17 value or the income from Government obligations. And  
18 that's all this case is.

19           Thank you.

20           CHIEF JUSTICE BURGER: Very well, Mr. Brown.

21           Mr. Graham.

22           ORAL ARGUMENT OF CARROLL R. GRAHAM, ESQ.

23           ON BEHALF OF RESPONDENTS

24           MR. GRAHAM: Mr. Chief Justice and may it  
25 please the Court:



1           The National Banking Act of 1864 authorized  
2 the tax in question, and that point was litigated in  
3 1866 very thoroughly in Van Ness versus The Assessors.  
4 Van Ness points out that there were two bases for the  
5 application of the tax, two prongs for it:

6           Number one, Congress said that you could tax  
7 the shares of national banks; and number two, there was  
8 no limitation to exclude any part of the value of the  
9 shares. And Van Ness versus The Assessors, 1866, held  
10 that, number one, you could tax the shares of national  
11 banks; and number two, you did not have to deduct the  
12 value of the federal obligations owned by the bank.

13           This situation remained throughout the years  
14 and every case which came to this Court prior to '59  
15 upheld the true share tax, but did not uphold the taxes  
16 where they tried to levy on the bank itself rather than  
17 the shareholders.

18           That problem does not exist with the Texas  
19 statute, as it clearly levies the tax on the  
20 shareholders, and there is no legal obligation upon the  
21 bank to pay any part of the share tax.

22           QUESTION: You say prior to '59 the tax would  
23 unquestionably have been upheld?

24           MR. GRAHAM: Yes.

25           QUESTION: And you don't think anything

1 changed that in '59?

2 MR. GRAHAM: No. No, I sure don't.

3 The point I'm trying to draw is that in 1959  
4 for 95 years -- for 93 years it had been settled law  
5 that national banks and state banks could be taxed on  
6 their shares, and that it was not necessary to deduct  
7 the value of federal obligations, because under the Van  
8 Ness holding when Congress authorized the taxing of the  
9 shares it authorized the taxing of the full value of the  
10 shares. And that position existed in 1959 and, we  
11 respectfully submit, was not changed at all.

12 Number one, it was not changed because that  
13 law was not touched. That was Revised Statute 5219. It  
14 was on the books all during those years. It was on the  
15 books in 1959. It was not touched by Congress in any  
16 manner.

17 It's our position that the modification or the  
18 codification of the exemption statute, 3701, did not in  
19 any way apply to or control or reflect upon the taxation  
20 of the national bank shares.

21 QUESTION: You would concede, wouldn't you,  
22 you'd rather have the Government's case after '59 than  
23 before?

24 MR. GRAHAM: No, sir. No, sir. In 1959,  
25 after the modification of 3701 with the addition of the

1 second sentence, the Bank Act still provided for  
2 taxation of bank shares in the same manner in which  
3 they're being taxed today, the same provision that the  
4 shares could be taxed, and there's never been any  
5 modification by the Congress of the definition of  
6 "shares" or in any manner changed the definition that  
7 was laid down in Van Ness.

8 QUESTION: Do you think the '59 amendment  
9 invalidated any tax that would have been valid before?  
10 What about Idaho? What about Idaho?

11 MR. GRAHAM: The gift tax --

12 QUESTION: What about Idaho?

13 MR. GRAHAM: Idaho would have been invalid  
14 before.

15 QUESTION: Why did they even -- why was  
16 anybody ever worried about it?

17 MR. GRAHAM: I don't know.

18 QUESTION: Well, Congress was.

19 MR. GRAHAM: But the Congressional Record said  
20 they probably wouldn't have prevailed, but they wanted  
21 to --

22 QUESTION: So they made sure that Idaho wasn't  
23 -- the tax wasn't going to pass muster, is that it?

24 MR. GRAHAM: Or that that particular type of  
25 tax was not going to be tried by anyone else.

1           In 1959, shortly before 3701 was modified,  
2 Congress did amend the national banking laws, but it did  
3 not change the provision in question whatsoever.

4           QUESTION: Mr. Graham, is it not true that  
5 your opponent's theory is not limited to extending the  
6 exemption on bank stock, but it covers all kinds of  
7 corporations under their reading of the '59 Act? As I  
8 understand, it would cover General Motors stock, every  
9 kind of stock that there is in the economy. So that you  
10 wouldn't expect it to focus on bank shares.

11           MR. GRAHAM: The General Motors, the question  
12 of the General Motors stock, the applicability there is  
13 a different question, Mr. Justice, because I know of no  
14 statute which authorizes the taxation of those shares  
15 specifically.

16           QUESTION: No, but if a state sought to impose  
17 some kind of a tax on any corporate entity measured by  
18 its net worth, under the Government's view they would  
19 have to exclude from the computation that portion that  
20 represented federal obligations. So they're not just  
21 talking about banks. They say this is really a pretty  
22 broad exemption they created in '59.

23           MR. GRAHAM: I do not take a position on other  
24 corporations, because I do not --

25           QUESTION: I don't know why you're afraid to.

1 It seems to me it would support your position. You say  
2 there wasn't -- you say at least, however broad it was,  
3 it didn't repeal, didn't effect an implied repeal of  
4 the --

5 MR. GRAHAM: Correct.

6 QUESTION: -- of the banking provisions?

7 MR. GRAHAM: Correct, sir, for a number of  
8 reasons. Number one, if you go look at the Committee  
9 reports, they talk about Idaho, they talk about  
10 interest, they talk about debt management. They don't  
11 ever mention a word about bank stock and taxation.

12 QUESTION: I guess you would feel comfortable  
13 with the proposition that the state could tax  
14 everybody -- that banks are different from other  
15 corporations, that the state could not tax anyone except  
16 banks?

17 MR. GRAHAM: On this point, on the federal  
18 obligation point? Without excluding the federal  
19 obligations?

20 QUESTION: Banks are different.

21 MR. GRAHAM: That may well be true, yes, sir.  
22 Banks are different. Banks pay different taxes. Banks  
23 do not pay personal property taxes. Banks do not pay  
24 franchise taxes. And we have a particular statute  
25 dealing with the taxation of national banks.

1           QUESTION: So a state could tax banks but  
2 couldn't tax anything else?

3           MR. GRAHAM: Oh, taxation -- if we're staying  
4 on the proposition of federal obligation, yes, sir.

5           QUESTION: You'd think it would almost run the  
6 other way, wouldn't you? Because these are national  
7 banks holding federal obligations. And yet you say the  
8 states can tax them even if they couldn't tax any other  
9 corporation.

10          MR. GRAHAM: That's right, because the  
11 Congress has provided that, and for a long time set out  
12 the precise methods by which those taxes, the tax  
13 methods that had to be followed. That has now been  
14 changed in 1969 and remedied -- or, I shouldn't say  
15 remedied, but expanded.

16          When we come back to the point of the implied  
17 repeal which I take it the Petitioners must rest upon,  
18 we have a number of statutory construction aids which we  
19 refer to in our briefs, consistently I hope, and all of  
20 them will point to the fact that there was no intention  
21 on the part of the Congress to repeal the authority  
22 given in the Bank Act to tax the national banks without  
23 deduction of any obligations whatsoever.

24          The question of indirect taxation was  
25 prohibited before 1959 and if you will look -- and we

1 cite the case of Society of Savings versus Bowers, in  
2 which Justice Harlan points out that indirect is  
3 prohibited with the exception of the bank stock tax.

4 In 1969, coming again to an argument against  
5 an implied repeal, in 1969 Congress amended the bank  
6 stock tax and enlarged the -- changed the method of  
7 taxation and directed the Federal Reserve to carry out a  
8 study. And during that time in '69 the Federal Reserve  
9 carried out a study and that study recognized that the  
10 bank share tax without any necessity for deducting  
11 federal obligations was, at least in the opinion of the  
12 people who made that study, still in full force and  
13 effect.

14 Thank you.

15 CHIEF JUSTICE BURGER: Very well.

16 Mr. Luna.

17 ORAL ARGUMENT OF EARL LUNA, ESQ.,

18 ON BEHALF OF RESPONDENTS

19 MR. LUNA: Mr. Chief Justice, may it please  
20 the Court:

21 This Court recently recognized in the  
22 Tennessee case the fact that the statute that we have  
23 here today, 31 742, principally restates the  
24 constitutional rule that we have had since M'Culloch  
25 versus Maryland. And in that Memphis Bank case the

1 Court pointed out very clearly that where the legal  
2 incidence of the tax falls on the separate property  
3 interest of the stockholder or some other person other  
4 than the Government or the owner of the bonds itself,  
5 that unless there is a discrimination between the  
6 national -- the taxation as to the federal securities  
7 and others, that it didn't violate 31 U.S.C. 742.

8 Now, there is no contention in this case as it  
9 is before the Court at this time that there is any  
10 discrimination on federal securities versus any other  
11 type securities, such as there was in the Tennessee  
12 case. Now, if that is true, the constitutional  
13 provision -- that statutory provision, as late as the  
14 Memphis case the Court has said it does not affect this  
15 kind of a transaction.

16 Now, I think that takes us, if we go all the  
17 way back to the two questions or the two reasons that  
18 were raised actually in the Van Allen case, the court in  
19 Texas, our Chief Justice Guittard, I think pointed out  
20 very carefully that there were two grounds that were  
21 mentioned in the Van Allen case, either one of which  
22 were sufficient to sustain our tax.

23 Now, the court pointed out first that there  
24 was a distinction between taxation of the shares and  
25 taxation of bank assets, and I think that is this



1 insulation that we were talking about earlier. There is  
2 an insulation between the corporation's assets and the  
3 stockholders. The legal incidence is on the stockholder  
4 and not the corporation.

5           The second reason that was mentioned in the  
6 Van Allen case which made it permissible to tax bank  
7 shares was a Congressional consent to state taxation of  
8 bank shares as expressed in Section 5219. 5219 has  
9 never been altered or changed, although it was expanded  
10 ten years after the '59 amendment that didn't allow. In  
11 1969 the Congress expanded that amendment to include  
12 more general areas than it did before.

13           But in our case, if then we take a look at the  
14 question we were talking about a while ago, the taxation  
15 of federal securities, I think if the tax the legal  
16 incident of which falls on these federal securities, it  
17 doesn't make any difference who it is, we cannot tax  
18 them. That's been very clear, and the cases have  
19 pointed out that we can't do it directly or indirectly,  
20 and they said that before 31 U.S.C. 742 was amended.

21           All of these cases have said that they can't  
22 be taxed directly or indirectly. But at the same time  
23 that the courts were saying they can't be taxed directly  
24 or indirectly, the court also said that a tax on the  
25 stockholder is not a tax on a bank.

1           Now, at some stages of this litigation the  
2 banks have said, but we paid the tax actually, and of  
3 course the reason they did that is because of another  
4 federal statute that permits them to pay the tax for the  
5 stockholder and that the bank can deduct it if the  
6 stockholder doesn't deduct it himself, which really  
7 makes it not material at all to the questions that we  
8 have here.

9           Now, we believe then that if we were to follow  
10 the view that the banks have propounded here today, that  
11 it would indeed mean that any corporation which owns  
12 federal securities, you would have to subtract that  
13 stock or those bonds and federal securities from the  
14 value of the stock before you could tax it. As a matter  
15 of fact, in one of the footnotes in our brief we point  
16 out that there are about 20-something states who tax  
17 either corporate stock in corporations generally or bank  
18 stock or both.

19           Now, in Texas that question is not material  
20 because we do not tax the corporate stock in other types  
21 of corporations, only banks. But as this Court  
22 mentioned in one of its opinions, if that should be --  
23 if we should have to deduct it in all cases, it would be  
24 nothing but chaos in the taxing systems of the various  
25 states.

1           Now, there is nothing in 31 U.S.C. 742 as  
2 amended in 1959 to require or suggest that it applies to  
3 ad valorem taxation if we can rely to any extent on the  
4 Congressional history. Secretary Anderson introduced  
5 Section 105 of that bill and in his introduction to the  
6 Ways and Means Committee of the bill he pointed out very  
7 carefully that indeed Idaho had attempted to tax the  
8 income from federal securities and they had not been  
9 able to convince them it wasn't taxable and Idaho was  
10 including it in the net income.

11           And he pointed out in his statement, which we  
12 quote at length in our brief, that it was -- that they  
13 believed that Idaho was wrong, but that this seemed to  
14 be the easiest way to clarify the problem, and therefore  
15 he recommended that Congress pass 105, Section 105 of  
16 that bill, in order to clarify the situation that they  
17 had as to Idaho. And that was the only thing that we  
18 had before the Congress at that time insofar as reasons  
19 as to why that statute ought to be amended in that  
20 particular.

21           Now, the Petitioners say that we shouldn't  
22 take into consideration in thinking about statutes  
23 anything subjective, that it's all objective. Now,  
24 unless we look at it subjective we don't get to the  
25 question here, because our state statute simply says

1 that the value of stock, the bank stock, shall be  
2 assessed at its cash value less the value of the real  
3 estate which may be taxed separately.

4           So our statute just talks about cash value.  
5 It doesn't say anything about the things we have here.  
6 Now, as a measuring stick of cash value we might use  
7 several things. In the Bank of Texas case where this  
8 decision was written, had we used cash value that they  
9 were getting when they were selling the stock down at  
10 the bank, the testimony showed it was bringing nine  
11 dollars a share. And the measuring stick that we used  
12 was \$5.65 a share.

13           So they're really arguing about our formula,  
14 not that we taxed the bank too high, the stock too  
15 high. So they say, if they use our formula, which was  
16 based on equity capital and not on what it was selling  
17 for at the marketplace, they wound up paying less tax  
18 than they would otherwise have paid.

19           Are they injured? Is there harm? And when  
20 one is challenging a statute, doesn't he have the burden  
21 of proving that there has been some harm? Certainly  
22 that has not been shown in this case. The only thing  
23 that has been shown is that by using the formula with  
24 which they argue the banks got a windfall.

25           QUESTION: Well, would you be making the same

1 argument if Section 5719 had never been on the books?

2 MR. LUNA: If Section 5719 would have never  
3 been on the books, I would be making the same argument,  
4 because we believe Van Allen stands for two propositions  
5 which permit bank stock to be taxable: One, because of  
6 the separate ownership of the stock and the corporation;  
7 and then number two, the consent statute, 5219 itself,  
8 either one of which --

9 QUESTION: You don't think the '59 amendment  
10 had any impact on that Van Allen line of cases at all?

11 MR. LUNA: I don't believe it had one iota on  
12 Van Allen, because I cannot believe that in all of the  
13 hearings of Congress they would have overruled almost  
14 100 years of cases of this Court and never told anybody  
15 that's what they were doing. That's just not the way  
16 Congress ordinarily works.

17 And they said that, instead of talking about  
18 the decisions of this Court, while the Congressional  
19 history was going on they said that, we're doing it in  
20 order to clarify the problem that we've got up in Idaho,  
21 and that is the only thing that there is in the  
22 Congressional history. And it would be indeed unusual  
23 if Congress were to overrule that many cases of this  
24 Court and not a word ever be said about what was going  
25 on.

1           In Plummer versus Coler the Court, this Court,  
2 had also pointed out in inheritance tax cases that there  
3 really was no impact on the market in the first place,  
4 on the market of bonds. I mention that very quickly  
5 because of one of the arguments that was made by, I  
6 believe it was the Solicitor General, that there was an  
7 impact on the market.

8           Now here the non-banking world owned 77  
9 percent of all of these, of all of United States  
10 securities. Of the 23 percent that is owned by the  
11 banks, there's only about five percent of the total that  
12 is owned by the banks in the six states or seven states  
13 that tax bank shares, six now since Georgia just  
14 recently repealed theirs.

15           And the only case, of course, that they have  
16 in their favor is the Montana case, and the Montana  
17 case -- and as they argue here, this permits bank share  
18 case -- it prohibits the bank share taxation, but  
19 permits the franchise tax. And of course as we know,  
20 Montana just recently ruled that their franchise tax is  
21 unconstitutional, too. We believe that, as the Texas  
22 court held, the Montana case is not reliable, and 732  
23 was something that was aimed at the Idaho income tax,  
24 that it has absolutely no effect on the tax that's  
25 before the Court at this time.

1 Thank you very much.

2 CHIEF JUSTICE BURGER: Do you have anything  
3 further, Mr. Sloman?

4 ORAL ARGUMENT OF MARVIN S. SLOMAN, ESQ.

5 ON BEHALF OF PETITIONERS -- REBUTTAL

6 MR. SLOMAN: If I may briefly, Mr. Chief  
7 Justice.

8 I'd like to point out in response to  
9 Respondent's argument concerning the Idaho case that had  
10 Congress intended solely to deal with the problem raised  
11 by the Idaho case it could have taken the then-existing  
12 form of Section 3701 and added four words. After the  
13 words "United States obligations" it could have added  
14 "or the interest thereon" were it addressing only the  
15 Idaho problem.

16 QUESTION: Do you think this tax would have  
17 been permissible before '59?

18 MR. SLOMAN: The tax in the case at bar, Your  
19 Honor? Yes, I certainly do.

20 QUESTION: So the '59 amendments you think did  
21 have the effect of overturning that line of cases, Van  
22 Allen and the whole crowd?

23 MR. SLOMAN: It had the effect of overturning  
24 the results of those cases.

25 QUESTION: Yes, yes.

1 MR. SLOMAN: Those cases stood, beginning with  
2 the Van Allen case in 1866 and ending with the Bowers  
3 case in 1955, those cases rested not on an  
4 interpretation of Section 5219, but on the shareholder-  
5 corporation distinction.

6 QUESTION: Yes, yes.

7 MR. SLOMAN: Now, under that distinction --

8 QUESTION: But isn't it true that --

9 MR. SLOMAN: Excuse me, Justice.

10 QUESTION: Isn't it true that your view of '59  
11 is it really destroys that distinction?

12 MR. SLOMAN: Well, I think that it goes --

13 QUESTION: At least for this kind of tax?

14 QUESTION: Well, it has to go that far or it  
15 wouldn't have overturned the cases.

16 MR. SLOMAN: It overturns the result of the  
17 cases by --

18 QUESTION: Well, as well as that theory --

19 MR. SLOMAN: -- providing a different test.

20 QUESTION: As well as that theory. Doesn't it  
21 have to overturn that theory, or the theory, as your  
22 opponent argues, would still prevail right on this tax?

23 MR. SLOMAN: That theory was germane only,  
24 Justice White, to a prohibition against a tax upon  
25 United States obligations. That distinction is not



1 germane any more.

2 QUESTION: So that that distinction was -- it  
3 isn't germane any more because of the '59 amendments?

4 MR. SLOMAN: Exactly.

5 QUESTION: What do you say to the argument he  
6 makes that making that significant a change in the law,  
7 where you had 90-some years of settled rule, would have  
8 invoked some comment in the legislative deliberations?

9 MR. SLOMAN: Well, it did evoke some comment,  
10 Justice Stevens. The comment on the whole subject that  
11 we're talking about, including this Idaho question  
12 or --

13 QUESTION: Well, that really says nothing  
14 about the differences between a corporation --

15 MR. SLOMAN: Exactly. There is a great --

16 QUESTION: There really is nothing in the  
17 legislative history that would tell the Congressmen who  
18 weren't as sophisticated in this area as lawyers who  
19 practice all the time just what was happening.

20 MR. SLOMAN: Well, the words of the  
21 statute --

22 QUESTION: Unless they just read into the  
23 words of the statute the "indirectly" language and the  
24 computation and the concern language.

25 MR. SLOMAN: And they did make that, those

1 words, those 52 words of the statute, not four words to  
2 deal with an Idaho problem -- they put the 52 words of  
3 the statute into the Act in furtherance of a stated  
4 purpose, which was stated by the Congress and the  
5 Congressional Committee, to make United States  
6 obligations more attractive as investments, and indeed  
7 to encourage banks to hold them.

8 QUESTION: Was this statute debated on the  
9 floor? Did it ever reach the floor, or was it just on  
10 the consent calendar?

11 MR. SLOMAN: I can't answer the question, Your  
12 Honor. I think that it was debated on the floor because  
13 there were some remarks of Congressman Mills mentioned.

14 QUESTION: Didn't the Secretary of the  
15 Treasury indicate that the purpose of the amendment was  
16 to make federal -- U.S. Government bonds more attractive  
17 to investors?

18 MR. SLOMAN: Yes, indeed, Your Honor.

19 QUESTION: That's certainly part of the  
20 legislative history.

21 MR. SLOMAN: Mr. Chief Justice, and to the  
22 banks.

23 QUESTION: Finally, I would like to point out  
24 one question that was raised by counsel for Dallas  
25 County as to injury or harm. At the time the 1979 cases

1 were first before the Texas Court of Civil Appeals, the  
2 Court of Civil Appeals entered its first opinion, in  
3 which it resolved every single state law question that  
4 was involved in these cases, including a question as to  
5 injury which was specifically raised by Dallas County in  
6 that case.

7 Now, that opinion is withdrawn. I'm not  
8 saying that that opinion is still in effect. But I am  
9 saying that this Court in the 1979 case has no state law  
10 questions concerning injury or anything else. And in  
11 the 1980 case there was a judgment entered in favor of  
12 the Petitioners here, which was then vacated and a new  
13 judgment entered based on the reversal of the judgment  
14 of the Court of Civil Appeals in the 1979 case.

15 But at one point in all of these cases all  
16 state law questions have been resolved and they're not  
17 present in the case. The Court is I think very clearly  
18 presented with a pure question of what the word  
19 "considers" means in Section 3701.

20 Thank you, Mr. Chief Justice.

21 CHIEF JUSTICE BURGER: Thank you, gentlemen.

22 The case is submitted.

23 (Whereupon, at 2:55 p.m., the case in the  
24 above-entitled matter was submitted.)

25

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CERTIFICATION

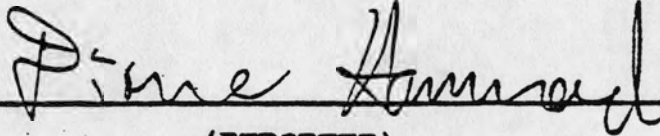
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