

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1066
TITLE UNITED STATES, Appellant
v.
HARRY PTASYNski, ET AL.
PLACE Washington, D. C.
DATE April 27, 1983
PAGES 1 - 43



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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Wallace, you may
3 proceed when you're ready.

4 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
5 ON BEHALF OF THE APPELLANT

6 MR. WALLACE: Mr. Chief Justice, and may it
7 please the Court:

8 On cross motions for summary judgment in this
9 tax refund suit, the district court held the Crude Oil
10 Windfall Profits Tax Act of 1980 unconstitutional and
11 ordered refunds for taxable periods in the year 1980.

12 The district court held, contrary to our
13 contention, that the act violates the uniformity clause
14 of Article I, Section 8 of the Constitution, and
15 rejected our further contentions that no refund should
16 be available in any event in this suit because there was
17 no oil extracted in 1980 that was subject to the
18 exemption at issue, and our contentions regarding
19 severability of the exemption at issue. The district
20 court stayed its judgment, and the United States
21 appealed to this Court.

22 The act at issue was the product of many
23 months, almost a year, of Congressional study and
24 deliberations involving extensive hearings, staff
25 studies, committee reports, floor debate, amendments, et

1 cetera.

2 It was enacted in conjunction with the
3 phaseout of domestic oil price controls. The decontrol
4 of domestic oil prices was undertaken to achieve two
5 purposes. One was to alleviate market disparities,
6 distortions that had existed because of market
7 disparities between the controlled domestic oil prices
8 and the rising world prices subject to manipulation by
9 the OPEC cartel. And the second purpose was to
10 encourage domestic exploration and development to make
11 the United States less dependent on imported oil.

12 And it was recognized widely in Congress as a
13 quid pro quo for the price increases that would be
14 caused by decontrol this act was required if President
15 Carter was going to go through with decontrol.
16 Actually, the phaseout was completed by President
17 Reagan. But we have cited in note 10 of page 14 of our
18 reply brief a number of statements made on the floor by
19 various members of Congress explicitly recognizing that
20 this was a part of the decontrol program in the sense
21 that the windfall tax was a quid pro quo for decontrol.

22 Now, the structure of the act is summarized in
23 chart form in the appendix to the jurisdictional
24 statement that we filed on page 3A, which is part of the
25 district court's opinion. The principal provisions of

1 Title I of the act, which is the title that imposes the
2 tax, are set forth there in chart form.

3 And our contention is that except for the
4 first categories of exceptions, which are not at issue
5 here and which were designed for other purposes because
6 the revenues there were thought to be devoted to public
7 purposes extraneous to the overall purposes of this act,
8 the other provisions of the act, including the so-called
9 provision for exempt Alaskan oil, all fit into a unified
10 theme.

11 The act was intricately designed to tax what
12 Congress said was the subject of the tax, the windfall
13 profits that would result from the decontrol of domestic
14 oil prices. But those windfall profits were to be
15 identified through various mechanisms in the act in a
16 way that did not tax all of the decontrol revenues that
17 would ensue, but only those that would be over and above
18 the ones that served the purposes of decontrol,
19 including the purpose to encourage domestic exploration
20 and development of oil that might otherwise not occur.

21 It was sometimes put that way in the course of
22 the legislative history, and sometimes stated as a
23 corollary, that the act was designed to impose
24 relatively high tax rates where production cannot be
25 expected to respond very much to further increases in

1 price and relatively low tax rates on oil whose
2 production is likely to be responsive to price.

3 In other words, the windfall that Congress was
4 seeking to identify was that portion of the decontrol
5 revenues that were not needed for one of the purposes of
6 decontrol, which was to stimulate domestic production.
7 And the mechanisms used included differences in the rate
8 base and these various tiers of taxable rates, all
9 intricately adjusted so as to identify what Congress was
10 getting at, what it considered to be the windfall. And
11 as might be expected, the highest rate of tax would be
12 on the so-called old oil, the existing oil production
13 that obviously would not have been stimulated by the
14 decontrol.

15 The windfall was only being taxed at these
16 various rates. It wasn't being entirely eliminated.
17 And other adjustments reflect various details such as
18 the fact that heavy oil is more expensive to extract and
19 produce. There were special adjustments made for
20 independent producers as against vertically integrated
21 producers because they did not have what was referred to
22 as downstream revenues and needed more in the way of
23 return to encourage their further explorations.

24 These various factors were considered in great
25 detail and painstakingly adjusted for insofar as it was

1 practicable to do so in this rather elaborate statute.
2 And the exemption for so-called exempt Alaskan oil fits
3 into this same pattern. This was carefully drawn to
4 identify those sources of oil in -- because of extreme
5 climatic and other conditions where no windfall was
6 expected to accrue at all within the meaning of what
7 Congress was getting at.

8 Now, this can be understood with reference to
9 a map which is appended to the brief in our support, the
10 amicus curiae brief of the State of Alaska.

11 QUESTION: What color is it?

12 MR. WALLACE: That's a green brief, Mr.
13 Justice. There's no difference in the color code
14 between amicus briefs in our support and amicus briefs
15 in support of the appellees. But it is a green brief
16 submitted on behalf of the State of Alaska. It has a
17 foldout map at the back which indicates the scope of the
18 exempt Alaskan oil.

19 And this particular exemption, I might say at
20 the outset, is a rather strange subject for a holding of
21 invalidity under the uniformity clause, which was, in
22 its historical origins, designed to prevent combinations
23 of states from discriminating in an oppressive way
24 against minorities of states.

25 What's involved here is an exemption from the

1 tax for a small percentage of oil partially located in
2 one state, but --

3 QUESTION: Well, Mr. Wallace, is it your
4 submission that the uniformity clause would have no
5 application if one could show that somehow there was no
6 discrimination against a minority of states?

7 MR. WALLACE: That is not our submission, but
8 I think --

9 QUESTION: Then why do you make the point?

10 MR. WALLACE: Because it -- it -- it puts in
11 perspective what it is that we're dealing with here and
12 why we believe that Congress acted consistently with
13 respect to this oil production in keeping with the theme
14 of the act as a whole, rather than in a way that should
15 raise concerns under the uniformity clause.

16 Now, the -- the exemption specifically
17 excludes from the exempt coverage the oil being produced
18 in the Sadlerochit reservoir, which is pictured at the
19 very top. That is the largest oil reservoir in Alaska,
20 at least of discovered reservoirs, and it is currently
21 producing more oil than is produced in any other state
22 other than Texas as a whole. That one reservoir is
23 currently producing more oil than any other state as a
24 whole.

25 The exemption also excludes the Cook Inlet oil

1 and other oil that's been developed down in the area
2 closer to Anchorage. The dotted line, which identifies
3 the beginning of the North Slope of the Alaska range and
4 Aleutian range is the dividing line for the exemption,
5 but the exemption excludes any oil within 75 miles of
6 the Trans-Atlanta pipe -- the Trans-Alaska Pipeline
7 system until it reaches the Arctic Circle, and then the
8 oil is included except for the Sadlerochit reservoir.

9 Now, the State of Alaska informs us in its
10 amicus brief on pages 5 and 7 that currently
11 approximately 5 percent of the oil being produced in
12 Alaska is subject to the exemption. It is estimated
13 that during the latter years of the applicability of the
14 windfall profits tax, which has a phaseout provision,
15 that percentage may rise to about 10 or perhaps a little
16 more than 10 percent, although much of the expected
17 additional production would be in Outer Continental
18 Shelf wells which are not part of the State of Alaska at
19 all.

20 So that we're talking, since there was no
21 production there for more than a year and a half after
22 the act took effect at all, no exempt oil being
23 produced, we're talking about what can on the average
24 not be expected to be more than 10 percent of Alaskan
25 production during the entire period of the act.

1 And this, in terms of the revenue disparity
2 caused by the exemption, would be further discounted
3 because the Sadlerochit oil and virtually all other
4 Alaskan oil, the great bulk of the 90 percent, is
5 subject to the highest rate of the tax under the
6 statute, 70 percent, whereas the exempt oil would be
7 subject to the rate for newly discovered oil, which at
8 the time of the initial enactment was 30 percent, and in
9 a 1981 amendment is being phased down from 30 to 15
10 percent on newly discovered oil throughout the United
11 States.

12 So that we're talking in terms of the effect
13 of the exemption in Alaska of a very small proportion of
14 the revenues that would otherwise be generated from
15 Alaska by this law.

16 QUESTION: Well, what's that got to do with
17 the uniformity clause? I can see how you might have an
18 argument about the severability clause.

19 MR. WALLACE: Well, it does bear on the
20 severability clause, but it also bears on the contention
21 being made by the appellees that this act favors Alaska
22 as a price for getting political support from Alaskan
23 representatives in Congress, and represents a coalition
24 of Alaska with others who favored the act as against the
25 states that would be more heavily taxed. Actually,

1 Alaska is one of the most heavily taxed states, and
2 every member of the Alaska delegation who voted voted
3 against the act.

4 But it bears on what is argued to be the
5 legislative background of the act and the way it -- it
6 -- an effort has been made to fit it into the historical
7 purposes of the uniformity clause as showing an unfair
8 coalition of states acting against the interests of
9 other states. And that is --

10 QUESTION: Of course, the fact is that
11 Congress used geographical terms, didn't they, when they
12 might have used other terms that were not geographical.

13 MR. WALLACE: That is correct.

14 QUESTION: And that's your problem.

15 MR. WALLACE: And that -- that -- we think
16 that -- that what is reflected here is a finding of a
17 unique combination of risks and costs in this area due
18 to the climate, the geological factors, the -- the
19 special problems of the fragile environment caused by
20 permafrost. Many -- these things are described in some
21 detail in the brief amicus curiae of the State of Alaska.

22 But what they show is that because of the
23 dangers of local flooding if the permafrost is disturbed
24 during the warm weather -- and all of this was brought
25 out in hearings before Congress -- the necessity is in

1 these areas to operate during the winter months when the
2 climate is very severe and when there is a great deal of
3 darkness, in some areas no light for many weeks at a
4 time; they're very remote from transportation, from
5 sources of labor, sources of supply, so that supply and
6 labor costs are many times what they are elsewhere in
7 the United States.

8 QUESTION: The argument is made in response
9 that there are other areas -- for instance, in some
10 offshore drilling programs in cold areas -- that present
11 equally expensive problems, Mr. Wallace.

12 MR. WALLACE: Well, no showing has been made
13 either before Congress or in the district court that
14 that is true. And Congress based its judgment on what
15 it concluded to be unique problems in Alaska that
16 eliminated the possibility of any windfall occurring
17 there and --

18 QUESTION: You said that they have very long
19 winters in Alaska and very short days. Of course, that
20 wouldn't be true in Louisiana, would it? That's
21 certainly a difference.

22 MR. WALLACE: Well, of course it's a
23 difference. And the -- the problems of equipment being
24 subjected to the severe weather problems, the need for
25 delays in the severe weather when no work can be done at

1 all, which requires very highly paid crews to stand by
2 idly and to be housed and fed in these remote areas,
3 these -- these problems were detailed in the legislative
4 history.

5 And the exemption really was put in in
6 response to the suggestion made during the hearings by
7 the Secretary of the Treasury which reflected that the
8 exemption really served the same purposes and reflected
9 the same standards as the other mechanisms in the act
10 used to identify the windfall profit. And we quoted
11 this testimony by the Secretary of the Treasury early on
12 in the hearing process that there are no windfalls that
13 will be gained by the producers of the Alaskan crudes,
14 confining the remarks to the exempt area. And he went
15 on to say it is easier to exempt Alaskan production from
16 the tax than to require Alaskan producers to file tax
17 returns solely for the purpose of showing that no
18 liability has been incurred, because this is an
19 expensive tax to administer.

20 And the exemption, in keeping with the overall
21 purposes of the tax, was meant to encourage the
22 development of these domestic oil resources. And this
23 brings us to -- now, so, let me -- before I get to Mr.
24 Justice Blackmun's point, I just want to say that we
25 think that this, because of the findings Congress made

1 about the unique circumstances in Alaska, meets the
2 established standard of this Court's cases under the
3 uniformity clause: that the tax is uniform because it
4 operates with the same force and effect in every place
5 where the subject of it is found, because Congress
6 isolated this area as one where windfall profits would
7 not be found.

8 QUESTION: Well, the tax is actually on oil
9 production, isn't it?

10 MR. WALLACE: That is -- well, it is designed
11 to tax the windfall profit. That is what Congress
12 called it.

13 QUESTION: But is -- what is the tax on?
14 That is what I was asking.

15 MR. WALLACE: It is on oil produced and sold
16 or for which sale is imputed. If it is stockpiled, if
17 the sales price exceeds the base price specified in the
18 act for the particular oil.

19 CHIEF JUSTICE BURGER: We'll resume at 1:00,
20 Mr. Wallace.

21 (Whereupon, at 12:00 p.m., the case in the
22 above-entitled matter was recessed for lunch, to be
23 reconvened at 1:00 p.m., the same day.)
24
25

1 AFTERNOON SESSION

2 CHIEF JUSTICE BURGER: You may continue, Mr.
3 Wallace.

4 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
5 ON BEHALF OF THE APPELLANT -- Resumed

6 MR. WALLACE: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 If, as I contended before lunch, the act
9 treats all persons similarly situated with regard to the
10 subject matter of the act in a similar manner, then the
11 question remains whether the fact that Congress used
12 geographic terms in describing the scope of the
13 exemption in some way adds an infirmity.

14 We think not. We think the exemption -- that
15 the uniformity clause protects substantive rights and
16 doesn't prevent Congress from using a clear and
17 convenient means of expressing itself, even though that
18 means happens to employ geographic terms. They were not
19 co-extensive in this case with any political boundaries
20 at all. And I think the point is best put --

21 QUESTION: Well, they were co-extensive in the
22 sense that only the State of Alaska was embraced within
23 the exemption.

24 MR. WALLACE: And offshore oil adjacent
25 thereto, Mr. Justice.

1 QUESTION: But outside the State of Alaska?

2 MR. WALLACE: Yes. In the Outer Continental
3 Shelf in the Bering Sea.

4 And I think the point is best made, if I may
5 quote a sentence used by Judge Friendly in the In re:
6 Penn Central Transportation Company case, a decision
7 that was approved by this Court in the regional
8 reorganization cases in 419 U.S., the way he put it was
9 that since what Congress did was not in violation of the
10 Constitution, we decline to hold its action to have
11 constituted a breach of the uniformity clause there of
12 the bankruptcy clause simply because it used words
13 readily intelligible to its members in the public rather
14 than circumlocutions that would have had exactly the
15 same effect.

16 And there has been no showing that the effect
17 itself, no showing either in Congress or in the Court
18 below that the effect itself is not a permissible one.

19 Now, in the brief time remaining I would like
20 to turn to the question of severability. As in Zobel v.
21 Williams last term, this is not a case in which the
22 Court need speculate about what the Congressional intent
23 was. It is common ground here that the question of
24 severability is a question of statutory interpretation,
25 and the Congressional intent governs.

1 The question arose not in time to be included
2 in the committee reports, but it nonetheless arose in
3 the discussion on the conference report prior to the
4 vote and was quite authoritatively addressed by the
5 floor manager of the bill and chairman of the Finance
6 Committee, Senator Long of Louisiana.

7 And what he said on the floor is: "Mr.
8 President, it is our intention that in the event the
9 Court should find this favorable treatment for Alaska
10 dictated by the very high production costs in that area
11 should violate the conformity provision as it is there,
12 the uniformity provision in the Constitution, that
13 provision should be regarded as a nullity, and that
14 Alaska will pay the same 30 percent tax on new oil as
15 everybody else. If that should be too much, Congress
16 could consider it in the future."

17 And then the next paragraph is the one
18 reproduced on page 11 of our reply brief where he
19 essentially repeats the same thing, emphasizing once
20 again the intention that it is the exemption that would
21 fall under the severability clause of the Internal
22 Revenue Code.

23 And these views not only were uncontradicted
24 on the floor, but they were supported by a memorandum
25 from the Office of Legislative Counsel that Senator Long

1 then had printed by unanimous consent into the record.

2 There is no other indication of Congressional
3 intent on this subject. And since everyone seemed to be
4 satisfied by the reassurance of Senator Long, first that
5 the uniformity clause was not violated, but even if it
6 were, it would not endanger anything but the exemption
7 itself, that is the only indication of Congressional
8 intent we have and should govern. And, indeed, even by
9 a process of inductive reasoning, since this was a
10 revenue measure reported out of Ways and Means and
11 Senate Finance and one in which the conference report
12 emphasized the amount of revenue that was expected,
13 \$227.7 billion over a 12-year period, and pointed to
14 other titles of the act which involved tax credits and
15 aid to needy families and the like as -- with the clear
16 implication that these were justified by the revenue
17 intake. And the fact that the exemption is a very minor
18 part of this overall picture -- we're talking about less
19 than ten percent, as I explained, of the proceeds to be
20 expected from one state -- and the fact that they
21 pointed to other possible means of subsidizing
22 production if necessary, which of course would not be
23 subject to the uniformity clause, which applies only to
24 taxation measures, it's clear that this, in context,
25 very small tail should not be wagging the dog and

1 abrogating this major revenue measure.

2 And beyond that, the stopping point, if any of
3 the revenue measure were to be invalidated, should have
4 been only the tax on newly discovered oil, one of the
5 categories being taxed, because the Alaskan exemption
6 applied only to newly discovered oil, and this is a
7 relatively very small part of the revenues produced by
8 the tax.

9 In 1981, calendar 1981, for example, the first
10 full year that the act was in effect, of 20 -- more than
11 \$26 1/2 billion in revenues, less than \$1 1/2 billion
12 were from newly discovered oil. So that even in that
13 way a great deal of the act and its revenue production
14 could have been saved, which is the cardinal principle,
15 particularly in revenue measures.

16 I'd like to reserve the balance of my time,
17 please.

18 CHIEF JUSTICE BURGER: Very well, Mr. Wallace.
19 Mr. Williams.

20 ORAL ARGUMENT OF STEPHEN F. WILLIAMS, ESQ.,

21 ON BEHALF OF THE RESPONDENT

22 MR. WILLIAMS: Mr. Chief Justice Burger, and
23 may it please the Court:

24 The uniformity clause of the Constitution
25 requires that excise taxes be uniform throughout the

1 United States. The crude oil windfall profit tax of
2 1980 imposes an excise tax on the production and removal
3 of crude oil, and that tax applies, according to the
4 terms of the statute, in 49 states and one-quarter of
5 Alaska. It's depicted I think very clearly in the map
6 attached to our brief.

7 The tax quite clearly violates the terms of
8 the Constitution, and accordingly should be found in
9 invalid.

10 I might say that the Government in its reply
11 brief at page 4 suggests that Congress has taxed such
12 profits, windfall profits, in every place where it has
13 determined them to exist. You should understand, Your
14 Honors, that the statute has a formula for the
15 computation of windfall profit -- that is to say,
16 removal price minus suggested base price -- and pursuant
17 to that formula, the oil in the exempt portions of
18 Alaska would be taxable.

19 Second, following up a few points by Mr.
20 Wallace, there's nothing deminimis about this
21 exception. Confining ourselves to the Kuparuk River
22 field, which is already in production, you're talking
23 about a field which, if it were a single state, would
24 rank seventh among all oil-producing states in the
25 United States.

1 As historically understood, the uniformity
2 clause has acted a restraint on regional preferences and
3 upon regional jealousies. It has done so entirely
4 without any need for the Court to get into questions of
5 tax policy or to get into questions of legislative
6 motivation. It's been a clear, bright line,
7 understandable to all, and obeyable by all, including
8 Congress. There's no need after 200 years of a
9 successful operation of this clause to suddenly abandon
10 it in favor of an ill-described formula suggested by the
11 government.

12 QUESTION: Mr. Williams, would you concede
13 that the Congress could exempt from taxation oil
14 produced in certain described geographical -- described
15 climatic conditions, for example?

16 MR. WILLIAMS: Yes. I think that Congress
17 probably could have some sort of formula which one would
18 then apply to the ground, and in areas where the
19 climatic standards were met, that formula would govern.

20 The defense -- excuse me.

21 QUESTION: Well, is it prohibited from giving
22 a shortcut description by reference to a geographical
23 area then?

24 MR. WILLIAMS: Yes. First, let me say that
25 despite the references to cold climate, there's no

1 serious contention that this exactly parallels a cold
2 climate, any definition of cold climate.

3 The point is made by the government and
4 stressed by the Atlantic Richfield amicus brief that one
5 is talking of some combination of factors which result
6 in high production costs. But the -- and so that we
7 seem to be near Judge Friendly's observation that
8 Congress should be forced into circumlocutions.

9 But the concern of the act as developed in
10 Congress and as developed in this litigation for cost is
11 simply in order to ensure that there are the appropriate
12 and necessary incentives for the production of oil.

13 Now, for those purposes, cost in the abstract
14 is not of interest to someone interested in investing in
15 the production of oil. What he is interested in is cost
16 in relation to the product, let's say how many barrels
17 of oil for cost.

18 When you look at it in that light, Your Honor,
19 the Court, it turns out that in fact the production in
20 Alaska is much less costly than in the lower 48 states.
21 In fact, the ratio is approximately 20 to 1. That is to
22 say, the return in terms of barrels of oil produced per
23 dollar of drilling costs in Alaska is less than 6
24 percent of the return per dollar invested in drilling in
25 the lower 48.

1 If one is thinking seriously about using some
2 kind of geographic line as a shorthand for high
3 production costs, that factor would -- would point
4 towards exempting the lower 48 and not exempting Alaska.

5 Let me say further that there are perfectly
6 good ways to deal with high production costs, let's say
7 to address the question of high production costs as such.

8 QUESTION: Well, what do you suppose -- what
9 do you suppose this exemption -- why did it even come
10 into being, or do you know, or do you care? It seems --
11 it certainly couldn't be because Alaska outlobbied all
12 the rest of the country.

13 MR. WILLIAMS: I can't rule that out, Your
14 Honor.

15 (Laughter.)

16 QUESTION: Well, there are some powerful
17 Senators from that state, that's true, but they only
18 have two votes.

19 MR. WILLIAMS: They only have two votes, but --

20 QUESTION: And they voted against it.

21 MR. WILLIAMS: They voted against it, but they
22 also withdrew the or ceased the delaying tactics in
23 which they had been engaged up until December 14.

24 QUESTION: Well, what -- so I'll ask my
25 question again. What did prompt Congress to do this?

1 MR. WILLIAMS: Your Honor, it's hard to --
2 they certainly thought, or at least many of them must
3 have thought that this was a sensible dealing with the
4 problem of special high production costs.

5 QUESTION: Yes. So they were just -- you say
6 they were just wrong.

7 MR. WALLACE: Well, we say that if you look at
8 high production costs --

9 QUESTION: Well, let's assume they were right,
10 absolutely right. You'd still be here making this
11 argument.

12 MR. WILLIAMS: Yes, we would, Your Honor, but
13 I think the point is that in view of the facts that I
14 have mentioned, even if the rational basis test
15 suggested by the Government were applicable, what you're
16 looking at is a -- is a trial which would be very
17 difficult and which it would be very difficult to
18 justify the line actually drawn by Congress.

19 QUESTION: Well, would you say the exemption
20 would be invalid if they exempted all oil produced above
21 the Arctic Circle, and it turned out that the only oil
22 produced was offshore on the Continental Shelf?

23 MR. WILLIAMS: Well, the two -- insofar as
24 they drew the geographic line and insofar as any part of
25 any state was covered by that line, it seems to me it

1 clearly violates the requirement of the uniformity
2 clause.

3 Now, on the question of production, the
4 suggestion of the Government that the validity of this
5 clause should flicker on and off like a lightbulb in
6 accordance with whether or not there is actual
7 production seems to us most unsound. You are talking
8 about a statute which from its inception collected tax
9 revenue from oil producers in the lower 48 states and
10 which drew an express legal line between their tax
11 liability and those in Alaska.

12 QUESTION: Is there any place below -- and you
13 call them the lower 48 states -- where for long periods
14 of time annually large numbers of workers are unable to
15 work and yet have to be paid?

16 MR. WILLIAMS: No, Your Honor. We -- we --

17 QUESTION: Well, that is a difference, isn't
18 it?

19 MR. WILLIAMS: We acknowledge that the
20 operating conditions are extremely hostile in Alaska, so
21 that the costs are high, but the costs per barrel are
22 low. And in terms -- in the very terms in which
23 Congress framed its purposes in this statute, that is
24 the relevant kind of cost.

25 Let me say a word about -- in the first place,

1 Congress in this very act addressed the problem of high
2 production costs in the net income limitation. In the
3 areas where that limitation applies one must simply --
4 one must show the existence of one's costs and compare
5 them to the revenue. But the Alaskan producer is able
6 to have exempt oil without any reliance whatsoever on
7 what his cost and revenues are.

8 In terms of the cases, the Government has
9 relied heavily on Head Money Cases, and it has quoted
10 the language of the Court there that the tax applied to
11 all ports alike. You cannot frame a comparable sentence
12 about this tax. It does not apply to all oil wells
13 alike or to all newly discovered alike. It is simply
14 not comparable to the Head Money Cases.

15 Second, the Government relies on language in
16 the Head Money Cases and in Nicol v. Ames, suggesting
17 that presence of reasonable grounds is enough to justify
18 a tax. But the language in those cases making that
19 reference essentially is attributable to the fact that
20 before 1900 this Court suggested that the uniformity
21 clause had two dimensions: one, requirement of
22 geographic uniformity; second, a requirement of
23 intrinsic uniformity, which meant that any
24 classification of a tax by Congress was subject to
25 review under the uniformity clause. And it is in that

1 connection that the Court in those two cases made that
2 explanation by way of justification of the tax.

3 In 1900 in *Melvin v. Ames* it completely
4 removed the concept of intrinsic uniformity from the
5 tax, and after 1900 you do not see that language
6 appearing in uniformity clause cases under the tax power.

7 Finally, the case of *Downes v. Bidwell*
8 involved a tax, special tax on Puerto Rico clearly
9 different from taxes imposed in the continental United
10 States. The Court said unless Puerto Rico can be
11 treated as different because it is not a territory of
12 the United States, this tax will have to be struck down.

13 I want to stress, Your Honor, that this clause
14 has operated successfully, without inquiries in a tax
15 policy and without scrutiny of legislative purpose, for
16 200 years.

17 Let me turn, if I may, to the question of
18 remedy.

19 QUESTION: Before you do that, Mr. Williams,
20 may I ask one question about your theory? In some of
21 the briefs they suggest there might be a distinction
22 between physical geography and political geography.
23 Would you make the same argument if -- would you take
24 the position that you could never comply with the
25 uniformity clause if you described an exempt area by

1 meets and bounds, say, instead of by political
2 boundaries?

3 MR. WILLIAMS: Essentially so. One can
4 imagine some deminimis exception, but -- but this is not
5 deminimis.

6 QUESTION: Well, but -- but you would say, for
7 example, all coal mined above 5,000 or something would
8 be equally subject to --

9 MR. WILLIAMS: That wouldn't seem to me a
10 meets and bounds description.

11 QUESTION: Well, I understand that --

12 MR. WILLIAMS: A meets and bounds description
13 in this act draws a geographic line --

14 QUESTION: Well, I understand. But if you
15 view it without meets and bounds, what if you did it by
16 altitude then, say, another geographic way, another
17 physical geographic boundary?

18 MR. WILLIAMS: I don't think there would be
19 any problem with that, Your Honor.

20 QUESTION: That would be permissible.

21 MR. WILLIAMS: I believe so, Your Honor.

22 QUESTION: But meets and bounds would not.

23 MR. WILLIAMS: Yes, Your Honor.

24 QUESTION: Or by depth of oil -- oil well.

25 MR. WILLIAMS: Yes, Your Honor. I think that

1 would be all right. We have such legislation, although
2 not in tax legislation.

3 QUESTION: Yes.

4 MR. WILLIAMS: On the question of remedy, Your
5 Honor, there are three central vices in the Government's
6 proposal that this tax be extended to Alaska.

7 It'd be wrong for this Court to impose a tax
8 on investors with respect to investment that --
9 investments that Congress deliberately decided to
10 exempt. It would be especially wrong where such a tax
11 would be retroactive.

12 It would be wrong for this Court to impose a
13 tax which jeopardizes production, which might jeopardize
14 production in an area where Congress was particularly
15 concerned that production not be jeopardized.

16 And finally, it would be wrong to violate the
17 precept laid down by Justice Brandeis in the Iowa-Des
18 Moines National Bank case, discussed at pages 35 and 36
19 of our brief, in which he said that the victim of an
20 illegal -- illegally discriminatory tax should not be
21 reduced to asking that that tax -- the taxes of other
22 parties be increased.

23 QUESTION: Well, Mr. Williams, do those
24 observations suggest that we shouldn't in this case, if
25 we were to agree with you on the substantive law issue,

1 follow the practice that we generally have of trying to
2 figure out what Congress would have intended had --

3 MR. WILLIAMS: No, Your Honor. No. We -- we
4 -- we agree with the Government that the basic test is
5 congressional intent, but we believe that the concept in
6 the -- in discerning congressional intent, one has to be
7 wary of judicial imposition of taxes that Congress did
8 not decide to impose.

9 If there were an expressed provision in the
10 statute that in the event of unconstitutionality of the
11 Alaska provision, the remedy should be to tax Alaska,
12 that would control

13 QUESTION: Is judicial imposition of taxes
14 that Congress didn't intend to impose any worse than
15 judicial relief from taxes elsewhere that Congress did
16 intend to impose?

17 MR. WILLIAMS: Yes, Your Honor. The
18 imposition of a tax, taking of property from a person is
19 something which, according to the Constitution, should
20 not happen without an act of Congress. And the burden,
21 it seems to us, should be very strongly in the first
22 instance upon the -- anyone seeking extension of the tax
23 to show that indeed Congress made such a decision.

24 Now, here the indirect evidence -- one may
25 call it that -- as to congressional willingness to tax

1 Alaska is all our way. There's an overwhelming record
2 showing that Congress did not intend to tax Alaska, the
3 exempt portions of Alaska. This exemption was in
4 President Carter's bill. An exemption, similar
5 exemption was in the House bill. The Senate Finance
6 Committee bill had a broader exception, one for newly
7 discovered oil; and on the floor of the Senate the --
8 that exemption was changed as a result of extremely
9 heavy negotiations, as a result of which the newly
10 discovered oil exemption was dropped and an exemption
11 for Alaskan oil substituted in its place.

12 That was a package transaction, Your Honor.
13 It would seem to us extremely inappropriate to take
14 one-half of the package, the tax on Alaska oil, and --
15 I'm sorry -- to discard the exemption for Alaskan oil
16 and to retain the tax on newly discovered oil.

17 Now, this great alliance by the government in
18 terms of direct evidence on Senator Long's statements in
19 the Senate on March 26th, 1980, the first point about
20 those is that they occurred nearly two weeks after the
21 House had finally approved the conference report. Let
22 us say all action by the House on this bill was complete
23 at the time that Senator Long made his statement.
24 Therefore, it seems to me inconceivable that the House
25 action could be said in any way to reflect Senator

1 Long's views.

2 Second, of course Senator Long was one
3 Senator, a distinguished one and very much involved in
4 the passage of the act, but nonetheless only one
5 Senator, and there's no echo from any other Senator in
6 support of him on this.

7 Finally, even Senator Long's statement
8 indicates that in the terms in which this Court has
9 framed the separability issue, the -- he would not want
10 separability. That is to say, he said that the -- in
11 the event of extension of the tax to Alaska, it would be
12 necessary for Congress to go back and make adjustments
13 to correct it. In *Williams v. Standard Oil* this Court
14 said that the separation is possible only when Congress
15 would have been satisfied with what remains after the
16 separation. And it's clear that even Senator Long
17 himself would not have been satisfied with what remains
18 after severance of the Alaska exemption.

19 The Government also relies heavily on the case
20 of *Utah Power and Light*. That, of course, has only a
21 dictum. The Court had no need whatever to reach the
22 question of separability in that case.

23 Second, the case is distinguishable in that
24 the record there involved no suggestion whatever that
25 the Idaho legislature was particularly concerned about

1 this exemption. By contrast, of course, here we have an
2 exemption to which Congress showed a continuous
3 commitment over the entire period through which the
4 legislation was considered.

5 And I may say the unified theme and the
6 painstaking carving out of the legislation by the
7 Congress, to which Mr. Wallace has alluded is and was
8 involved in that.

9 Second, the -- the dictum in Utah Power and
10 Light was ill considered. Clearly the issue had not
11 been thoroughly litigated. The Court makes no reference
12 whatever to the decision of Iowa-Des Moines National
13 Bank, which was at that time and remains the leading
14 case on the proper remedy for a tax which illegally
15 discriminates.

16 And since the -- under the -- as the Court was
17 discussing the matter in Utah Power and Light, what was
18 at issue was an illegal discrimination. The controlling
19 case at that time was Iowa -- the Iowa-Des Moines
20 National Bank case.

21 Moreover, the Utah Power and Light dictum
22 occurs in 1932. In 1946 this Court in the Township of
23 Hillsborough case said that the Iowa-Des Moines -- not
24 only said that the Iowa-Des Moines National Bank case
25 was good law, but it applied it, saying that a state

1 providing a remedy for illegal discrimination which
2 limited the taxpayer to seeking extension of the tax to
3 others was not providing an adequate remedy, and that,
4 therefore, federal jurisdiction was available.

5 There is also reliance by the Government on
6 the general separability clause of the Internal Revenue
7 Code, Section 7852(a). The difficulty with that clause,
8 from the Government's point of view, is that the invalid
9 provision, reading the statute in its natural way, is
10 the tax, not the exemption. There is nothing invalid,
11 quite clearly, about failing to tax particular producers
12 in Alaska. What is invalid is the combination of taxing
13 people in the other 49 states and, in combination with
14 that, failing to tax similar production in Alaska.

15 I may say that the very naturalness of that
16 reading is evident to us in Judge White's concurring
17 opinion in the Minneapolis Star case where finding the
18 exemption illegal, he concluded automatically and
19 naturally that the tax was therefore illegal.

20 In addition, the -- it seems to us that
21 Section 7852(a) must be construed in the light of the
22 law then prevailing and now prevailing -- that is to
23 say, the decision in Iowa-Des Moines National Bank, and
24 that is to say, treating the problem of remedying an
25 illegal discrimination in taxes as a special kind of

1 remedial problem.

2 In the absence of any indication that Congress
3 in the -- in adopting Section 7852(a) was aiming at
4 overruling the established law on that point, it would
5 seem to me the natural conclusion is that it had no
6 intention at all to undercut the then prevailing rule on
7 the matter.

8 The only -- I may say that the only lower
9 court interpretation of Section 7852(a) that deals with
10 the problem -- that interprets the clause in the context
11 of a tax that illegally discriminates is the Moritz case
12 from the Tenth Circuit, and there the Court construed it
13 in the way that we have suggested here; that is to say,
14 to extend relief to the taxpayer who had been
15 discriminated against rather than burdening taxpayers
16 who had been illegally benefitted.

17 I may say that the -- if I may return to Utah
18 Power and Light, the Government argues that that is a
19 case which can be completely disregarded -- I'm sorry --
20 which is not at all in conflict with Iowa-Des Moines
21 National Bank because Iowa-Des Moines National Bank did
22 not involve separability.

23 It is quite true that in Iowa-Des Moines
24 National Bank separability per se was not at stake;
25 that is to say, the problem was not the remedying a

1 statute which discriminated illegally. The
2 discrimination arose because a county auditor had
3 illegally made certain decisions to the benefit of the
4 complaining taxpayer.

5 There is that -- there is that nominal
6 distinction. The impact of that distinction, it seems
7 to us, Your Honor, cuts entirely our way. It was
8 perfectly clear in Iowa-Des Moines National Bank what
9 the legislature wanted. The legislature wanted both
10 sides of discrimination to be taxed at the higher rate.
11 The county auditor had illegally in violation of statute
12 produced lower rates for a certain set of taxpayers, and
13 despite the obvious intent of the legislature there, the
14 Court said that the remedy must be equalization of taxes
15 by lowering the adversely affected taxpayers' taxes to
16 the level of or to the rate which had been applied to
17 those who had illegally benefitted.

18 Your Honor, the Court -- the remedies
19 suggested by the Government have in common that -- the
20 -- the Government has suggested a variety of remedies
21 throughout this litigation: one, that the tax be
22 extended to Alaska; second, that the tax be invalidated
23 only insofar as it applies to newly discovered oil; and
24 third, a position adopted in the district court and
25 apparently not pressed here, that the Court itself carve

1 out some sort of exemption for cold climate, distance
2 from markets and things of that sort.

3 The -- all of these -- the very multiplicity
4 of proposals by the Government suggests to us the highly
5 legislative character of its remedial suggestions. The
6 choice between these different proposals obviously
7 involves very different tradeoffs between revenue
8 collection for the government, between the problem of
9 persons who have invested in reliance on a particular
10 status quo, and the problems of disincentive to
11 production. And those tradeoffs are surely legislative
12 nature and ones to be made by Congress.

13 In addition, within the remedies proposed by
14 the Government there are legislative decisions to be
15 made. The -- whether or not if Alaskan oil should be
16 taxed the TAPS adjustment, a special provision, the
17 details of which I needn't give you, should be applied
18 to that oil is a question which would be open if the
19 Court should extend the tax to Alaska.

20 How the -- the revenues from the exempt
21 portions of Alaska should affect the computation of the
22 phaseout provisions, which the phaseout is supposed to
23 start after \$227 billion in net revenues have been
24 collected, how those provisions should be adjusted to
25 reflect extension to Alaska are clearly legislative ones

1 and do not seem appropriate for the Court.

2 Let me say a brief word about the question of
3 ripeness, Your Honors. The -- this is -- the ripeness
4 claim here is different from any other that one is
5 familiar with. Here one has a tax which from its start
6 has led to the taxpayers in the lower 48 states paying
7 taxes. In addition, the line illegally drawn by the
8 statute is one which had its effects immediately in
9 terms of attracting capital to the exempt areas of
10 Alaska which otherwise producers in the lower 48 states
11 might have attracted.

12 The Government's proposal that the
13 constitutionality be dependent on production suggests
14 this continual on and off possibility, which has no
15 precedent in your ripeness jurisprudence.

16 And, finally, the cases which have overcome
17 ripeness and dealt with a statute which has not taken
18 effect, which, of course -- and ours has taken effect in
19 terms of forcing the collection of revenue -- cases
20 dealing with that have never said that the illegality
21 will begin only when the effect begins. They have
22 spoken of the act being unlawful at the time of the
23 adjudication even though the effect is only
24 anticipated. In *Pierce v. Society of Sisters*, for
25 example, the Court talks about the proper role of an

1 equity court to give relief before the -- to give relief
2 immediately for unlawful action, referring to the
3 statute as passed.

4 There's continual reference to the enormous
5 sums at stake in the event that the government's -- in
6 the event that the taxpayers' proposed remedy is
7 adopted. It seems to me that that need not be a
8 concern, that the Congress has within its power curative
9 measures and that there is no need to shy off from
10 giving the natural remedy despite the presence of those
11 -- despite the fact that the immediate result would be
12 the invalidation of a statute which on its face involves
13 large sums.

14 Your Honor, I want to emphasize that here we
15 have a clause which has worked effectively to restrain
16 regional preferences and jealousies without the courts
17 being concerned with tax policy or legislative
18 motivation. There is no reason in view of the ease with
19 which Congress can handle the problems which are alleged
20 by the Government to exist without drawing geographic
21 lines, there is no need to adopt some substitute test,
22 the testing -- the proof of which would be extremely
23 complex.

24 As far as remedy is concerned, the extension
25 of a tax to investors that Congress decided to exempt,

1 to production that it was concerned to preserve, and
2 leaving taxpayers in a situation where they had no
3 remedy but to increase the taxes of others would not be
4 wrong -- would not be right or consistent with the
5 prevailing cases on remedy.

6 QUESTION: You mean it might --

7 MR. WILLIAMS: Beg pardon?

8 QUESTION: -- Raise their costs to what others
9 -- that your message is that they were a lower cost
10 producer anyway.

11 MR. WILLIAMS: That is true. Lower cost in
12 relation to the --

13 QUESTION: And if you add --

14 MR. WILLIAMS: -- Productivity.

15 QUESTION: And if you add the tax, it may not
16 hurt them at all.

17 MR. WILLIAMS: It may not, but whether --

18 QUESTION: Except for the amount of the tax --

19 MR. WILLIAMS: -- Whether -- whether this
20 Court should take the risk of imposing a tax that
21 Congress decided not to impose is another matter.

22 Thank you, Your Honor.

23 CHIEF JUSTICE BURGER: Do you have anything
24 further, Mr. Wallace? You have three minutes remaining.

25 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

1 ON BEHALF OF THE APPELLANT -- Rebuttal

2 MR. WALLACE: Yes, Mr. Chief Justice.

3 Professor Williams has spent much of his time
4 on the question of severability, but our principal
5 contention in this case is that there is no violation of
6 the uniformity clause. And as I understand his argument
7 in the Appellees' brief, they concede that Congress
8 could have achieved precisely the result it achieved
9 here if it had used different language in drafting the
10 exemption provision at issue.

11 That means to us that no one is being
12 subjected to taxation that Congress is prohibited by the
13 Constitution from imposing, or in other words that the
14 uniformity -- the protection afforded by the uniformity
15 clause, which is substantive protection, is not being
16 violated here.

17 There have been references to the cost per
18 barrel of producing oil in Alaska. Of course, the oil
19 being produced costs less per barrel to produce in
20 Alaska than oil elsewhere because you have to add on
21 such enormous transportation costs. The only reservoirs
22 being developed, particularly in these remote regions,
23 are the ones where you can efficiently produce it
24 because you're getting a wellhead price of \$8 to \$10
25 less than the wellhead price that you can get

1 elsewhere. And that has a great deal to do with why
2 Congress concluded that the Sadlerochit Reservoir should
3 be taxed and taxed at the highest rate.

4 The exemption was designed to nurture
5 production elsewhere. And Footnote 26 on page 19 of our
6 brief shows how a slight decline in the price of oil
7 during 1982 was shown to have resulted in a slowdown of
8 development in the Kuparuk River field precisely because
9 of this problem.

10 One of the things that distinguishes the
11 exempt area from the rest of the United States is the
12 extreme remoteness from refineries and markets that
13 results in very substantial transportation costs. And
14 below the Arctic Circle the exempt area excludes
15 anything within 75 miles of the Trans-Alaska Pipeline
16 system. The exemption is carefully tailored to isolate
17 those places where Congress had ample reason to conclude
18 that no windfall would result in terms of what they were
19 trying to reach.

20 And certainly the theme that is as consistent
21 as the theme that an exemption for this would fit into
22 the scheme of the act is the theme equally in every
23 version of the bill that a very substantial tax would be
24 imposed. That is as consistent a theme as the exemption
25 theme and was certainly the principal purpose of the

1 act, to have revenues resulting from the windfall that
2 was going to result from decontrol.

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

5 We will hear arguments next in Nevada against
6 the United States and the consolidated cases.

7 (Whereupon, at 1:40 p.m., the case in the
8 above-entitled matter was submitted.)
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CERTIFICATION

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