

**ORIGINAL**

**OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE**

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-401

**TITLE** BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE  
DEPARTMENT OF ALCHOLIC BEVERAGE CONTROL OF CALIFORNIA  
Petitioner, v. EVA REHNER

**PLACE** Washington, D. C.

**DATE** March 21, 1983

**PAGES** 1 thru 46



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IN THE SUPREME COURT OF THE UNITED STATES

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BAXTER RICE, INDIVIDUALLY AND AS  
DIRECTOR OF THE DEPARTMENT OF  
ALCOHOLIC BEVERAGE CONTROL OF  
CALIFORNIA,

Petitioner

v.

No. 82-401

EVA REHNER

-----x

Washington, D. C.

Monday, March 21, 1983

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

APPEARANCES:

ALAN S. METH, ESQ., Dep. Attorney General of California,  
San Diego, California; on behalf of the Petitioner.

STEPHEN V. QUESENBERRY, ESQ., Ukiah, California; on behalf  
of the Respondent.

JOSHUA I. SCHWARTZ, ESQ., Office of the Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the U.S. as amicus curiae.

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P R O C E E D I N G S

1  
2 CHIEF JUSTICE BURGER: Mr. Meth, I think you may proceed  
3 when you are ready.

4 ORAL ARGUMENT OF ALAN S. METH, ESQ.

5 ON BEHALF OF THE PETITIONER

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

8 This case is here under the certiorari from the Court  
9 of Appeals from the Ninth Circuit to review a decision of that  
10 court which held that California did not have the authority to  
11 regulate through licensing Indian country liquor transactions.  
12 In so doing, the Court of Appeals reversed the judgment of the  
13 District Court which had upheld the right of California to  
14 regulate through licensing Indian country liquor transactions.

15 This case asked the Court to resolve two well-established  
16 and entirely distinct principles. On the one hand is the  
17 principle that Indians and Indian tribes are to be left free of  
18 state control and their affairs governed by themselves and by  
19 the United States.

20 The other principle is that it is the states which have  
21 the authority to determine how liquor transactions within the  
22 state's borders are to take place.

23 This case began about six years ago when Respondent,  
24 who is a tribal Indian living on a reservation in a northern  
25 part of San Diego County, the Pala Reservation, requested that she

1 be allowed to sell distilled spirits from her general store,  
2 which is located on the Pala Indian Reservation. She made the  
3 request to the California Department of Alcoholic Beverage Control,  
4 which has the authority under California law to require and enforce  
5 California's liquor licensing system.

6 The Department denied Respondent's request for an  
7 exemption from California's liquor licensing laws, and Respondent  
8 then filed suit in the District Court seeking injunctive and  
9 declaratory ruling. And, the basis for that suit was that as a  
10 tribal Indian seeking to sell distilled spirits from her store  
11 located in Indian country she was exempt from California's  
12 liquor licensing laws.

13 The Department moved to dismiss the complaint or for  
14 summary judgment, and the District Court agreed with the Depart-  
15 ment that it had the authority to require licenses, and, therefore,  
16 dismissed the complaint.

17 The case was then appealed to the Court of Appeals which,  
18 after a lengthy stay in that Court, reversed the decision of  
19 the District Court and held that California's liquor licensing  
20 laws as opposed to its state substantive laws had no impact in  
21 Indian country and need not be followed.

22 This case thus presents the question whether a state  
23 has the authority to require tribal Indians to obtain a state  
24 license if state law requires the license be obtained before  
25 liquor transactions take place in Indian country.

1 QUESTION: May I clarify one thing, Mr. Meth, at the  
2 outset. The state of California does not base any reliance in  
3 this case on any jurisdiction it might have obtained under Public  
4 Law 280?

5 MR. METH: That is correct.

6 QUESTION: And, why is that?

7 MR. METH: Public Law 280, as we read it, is a criminal  
8 jurisdictional type of statute. The request made in this case  
9 was solely for a license.

10 QUESTION: And, also some forms of civil jurisdiction,  
11 right?

12 MR. METH: That is correct. Public Law 280 --

13 QUESTION: Then, it is your position that it would  
14 not encompass liquor licensing?

15 MR. METH: The criminal and civil jurisdiction which  
16 California has under Public Law 280 may come into play somewhere  
17 further down the line if Respondent is required to obtain a  
18 license and then doesn't act, which is both punishable under the  
19 licensing system and the criminal system. If it is punishable  
20 under the criminal system, Public Law 280 would give California  
21 the authority to punish that act criminally.

22 But, as far as the disciplinary action which California  
23 through the Department of Alcoholic Beverage Control would take  
24 against Respondent under the licensing system, that authority,  
25 we believe, is contained in Section 1161.

1 QUESTION: Well, in any event, Public Law 280 is  
2 applicable in the state of California?

3 MR. METH: That is correct. California is a Public Law  
4 280 state.

5 QUESTION: It is not just limited to criminal juris-  
6 diction, is it?

7 MR. METH: No, civil jurisdiction, as this Court con-  
8 strued Public Law 280 in Bryan that it relates to criminal and  
9 civil, but civil jurisdiction was limited by the Court to causes  
10 of action cases where a court's services were required, and it  
11 excluded --

12 QUESTION: That was because of the Bryan interpretation  
13 that you opted to drop any reliance on 280, is that right?

14 MR. METH: That is correct.

15 Before 1953 this question would not have arisen, for  
16 the simple fact that Indian country was dry. Beginning in 1802,  
17 federal legislation prohibited the introduction of liquor into  
18 Indian country.

19 In 1832, the prohibitions were made criminal. So,  
20 under federal law, as well as state law, a number of states also  
21 regulated liquor transactions with Indians. Beginning in 1832,  
22 liquor transactions with Indians either on the reservation or  
23 off the reservation were prohibited.

24 The federal prohibitions are now contained in 18 U.S.C.  
25 Sections 1154 and 1156. In 1953, Congress passed 18 U.S.C. Section

1 1161, which removed the federal criminal penalties unconditionally  
2 if the transaction occurred off the reservation. With respect to  
3 on the reservation, acts or transactions occurring in Indian  
4 country, the federal penalties were removed conditionally, the  
5 conditions being that the acts or transactions had to conform  
6 both with the laws of the state in which the acts or transactions  
7 occurred and an ordinance duly adopted by the tribe having  
8 jurisdiction over that area of Indian country.

9           The Department asserted in the District Court and the  
10 District Court agreed that California had the authority to require  
11 Respondent to obtain a license. Before I analyze Section 1161,  
12 with respect to what it actually says, I think it is very impor-  
13 tant for the Court to consider what the statute does not say in  
14 light of the Court of Appeals' decision.

15           The Court of Appeals' decision was based primarily on  
16 the concept of jurisdiction, and as I have indicated before,  
17 California is not asserting criminal or civil jurisdiction in  
18 the Public Law 280 sense under this statute.

19           QUESTION: May I ask you then, what is California's  
20 view about--Assume you prevail, how will you enforce your victory?

21           MR. METH: California's liquor licensing laws are  
22 enforced administratively. A license is in effect a decision by  
23 the Department of Alcoholic --

24           QUESTION: I understand, but supposing your opponent  
25 decides just to start selling liquor. What can you do about it?



1 MR. METH: The sale of liquor without a license in  
2 California is a crime.

3 QUESTION: I understand.

4 MR. METH: I would think that the local district attorney  
5 The Department of Alcoholic Beverage Control has no criminal --

6 QUESTION: That only applies to California territorial  
7 land, doesn't it?

8 MR. METH: Pardon me?

9 QUESTION: Well, is the Indian reservation part of the  
10 territorial land of California?

11 MR. METH: Yes it is, Your Honor.

12 QUESTION: News to me.

13 QUESTION: I am still not sure I understand the answer  
14 to my question. Let me give you two questions. One, supposing  
15 somebody sells liquor without a license on an Indian reservation.

16 Secondly, suppose someone who may have a license on an  
17 Indian reservation violates some after-hours, sells at the wrong  
18 time of day, or something like that. What can California do  
19 about either of those situations?

20 MR. METH: There are two ways that California enforces  
21 its liquor laws.

22 The primary way is through licensing, and in that way  
23 the Department can take action against the license and if it  
24 determines that there has been a violation of the alcoholic  
25 beverage control law, then the Department can suspend, for a short

1 period of time, the license, the business operation, or the  
2 Department can revoke the license and put the licensee out of  
3 business.

4 The alternative method is if the local district attorney  
5 decides that if the act is a criminal offense, and as His Honor  
6 mentioned, after-hours sale is a criminal act, the district attorney  
7 could take --

8 QUESTION: You mean the federal attorney, or the  
9 California attorney?

10 MR. METH: California attorney under Public Law 280.

11 QUESTION: Are you -- Oh, I see, under Public Law 280  
12 you would enforce even the jurisdiction that is left under the  
13 Court of Appeals holding criminally in the state courts?

14 MR. METH: That is correct.

15 QUESTION: It would also be a federal crime?

16 MR. METH: That is correct.

17 QUESTION: You also enforce the laws about obscene  
18 dancing in a liquor place on an Indian reservation?

19 MR. METH: Off the reservation, those penalties or  
20 those prohibitions are contained in the Department's regulations.  
21 The Department is the California licensing agency.

22 If the Court of Appeals' decision is upheld, the  
23 California licensing agency would not have any authority in  
24 Indian country, and so those regulations, I submit, would not be  
25 the kinds of things that if Respondent violated -- If Respondent

1 were operating a bar instead --

2 QUESTION: Without that, you could. That is your  
3 position?

4 MR. METH: The only way that --

5 QUESTION: That you could enforce on an Indian reserva-  
6 tion the regulation of the California liquor board that you cannot  
7 have obscene dancing in a place that sells liquor --

8 MR. METH: That is correct. It is not a crime --

9 QUESTION: And, you can enforce that?

10 MR. METH: Only administratively, Your Honor. Only by  
11 action against the licensee. Those prohibitions are contained in  
12 the Department's regulations, and those regulations are not crimes.  
13 So, by virtue of the limited authority that the Court of Appeals  
14 has given the Department, a violation of one of those regulations  
15 would not result in a federal crime. So, there would not be any  
16 federal criminal sanctions against nude dancing.

17 QUESTION: I did not mention federal. I said state.

18 MR. METH: It is not a state crime either. If they are  
19 only contained --

20 QUESTION: Obscene dancing --

21 MR. METH: Those are contained --

22 QUESTION: I thought a case came up here from  
23 California --

24 MR. METH: California versus LaRue --

25 QUESTION: I thought so.

1 MR. METH: -- in 1972. The Court upheld --

2 QUESTION: And, we upheld it, didn't we?

3 MR. METH: The Department's regulations --

4 QUESTION: That was a state rule, not federal.

5 MR. METH: But it was a state regulatory rule --

6 QUESTION: All I am saying is the courts will enforce  
7 that rule on an Indian reservation.

8 MR. METH: If the Court gives the Department the authority  
9 to require licensing. If the Department does not have the  
10 authority to license and to take action against the license, those  
11 prohibitions cannot be enforced. That is the basic distinction  
12 between the criminal system of enforcing the Alcoholic Beverage  
13 Control Act and the administrative system for implementing that  
14 Act.

15 Only regulations promulgated by the Department which  
16 are not crimes could not be determined to be substantive state  
17 standards which the Court of Appeals has said are those matters  
18 which result in federal crimes. So, the entire regulatory  
19 scheme of the Department would be inapplicable.

20 The only other case to reach this Court involving  
21 Section 1161 is United States versus Mazurie in 1975. I believe  
22 that that is a very important case on the matter of this juris-  
23 diction.

24 In that case non-Indians were convicted of the federal  
25 offense of violating Section 1154 because they had not obtained

1 tribal licenses. The tribal ordinance required that anyone selling  
2 liquor in an Indian reservation on that Indian reservation had to  
3 obtain a tribal license. The Mazuries obtained state licenses and  
4 so they were in conformity with the state law, but they had not  
5 obtained tribal licenses.

6 By virtue of that act, not obtaining tribal licenses,  
7 the tribal license, they were convicted in federal court of  
8 violating Section 1154.

9 All California is asking is to have the same power.  
10 The tribes in that situation in Mazurie did not have criminal  
11 jurisdiction over the non-Indians. This Court's decision in  
12 Oliphant made that clear.

13 The jurisdiction was not an issue, and it should not  
14 be an issue. The only authority, the only governmental entity  
15 which we know has jurisdiction over Indian country liquor trans-  
16 actions and, in fact, all acts committed on an Indian reservation  
17 is the United States. The United States had jurisdiction over  
18 the non-Indians in the Mazurie case. The United States has  
19 jurisdiction over Respondent because she is an Indian.

20 In this case the United States has the jurisdiction.  
21 In this case, all we are saying, all California is saying is that  
22 it has the authority to set the conditions under which lawful  
23 Indian country liquor transactions are to take place, and if state  
24 law requires a license, just like if a tribal ordinance requires  
25 a license, then the person desiring to engage in liquor traffic

1 in Indian country has to obtain a license. That is all this  
2 case is about.

3 I suggest the proper way to analyze this case is the  
4 way this Court did in a number of cases cited in both of the  
5 briefs, California versus the United States, EPA versus State  
6 Water Resources Control Board, and Hancock versus Train. In all  
7 three of those cases, the Court was faced with a situation where  
8 a state was requiring a federal agency to obtain a license.

9 In each of those cases, the Court looked at the statute,  
10 looked at the entire statutory scheme, looked at the legislative  
11 history and looked at anything else that the Court thought was  
12 relevant to this situation. But, the Court did not base its  
13 decision on the fact that a state does not have jurisdiction over  
14 the Secretary of Interior. Only if Congress has given a state  
15 the power to require the Secretary of Interior to obtain a  
16 license can a state make the Secretary of Interior obtain a  
17 license. That is all we are asking for in this case is for the  
18 Court to look at the statute, look at the legislative history,  
19 look at the various relationships and determine whether  
20 California has the power to require a license.

21 I do not believe it would be fruitful at all for the  
22 Court to go into the matter of jurisdiction.

23 The Court of Appeals seemed to assume that the  
24 California license was nothing more than a piece of paper, which  
25 simply allows someone to do an act. California's liquor licensing

1 scheme is much more than that, and I do not believe that the  
2 Court's decision that only a state's substantive standards as  
3 opposed to its licensing scheme is a valid one.

4 California both in its Constitution and in its statutes  
5 has declared that a licensing system is necessary for the protection  
6 of the health, welfare, safety and keeps the morals of its people,  
7 and the system is designed to eliminate what it views as the evils  
8 of unlicensed liquor traffic within the state.

9 QUESTION: Can non-Indians purchase liquor at these  
10 establishments?

11 MR. METH: Yes, they can, Your Honor. The statute is  
12 not limited with respect to the identity of the seller or the  
13 identity of the buyer. So, anyone can sell under this statute  
14 in Indian country, and anyone can buy under this statute, assuming  
15 that the sale is in conformity with tribal and state laws.

16 California has also declared that its licensing system  
17 involves in the highest degree -- and I am reading from the words  
18 of the statute -- in the highest degree the economic, social and  
19 moral well-being and safety of the state and all of its people.

20 In light of what California believes, I wonder how the  
21 Court of Appeals can say that a licensing system is something  
22 that can be ignored. It is an important aspect of California's  
23 regulatory system of liquor traffic, and I think it is quite  
24 important for the state to be able to impose its licensing  
25 system.

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QUESTION: Mr. Meth, wasn't the principle reason that the Court of Appeals found against you, its conclusion that 1161 was not an express grant of legislative jurisdiction to the states to regulate liquor sales on reservations?

MR. METH: That is eventually what the Court said.

QUESTION: So that any observations it might have had or might have had in the back of its mind about the importance of a California liquor license I would think would probably be secondary to that conclusion, don't you?

MR. METH: The Court analyzed -- I am not sure how the Court analyzed the statute. I would like to make an observation.

The Court analyzed the words of the statute in the beginning of the opinion. In none of the briefs cited by -- None of the briefs submitted by Respondent, or the United States or any other amici have that interpretation of the statute. The words of the statute have been adopted, and I suggest that that is so because the Court of Appeals' reading of the statute was not understandable.

I have read that opinion many times. I do not understand how the Court can arrive at the conclusions it did based upon the wording of the statute.

The Court then drew a distinction between licensing and substantive state standards, but the Court nowhere defined the phrase substantive state standards. What we are saying is that



1 there are many substantive state standards, basic policies, as  
2 Respondent put it in her brief. There are many basic policies  
3 which are contained in the licensing system and are not  
4 simply criminal statutes.

5 For those reasons, we believe that the entire state  
6 regulatory system and not simply what are called state substantive  
7 standards without definition are to be followed in Indian country.

8 If I can give some examples -- Perhaps the most impor-  
9 tant policy with respect to retail sales of liquor in California  
10 is the proposition that there should not be a liquor store or  
11 bar on every corner. California tries to limit the number of  
12 people who are engaged in the sale of distilled spirits. Cali-  
13 fornia does that in a number of ways.

14 It limits the number of licensees, the number of people  
15 who may be engaged in the liquor traffic. That is based on  
16 population.

17 Another way is for the Department -- The Department is  
18 given the authority to determine if a particular location is the  
19 proper location for a retail liquor establishment. The Depart-  
20 ment is specifically given the authority --

21 QUESTION: Would you think that the Department would  
22 know what was going on in an Indian reservation?

23 MR. METH: I do not see why not, Your Honor.

24 QUESTION: Well, where is the Department? What city  
25 is it in?

1 MR. METH: The Department maintains offices throughout  
2 California.

3 QUESTION: Does it have one on the Indian reservation?  
4 Of course, they do not.

5 MR. METH: That is correct.

6 QUESTION: So, how would they know?

7 MR. METH: The Department has investigators, and the  
8 Department's investigators --

9 QUESTION: Indians? Indian investigators?

10 MR. METH: There is nothing in the statutes which would  
11 prohibit an Indian from being an investigator.

12 QUESTION: My question was, do they have any Indians?

13 MR. METH: I do not know if any of the employees are  
14 Indians --

15 QUESTION: You know they don't, don't you?

16 MR. METH: Pardon me?

17 QUESTION: Don't you know that they don't have any?

18 MR. METH: I do not know that, Your Honor. There would  
19 be nothing in the statutes which would prohibit the Department  
20 from hiring Indians.

21 QUESTION: If you prohibit them, you might be in trouble  
22 with somebody else.

23 MR. METH: That is certainly correct, Your Honor. They  
24 have other agencies of the state which would prohibit that sort  
25 of activity, and California as an employer has traditionally been

1 one which has hired all kinds of --

2 QUESTION: Well, for example, do you have a rule in  
3 California that says you cannot have one near a church?

4 MR. METH: That is correct.

5 QUESTION: How many churches do you have on the  
6 reservations?

7 MR. METH: Your Honor, there are 75 to 80 reservations  
8 in the state of California. I do not know where the locations  
9 of the churches are.

10 QUESTION: I am sure you don't, and I doubt anybody  
11 else does. That is my point.

12 MR. METH: An investigator can drive up to a reservation  
13 and determine if the proposed license is to be --

14 QUESTION: And decide what is best for the Indians?

15 MR. METH: For the people of the state of California,  
16 not just the Indians.

17 QUESTION: You indicated earlier these stores would  
18 sell to non-Indians, I assume.

19 MR. METH: That is correct.

20 QUESTION: And there are some checkerboard reservations,  
21 aren't there?

22 MR. METH: That is correct, Agua Caliente being a  
23 prime example.

24 QUESTION: Well, they are getting their liquor from  
25 the same Oklahoma place that the California wholesalers wanted

1 to get it from in that Oklahoma connection case, aren't they?

2 MR. METH: I do not know where the Agua Calientes are  
3 getting their liquor.

4 QUESTION: California has amended its laws, I take it,  
5 to make it possible for wholesalers to sell to unlicensed  
6 establishments on the reservation?

7 MR. METH: That is correct. So, that would eliminate  
8 one of the enforcement methods that California has for preventing  
9 the unlawful sales by non-licensees.

10 QUESTION: But, California has kept on the books, at  
11 least, its requirements that these establishments be licensed so  
12 you assert it is not moot?

13 MR. METH: That is correct, Your Honor.

14 QUESTION: Does California regulate the price of  
15 liquor sold in its liquor stores?

16 MR. METH: No, it does not, Your Honor.

17 QUESTION: It does regulate the hours during which they  
18 may be sold, I suppose?

19 MR. METH: That is correct. Sales cannot be between  
20 2 a.m. and 6 a.m.

21 QUESTION: Yes.

22 MR. METH: And, to just follow that up for a moment, it  
23 does not seem to me that it makes much sense to draw a distinction  
24 between the hours of operation in which Respondent and the United  
25 States seem to say are ones which California may regulate and the

1 location of a liquor store or a bar. What we are talking about  
2 is access to liquor.

3 QUESTION: Do you think they concede that you can  
4 regulate it or do they just concede that the store owner must  
5 abide by California law?

6 MR. METH: No, they are saying that it is a federal  
7 offense --

8 QUESTION: That is right, but they do not say that  
9 California can do anything about it --

10 MR. METH: Not in the licensing scheme, that is correct.

11 QUESTION: Well, or any other way?

12 MR. METH: Well, the --

13 QUESTION: They do not concede that?

14 MR. METH: They are conceding that under 1161 --

15 QUESTION: It would be a federal crime. --

16 MR. METH: A federal crime.

17 QUESTION: They do not concede that California can do  
18 anything at all about it if the store owner was selling to  
19 minors?

20 MR. METH: That is correct. However, California could  
21 enforce those laws under Public Law 280, but as I said before,  
22 Public Law 280 is not involved in this case. And, California's  
23 authority under Public Law 280 is not involved in this case,  
24 only its licensing scheme.

25 If I may reserve the remainder of my time --

1 QUESTION: May I ask you one other question before you  
2 sit down?

3 MR. METH: Certainly.

4 QUESTION: Am I correct in my impression, the 21st  
5 Amendment aspect of the case was not argued below?

6 MR. METH: It was not argued by California in the  
7 District Court. When Respondent filed her opening brief in the  
8 Court of Appeals, she raised the 21st Amendment.

9 We did not -- California did not respond to the 21st  
10 Amendment argument. However, when the case was consolidated  
11 with Washington's case, the Washington Attorney General advocated  
12 the 21st Amendment issue, and then the Court of Appeals did dis-  
13 pose of the 21st Amendment issue.

14 CHIEF JUSTICE BURGER: Mr. Quesenberry.

15 ORAL ARGUMENT OF STEPHEN V. QUESENBERRY, ESQ.

16 ON BEHALF OF THE RESPONDENT

17 MR. QUESENBERRY: Thank you, Justice Burger, and may  
18 it please the Court:

19 The state has taken inconsistent positions in this case  
20 as Mr. Meth has indicated, first asserting clear jurisdiction  
21 under this statute and then moving to a position where we are at  
22 today. The state is saying that this federal criminal statute  
23 incorporates an entire state licensing scheme as a condition for  
24 immunizing persons who engage in liquor transactions on Indian  
25 reservations to federal criminal prosecutions.

1 I would like to go directly to the words of that  
2 statute and the language that we are dealing with today, the  
3 in conformity with state laws language.

4 QUESTION: Mr. Quesenberry, do you basically agree with  
5 the Court of Appeals construction of that relevant part of that  
6 statute?

7 MR. QUESENBERRY: Yes, we do, Justice Rehnquist.

8 The in conformity with language modifies the statement  
9 that acts or transactions within Indian country shall be in  
10 conformity with state law and with a tribal ordinance. That  
11 in conformity with language is a convenient technique that  
12 Congress has used in other contexts, other contexts involving  
13 federal penal statutes, the Assimilated Crimes Act and the Major  
14 Crimes Act, to utilize state law as a standard for determining  
15 whether that conduct may or may not violate federal law.

16 This Court in cases under other federal statutes,  
17 the federal Water Pollution Control Act and the federal Clean  
18 Air Act, where Congress has used language, shall conform with  
19 state law, has said that that means that state standards, state  
20 law would serve as standards for regulating federal facilities,  
21 but by no measure would require those facilities to obtain a  
22 state license.

23 When Congress passed this statute, its overriding  
24 concern was to eliminate discrimination against Indians in the  
25 sale of alcoholic beverages. So, it is reasonable to look at this

1 statute and the act or transactions language and imply or assume  
2 that Congress was concerned about the sale or use of alcohol  
3 within Indian country, and by no means was concerned with matters  
4 such as licensing and taxation of liquor within Indian country.

5 QUESTION: Mr. Quesenberry, what is the effect, in your  
6 view, of the in conformity language insofar as it talks about  
7 conformity with the laws of the state in which such act or  
8 transaction occurs?

9 MR. QUESENBERRY: Our position is that that language  
10 deals with -- that that language applies state law to the sale  
11 or use of alcohol. That is sales to minors, sales to habitual  
12 drunkards, sale during hours --

13 QUESTION: Well, how was that state law to be enforced?

14 MR. QUESENBERRY: That state law is to be enforced  
15 through the United States Attorney or through some type of  
16 action brought by the tribe. The tribe would have civil enforce-  
17 ment authority under its own ordinance if there was a violation,  
18 but essentially the violation of state standards would be  
19 enforced by the United States Attorney.

20 As to a situation where a non-Indian was selling in  
21 violation of a state standard, for example selling to minors,  
22 the state has criminal jurisdiction over non-Indians under  
23 McBratney and Draper, very early decisions by this Court. The  
24 state seems to imply in its reply brief that it does not have  
25 that type of jurisdiction --



1 QUESTION: But only criminal jurisdiction -- You would  
2 have to go through the processes of trying to get criminal  
3 prosecutions as opposed to some kind of suspension of the license  
4 or other disciplinary action as an administrative matter, in  
5 your view, and under the view of the CA 9?

6 MR. QUESENBERRY: There is an additional mechanism here  
7 and that is the Federal Indian Traders Laws. Any non-Indian  
8 doing business on the reservation would be required to comply  
9 with those laws, and they would be licensed --

10 QUESTION: Well, provided the state authorities could  
11 convince the federal Bureau of Indian Affairs to take some kind  
12 of action?

13 MR. QUESENBERRY: In that particular situation, yes.

14 QUESTION: And that may be quite a difficult task.

15 Let me ask you, this statute, 1161, arose really out  
16 of situation that existed in the state of Arizona, did it not?

17 MR. QUESENBERRY: Yes, it was initially designed just  
18 to apply to a single state.

19 QUESTION: Right, and later in the process of the  
20 congressional hearings it was expanded to encompass other states  
21 as well and to remove the disabilities that the federal law had  
22 imposed on the use and possession of alcohol on reservations?

23 MR. QUESENBERRY: That is correct.

24 QUESTION: And, during the course of the legislative  
25 history there was some indication, at least, by, I think, then

1 Representative John Rhodes and maybe others, it was their under-  
2 standing that state laws would then apply in the liquor area,  
3 right?

4 MR. QUESENBERRY: Yes, the idea of state laws applying.

5 QUESTION: And, the thing that concerns me a little bit  
6 about the history, which is far from clear, of course, is that  
7 at least in Arizona where all of this emerged many of the  
8 reservations are right there in urban areas, in Scottsdale, in  
9 the heart of Scottsdale, all along the Colorado River where there  
10 are now casinos developing and quite a population area. Do  
11 you think that Congress may have been concerned about applying  
12 the full state administrative mechanism in those areas?

13 MR. QUESENBERRY: I cannot really respond to that because  
14 Congress was very unclear in articulating its overall intent. It  
15 did not tell us a great deal about its intent, so we have the  
16 language of the statute.

17 We also have the strong federal policies that have  
18 protected Indian reservations, particularly tribal members, from  
19 incursions of state jurisdiction.

20 QUESTION: If you say -- If you concede what you do  
21 that the Indian trader selling liquor would have to comply with  
22 the state laws except for licensing, hours and that sort of  
23 thing, why couldn't the state, although it would not have any,  
24 under your theory, would not have any licensing leverage, why  
25 couldn't it go to a state court and enjoin a persistent course of

1 conduct in violation of state law and not just rely on the United  
2 States Attorney who would probably tell him to go piddle his  
3 papers?

4 MR. QUESENBERRY: If the state -- If there is a viola-  
5 tion of the state criminal law, particularly --

6 QUESTION: Well, there is a statute that says nobody  
7 can sell to minors.

8 MR. QUESENBERRY: That is a state criminal statute. Nobody  
9 can sell to minors.

10 QUESTION: Whether it says criminal or not, it is a  
11 state law. Why shouldn't the state be able to enjoin the per-  
12 sistent violation of that law?

13 MR. QUESENBERRY: Are we referring here to a non-Indian  
14 person or an Indian person?

15 QUESTION: I am referring to anybody -- The state comes  
16 in and alleges in court that this Indian trader, this trader is  
17 consistenly selling to minors, and Indians, non-Indians, and he  
18 openly announces that he is not obeying the state law about  
19 minors. Why shouldn't the state be able to enjoin him.

20 MR. QUESENBERRY: Oh, I think, clearly as far as a  
21 non-Indian violating they would have jurisdiction --

22 QUESTION: What do you mean a non-Indian? What about  
23 an Indian?

24 MR. QUESENBERRY: As far as an Indian, I think that  
25 there is a question there.

1 QUESTION: Why?

2 MR. QUESENBERRY: Because 1161 was initially part of the  
3 body of legislation which was Public Law 280 --

4 QUESTION: You concede, though, that whether the seller  
5 is an Indian or a non-Indian that he must abide by state law  
6 except for licensing.

7 MR. QUESENBERRY: Right. He must abide by state stan-  
8 dards governing the sale --

9 QUESTION: Exactly, and let's assume that it is true.  
10 He has announced that he is not going to abide by this state law  
11 with respect to hours or sales to minors, and he just doesn't  
12 live up to the state law. Why shouldn't the state be able to  
13 enjoin him, whether he is an Indian or not?

14 MR. QUESENBERRY: I cannot answer why or why not. I  
15 can answer that it is my opinion that based on the legislative  
16 history of 1161 and Public Law 280 that Public Law 280 was focused  
17 on a grant of criminal jurisdiction to the states. Eleven sixty-  
18 one was part of Public Law 280. It was pulled out of Public Law  
19 280 because of the concern by Indian people that the acceptance  
20 of criminal jurisdiction, the repeal of liquor was tied to the  
21 acceptance of criminal jurisdiction.

22 I would say that if the violation was directly related  
23 to a transaction in liquor that the exclusive enforcement procedure  
24 against an Indian person that was violating would be by federal  
25 statute or by tribal action against that person.

1 QUESTION: Didn't we say that you could not enforce a  
2 state liquor law on an Army base? We said that, I think.

3 MR. QUESENBERRY: Yes, you did, Your Honor. You said  
4 that under the 21st Amendment.

5 QUESTION: Why didn't you bring it up a minute ago?

6 MR. QUESENBERRY: Well, the cases that this Court has  
7 decided have said that you cannot allow a state to regulate on  
8 military reservations. We don't see any of those cases -- We  
9 don't see the case distinguishing those --

10 QUESTION: I frankly don't see where a state gets a  
11 right to regulate the liquor drinking on a reservation by  
12 Indians.

13 MR. QUESENBERRY: We are not conceding that. In fact,  
14 that is specifically what I am saying, Your Honor.

15 We do not concede that type of regulation. The state's  
16 remedy in the event that one of the standards is violated in the  
17 sale or use of liquor they must go to the United States Attorney.

18 QUESTION: But you do concede, if I understand you  
19 correctly, that the Indians must obey those state standards that  
20 you agree are applicable within the reservation?

21 MR. QUESENBERRY: We definitely --

22 QUESTION: There are some state standards, and you are  
23 not concerned in this case about how they enforce them. You are  
24 just saying the only state standard you do not have to obey is  
25 the licensing requirement.

1 MR. QUESENBERRY: That is correct, Your Honor.

2 QUESTION: What about state standards that are merely  
3 implementations of a licensing requirement, such as those things  
4 that they say if you do A, B, and C, then your license may be  
5 revoked, but there is no criminal state sanctions. Are they  
6 binding, or not, under your view?

7 MR. QUESENBERRY: They would not be binding. Under  
8 our view what we are saying, and let me clarify it, is that the  
9 determinations leading up to the actual sale of liquor, the  
10 unique determinations of licensing and the qualifications of  
11 the licensee, the determination of whether these premises are  
12 fit for liquor to be sold, are within the prerogative of the  
13 tribal governmental authority under Section 1161.

14 QUESTION: And that would include, for example, method  
15 of operation, for example, the problem Justice Marshall brought  
16 up about the obscene dancing which is in one of their adminis-  
17 trative regulations but is not a criminal offense. You say that  
18 regulation does not apply within the reservation?

19 MR. QUESENBERRY: If it was part of their adminis-  
20 trative regulations --

21 QUESTION: Well, it is.

22 MR. QUESENBERRY: -- and tied to licensing, we would  
23 say that it is not applicable. If it was a state criminal  
24 offense --

25 QUESTION: So that your real position is there is no

1 licensing requirement and no requirement that merely relates to  
2 licensing is enforceable within the state.

3 MR. QUESENBERRY: That is our position.

4 QUESTION: So a state statute that says no licensee  
5 selling liquor shall sell to minors, that would not be applicable  
6 to the Indians?

7 MR. QUESENBERRY: No, that would be applicable. That is  
8 governing --

9 QUESTION: Why? It is tied to a licensee.

10 MR. QUESENBERRY: That is governing the sale or use  
11 of liquor, Your Honor. We are focusing on the sale or use of  
12 liquor.

13 I think you can reasonably distinguish between the  
14 determinations about the qualifications of the seller and where  
15 the liquor is sold and the actual sale or use of liquor. Congress

16 QUESTION: How about a regulation that liquor may be  
17 sold only between the hours of 12 and 6, if that is a state  
18 regulation?

19 MR. QUESENBERRY: That liquor can only be sold during  
20 the hours of 12 and 6?

21 QUESTION: Yes, and may not be sold on Sunday.

22 MR. QUESENBERRY: Then that is -- The Indian on the  
23 reservation is going to have to abide by that. That is going to  
24 be a standard that is going to be enforced --

25 QUESTION: No food may be sold where liquor is sold.

1 MR. QUESENBERRY: That is also, if that is a state  
2 standard, that is one that would be applicable.

3 QUESTION: But what if those that Justice Brennan gave  
4 you were not in any state statute but were merely in regulations  
5 promulgated by the liquor authority saying that every licensee  
6 must do the following or his license will be revoked. Then,  
7 under your view, they would not be enforceable, as I understand  
8 you.

9 MR. QUESENBERRY: I think in that situation you would  
10 have to just ask if that is a determination that is leading up  
11 to the ultimate grant of the license.

12 QUESTION: Well, assume it is, that the only source of  
13 state law is that if you do not follow these rules your license  
14 will be revoked. That is our hypothesis.

15 MR. QUESENBERRY: I agree with you. I think that if  
16 you say that it is part of their regulatory structure, I would  
17 say that Congress in enacting this federal penal statute did  
18 not intend to incorporate this whole state civil regulatory  
19 scheme --

20 QUESTION: Well, does your distinction turn on the  
21 difference between a regulation and a statute?

22 MR. QUESENBERRY: In this particular situation --

23 QUESTION: What particular situation?

24 MR. QUESENBERRY: In the situation presented by Justice  
25 Stevens that it would turn on that because the state standard



1 in that particular hypothetical was tied to the administrative  
2 regulation, to its civil regulatory structure rather than imposed  
3 in the specific statute imposing a criminal penalty.

4 QUESTION: Do you agree that the Indian reservations  
5 are subject to the licensing provisions of California? Do you  
6 agree to that?

7 MR. QUESENBERRY: No, I do not.

8 QUESTION: Well, it sounded like you did a minute ago.

9 MR. QUESENBERRY: Well, I certainly did not mean to  
10 indicate that at all. That is what this case is about --

11 QUESTION: That is what I thought.

12 MR. QUESENBERRY: That is what this case is about.  
13 We contend that the statute by no means is a grant of any type  
14 of licensing authority, nor does it impose the state licensing  
15 requirements by way of this in conformity with language.

16 In our briefs we go into discussion of the previous  
17 decisions by this case, including the Moe decision which dealt  
18 with state licensing, cigarette vendors license. Now, that  
19 particular case did not have a specific federal statute such as  
20 we have in this particular instance.

21 But, we do not see any clear indication in the legis-  
22 lative history or in the language of the statute that Congress  
23 intended to impose a state civil regulatory scheme as a con-  
24 dition --

25 QUESTION: But, they certainly did decide in 1161 to

1 treat liquor transactions differently than cigarette transactions  
2 and that sort of thing, which really are not covered by a specific  
3 statute.

4 MR. QUESENBERRY: That is correct, and that was against the  
5 backdrop of total federal preemption of the area of liquor trade.  
6 This Court in Mazurie held that there was a valid delegation of  
7 congressional authority to tribes, which as a group exercised some  
8 inherent, independent authority over both the territory, the  
9 members, and the subject matter.

10 QUESTION: But Mazurie was basically an argument between  
11 a private individual and the federal government prosecuting as  
12 on the basis of an Indian regulation and argue unlawful delegation  
13 and that sort of thing. The state, Wyoming, was not involved in  
14 Mazurie at all.

15 MR. QUESENBERRY: No, I think they may have participated  
16 as a amicus, but there was no real conflict between the state and  
17 the tribe because there was a state license that was required by  
18 virtue of tribal ordinance, in fact, in that case. I would  
19 point out that in that case Indian tribal members were subject  
20 only to a tribal licensing requirement.

21 Essentially what the state -- We see the state's  
22 position as trying to come in the back door from Public Law 280  
23 essentially trying to obtain civil regulatory control in this  
24 area that has been denied --

25 QUESTION: May I ask one other question about their

1 trying to gain control? This statute was passed 30 years ago.  
2 Why do you suppose it took so long for this issue to get here?  
3 I know there was an Interior Department opinion in 1971 that  
4 indicated that you were correct. Before that had anybody tried  
5 to get these licenses, before that 1971 -- What took -- I do  
6 not understand why it takes 30 years for this issue to arise.

7 MR. QUESENBERRY: I think that part of the answer to  
8 that is that Indian reservations are beginning to experience  
9 economic development. They have been suppressed for a long time.

10 Tribal governments are developing. They are regulating  
11 more, and we have a situation where non-Indian communities and  
12 Indian communities are maybe closer together.

13 We have tribal authority being exerted to a greater  
14 extent than it was before.

15 QUESTION: Is it correct that prior to 1971 that there  
16 was no attempt to get any liquor license within an Indian  
17 reservation?

18 MR. QUESENBERRY: I cannot really answer that. I do  
19 not have the facts to answer that question.

20 QUESTION: Mr. Quesenberry, why couldn't the state of  
21 California simply make selling liquor without a license a crime  
22 and punish them for a crime?

23 MR. QUESENBERRY: Again, I would say that is a civil  
24 regulatory-type act.

25 QUESTION: No, they make it a criminal offense.

1 MR. QUESENBERRY: They could absolutely prohibit the  
2 sale of liquor. They could maintain a dry state and that would  
3 be -- If an Indian on a reservation chose to sell liquor in  
4 violation of that, they could be subject to prosecution under  
5 federal law. But, that would be --

6 QUESTION: Not under state law, you say?

7 MR. QUESENBERRY: The position that I took before on  
8 that was as to criminal violations --

9 QUESTION: Under Justice O'Connor's example there is a  
10 state criminal statute. Let's assume that nobody may sell liquor  
11 in the state of California. Now, could the Indian be prosecuted  
12 under state law for selling liquor?

13 MR. QUESENBERRY: Our contention would be that they  
14 could not, that Public Law 280, that 1161 was pulled outside of  
15 Public Law 280 and was treated differently, that liquor has been  
16 treated differently historically by Congress and that the remedy  
17 is through the federal enforcement scheme.

18 Thank you. I think my comments are concluded.

19 CHIEF JUSTICE BURGER: Mr. Schwartz.

20 QUESTION: Mr. Schwartz, before you commence, I wish  
21 you would try to clarify for me exactly what the federal govern-  
22 ment thinks that the state may regulate, and I am thinking  
23 primarily about matters such as Sunday operation, hours of  
24 operation, sales to minors, location of stores. May the state  
25 regulate all of those under the government's position?

1 ORAL ARGUMENT OF JOSHUA I. SCHWARTZ, ESQ.

2 AS AMICUS CURIAE

3 MR. SCHWARTZ: Mr. Justice Powell, I think it may, but  
4 perhaps we better be crystal clear about our terms here. I am  
5 not sure what you mean by regulate.

6 QUESTION: Well, determine whether they can operate on  
7 Sunday or not, when they must close, et cetra.

8 MR. SCHWARTZ: State laws on that subject do determine  
9 the terms, in our view, as to which --

10 QUESTION: But, only the federal government can enforce  
11 them?

12 MR. SCHWARTZ: Well, as we understand it, we would  
13 suggest that certain state laws which do not have any licensing  
14 related terms that say in the absolute, no person may sell  
15 alcohol to a minor, or give alcohol to a minor at certain hours  
16 are pure criminal statutes and are not the kind of essentially  
17 a subterfuge --

18 QUESTION: But the state could revoke the license if  
19 these regulations were violated?

20 MR. SCHWARTZ: Our view is that the state lacks licensing  
21 authority so that a pure criminal violation would in California  
22 because it is a Public Law 280 state could actually be prosecuted  
23 by the state.

24 QUESTION: Under state law?

25 MR. SCHWARTZ: Under state law.

1 QUESTION: So, you disagree with your colleague on  
2 that?

3 MR. SCHWARTZ: I may to some extent. What the --

4 QUESTION: Well, to some extent he said that the state  
5 could not prosecute him.

6 MR. SCHWARTZ: It is the government's view --

7 QUESTION: You say that he may be prosecuted. That is  
8 not just to some extent.

9 MR. SCHWARTZ: If I may, Mr. Justice White --

10 QUESTION: You may.

11 MR. SCHWARTZ: There are -- Section 1161 and Public Law  
12 280 were passed on the same day by Congress. They do have a  
13 common background, and it is necessary to sort out a sensible  
14 in pari materia construction of the two.

15 We would submit that a state may not, given that  
16 background, pass a statute, as California, in fact, has, that  
17 says it is a misdemeanor to sell liquor without one of our  
18 licenses because that would totally frustrate the sense of Section  
19 1161, even though that is on its face a criminal violation.  
20 I take it that was what fueled Justice O'Connor's question.

21 On the other hand, it is our sense that some criminal  
22 violations which are written in the absolute and they are not  
23 tied to the requirement of a license may fairly be regarded as  
24 distinct and true criminal proscriptions and that those may be  
25 enforced by the state. If that is in conflict with private

1 counsel's answer, so be it, Justice White.

2 QUESTION: Well it is.

3 QUESTION: Counsel, the statute says, "no one Indian  
4 or otherwise in the state of California may sell liquor to a  
5 minor." Can that be enforced?

6 MR. SCHWARTZ: I would think that it could.

7 QUESTION: By the state? They could send in an officer  
8 and arrest?

9 MR. SCHWARTZ: Pursuant to Public Law 280, Justice  
10 Marshall, because California is a Public Law 280 state and does  
11 have some jurisdiction which permeates the reservation, that is  
12 not resting on the statute which is the focus of this case.

13 QUESTION: But that statute could be enforced?

14 MR. SCHWARTZ: That would be our understanding.

15 QUESTION: How far would you go? Where are you going  
16 to draw the line now?

17 MR. SCHWARTZ: Well, one line that we would clearly  
18 draw is that no proscription which is tied by the state in its  
19 own scheme to possession of a license may be enforced in that  
20 manner because that must be regarded as part of the regulatory  
21 scheme.

22 QUESTION: There is also a regulation by the state  
23 liquor board which says that nobody operating a licensee place  
24 shall sell to a minor. Would that make the criminal statute  
25 invalid?

1 MR. SCHWARTZ: I am not sure I understand the question.

2 QUESTION: I do. You say the difference is between  
3 whether it is criminal or it is a regulation. I have given you  
4 one that you have both.

5 MR. SCHWARTZ: Mr. Justice Marshall --

6 QUESTION: Now, are they both good, or is one good?

7 MR. SCHWARTZ: Let me try this and see if this will  
8 answer your question. Our view is not that the distinction  
9 depends on whether something is embodied in a regulation or a  
10 state statute. Let us be clear about that.

11 We suppose that for purposes of Section 1161 if the  
12 state of California delegates to an administrative agency the  
13 authority to enact a regulation proscribing terms of conduct in  
14 general terms not depending on whether or not you hold one of  
15 their licenses or not, that that is part of the state law. If  
16 that state law is criminal, then California being a Public Law  
17 280 state it may be enforced.

18 But, whether or not the state is a Public Law 280 state  
19 because it is part of the terms of state law which must be  
20 conformed to, the federal sanction does apply.

21 If I have not helped you, come back at me.

22 QUESTION: Well, I just do not understand how you say  
23 that you can do one by merely putting the word criminal on it.  
24 Unless you put criminal on it, it does not work.

25 MR. SCHWARTZ: The answer is in part that Public



1 Law 280, which stands outside this case, says that the state shall  
2 have certain criminal jurisdiction. Now, the state as --  
3 California has a system whereby certain acts are proscribed only  
4 through the licensing scheme, but should the state wish to,  
5 proscribe those acts in general terms, those would be incorporated  
6 within the Section 1161 structure.

7 QUESTION: Does that mean then -- You do take a  
8 different view. Say they have a regulation that says, no obscene  
9 dancing in a liquor establishment, and anyone who violates  
10 this regulation can have his license revoked, but there is no  
11 criminal prohibition against it. Is that enforceable, or is it  
12 not, in Indian reservations?

13 MR. SCHWARTZ: I think we would say not because the  
14 sanction is license revocation, but the same regulation could  
15 be written a different way to accomplish the same effect.

16 QUESTION: Do you find that in the text of 1161, that  
17 distinction?

18 MR. SCHWARTZ: No, Justice Stevens -- In an indirect  
19 sense we do. What our contention is that Section 1161 does not  
20 authorize the state to regulate through licensure. That means  
21 it cannot do any of these things indirectly through licensure.

22 If it wishes to enact laws --

23 QUESTION: Well, but would you say that a person who  
24 runs a liquor establishment in which there is the kind of dancing  
25 I described that violates a state regulation, is that liquor

1 being sold in conformity with state law within the meaning of  
2 1161? You say it is, even though it violates a plain rule of  
3 California law.

4 MR. SCHWARTZ: The answer is whether that plain rule  
5 is a rule that says, our licensees may not permit such conduct  
6 or whether, on the other hand --

7 QUESTION: No, the question is whether the person  
8 within the meaning of 1161 has been acting in conformity with  
9 state law. That is what that statute says.

10 MR. SCHWARTZ: In conformity with state law, we under-  
11 stand to mean --

12 QUESTION: Conforming with some state laws?

13 MR. SCHWARTZ: If you will, Justice Stevens, but the  
14 point is that licensing is a very different kind of authority  
15 to exercise and that the state can accomplish the same objective  
16 through enacting general purpose standards.

17 What is offensive, if I may, about the licensing,  
18 regulatory authority that the state claims, is its discretionary  
19 element, as well as the fact that a tax is being imposed. The  
20 substantial fee is exacted before for the privilege of doing  
21 business on the reservation.

22 QUESTION: Well, the Court of Appeals did not really  
23 base its holding on the theory that it was a tax which the  
24 government had argued, did it?

25 MR. SCHWARTZ: I think it is fair to say that the

1 Court of Appeals did not base its holding on it. It did not  
2 reject it. It simply did not rely on it.

3 What we would lay emphasis on, Justice O'Connor, is  
4 the discretionary element. It is important to understand that in  
5 operating a licensing scheme the state does not disavow the full  
6 range of discretionary powers that exist under a licensing scheme.

7 It is useful to actually look at the California statutes  
8 and see what may happen. For instance, when one applies for an  
9 Alcoholic Beverage Control Department license the duty of the  
10 Department is to determine whether the licensee is qualified.

11 Among the things that must be taken into consideration  
12 are the results of an investigation. The Department is enjoined  
13 to investigate all matters affecting the public welfare or morals,  
14 and it has been held under California law that a license may be  
15 denied on the basis of a determination respecting these con-  
16 siderations.

17 The statute also incorporates other relatively vague  
18 criteria.

19 QUESTION: But, suppose those criteria were made  
20 specific, such as you cannot get a license if you are convicted  
21 of a felony. Another state, not California, has a law that you  
22 cannot sell liquor if you have been convicted of a felony.  
23 That law could be enforced in the other state but not California,  
24 as I understand it.

25 MR. SCHWARTZ: Yes, Justice Stevens, and I would draw

1 an analogy here to the Court's decision in the Grendalls Den  
2 case. If a state chooses to make its criteria unconditional  
3 then those criteria come outside the realm of discretionary  
4 administration and then they are part of the laws of the state  
5 for purposes of Section 1161.

6 If the state makes the choice to insist on retaining  
7 discretion to sort these factors out for itself then the con-  
8 sequence under Section 1161 is that that is not part of the law  
9 of the state.

10 QUESTION: Do you find any support for this in either  
11 the language of the statute or the legislative history, this  
12 rather subtle distinction?

13 MR. SCHWARTZ: Justice Stevens, if I may, a one sen-  
14 tence answer -- The key thing in our view is that there is no  
15 support for the rather remarkably intrusive authority that the  
16 state does claim. The more modest authority that we would accord  
17 the state is consistent with a traditional pattern.

18 QUESTION: But it is equally intrusive as to its own  
19 citizens. It treats them exactly like it treats the people who  
20 live in California off a reservation.

21 MR. SCHWARTZ: Yes, but I think it is common ground here  
22 that those who live on Indian reservations may not in general be  
23 treated the same way absent federal authority, and that is why we  
24 draw that distinction.

25 QUESTION: Well, I suppose you could have argued just

1 simply that the federal laws on Indian traders preempted in this  
2 area but not make the further distinction that you appear to be  
3 trying to make.

4 MR. SCHWARTZ: We think that -- An argument that the  
5 state has no authority whatsoever because of the federal Indian  
6 trader statutes would be difficult to reconcile with the fact  
7 that Congress does appear to have recognized some role for the  
8 states in Section 1161. This distinction, perhaps not totally  
9 satisfactory and certainly not lucidly clear, is the best way  
10 we can find to draw some line in an area where it appears that  
11 some line must be drawn.

12 Thank you.

13 CHIEF JUSTICE BURGER: Mr. Meth, you have about four  
14 minutes remaining.

15 Let me ask you a question. I am confused somewhat by  
16 these arguments. Does California have the same control, in your  
17 view, in terms of issuing licenses over Indians on Indian reser-  
18 vations as over all the other people within the outer perimeter  
19 boarders of California.

20 ORAL ARGUMENT OF ALAN S. METH, ESQ.

21 ON BEHALF OF THE PETITIONER -- REBUTTAL

22 MR. METH: Yes, that is California's position, Your  
23 Honor, based on the wording of the statute and the legislative  
24 history.

25 QUESTION: In other words, Indians are no different from

1 any other person?

2 MR. METH: That is correct.

3 I think it is reasonably clear from Section 1161 that a  
4 state has the, what Mr. Schwartz called the remarkably intrusive  
5 authority of telling an Indian reservation that it cannot sell  
6 liquor at all. The way that a state has that authority is by  
7 making the entire state dry.

8 In 1953, there were two states that were actually dry,  
9 Mississippi and Oklahoma. The Court on a number of occasions has  
10 said that if a governmental entity has a greater power, it also  
11 has all of the lesser powers included within that greater power.

12 Two early 21st Amendment cases, *Ziffrin, Inc. v. Reeves*  
13 and *State Board of Equalization v. Young's Market Co.* cited in  
14 our briefs indicate that a state has the authority under the 21st  
15 Amendment to totally prohibit the introduction of liquor within  
16 the state, and if a state has that authority it has the authority  
17 to strictly control how liquor is to be distributed within the  
18 state.

19 Another case, a recent Indian case, *Merrion v. Jicarilla*  
20 *Apache Tribe* -- and I hope I pronounced it correctly -- the Court  
21 dealt with the question of whether a tribe could exclude nonmembers,  
22 and the Court said that the power to exclude nonmembers from the  
23 reservation included the power to condition entry onto reservation  
24 land, to condition the continued presence on Indian land, and also  
25 condition reservation conduct.

1           If a state has the greater power to totally prohibit  
2 liquor within Indian country, I do not understand why the dis-  
3 tinction has to be drawn that some laws, lesser laws should be  
4 followed but other lesser laws should not be followed. If a  
5 state under Section 1161 has the greater power, it should also  
6 have the lesser power.

7           In summary, California is only asserting that it has  
8 concurrent authority with the tribes and with the United States  
9 to control liquor traffic in Indian country. We are not asserting  
10 that because of California's licensing laws. Those laws are  
11 exclusive. Section 1161 gives the United States the authority  
12 to criminally prosecute. Section 1161 also gives certain res-  
13 ponsibilities to the state -- to the tribes, and if the powers to  
14 the tribe include the power to license, all California is saying  
15 that that statute with the words both and the words in conformity  
16 with, and the words laws of the state includes the same powers to th  
17 state.

18           CHIEF JUSTICE BURGER: Thank you, gentlemen.

19           The case is submitted.

20           (Whereupon, at 3:05 p.m., the case in the above-  
21 entitled matter was submitted.)  
22  
23  
24  
25

CERTIFICATION

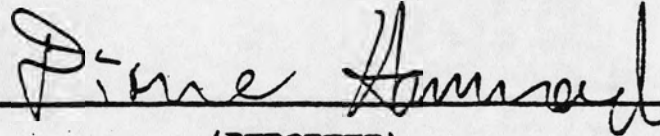
Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ~~ALCHOLIC BEVERAGE CONTROL OF CALIFORNIA~~, Petitioner v.

EVA REHNER # 82-401

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pione Howard", written over a horizontal line.

(REPORTER)



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