

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1021 & 85-1022

TITLE R. J. REYNOLDS TOBACCO COMPANY, Appellant V. DURHAM COUNTY, NORTH CAROLINA AND FORSYTH COUNTY, NORTH CAROLINA AND ITS AFFECTED MUNICIPALITIES; and R.J. REYNOLDS TOBACCO COMPANY, Appellant V. DURHAM COUNTY, NORTH CAROLINA AND FORSYTH COUNTY, NORTH CAROLINA AND ITS AFFECTED MUNICIPALITIES

PLACE Washington, D. C.

DATE October 6, 1986

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APPEARANCES:

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the appellant.

REX E. LEE, ESQ., Washington, D.C.; on behalf of the
appellee.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-1021, R.J. Reynolds Tobacco Company versus Durham County, North Carolina, et al.

Mr. Griswold, you may proceed when you are ready.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,
ON BEHALF OF APPELLANT

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court, this case presents the question whether North Carolina may consistently with the supremacy clause and the due process and import-export clauses of the constitution impose an ad valorem property tax on tobacco stored in a United States Customs bonded warehouse.

The appellant is in the business of manufacturing finished tobacco products which, quoting from the opinion of the North Carolina Court of Appeals, it sells to wholesale distributors and other authorized purchasers in the United States and abroad.

In its manufacturing process Reynolds uses both foreign and domestic tobacco. The foreign tobacco in this case is placed under Customs bond when it enters the country. It is then shipped by Customs bonded carriers and is placed in Customs bonded warehouses in

1 Durham or Forsyth Counties, North Carolina. Under the
2 applicable Federal statutes Reynolds does not pay the
3 Customs duties until the tobacco is withdrawn from the
4 warehouses.

5 In listing its personal property for 1983,
6 Reynolds claimed that the imported tobacco in the
7 Customs bonded warehouses was immune from state taxation
8 on Federal constitutional grounds, relying on this
9 Court's decision in the Xerox case in 459 U.S., decided
10 less than four years ago in 1982.

11 The claims for immunity were denied by the
12 administrative officers, and an appeal to the North
13 Carolina Court of Appeals on constitutional grounds was
14 unsuccessful. Reynolds then appealed to the Supreme
15 Court of North Carolina. That appeal was dismissed
16 without opinion for lack of a substantial Constitutional
17 question. This Court postponed the jurisdictional
18 question to the hearing on the merits, so I will address
19 that first.

20 There are two aspects to the jurisdictional
21 question. One is whether the appeal should be taken to
22 the North Carolina Court of Appeals or to the North
23 Carolina Supreme Court. Out of abundance of caution we
24 filed two jurisdictional statements representing appeals
25 to both of the courts. we don't care which one is

1 sustained, but we have examined the North Carolina
2 statute in our brief and suggest that the decision of
3 the North Carolina Supreme Court dismissing the appeal
4 there for want of a substantial Constitutional question
5 was on the merits, so that the appeal to that Court is
6 well taken.

7 This is a bootless kind of question which
8 ought to be resolved one way or another, and it would be
9 helpful to practitioners and would save the time of the
10 Court in later cases if the question could be cleared up
11 in this decision. The appellants, however, raise
12 another Constitutional question in their brief on the
13 merits, another jurisdictional question.

14 This is a question which was not presented in
15 the motion to dismiss. They say that the validity of no
16 state statute was drawn into question in the courts
17 below. We think that they are wrong in that, and we
18 have answered them in our reply brief.

19 I would only point out that the North Carolina
20 Court of Appeals referred specifically to a North
21 Carolina statute, the Machinery Act. This appears in
22 the opinion on Page 17A of the jurisdictional statement
23 appendix, and the North Carolina Court of Appeals then
24 concluded that the tax imposed by that statute is, and I
25 quote, "constitutional under the U.S. Constitution," and

1 that appears on Page 18A of the appendix to the
2 jurisdictional statement.

3 This brings the situation squarely within the
4 decision of the Court finding jurisdiction in the Japan
5 Lines case in 441 US and in a case which I have already
6 referred to, the Xerox case, which is virtually
7 identical to this one. In Xerox this Court said an
8 indispensable predicate to an award of judgment to the
9 appellees on their counterclaim was a determination that
10 the taxes at issue were permissible under the United
11 States Constitution.

12 The Texas Court of Civil Appeals so held. We
13 therefore have jurisdiction to review that judgment, and
14 that would seem to be dispositive of the jurisdictional
15 question here.

16 QUESTION: Of course, we could grant cert
17 anyway, I suppose, couldn't we?

18 MR. GRISWOLD: Sorry, Your Honor?

19 QUESTION: We could grant certiorari anyway.

20 MR. GRISWOLD: You could grant certiorari and
21 I would point out that in three or four of the cases
22 which have been cited by the appellees in their briefs,
23 in their brief where the Court found there was no
24 jurisdiction in all of them certiorari was granted.

25 QUESTION: Of course, Mr. Griswold, in the

1 Xerox case the jurisdictional argument was that the
2 decision rested on an adequate state ground. It wasn't
3 the claim that there was no statute drawn in question.
4 Isn't that right?

5 MR. GRISWOLD: No, I do not so understand.
6 The decision there was that the Texas statute was
7 unconstitutional, and that's what the Court said in that
8 passage, "An indispensable predicate was that the taxes
9 at issue were permissible under the United States
10 Constitution," and that is not a --

11 QUESTION: Well, the immediately preceding
12 sentence was, "Appellees argue that this Court lacks
13 jurisdiction since the decision of the Texas court
14 reversing the grant of an injunction rested on an
15 independent and adequate state ground," and then what
16 follows is in response to that argument.

17 MR. GRISWOLD: And the court held this Court
18 did have jurisdiction.

19 QUESTION: But in this case, as I understand
20 it, their argument is that there is no challenge to a
21 statute within the meaning of the code. Well, perhaps I
22 should --

23 MR. GRISWOLD: Well, here there was a
24 challenge to the statute expressly recognized by the
25 only court which rendered an opinion in North Carolina,

1 and that court held that the statute was
2 constitutional.

3 The basic question in this case turns in large
4 part on what this Court held in the Xerox case.
5 Reynolds submits that the holding there was carefully
6 expressed in the explicit statement on Page 154 of the
7 opinion where the court said, "Accordingly we hold that
8 state property taxes on goods stored under bond in a
9 Customs bonded warehouse are preempted by Congress's
10 comprehensive regulation of Customs duties."

11 QUESTION: Well, Mr. Griswold, true, the court
12 said "we hold" there, but was that actually a holding?
13 Isn't that language a little broader than was necessary
14 to decide the case?

15 MR. GRISWOLD: I think not, Your Honor,
16 because this gets back almost to law school analysis of
17 what is the ratio decidendi of the case. I think the
18 holding in that case was that there was preemption, and
19 there was preemption because of Congress's comprehensive
20 regulation of Customs duties, and that comprehensive
21 regulation of Customs duties applies to all property in
22 the Customs bonded warehouse regardless of its eventual
23 destination.

24 It is subject to Customs custody, it is
25 subject to bond, and the duties are not payable until it

1 is released from Customs custody, and that is equally
2 applicable to all kinds of property.

3 QUESTION: Well, Mr. Griswold, is it possible,
4 then, that the state could levy its tax and just defer
5 the collection until the goods leave the warehouse?

6 MR. GRISWOLD: Justice O'Connor --

7 QUESTION: Consistent with the Federal
8 scheme?

9 MR. GRISWOLD: -- I think that would put the
10 state very close to a violation of the import-export
11 clause. That state tax would not be due until the
12 property was imported. At that point the state tax
13 would be levied, and that, it seems to me, is hard to
14 distinguish.

15 QUESTION: Well, maybe the tax could be levied
16 but it just -- the collection would be deferred until
17 the goods leave the warehouse, if they are intended for
18 domestic use.

19 MR. GRISWOLD: One problem is that in a great
20 many situations you don't know what property is going to
21 be imported and what property is going to be exported.
22 You would have to estimate or guesstimate. If that
23 decision is only made when the property is actually
24 released from Customs and used domestically, then it
25 seems to me to be very close to if not identical to a

1 tax on imports.

2 Moreover, there would be tied up with this
3 state tax, I suppose, a lien for the state taxes, and a
4 lien for state taxes on property held in a Customs
5 bonded warehouse certainly involves not necessarily
6 conflicts but a little bit like the church-state
7 situation, intermingling between the Federal government
8 and the state governments.

9 We think it would be very difficult to
10 administer, but beyond that the basis for the decision
11 in Xerox, first, the supremacy clause, second, the
12 legislative history, which was reviewed by the Court,
13 and which I will endeavor to show in a moment, was
14 fairly clear that this, the Customs-bonded warehouse was
15 designed to facilitate both transshipment and
16 importation, and finally the fact that Congress has, we
17 say, ratified this Court's decision in the Xerox case
18 together with the fact that there are other passages in
19 the Xerox opinion which make it plain that the Court was
20 aware of this distinction between importation and
21 eventual exportation and specifically clearly decided
22 that that was not relevant.

23 That was brought out expressly in the oral
24 argument of the Xerox case. The transcript appears in
25 Appendix G of the appendix to the jurisdictional

1 statement. A member of the court addressed the question
2 to counsel for the taxing authorities, "So it really
3 does not make any difference in this case as to whether
4 they are destined for a foreign market," to which
5 counsel replied, "Absolutely not," and then when counsel
6 for Xerox was at this podium the following question was
7 asked, "Well, is an importer who says, yes, these are
8 going to be sold in the United States, and he puts them
9 in a bonded warehouse and holds them for two years, may
10 Texas levy a tax while they are in the warehouse," to
11 which Mr. Hoddinott, counsel for Xerox, replied, "No,
12 sir, that is entirely opposed to the legislative purpose
13 of the warehousing Act.

14 Now, there are, as I have said, there are
15 passages in the Xerox opinion which make it clear that
16 the Court was aware of the distinction between property
17 held primarily for import and property held for export.

18 QUESTION: Mr. Griswold, supposing we would
19 agree that you are correct entirely about the
20 construction of the Xerox opinion. Is that opinion a
21 constitutional opinion such as it would come under
22 Justice Brandeis's observation in Burnett that stare
23 decisis is less important in constitutional cases than
24 statutory cases.

25 MR. GRISWOLD: That is an interesting question

1 because I suppose it was a constitutional decision under
2 the supremacy clause, but decisions under the supremacy
3 clause are rather different than decisions under the due
4 process clause or the equal protection clause because it
5 is a decision which remains entirely in the control of
6 Congress.

7 If Congress doesn't like the result of this
8 Court's decision in the Xerox case, Congress is
9 constitutionally free to change it. In such a
10 situation, in the absence of further action by Congress,
11 there is every reason to apply the Xerox decision here.
12 Indeed, there has been further action by Congress, which
13 is to accept and approve the Xerox decision, which we
14 think is irrelevant to any question as to whether the
15 Xerox decision should be narrowed or qualified or
16 overruled.

17 The basic purpose of stare decisis is to
18 provide rules on which the lower courts, government
19 officers, private practitioners may rely with a measure
20 of confidence, and a failure to apply stare decisis in a
21 situation like this simply invites relitigation of
22 decided questions, thus contributing to the uncertainty
23 of the law and to the burden of litigation.

24 Now, I have already referred to the
25 legislative history. It is perhaps a little odd to be

1 dealing with legislative history that is 140 years old.
2 But I think the fact that this statute is 140 years old
3 is highly relevant. These Customs bonded warehouses
4 have been in active operation for 140 years, and it is
5 perfectly plain that Congress likes them.

6 Indeed, it likes them so much that in the
7 statute of two years ago it extended this Court's Xerox
8 decision to foreign trade zones, which are a new
9 development going back, I think to about 1930, expanding
10 since World War Two, where broader operations are
11 allowed, goods can be put on display, they can be
12 manufactured, packed, various other things, and people
13 can come in and look at them and decide whether to buy
14 them or not, and following the Xerox decision counties
15 in Texas, the same as in Xerox, threatened taxes on
16 goods in foreign trade zones, and Senator Tower and a
17 Congressman from Texas introduced bills, the Committee
18 reports both refer explicitly to the Xerox decision, and
19 Congress enacted a statutory provision which extended
20 the Xerox decision to foreign trade zones.

21 The full text of the statute is on the bottom
22 of Page 27 of our brief. Incidentally, although the
23 statute was passed late in 1983, the last line on Page
24 27 shows that the amendment shall take effect on January
25 1, 1983, which was 18 days after this Court's Xerox

1 decision on December 13th, 1982, and the statute
2 provides that tangible personal property imported from
3 outside the United States and held in a zone for the
4 purpose of storage, sale, exhibition, repackaging,
5 assembly, distribution, sorting, grading, cleaning,
6 mixing, display, manufacturing, or processing, shall be
7 exempt from state and local ad valorem tax.

8 But I also call the Court's attention to the
9 fact that the statute went beyond this Court's decision
10 in Xerox because it also provides that tangible personal
11 property produced in the United States and held in a
12 zone for exportation either in its original form or as
13 altered by any of the above processes shall be exempt
14 from state and local ad valorem taxation.

15 Now, there is nothing in the Xerox case that
16 applies to goods produced in the United States and taken
17 into a Customs bonded warehouse because the Customs
18 bonded warehouses aren't available for such goods. They
19 are under Customs control, and that is only applicable
20 to goods which are brought into the United States, but
21 Congress so liked the idea of tax exemption in these
22 foreign trade situations that in this statute of 1984 --
23 incidentally, enacted after this case was first started
24 in the North Carolina courts -- Congress has not only
25 completely ratified the Xerox decision, but has extended

1 it beyond anything this Court did or needed to do or
2 could do.

3 QUESTION: Well, Mr. Griswold, how should that
4 affect our interpretation of what Congress intended so
5 many years ago when it passed the Act that we are asked
6 to apply here?

7 MR. GRISWOLD: I think this is in part
8 connected with my answer to the Chief Justice's question
9 whether this is a constitutional decision. I said, yes,
10 it was, but it is a constitutional decision which
11 Congress can change, and this statute shows that
12 Congress not only didn't want to change it, they relied
13 on it as a basis for extending the result of that case
14 in a closely related area, namely, foreign trade zones.

15 So I think we have two strings to our bow
16 there, the legislative history of 1846 plus the fact
17 that Congress has very recently expressed its complete
18 concurrence with and approval of the decision which this
19 Court reached in the Xerox case.

20 QUESTION: That extension which you say is an
21 extension of Griswold, by the terms of that statute it
22 applies only as to goods held for exportation, which is
23 the very issue here, whether --

24 MR. GRISWOLD: No, no, not at all. This
25 statute refers to the Xerox decision which we say is in

1 comprehensive terms, and provides that property imported
2 from outside the United States and held for all these
3 reasons --

4 QUESTION: No, the last provision that you
5 read, which you suggested was an expansion of Xerox --

6 MR. GRISWOLD: No -- I agree --

7 QUESTION: -- that only applies to domestic
8 goods put into those trade zones for exportation.

9 MR. GRISWOLD: I agree with that entirely. I
10 was relying on it only to say that Congress not only
11 liked what the Xerox decision said, but it said, give us
12 more, and that is a long way from disapproving, which
13 Congress has power to do, Congress can tomorrow if it
14 could get it through before adjournment pass a statute
15 saying that we disapprove of the Xerox decision and all
16 goods in Customs bonded warehouses shall be subject to
17 state property taxes.

18 Congress has never done that for 140 years. I
19 think it is rather unlikely that Congress will. And in
20 large measure this goes back to the legislative
21 history. That is covered quite fully in our brief and
22 in Appendices B and C to our brief. Appendix B is the
23 committee report of the House, and Appendix C is two
24 speeches by Mr. Dix, a Senator from New York.

25 Our opponents in their brief say that what the

1 legislative history shows is that Congress was
2 interested in encouraging import of goods for
3 transshipment so that they could be assembled here and
4 then sent on elsewhere, but we point out that of the
5 first seven pages of the committee report it was related
6 to goods which would be imported, and after that they
7 said, besides, or the second reason why it is useful is
8 for the transshipment.

9 But I would like to call particularly to the
10 speech of Senator Dix in the Senate on July 9th where he
11 was replying to a contention that the British system of
12 Customs warehouses on which this legislation was based,
13 that it required that goods be designated when they went
14 into the warehouse as to whether they were for import or
15 whether they were for eventual transshipment.

16 And he says that his studies show that this
17 applied only to goods which could not be legally
18 imported into Great Britain. They will be allowed to be
19 taken into the warehouse, but they had to be designated
20 as for export. He points out in his Paragraph 4, "No
21 goods which have been warehoused can be taken out except
22 upon due entry for exportation or upon due entry and
23 payment of the full duties payable thereto for home
24 use."

25 This shows that the election is made on

1 withdrawing the goods from warehouses and not on
2 warehousing them. And then in his Paragraph 3 on Page
3 25A he says, "All other goods excepting those
4 comprehended in the two foregoing classes may be
5 imported and warehoused either for home consumption or
6 exportation without any declaration at the time of the
7 entry whether they are intended for one or the other,
8 thus making it quite clear that the Congress intended
9 and understood that warehousing to apply to all imports
10 regardless of their eventual destination.

11 I would like to reserve my remaining time.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Griswold.

14 We will hear from you, Mr. Lee.

15 ORAL ARGUMENT OF REX E. LEE, ESQ.,

16 ON BEHALF OF THE APPELLEE

17 MR. LEE: Thank you, Mr. Chief Justice, and
18 may it please the Court, the basic question in this
19 preemption case is whether the petitioner has met its
20 heavy burden of showing that Congress really intended to
21 take away the power of state and local governments to
22 impose a non-discriminatory property tax under the facts
23 of this case.

24 This case simply is not Xerox. The holding
25 doesn't apply and the rationale squarely supports the

1 holding of the North Carolina courts. There is one
2 factual feature of the case that distinguishes Xerox and
3 controls its outcome. The Xerox Corporation had an
4 option in between the time that those machines were
5 manufactured in Mexico and sold in some country other
6 than the United States, Spanish-speaking or
7 Portuguese-speaking, to warehouse those machines either
8 in an American warehouse or some warehouse other than in
9 the United States.

10 In the event that it elected to warehouse
11 here, then some American port will get the business. In
12 this case there is no corresponding option available to
13 Reynolds. These goods, unlike the goods in Xerox, as
14 Mr. Griswold has pointed out, are not for sale. They
15 are for manufacture.

16 The only reason that Reynolds buys tobacco is
17 to make it into cigarettes, and the only place in the
18 world that it manufactures cigarettes is in
19 Winston-Salem, North Carolina, and as a consequence that
20 means that its foreign leaf tobacco must come in through
21 an American port. There is no other option.

22 It will come in through an American port. And
23 the only competition affected by this case is not
24 American ports versus foreign ports, it is American
25 tobacco growers versus foreign tobacco growers.

1 Reynolds does not challenge and could not
2 challenge the finding, and I am quoting it, that "none
3 of the imported tobacco in bonded storage was being held
4 for export by Reynolds," and in fact none of it ever
5 has. In light of that unequivocal finding, the issue
6 comes down to this.

7 Can Congress be assumed to have intended to
8 exempt more than a half billion dollars worth of foreign
9 tobacco that has come permanently to rest in this
10 country from the same property tax that American grown
11 tobacco must pay when the two impose identical demands
12 on county and city resources and are used for identical
13 purposes, namely, they are the manufacturing inventory
14 for the owner's American plant.

15 QUESTION: Mr. Lee, the Xerox opinion contains
16 rather broad language, although on its facts we have
17 there a situation of goods intended for export. But the
18 Xerox opinion relied in part on a D.C. Circuit opinion
19 called District of Columbia versus International
20 Distributing Corporation, and that opinion in turn
21 seemed to suggest to me that the state lacked
22 jurisdiction to tax property in these bonded warehouses
23 because they have not yet been in fact imported.

24 MR. LEE: Yes, there is that notion -- excuse
25 me.

1 QUESTION: Yes. So it seemed to me that
2 perhaps to that extent there is a problem in your
3 argument about the meaning of the Xerox opinion.

4 MR. LEE: Well, let me answer it. The Xerox
5 opinion, first of all, let me say, there is the one,
6 there is the sentence at the end, but the sentence at
7 the beginning says, "We noted probable jurisdiction to
8 decide whether a state may impose non-discriminatory ad
9 valorem and personal property taxes on imported goods
10 stored under bond in a Customs warehouse and destined
11 for foreign markets."

12 Now, the petitioner, to be sure, does have
13 this argument that up until the time that the goods are
14 actually taken out of Customs bond, that they are not
15 within the jurisdiction and therefore not within the
16 power, and there is the dictum that is relied on from
17 the District of Columbia case and also from an older
18 case from Bree versus Murphy of some time ago.

19 Neither of those -- two points. One is that
20 neither of those cases involved the problem that is
21 involved here, but Bree versus Murphy did not even
22 involve state taxes at all. It involved only the
23 Customs, only the Customs duty itself.

24 It would make, Justice O'Connor, the state's
25 constitutional rights to exercise their most important

1 governmental function, the power to tax, which is the
2 power on which all other governmental powers depend,
3 turn on a wooden formalism, and that is, it would turn
4 on which side of a yellow line in a Class II Customs
5 bonded warehouse those goods happened to be on, and I
6 simply submit that it is --

7 QUESTION: I think there may be some practical
8 difficulties, too. Although in this case apparently it
9 is conceded that the tobacco will be for domestic use,
10 there may be a variety of products put in these
11 warehouses where the importers aren't certain yet
12 whether they will be reexported or not.

13 MR. LEE: Let me address that question, and I
14 will do so in two steps. The first is to observe that
15 -- three steps. The first is to observe that, as you
16 correctly state, that is not this case, and therefore
17 does not have to be decided in this case. All that you
18 have to decide in this case is that where there is --

19 QUESTION: Well, but you would certainly have
20 to have in mind what you were going to do.

21 MR. LEE: The next step down the road. But so
22 long as we are -- we recognize, first of all, that we
23 are really deciding the next case and not this one.

24 My second point is that I don't think it is
25 terribly -- it is not either necessary nor even helpful

1 to speculate on what that circumstance would be because
2 history teaches that in the context of this particular
3 warehousing Act that by the time the case has reached
4 this Court that question will have been decided.

5 In Xerox, for example, it was very clear by
6 the time -- on the record by the time the case got here
7 that all of those machines were destined for
8 transshipment. In McGoldrick it was very clear on the
9 record that all of that fuel was to be used on vessels
10 in foreign commerce. And in this case it is undisputed
11 that all of these goods are going to be manufactured
12 into tobacco.

13 It would seem that whatever the circumstance
14 might have been in 1846, when there might be this
15 uncertainty, that with the improved telecommunications
16 of today's modern world, that that will not be a serious
17 problem, and as a consequence I would say that the only
18 thing you really have to decide is today's case and that
19 you don't have to anticipate that.

20 Now, the final and my third point is that in
21 the event that you do, as I would urge you not to, I
22 think the fair way to handle it if the exporter, if the
23 taxpayer doesn't know whether he is going to ship it or
24 not, pay the tax, and then in the event that he does
25 transship it, the laws of the state of North Carolina

1 give him a remedy to sue in the event that he -- that
2 that should eventually be the holding, that he is
3 entitled to it, to get the tax back.

4 And this brings me back to the standard by
5 which to determine what was Congress's real intent
6 here. Did Congress really intend to take away the power
7 to tax under these circumstances? And a helpful
8 starting point is a brief review of the threshold of
9 proof that must be made in order to establish that
10 proposition.

11 Congressional intent to preempt state law will
12 never be lightly inferred, as this Court has made very
13 clear, particularly in the last three or four years, and
14 that is especially true, we submit, when the power to
15 tax is involved.

16 The power to tax is not only a core
17 governmental function, it is the function on which all
18 others depend, and because under Garcia Congress is the
19 principal protector of the state's constitutional rights
20 of self-governance, we submit that it follows that
21 Congress should not be assumed to have taken that
22 responsibility lightly, and that Congress should be
23 assumed to have intruded into the state's taxing power
24 only if Congress itself makes that intent very clear,
25 and this case simply doesn't arise to that standard.

1 QUESTION: Is it possible that Congress
2 intended at least that state and local taxes on goods
3 for domestic use be deferred?

4 MR. LEE: Might be deferred. I think that is
5 the most. I think that is the most that can be
6 inferred, and of course that is a result that would not
7 be totally unwelcome to us. It would not be our
8 preferred result, but at least there would be -- I think
9 it is easier to read that kind of result into a Federal
10 duties deferral scheme than it is to read an exemption
11 result into a Federal duties deferral scheme.

12 But I would point out that Reynolds can point
13 to no language, no Congressional language either in the
14 statute or the legislative history that even mentions
15 exemption from state taxes. I think it is also
16 important to note in that respect the rule for which
17 Reynolds is asking and the rule --

18 QUESTION: It is the same as Xerox, isn't it?

19 MR. LEE: That is correct. That is correct.
20 But then I am sure that you already --

21 QUESTION: Same as Xerox.

22 MR. LEE: -- understand what the distinction
23 is between this case and Xerox, and here is where you
24 can't distinguish this case from Xerox. Reynolds
25 attempts to take Xerox and say that from that it is not

1 just a case that is applicable where the goods, where
2 the presence of the goods in this country is simply in a
3 way station, in a foreign journey that neither began
4 here nor will end here but is a per se rule that any
5 time the goods get into a Customs bonded warehouse, that
6 ipso facto, per se, makes them exempt from all state
7 taxes.

8 And my point, Justice Scalia, is that while
9 you may have been able -- no, excuse me, while you can
10 properly infer an intent from the general Congressional
11 purpose or you do have the clean facts of a completely
12 international journey, it is an entirely different
13 matter under facts such as these.

14 QUESTION: Why wouldn't it be an entirely
15 different matter for purposes of assessment of the
16 Federal import tax as well? And yet it is clear that
17 that is not assessed immediately on those goods that are
18 held in that warehouse but will later be used
19 domestically rather than reexported.

20 MR. LEE: My answer to that is that that is
21 better a question to be addressed to Congress because
22 what we are dealing with here is how much mileage can
23 you get out of what Congress said and what was their
24 purpose in passing the Warehousing Act.

25 QUESTION: But surely that indicates that

1 Congress had in mind a system under which everything
2 that is in the warehouse is in the warehouse, period,
3 because it makes no more sense to defer the Federal
4 import tax until the point where it is taken out for
5 domestic consumption than it does, as you have
6 described, to prevent the imposition of state property
7 taxes until it is taken out.

8 MR. LEE: Two points. The first is that that
9 is an argument that would support Justice O'Connor's
10 point of view, that you defer the state tax until such
11 time as the Federal tax is imposed, but let me tell you
12 why that -- they really weren't talking about that kind
13 of ribbon matching between Federal Customs duties on the
14 one hand and tax exemption on the other. It will take
15 me just about 30 seconds to give you that answer.

16 The first is, and I want to emphasize this,
17 that is not what the statute says. It says nothing,
18 neither the language nor the legislative history says
19 one word about exemption from state taxes. Now, in
20 addition, there is a regulation, and this goes directly
21 to your point, Justice Scalia, there is a regulation
22 that is cited at Footnote 24 of our brief, and I quote
23 it.

24 It requires the private bonded warehouse
25 owner, this is the warehouse owner, and I am quoting

1 now, "to provide an estimate of the maximum duties and
2 taxes," duties and taxes, Footnote 24, "which will be
3 due on all merchandise in the bonded warehouse."

4 Now, the significance of that regulation is
5 this. The rule for which Reynolds is contending is a
6 per se rule that once it is in the warehouse it is
7 exempt from taxing. There is no way you can square that
8 with a regulation that refers to taxes which will be
9 due, and that was not the Customs duties they were
10 talking about because it refers to duties and taxes.

11 That leaves you with the only argument that
12 Reynolds has, one which I would like to concentrate on
13 now, that a blanket exemption can nevertheless be
14 inferred from the more general purposes of the statute,
15 and it is true that the two primary purposes of the
16 Federal tariff laws as developed by our brief are,
17 first, to gather revenue, and second, to protect
18 American businesses.

19 And in Xerox the Court inferred an intent to
20 exempt where the goods were destined for foreign
21 transshipment, and it is very clear and, I think, very
22 proper that the reason is because of the favorable
23 competitive effect on American ports, and as I believe
24 it was you pointed out, Justice Scalia, that distinction
25 between -- goods, yes, it was you -- that are to be

1 transshipped and that are not to be transshipped is
2 recognized in the warehousing Act, which imposes no
3 Customs duty on imported goods destined for foreign
4 markets.

5 Now, if you take that Xerox rationale and
6 apply it to the facts of this case, you will affirm,
7 because the only American industries whose competitive
8 standing is at stake in this case are the American
9 tobacco producers. And like -- in Xerox, Reynolds does
10 not need any Federal incentive to bring its foreign
11 grown leaf tobacco into this country for manufacture
12 here rather than manufacturing some place else.

13 The only place it can manufacture is in
14 Winston-Salem, and it did so long before it challenged
15 this case. In the most elementary sense, in the most
16 elementary sense, the result for which Reynolds is
17 contending here is a subsidy.

18 The Court in American Smelting called it a
19 bounty. Enacted into law by an American Congress
20 available only to foreign businesses and working to the
21 competitive disadvantage of American businesses,
22 Reynolds manufactures from a blend, a certain percentage
23 of foreign and a certain percentage of domestic.

24 If my clients lose this case the comparative
25 costs of the two components of that blend are going to

1 change, and it will be to Reynolds' economic advantage
2 to increase the percentage of foreign tax-exempt
3 tobacco, and I return to the question, why would
4 Congress want to do that?

5 QUESTION: What is the amount of tax at stake
6 in this case, Mr. Lee?

7 MR. LEE: In this particular -- this is for
8 1983, and for the two counties and three cities, it is
9 on the order of \$7 to \$8 million.

10 QUESTION: How much?

11 MR. LEE: Seven to eight million dollars.

12 QUESTION: Seven to eight million dollars?

13 MR. LEE: For the one year. We realistically
14 have about seven years that are at stake because of the
15 other suits that are backed up and waiting in the North
16 Carolina courts.

17 In Xerox, then, inferring Congressional intent
18 to exempt where the warehouse storage was really only a
19 way station on a foreign journey, so that the only
20 competition possibly affected involved not American
21 producers but American ports made some sense, here it
22 made no sense at all. This is a non-discriminatory
23 tax. It is not a new tax.

24 It has been in existence at least since
25 Michelin versus wages as applicable to this particular

1 transaction. All that these counties and cities are
2 attempting to do is to continue to apply to tobacco that
3 is grown in Bulgaria, Syria, Lebanon, Turkey, and a few
4 other places the same tax that must be paid and will be
5 paid on account of tobacco grown in North Carolina,
6 Virginia, Kentucky, Maryland, Tennessee, and a few other
7 states. The foreign tobacco constitutes, Mr. Chief
8 Justice, about 40 percent -- excuse me, 42 percent of
9 Reynolds' total taxable property, at least in Forsyth
10 County, and the record is silent as to what it is in
11 Durham.

12 Both the foreign and the domestic are stored
13 in identical warehouses. There is no physical
14 difference between them. In both cases the warehouses
15 are in fact owned by Reynolds and used exclusively by
16 them, and both kinds of tobacco pose identical demands
17 on these counties and cities for fire and police
18 protection as well as for a broad range of services for
19 Reynolds employees who work with tobacco.

20 QUESTION: You would think it would be easy,
21 if this is what Congress intended, to get a statute
22 through. I mean, if indeed they intended to have the
23 tax applied, what you say makes it a wonderment that a
24 statute hasn't been enacted.

25 MR. LEE: Two points. The first is that it is

1 not our burden to get that statute through. Under this
2 Court's well established precedence, the tilt is toward
3 the taxing power and not against it. Now, the second
4 point is the more telling one. Let's just put it
5 directly.

6 Let's just face the question directly, and
7 let's say then that Reynolds did go to Congress and
8 performed its obligation that it has to get the statute
9 through, and it proposed a bill that would exempt
10 tobacco grown in Bulgaria and Syria from property taxes
11 that have to be paid by tobacco grown in Maryland and
12 Virginia.

13 Now, your first reaction to that is that is
14 going to quickly find some legislative black hole from
15 which it will never emerge. Is there any reason to
16 assume that any Congress from 1846 to the present would
17 have taken any different position, and that is what
18 shows the mischief that would be worked by a per se rule
19 in a case like this.

20 In Reynolds -- excuse me, in Xerox, drawing
21 the inference at least had some basis, and here it does
22 not.

23 QUESTION: But not much, you don't think.

24 MR. LEE: Excuse me?

25 QUESTION: But not much, you don't think?

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MR. LEE: Barely enough --

QUESTION: Your argument -- your argument -- your argument would really lead to just saying that Xerox was just wrong and should be overruled.

MR. LEE: We think Xerox represents, Justice white, the outer limits of what should be good law.

(General laughter.)

MR. LEE: We certainly do not have to ask that it be overruled here. And I think that most of what I said --

QUESTION: Well, eight Justices joined that opinion and that language in it.

MR. LEE: That is correct, and eight Justices who are -- very good judgment, and we are not asking -- we are not asking that the case be overruled because there is this factual distinction, and it doesn't do a lot of good to parse the Xerox opinion as though it were a statute, and we are not asking the Court to do it.

QUESTION: But you agree it was in effect a statutory construction.

MR. LEE: It was in effect a statutory construction question. That's exactly right. Let me say just a word about the Foreign Trade Zones Act. To the extent that that is relevant at all it supports our position. Foreign trade zones are very different from

1 warehouses.

2 It is a separate part of the statute. And to
3 the extent that it shows anything at all, that
4 legislative history simply shows that Congress has
5 treated one statute different from another simply
6 because of the fact that the activity is different.

7 QUESTION: How are they different?

8 MR. LEE: Several ways. The most important
9 way, Justice O'Connor, is that they are in effect -- not
10 in effect, the statute says they are public utilities.
11 And that means that any secrets that Reynolds has in
12 connection with the blend and its manufacturing process
13 would have to be sacrificed.

14 They are open to the public, to all comers,
15 whereas the bonded warehouses, these two kinds that are
16 used here, are private, and there is a great variety of
17 activities that goes on within these foreign trade zones.

18 Most important for our purposes, they are
19 subject to two different kinds of statutes, and they are
20 subject to different statutory provisions. They are not
21 identical. As my colleague, Mr. Griswold, has pointed
22 out in the case of foreign trade zones, domestic goods
23 that come in for foreign transshipment are exempt from
24 property taxes, and Congress has not done that with
25 respect to the Warehousing Act.

1 Now, the statements by Senator Tower and
2 Congressman Wright, the most that you can get out of
3 those is that they may have read, may have read the
4 Xerox decision the same as Mr. Griswold does. I don't
5 think they were even focusing on the problem in this
6 case at all.

7 I think the most that the legislative history
8 shows is what Senator Bentsen says, that, and I am
9 quoting, that we are dealing with a very narrow problem
10 dealing with foreign trade zones in the state of Texas.
11 They were simply concentrated -- it was easier to get a
12 Congressional statute passed than it was to amend the
13 constitution of the state of Texas.

14 But even if you read those statements as
15 favorably as possible to Reynolds, they cannot possibly
16 qualify as any kind of legislative history of the
17 warehousing Act.

18 QUESTION: Mr. Lee, there was an old Treasury
19 Department regulation, was there not --

20 MR. LEE: Yes.

21 QUESTION: -- that used to say that these
22 state and local taxes were preempted?

23 MR. LEE: It at least would support that
24 notion, and that was repealed. We think the repealer
25 supports us, but I hadn't planned to mention it because

1 in Xerox the Court said, we won't speculate on it.
2 Since the Court has given that advice, I will follow
3 it.

4 But there is the remaining regulation, and
5 this one, I think, is a powerful one. The remaining
6 regulation says that it is the obligation of the private
7 bonded warehouse owner to provide a list of all duties
8 and taxes that will be due. That is on, as I say,
9 Footnote 24 of our brief. There is no way you can
10 reconcile that with the position that Reynolds is taking
11 in this case.

12 Two final points. One is that there is only
13 one case in which this Court has squarely decided this
14 issue on the merits, and that is the summary dismissal
15 of the appeal in American Smelting. That is the only
16 case that involved the precise facts of this case,
17 namely, where you had raw materials, manufacturing
18 inventory in a bonded warehouse awaiting manufacture in
19 this country.

20 And while we recognize that a summary
21 disposition does not carry as much precedential weight
22 as does a decision following full briefing and argument,
23 it does carry precedential weight, and this fact
24 remains, and this is very clear. If you look at
25 holdings, affirmance of the North Carolina courts will

1 not require overruling any merits decision of this
2 Court. Reversal will.

3 Now, finally, let me say just a word about the
4 constitutional arguments. We think that they follow a
5 fortiori from the statutory interpretation issue,
6 particularly in light of this Court's decisions in
7 Michelin versus Wages and Wisconsin versus J.C. Penney,
8 and that the overarching principle that governs both of
9 those is the principle well embedded in this Court's
10 jurisprudence that foreign commerce must pay its fair
11 share.

12 The Court said in Wisconsin versus J.C. Penney
13 that the simple but controlling question is whether the
14 state has given anything for which it can ask in turn.
15 It is that simple but controlling question, we submit,
16 which governs this case. These two counties and these
17 three cities have given something, the full range of
18 governmental services from fire to police to education
19 to streets and parks directly attributable to the
20 presence of Reynolds tobacco in these warehouses in this
21 country.

22 All that they ask in return is that the
23 foreign tobacco pay its fair share, the same as the
24 share that is paid by tobacco grown in North Carolina
25 and other neighboring states.

1 Unless the Court has questions, Mr. Chief
2 Justice, I have nothing further.

3 CHIEF JUSTICE REHNQUIST: Thank you.

4 Do you have something further, Mr. Griswold?
5 You have two minutes.

6 ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

7 ON BEHALF OF THE APPELLANT - REBUTTAL

8 MR. GRISWOLD: Yes, Mr. Chief Justice.

9 With respect to Justice O'Connor's question
10 about deferral, it seems to me that that is an argument,
11 as much of Mr. Lee's argument is, which ought to be
12 addressed to Congress and not to this Court.

13 It was already indicated, Mr. Lee indicated
14 that if there wasn't -- that deferral might require
15 payment now and then North Carolina would somehow or
16 other provide a refund if it wasn't eventually
17 imported. I suggest that that is a fairly complicated
18 legislative process which ought to be left to the
19 legislative branch of the government.

20 QUESTION: Getting a refund of state property
21 taxes is not the easiest task in the world. It is very
22 different from income taxes.

23 MR. GRISWOLD: It often presents very serious
24 difficulties. Mr. Lee referred to a provision in the
25 regulations which said that the importer must make an

1 estimate of duty and taxes. That, I think, quite
2 obviously is a reference to Federal excise taxes, which
3 are applicable to liquor, to many other things which
4 from time to time are subject to excise tax.

5 I remember back in World War One when candy
6 was subject to an excise tax. If candy was imported
7 from France or England it would be subject both to duty
8 and to pay the excise tax. Now --

9 QUESTION: Are you clear that those excise
10 taxes are payable when the goods are in the bonded --

11 MR. GRISWOLD: Yes. Otherwise there would be
12 a discrimination against domestic manufacturers who
13 would have to pay the excise tax, but it could be made
14 in Canada and brought in and not pay the excise tax, so
15 the excise tax is applicable both to goods manufactured
16 in the United States and goods imported into the United
17 States.

18 QUESTION: Is that the same kind of
19 discrimination that Mr. Lee is telling us about in this
20 case? Potential discrimination?

21 MR. GRISWOLD: Yes, it would be a
22 discrimination on that ground. I would point out in
23 this connection that North Carolina itself exempts
24 tobacco from property tax during it's first year as long
25 as it is owned by the producer, so that North Carolina

1 recognizes a discrimination. Let me say just one
2 further thing. Mr. Lee referred to --

3 CHIEF JUSTICE REHNQUIST: Your time has
4 expired, Mr. Griswold.

5 The case is submitted. We will resume there
6 at 1:00 o'clock.

7 (Whereupon, at 11:55 a.m., the case in the
8 above-entitled matter was submitted.)

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Supreme Court of The United States in the Matter of:

85-1021 - R. J. REYNOLDS TOBACCO COMPANY, Appellant V. DURHAM COUNTY, NORTH CAROLINA
FORSYTH COUNTY, NORTH CAROLINA AND ITS AFFECTED MUNICIPALITIES: and

#85-1022 - R. J. REYNOLDS TOBACCO COPANY, Appellant V. DURHAM COUNTY, NORTH CAROLINA AN
FORSYTH COUNTY, NORTH CAROLINA AND ITS AFFECTED MUNICIPALITIES

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BY Paul A. Richardson

(REPORTER)