

ORIGINAL

REVISED

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1708

TITLE CALIFORNIA, ET AL., Petitioner V. CABAZON BAND OF
MISSION INDIANS, ET AL.

PLACE Washington, D. C.

DATE December 9, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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CALIFORNIA, ET AL., :

Petitioner, :

V. : No. 85-1708

CABAZON BAND OF MISSION :

INDIANS, ET AL. :

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Washington, D.C.

Tuesday, December 9, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:35 o'clock p.m.

APPEARANCE:

RODERICK E. WALSTON, ESQ., Deputy Attorney General of
California, San Francisco, California; on behalf of
the petitioner.

GLENN M. FELDMAN, ESQ., Phoenix, Arizona; on behalf of
the respondent.

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1 PROCEEDINGS

2 CHIEF JUSTICE REHNQUIST: We will hear
3 argument next in No. 85-1708, California versus Cabazon
4 Band of Mission Indians.

5 Mr. Walston, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF RODERICK E. WALSTON, ESQ.,
8 ON BEHALF OF THE PETITIONER

9 MR. WALSTON: Mr. Chief Justice, and may it
10 please the Court, the question presented in this case is
11 whether state laws prohibiting high stakes gambling are
12 applicable to tribal gambling operations, most of which
13 feature bingo.

14 The question as we see it breaks down into two
15 major questions: first, whether state gambling laws are
16 applicable under the balancing test that this Court has
17 established in past Indian law cases, which has often
18 been referred to as a form of federal common law. The
19 second question is whether state gambling laws are
20 applicable here under Public Law 280, which of course is
21 a federal statute.

22 Before beginning my argument I would like to
23 briefly summarize our main argument before the Court.
24 Our view is that four major factors support state
25 jurisdiction here as those factors are relevant under

1 the balancing test, and I would like to briefly mention
2 them.

3 First, in our view the tribal games here are
4 successful primarily because they are illegal under
5 California law in that they allow non-Indians to play
6 high stakes bingo in circumvention of state law, and
7 therefore the value of the games essentially derives
8 from restrictions that the state places against its own
9 non-Indian citizens.

10 Second, the states, not Indian tribes, have
11 traditionally regulated gambling. Therefore the
12 activity in this case falls within the traditional
13 province of states, not Indian tribes, and therefore as
14 we view it the principal of tribal sovereignty is not
15 implicated in this case.

16 Third, the federal government does not in any
17 way regulate or supervise these games. They are wholly
18 unregulated.

19 Fourth, because of the high stakes and lack of
20 regulation the tribal games create in our view a serious
21 risk of infiltration by organized criminal elements.

22 QUESTION: What do you mean by high stakes?

23 MR. WALSTON: High stakes is, under California
24 law is anything that exceeds \$250. Under California law
25 charitable bingo operations can be conducted on a low

1 stakes basis, and low stakes are defined as anything not
2 exceeding \$250.

3 QUESTION: That might be pretty high for you
4 or me.

5 MR. WALSTON: Pardon me?

6 QUESTION: That might be high for you or me.

7 MR. WALSTON: I think that -- I would imagine
8 that that is still fairly low stakes, certainly
9 considering the type of tribal stakes that are involved
10 here. For example, one of the tribes has maximum stakes
11 of \$15,000. Another tribe in California has a maximum
12 stake --

13 QUESTION: Maximum what?

14 MR. WALSTON: Pardon me?

15 QUESTION: Per card?

16 MR. WALSTON: Per game.

17 QUESTION: Per game?

18 MR. WALSTON: Yes.

19 QUESTION: Well, that involves only one card,
20 doesn't it? No?

21 MR. WALSTON: That is one tribal bingo game
22 featuring one card, and the prizes, of course, vary from
23 reservation to reservation, but some tribes -- in this
24 case --

25 QUESTION: But are you telling us you can win

1 \$15,000 in one game?

2 MR. WALSTON: Yes, that is correct. There is
3 a \$15,000 maximum prize under the Marango games.
4 Another tribe in California, and this is in the record,
5 has a maximum stake of \$100,000. So the prizes here are
6 very high, and yet when you compare that with the \$250
7 limit of charitable bingo that is authorized under state
8 law you see the disparity between the games that are
9 authorized and the games that are not.

10 QUESTION: Does the record show how many
11 participants there are in a game where there's a
12 \$100,000 prize?

13 MR. WALSTON: It doesn't show that with
14 respect to the \$100,000 prize, but we do know that the
15 bingo parlor conducted by the Cabazon band has a seating
16 capacity of 500 people. A state investigator visiting
17 the bingo parlor on one occasion in 1984 observed
18 approximately 300 people.

19 QUESTION: How much does each player have to
20 invest in the \$15,000 game?

21 MR. WALSTON: We don't have that information
22 but I do think the record shows that the average player
23 in one of the bingo games in Southern California spends
24 on the average \$84 per person. That is in the record.

25 QUESTION: For the whole evening, you mean?

1 MR. WALSTON: Yes. That is the average amount
2 of outlay per player for one night at that particular
3 operation. Our conclusion from the four factors that if
4 these games are legalized they should be regulated and
5 therefore the conclusion as we view it is that if there
6 is to be bingo by the Indian tribes here the
7 authorization must come from Congress.

8 Congress has the power to impose regulations
9 upon these games. Until Congress does that we think it
10 is impermissible for this Court to uphold the games in
11 their present form.

12 QUESTION: Don't the tribes claim that they
13 regulate the games?

14 MR. WALSTON: The tribes claim that but in
15 actuality we feel that there is no regulation at all.
16 Each tribe makes its own decision in terms of how the
17 games are operated. There is no uniform federal
18 standard that applies. The Secretary of Interior does
19 not regulate the games. There is no uniform intertribal
20 standard that applies.

21 QUESTION: But that is true -- if you think of
22 tribal sovereignty as compared to state sovereignty,
23 California wouldn't regulate the same way that Arizona
24 does.

25 MR. WALSTON: That's true. We don't view

1 Indian tribes as having the same relation to the state
2 as other states do. Certainly the sovereignty of the
3 states is spelled out in the Tenth Amendment of the
4 United States Constitution. This Court, on the other
5 hand, has held that tribal sovereignty depends upon a
6 balance of competing interests, the balance of competing
7 tribal, federal, and state interests.

8 Therefore we don't view the situations as
9 analogous. One of the tribes in this case, for example,
10 has only 25 members, and it is difficult for us to
11 imagine that an Indian tribe with 25 members can be
12 equated with, say, the sovereign state of California or,
13 for that matter, any other sovereign state. They just
14 don't have the ingredients of law enforcement techniques
15 that the states have in trying to prevent the intrusion
16 of organized crime.

17 QUESTION: Mr. Walston --

18 MR. WALSTON: Yes.

19 QUESTION: -- the Interior Department does
20 have certain guidelines for these bingo games, doesn't
21 it? It requires FBI checks and periodic audits and what
22 have you?

23 MR. WALSTON: I don't believe that is correct,
24 Your Honor. Our understanding is that the Secretary of
25 the Interior has guidelines for the approval of

1 management contracts. In other words, if an Indian
2 tribe signs a contract with a non-Indian operator, and
3 if the tribe voluntarily submits the contract to the
4 Secretary for his approval, then under those
5 circumstances the Secretary does apply the guidelines,
6 but of course --

7 QUESTION: Well, I suppose there is certainly
8 no question but that the federal government has
9 supported and encouraged the tribes to engage in these
10 bingo operations.

11 MR. WALSTON: I am not entirely sure that that
12 is true, Your Honor. I think that there is a
13 pronounced --

14 QUESTION: You don't concede that?

15 MR. WALSTON: Pardon me?

16 QUESTION: You don't concede that?

17 MR. WALSTON: No, we don't. I think there is
18 a pronounced ambivalence in the federal attitude with
19 respect to the tribal games here. Certainly there are
20 elements in the federal government that basically
21 support the tribal games but they don't regulate the
22 games. They provide support in the sense that they will
23 approve tribal ordinances that are submitted to them for
24 approval but otherwise there is no regulation, and other
25 agencies of the federal government I understand are much

1 less sympathetic to the type of tribal activity here.

2 QUESTION: Isn't there legislation pending in
3 the Congress now that would -- federal legislation that
4 would authorize these games and regulate them, too?

5 MR. WALSTON: Well, there was an Indian bingo
6 bill or an Indian gambling bill that passed the House
7 and then passed a Senate Select Committee, but it was
8 not approved on the floor of the House and as far as we
9 understand --

10 QUESTION: That's because it was the end of
11 the session, wasn't it?

12 MR. WALSTON: Well, yes, but there was more to
13 it than that. I understand that there was strong
14 opposition on the floor of the Senate to the bill and
15 also --

16 QUESTION: Would that bill have authorized the
17 tribes to conduct these games?

18 MR. WALSTON: Yes, it would have.

19 QUESTION: And also have regulated how they
20 conduct?

21 MR. WALSTON: Yes, it would have provided both
22 for authorization and for regulation. In fact, I should
23 add, Your Honor, that the Department of Justice
24 commented on the bill and stated that the bill did not
25 go far enough in establishing regulatory safeguards. In

1 fact, it called the bill an anti-law enforcement device
2 that failed to adequately protect against the intrusion
3 of organized crime on Indian reservations.

4 So, it appears, as I say, that there is an
5 ambivalence --

6 QUESTION: Has the government filed a brief on
7 this case?

8 MR. WALSTON: No, the federal government has
9 not, and I think that the failure of the federal
10 government to file a brief in this case speaks volumes
11 concerning the ambivalence of the federal position in
12 this case.

13 QUESTION: Well, did the federal government
14 support this bill in the Congress, the pending one?

15 MR. WALSTON: Did -- I am sorry.

16 QUESTION: Did the Interior or any other
17 agency of the federal government support the bill?

18 MR. WALSTON: Well, I understand that the
19 Interior Department supported the bill. The Justice
20 Department opposed it, and the views of the President, I
21 understand, were closer to those of the Justice
22 Department than Interior, but the important thing is
23 that the bill, regardless of what form it came out of
24 Congress in, would have provided for the kind of
25 regulation and control that is not present with respect

1 to the tribal games here, and that is the key point.

2 Our view all along has been that there is an
3 argument to be made for tribal bingo, but the games
4 should not be legalized unless they are adequately
5 regulated, and we don't have the adequate regulatory
6 controls at this time.

7 Therefore, for that reason --

8 QUESTION: May I ask a question --

9 MR. WALSTON: Pardon?

10 QUESTION: -- Mr. Walston? I understood you
11 to say that you didn't think the Department of Interior
12 supported the Indians' position, but --

13 MR. WALSTON: No, I think I said the
14 opposite.

15 QUESTION: -- how do you read the affidavit by
16 Mr. Krenzke, Page 219 of the joint appendix? This
17 gentleman says he is the Director of Indian Services,
18 Bureau of Indian Affairs, Department of the Interior.
19 You have seen the affidavit, of course.

20 MR. WALSTON: Yes, I am familiar with the
21 affidavit.

22 QUESTION: You think that does not represent
23 the view of the Department of the Interior?

24 MR. WALSTON: No, I -- perhaps Your Honor
25 misunderstood me or perhaps I misspoke, but I thought

1 what I said was that Interior basically supported the
2 Indian gambling bill and supported the tribal activities
3 here but the Justice Department apparently as far as we
4 know feels differently, so the ambivalence in the
5 federal position is between Interior and Justice. That
6 was the point I meant to make. Justice Blackmun?

7 QUESTION: Isn't it true that the tribes rely
8 on the proceeds from these games, indeed rather heavily,
9 for support and --

10 MR. WALSTON: Yes, that's -- I think that is a
11 fair statement. I think that it is fair to say that the
12 tribal games here do indeed provide for large revenues
13 for a number of tribal programs, and we certainly
14 concede that. There are some responses to that. First,
15 the tribes have an interest only in the revenue, but
16 they don't have an interest in the activity involved
17 here. They don't have an interest, a sovereign tribal
18 interest in the subject of high stakes gambling. High
19 stakes gambling has never played a part of Indian
20 historical development. It is not indigenous to tribal
21 culture or custom. It is not a traditional Indian
22 practice.

23 QUESTION: The Ninth Circuit, perhaps not on
24 the most strong evidence in the world, said that there
25 had been a tradition of Indian gambling for a long time,

1 didn't they, in their opinion?

2 MR. WALSTON: No, the Ninth Circuit didn't say
3 that, Mr. Chief Justice. I think that the Ninth Circuit
4 said that the tribes had a sovereign interest in raising
5 revenue and that that was a traditional government
6 function, and that therefore the tribes as we -- as I
7 understand it the tribes should therefore be allowed to
8 raise revenue by any type of activity at all, and
9 therein lies the difference, one of the major
10 differences between the Ninth Circuit and us.

11 Our view is that although the tribes do indeed
12 have an economic interest it is crucial that this Court
13 focus upon the activity that provides that revenue, for
14 this Court has always looked to the activity of Indian
15 tribes, not their revenue raising interest, in
16 determining whether the principle of tribal sovereignty
17 applies. And indeed the Court did this very recently in
18 the case of Rice versus Rehner.

19 Yes?

20 QUESTION: May I just ask this question? You
21 mentioned and your brief also mentions organized crime
22 and the danger of infiltration. Is there any evidence
23 that organized crime has infiltrated the bingo
24 operations of the tribes that are before us? Any
25 evidence in this record?

1 MR. WALSTON: Not in the record. Not in the
2 record. To fully answer your question, Justice Powell,
3 I would have to go outside the record, and I am
4 reluctant to do that.

5 QUESTION: Maybe I had better withdraw the
6 question then, but you argue in your brief that that is
7 a concern of the state of California.

8 MR. WALSTON: Yes. The possibility that the
9 bingo operations may be taken over by organized crime is
10 a very serious concern to the state of California. We
11 did, by the way, concede below that we do not allege --
12 "we do not allege" the existence of organized crime in
13 this case. We have never conceded that organized crime
14 may or may not be involved in this case.

15 But our view is that California law is
16 intended to prevent organized criminal infiltration
17 before it takes place rather than simply eradicate a
18 criminal operation after it has actually occurred.

19 QUESTION: How long has this bingo been going
20 on?

21 MR. WALSTON: Since 1983, March, 1983.
22 Essentially most of the tribal bingo operations that are
23 proliferating nationally have taken place as a result of
24 a 1982 decision by the Fifth Circuit in the Seminole
25 Tribes case. So the phenomenon before this Court is a

1 fairly recent one, but going back to the organized crime
2 question, the President's Commission on Organized Crime
3 recently noted that gambling, second only to drugs, is a
4 major source of income for organized crime.

5 The National Gambling Review Commission, which
6 was established by Congress to study the links between
7 gambling and organized crime concluded that high stakes
8 bingo does indeed attract organized crime because of the
9 large amounts of cash that are involved. And that
10 Commission, a Congressionally established Commission,
11 recommended that the only effective way to prevent
12 organized criminal infiltration with respect to bingo
13 games is for the states to provide for adequate
14 regulation and control of the games.

15 The California Attorney General Task Force
16 issued a report in 1971 in the same vein, and the
17 Attorney General Task Force noted the experience of New
18 York. New York in the late 1950s legalized bingo. The
19 games were quickly taken over by organized criminal
20 elements and New York was able to regain control only by
21 establishing and enforcing stringent limitations.

22 Therefore our view is that state regulation of
23 gambling is the main bulwark against organized criminal
24 infiltration, but under the view being asserted by the
25 tribes today that bulwark is not present with respect to

1 the tribal games here.

2 QUESTION: Well, I suppose nothing would
3 prevent the Department of Interior from adopting some
4 kind of further regulation.

5 MR. WALSTON: That is true, Justice O'Connor.
6 If Interior adopted regulations presumably the
7 regulations would be effective in resolving or at least
8 reducing the organized crime problem, and to the extent
9 that the regulations would have that effect, than many
10 of the concerns that I have expressed today would be
11 mitigated.

12 To date Congress has not acted. Congress has
13 not acted. The Secretary of the Interior has not
14 acted.

15 QUESTION: Has California (inaudible)?

16 MR. WALSTON: Has California?

17 QUESTION: Asked Interior to do something
18 about it?

19 MR. WALSTON: California has indeed
20 recommended passage of on of the Indian gambling bills
21 subject to stringent regulations, and I should add that
22 California did not recommend adoption of the bill that
23 passed the House and that passed the Senate Select
24 Committee because California felt, as does the
25 Department of Justice, that that bill does not go far

1 enough to prevent organized criminal infiltration.
2 California instead recommended a bill which had been
3 propounded by the administration that went much further
4 in that direction.

5 QUESTION: Mr. Walston, is the prevention of
6 organized crime infiltration the only state interest in
7 controlling gambling?

8 MR. WALSTON: No, the other interest, Justice
9 Stevens, is that the success of the tribal games, as I
10 mentioned at the outset, depends upon their illegality
11 under California law, and that they allow non-Indians to
12 play bingo, high stakes bingo in violation of state
13 law. And thus the very *raison d'etre* of the games is to
14 attract non-Indians to come on the reservations to play
15 the games, in circumvention of state law, and thus in
16 our view the games themselves have no truly intrinsic
17 value. Rather, their value derives from restrictions
18 that the state places against its own non-Indian
19 citizens.

20 The state, as it were, has created the market
21 that the tribes are trying to exploit, and the tribes
22 are taking commercial advantage of California law by
23 marketing to non-Indians the very high stakes gambling
24 that California law prohibits.

25 QUESTION: I understand that, but do you

1 allege there is any other state interest in placing
2 limits on the games as you have no more than \$250 in a
3 bingo game and a lot of other things that are illegal
4 gambling? Is there any state interest in those laws
5 that is implicated other than trying to prevent
6 organized crime from coming into the state?

7 MR. WALSTON: No, that is the major interest
8 that California has in placing limits on charitable
9 bingo.

10 QUESTION: Just to keep organized crime out?

11 MR. WALSTON: Yes, our view is that if the low
12 stakes limits were eliminated and if charitable
13 organizations were allowed to hire outside operators
14 rather than conduct the games themselves, then under
15 those circumstances organized crime may well take
16 control of charitable bingo operations in California,
17 but as I said, the stakes are kept low and under
18 California law --

19 QUESTION: Do you think historically that has
20 been the only basis for state prohibition or regulation
21 of gambling, is to keep organized crime out of the
22 business?

23 MR. WALSTON: Well, I suppose --

24 QUESTION: It has been a long time that
25 gambling was considered contrary to public policy.

1 MR. WALSTON: I suppose there is another
2 element --

3 QUESTION: You just happened to think of
4 that?

5 MR. WALSTON: -- and I suspect that what you
6 are leading to is the possibility that the state may
7 have some moral objections to unregulated gambling.

8 QUESTION: Protecting its citizens against
9 their appetites, isn't it?

10 MR. WALSTON: Pardon me?

11 QUESTION: Protecting its citizens against
12 their appetites.

13 MR. WALSTON: Yes, that is true. I think the
14 entire question here is --

15 QUESTION: But California allows other sorts
16 of gambling, doesn't it?

17 MR. WALSTON: Yes.

18 QUESTION: Such as what?

19 MR. WALSTON: California allows a state
20 lottery. It allows in addition -- and also, of course,
21 low stakes bingo, and then finally horseracing,
22 horseracing betting.

23 QUESTION: And horseracing?

24 MR. WALSTON: Right, so I do not -- in
25 response to Justice Stevens' question, I am not --

1 QUESTION: It is sort of hard to get moral
2 when you hit bingo.

3 (General laughter.)

4 MR. WALSTON: I have deliberately not tried to
5 advance a moral argument before this Court. I think
6 that perhaps in its inception the states did indeed
7 regulate gambling for primarily moral reasons, and that
8 is probably the way that state regulation of gambling
9 arose, but with the recent adoption of the state lottery
10 and other types of state-authorized gambling activities,
11 I think that the state's moral objections to gambling
12 have diminished.

13 I suppose that they are there. I suppose that
14 many people in California support California's
15 anti-gambling laws primarily on moral grounds, but as I
16 say, that is not the argument that we address before
17 this Court today.

18 QUESTION: Doesn't Colorado or California's
19 efforts here go beyond protecting or preventing the
20 Indians from offering this service or marketing this
21 gambling to non-Indians? You want them to quit
22 entirely?

23 MR. WALSTON: I don't quite understand your
24 question.

25 QUESTION: What does California want to do to

1 these bingo games? They want to stop them unless they
2 are what?

3 MR. WALSTON: Unless they are compliant with
4 California law.

5 QUESTION: Well, suppose the Indians said, all
6 we want to do is have a bingo game for Indians.

7 MR. WALSTON: Oh, for Indians. Okay. I think
8 that --

9 QUESTION: I thought you were still insisting
10 that you had the right to regulate them.

11 MR. WALSTON: I think that the factors, the
12 elements, and the dynamics of the case would be vastly
13 different if Indians were playing bingo on the
14 reservation with other Indians. One of the strong
15 factors that supports state jurisdiction here is the
16 fact that the games are intended to attract non-Indians
17 to come on the reservation to play the games. Where
18 Indians engage in a purely internal activity on the
19 reservation I think a stronger argument can be made by
20 the tribes that they have a sovereign right to engage in
21 that kind of activity.

22 I notice in the Rice case --

23 QUESTION: Even though that might attract
24 criminal elements just as well. If you have enough
25 Indians on the reservation you can have a pretty big

1 bingo game, and organized crime might be attracted to
2 it.

3 MR. WALSTON: That is true, but still the
4 balance of interest we think might indeed support that
5 kind of tribal operation.

6 QUESTION: California law on its face would
7 prevent that.

8 MR. WALSTON: Well, that's true. California
9 law, the situation before the Court is not one where
10 Indians are playing bingo amongst themselves. As a
11 matter of fact, one of the tribes here has only 25
12 members, and I think perhaps only nine adult members.
13 And therefore it is hard to imagine --

14 QUESTION: So your argument is, well, really,
15 this is just Indians dealing with a non-Indian
16 situation, and if you can keep them from selling
17 cigarettes to non-Indians you ought to be able to keep
18 the non-Indians out of their bingo game.

19 MR. WALSTON: I think that is essentially much
20 of our argument.

21 QUESTION: What else is it?

22 MR. WALSTON: Well, the fact that the Court
23 did hold in Coleville that Indian tribes do not have a
24 vested right to sell products to non-Indians. I think
25 that is a very important factor in this case. I think

1 that the element there was that the tribes were engaged
2 in activity with non-Indians, not simply engaged in
3 activity on the reservation involving only themselves.

4 QUESTION: Well, one reason the state approves
5 and regulates horseracing is that it gets a lot of
6 revenue. Now, is that true of its regulation of bingo,
7 too? Does it get any revenue from bingo games that are
8 conducted in compliance with its laws?

9 MR. WALSTON: No, California gets money from
10 the state lottery and the state horseracing act, but it
11 does not get money from charitable bingo. The money
12 from charitable bingo, of course, goes just for
13 charitable purposes. I should add that part of the
14 moneys from the state lottery do indeed innure to the
15 benefit of Indians themselves.

16 To date the state lottery has generated about
17 \$850 million for education of California school
18 children, and given the percentage of Indian enrollment
19 in the public schools in California about \$6.5 million
20 of state lottery funds heretofore have been expended
21 just for the education of Indian children.

22 So the Indian children themselves receive the
23 benefits of California's state lottery, and it is
24 therefore difficult for us to understand the tribal
25 argument that somehow the existence of the state lottery

1 militates against the state position here.

2 Another major factor in this case, we think,
3 is the existence of the Organized Crime Control Act.
4 This is an act that was passed by Congress in 1970, and
5 it prohibits gambling operations in violation of both
6 state and local law. On its face the act might make
7 California gambling laws directly applicable on Indian
8 reservations.

9 But whether or not that is so, our view is
10 that the Organized Crime Control Act at least expresses
11 a federal policy, a federal policy that supports the
12 state position here. It expresses a federal policy we
13 think in favor of state regulation of gambling and
14 against unregulated gambling, and therefore as we view
15 it federal policy in this case is high congruent with
16 the purposes of California law, and also, as I mentioned
17 earlier, the states, not Indian tribes, have
18 traditionally regulated gambling. Gambling has not been
19 traditionally regulated by the federal government. A
20 fortiori, it has not been traditionally regulated by
21 Indian tribes.

22 It is a traditional function of the states
23 that, as Justice Stevens pointed out, goes back some
24 time in history. It is very analogous to the type of
25 liquor regulation that was involved in the Rice case,

1 where the Court held that Indian tribes have not
2 traditionally engaged in the regulation of liquor
3 sales.

4 I think I would like to reserve the rest of my
5 time for rebuttal.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
7 Walston.

8 We will hear now from you, Mr. Feldman.
9 ORAL ARGUMENT OF GLENN M. FELDMAN, ESQ.,
10 ON BEHALF OF THE RESPONDENTS

11 MR. FELDMAN: Mr. Chief Justice, and may it
12 please the Court, I think we have seen a bit of
13 equivocation on the part of the state here this
14 afternoon. Let there be no mistake that what the state
15 is asking for here is full jurisdiction over these
16 tribal activities to shut them down and put them out of
17 business. That is what this case has been about since
18 Day One.

19 So we are not here talking about some minimal
20 amount of intrusion on a tribal activity. The state is
21 asking --

22 QUESTION: Well, Mr. Feldman, is that fair --
23 if you just put a \$250 limit on the game they wouldn't
24 want to shut you down, would they?

25 MR. FELDMAN: No, that is not correct, Your

1 Honor. Under California law a great number of
2 organizations can sponsor charitable bingo, but Indian
3 tribes are not among those groups, so under California
4 law Indian tribes are not able to sponsor even
5 charitable bingo in California.

6 QUESTION: Who are allowed? Who are those who
7 are allowed?

8 MR. FELDMAN: It is defined in terms of the
9 state tax code if you are subject or not subject to
10 certain aspects of California state taxes, but specific
11 ones, and they detail the organizations. It is Little
12 Leagues, mobile home parks, non-profit cemetery
13 associations.

14 QUESTION: I see. That is sort of
15 hypothetical anyway, because I don't imagine the tribes
16 would want games unless they could attract non-Indians
17 onto the reservation, would they?

18 MR. FELDMAN: Well, the other point that is
19 important here is this. The question is, well, could
20 they or should they restrict the games to tribal
21 members. A crucial fact in this case is that under
22 California law the law -- California's bingo law
23 affirmatively requires that the bingo games must be open
24 to the general public, and the games cannot be
25 restricted solely to members of the authorized

1 organization.

2 QUESTION: Well, in the case of the tribe with
3 only nine adult members I suppose the tribe also has an
4 interest in opening it to the general public.

5 MR. FELDMAN: Certainly the tribal interest is
6 congruent with the state interest here, but my point is
7 that if the tribes were to limit their games only to
8 tribal members, regardless of how large or how small,
9 they would be in violation of California state law.

10 QUESTION: Mr. Feldman, I guess the most
11 obvious concern about your position in the case is the
12 concern we would have that the tribes are marketing an
13 exemption from state law and the analogy to the
14 cigarette tax situation as in Coleville.

15 MR. FELDMAN: Well, Your Honor, we think the
16 situation here is considerably different than that
17 presented in Coleville. I would note at the outset that
18 in the cigarette tax case that the incidence of the tax
19 at issue there was on non-Indians. In this case the
20 incidence of the state's jurisdictional scheme is
21 directly on the tribes themselves. So the question of
22 whether the state has jurisdiction to regulate these
23 activities is a considerably different one. There it
24 was the non-Indians who were being regulated. Here the
25 incidence of California's regulatory scheme is solely on

1 the operators. Non-Indians who come onto the
2 reservation to play the games are violating no state
3 law. They are evading no state obligation by doing so,
4 so California's interests are simply not implicated.

5 In the Coleville case the cigarette purchasers
6 were evading a legal obligation to pay Washington state
7 sales -- cigarette taxes. Here there is no similar
8 situation. In this case, as a further distinction, in
9 that case the Court said that what the Indians were
10 marketing, what the tribes were marketing there, the
11 sellers, was really an exemption from state tax laws.
12 And they said there was no value, no tribally generated
13 value that was being presented or being provided.

14 QUESTION: Do you think the tribes could open
15 casino gambling on the reservation?

16 MR. FELDMAN: The answer to that is clearly
17 no. Under 11 -- under 15 USC Section 1175 the use or
18 possession of certain mechanical gambling devices is a
19 federal offense. That relates primarily to slot
20 machines, roulette wheels, wheels of fortune. So in no
21 instance could those activities take place on an Indian
22 reservation. They would be immediately in violation of
23 federal law. In addition --

24 QUESTION: Well, doesn't that law say unless
25 the state permits it?

1 MR. FELDMAN: There may be -- there might
2 be --

3 QUESTION: Well, how else would there be
4 gambling in any state with these devices?

5 MR. FELDMAN: This applies only on Indian
6 reservations, on federal reservations. Section 1175 is
7 a prohibition against mechanical gambling devices on
8 federal reservations, which includes Indian
9 reservations. There is a specific federal law that
10 deals with that.

11 QUESTION: All right.

12 MR. FELDMAN: Getting back to the question of
13 marketing an exemption, the key element there, I think,
14 was that the tribes were not providing what was called
15 value generated on the reservation. Here the situation
16 is quite different. There you had people coming onto
17 the reservation, buying cigarettes which had been
18 imported from elsewhere, and then taking the cigarettes
19 off and evading the state, the obligation to pay state
20 taxes.

21 What the tribes are offering here are
22 recreational services, plain and simple.

23 QUESTION: Could I ask you, does this tribe --
24 is this tribe required to submit any of its ordinances
25 or laws, tribal laws to the secretary?

1 MR. FELDMAN: Neither the Cabazon or Marango
2 bands are required to. In this instance they both have
3 submitted their bingo ordinances and those ordinances
4 have been approved by the secretary.

5 QUESTION: And they were approved pursuant to
6 an authority the Secretary has, expressly has?

7 MR. FELDMAN: Yes. In addition, in the case
8 of the Marango band, they have a management agreement,
9 and that management agreement has been submitted to the
10 Secretary, again has gone through the entire review
11 process, background, FBI checks, and that agreement has
12 been --

13 QUESTION: Mr. Feldman, with reference to
14 recreational services on the reservation, what if the
15 services were the opportunity to consume drugs on the
16 reservation?

17 MR. FELDMAN: Well, our position is really
18 pretty straightforward, that if the activity is
19 prohibited by the state, then under Public Law 280 that
20 prohibition applies equally on the reservation.

21 QUESTION: Isn't the activity of bingo at more
22 than 250 jackpots prohibited by the state?

23 MR. FELDMAN: No, the question is what
24 activity is involved, and in this case bingo is
25 permitted but regulated under California law. That was

1 the --

2 QUESTION: You can really get into some
3 hairsplitting about, you know, whether something is
4 prohibited or whether it is regulated. Witness some of
5 Justice Holmes' comments in The Common Law.

6 MR. FELDMAN: I cannot deny that the test
7 isn't going to result in absolute clarity in every
8 instance, but the test that has been developed and been
9 applied by every federal court that has considered --
10 every lower federal court that has considered this
11 question has allowed them -- first of all, it is
12 consistent with this Court's holding in Bryan.

13 In Bryan, this Court -- Bryan versus Itasca
14 County, this Court unanimously held that states had no
15 civil regulatory jurisdiction over tribal government.

16 QUESTION: Did it hold that?

17 QUESTION: Mr. Feldman, supposing a state
18 authorized prostitution subject to certain regulation.
19 If they regulated it, then it would be -- you could have
20 it on an Indian reservation unregulated under your
21 argument.

22 MR. FELDMAN: There may be a federal law that
23 would cover that. I don't know. Certainly federal
24 prohibitions would apply on reservations.

25 QUESTION: No, but I am just assuming the

1 only -- that there is a state regulation of the
2 activity, not a total prohibition, as I presume there is
3 in Nevada, that in that state the Indian tribes could
4 operate unregulated under your theory.

5 MR. FELDMAN: If the state permits local
6 option on prostitution, then yes, our view is that a
7 tribal government is equivalent to a city or state or
8 county government.

9 QUESTION: No, I didn't say local option. I
10 said they permit it throughout the state but they
11 regulate it. They have certain health regulations and
12 one thing and another. But you would say on the tribe
13 it could go forward unregulated.

14 MR. FELDMAN: It could go forward subject to
15 federal and tribal regulation.

16 QUESTION: By analogy to the bingo -- yes.

17 MR. FELDMAN: I think there has got to be an
18 element of common sense provided here. Indian tribes
19 are under the direct control and supervision of the
20 Secretary of the Interior, and the Secretary is not
21 going to allow outrageous activities on the
22 reservation.

23 QUESTION: Well, let me ask you this then.
24 Supposing we had a change of administration. You got a
25 different Secretary of Interior who thought gambling was

1 morally wrong and prohibited it. Would you no longer
2 have a claim?

3 MR. FELDMAN: Would we no longer have what? I
4 am sorry.

5 QUESTION: Would you no longer be able to
6 operate if the Secretary of Interior had a different
7 view about the propriety of gambling?

8 MR. FELDMAN: Not necessarily. I think that
9 the Secretary's view here and the support of the federal
10 government is an important aspect of this case. It is
11 not determinative necessarily. It provides the federal
12 gloss here, if you will.

13 QUESTION: Well, but what if we in applying
14 the balancing test thought that that was the factor that
15 tipped the scale, and then if, as Justice Stevens
16 suggests, a new Secretary of the Interior had a
17 different view, the situation would change.

18 MR. FELDMAN: Well, administrations do change,
19 and federal policies towards Indians change. Today the
20 policy is in favor of tribal self-government and
21 economic development. That has not always been the
22 case.

23 QUESTION: Was your management contract
24 required to be presented to the Secretary?

25 MR. FELDMAN: Yes, under 25 USC Section 81,

1 contracts of this type must be approved.

2 QUESTION: But your ordinance wasn't?

3 MR. FELDMAN: That's correct, ordinances are
4 not mandatorily --

5 QUESTION: So if the Secretary withdrew his
6 approval of your management contract in order to get
7 around that you would have to get his decision
8 overturned in court, I suppose.

9 MR. FELDMAN: Or get rid of the management
10 company.

11 QUESTION: Well, in which event you would have
12 to present another management contract, I suppose.

13 MR. FELDMAN: No, not necessarily. The trend
14 today is to get away from management companies. Now
15 that tribes have had experience in this activity, and I
16 should note that tribal bingo has been going on in some
17 reservations for as long as 12 years, and on many
18 reservations for six or seven years. So tribes have now
19 begun to develop the managerial skills that they didn't
20 have at the outset, and today the trend is away from
21 management contracts and towards internally operated,
22 tribally operated, wholly tribally operated activities.
23 I would like to address --

24 QUESTION: Did the state know you were
25 submitting to the Secretary those ordinances and the

1 management contract for approval? Did they oppose it,
2 or did they even know about it?

3 MR. FELDMAN: I don't think that's a matter of
4 the state's concern. That is a matter between the
5 tribes and the Secretary to --

6 QUESTION: Well, if I wanted the best place I
7 would suppose that they might have opposed this
8 administrative decision to permit it, but they didn't,
9 anyway.

10 MR. FELDMAN: No, not that I'm aware of.

11 QUESTION: All right.

12 MR. FELDMAN: I certainly don't know what
13 communication there may have been, but I am not aware of
14 any such communication.

15 Let me make a couple of points here that I
16 think need to be made. First, Indian tribes are
17 governments, and like all governments they have to have
18 a source of revenue in order to function. Now, most
19 tribes do not have a natural resource base. The Cabazon
20 and Marango bands have reservations out in the middle of
21 the desert, and until there is a commercial market for
22 sand or sagebrush they do not have any sort of natural
23 resources to generate tribal income.

24 As a result they have turned to bingo along
25 with more than 120 other tribes around the country. In

1 doing this they have been acting very much like the 28
2 states, including California, that have established
3 state lotteries. The purpose is the same, to provide
4 governmental revenues for public purposes.

5 This is in essence a form of voluntary
6 taxation. Now, the federal --

7 QUESTION: California is saying that bingo
8 would be like sand and sagebrush but for the fact that
9 California doesn't allow it, that it is only --

10 MR. FELDMAN: There is certainly nothing in
11 the record to support that, Your Honor. The only
12 information in the record, which has to do with the size
13 of prizes actually awarded here, is that for a
14 representative four-month period during 1984 the average
15 jackpot on the Cabazon reservation for their bingo games
16 was \$184.89, well below the state maximum limit.

17 Now, that is not to say that in some games
18 they don't offer larger prizes. They do. We have
19 conceded that. But most games, and in fact the state's
20 under cover agent who went in and observed the activity
21 and then submitted declaration makes it very clear that
22 while he was there, yes, there were signs up that said,
23 "You can win this boat," "You can win this car," but in
24 fact the prizes that were awarded that night ranged from
25 \$25 to \$300. So the amount of money that is actually

1 being awarded here is considerably less than what the
2 big letters say on the sign outside, in the same way
3 that the D.C. Lottery doesn't award \$20 million every
4 week. It is something that is designed to improve the
5 number of people --

6 QUESTION: Do you think the state has an
7 interest in regulating the kind of disclosure that is
8 made to prospective customers?

9 (General laughter.)

10 MR. FELDMAN: I think that we haven't reached
11 that issue. I think that the advertising is legitimate,
12 and they do in some instances give away large prizes as
13 promotional activities. But the run of the mill
14 jackpot, they are playing bingo out there for \$25 in
15 some games, many games. So let's not be -- let's not be
16 misled by what the large signs say.

17 The reality is here, that these games are run
18 and operated very much like charitable bingo. In fact,
19 they are consistent with every aspect of California's
20 bingo law with just three exceptions. They are
21 operating the games and they are not an authorized
22 organization under California's law.

23 QUESTION: Why do people drive 70 or 80 miles
24 then to play this game if they do that when they could
25 just drive a couple miles to a charitable game closer to

1 home?

2 MR. FELDMAN: Well, there is nothing that
3 indicates how far people come from. These, both Cabazon
4 and Marango are within reasonably close distance to a
5 number of small communities, so there is no evidence
6 that people are driving long distances here, but more
7 importantly we think that what we are providing are
8 better services, frankly.

9 We are providing -- bingo players don't
10 require very much. Bingo players want a chair with a
11 little padding and Smoke-Eaters that will clear the air
12 and get the cigarette smoke out. And if you can provide
13 that better than the guy down the street, then you are
14 going to attract more people to your bingo. I am being
15 serious. That is what these games are offering. The
16 tribes have built large, modern, clean, well-lit
17 facilities, and they provide a chance for --

18 QUESTION: (Inaudible.)

19 MR. FELDMAN: No, this is my argument.

20 (General laughter.)

21 MR. FELDMAN: But what we are providing are
22 recreational services here, and there is no indication
23 why people go to one bingo as opposed to the other, but
24 the creature comforts certainly have something to do
25 with it.

1 Let me turn for a moment to this question of
2 organized crime. What we are dealing here on the part
3 of the state of California is at most a hypothetical
4 concern. They have stipulated to the fact that there is
5 no organized crime involvement on either the Cabazon or
6 Marango reservation.

7 Now, they draw some distinction between
8 whether they are alleging that it is or isn't. I
9 suspect --

10 QUESTION: I didn't understand them to
11 stipulate that there wasn't any. They just said they
12 haven't alleged any to be there.

13 MR. FELDMAN: Well, they said they hadn't
14 alleged it. My question is, if I was representing the
15 state and I knew of some, I don't think I would keep it
16 a secret. I think I would get it out before the Court.

17 QUESTION: But they say there is a real
18 danger. That is what they say.

19 MR. FELDMAN: They say there is a real danger
20 but the evidence points directly in the opposite
21 direction. The Ninth Circuit concluded that there was
22 no evidence of organized crime, and more importantly,
23 Congress has studied this issue, but the Senate and the
24 House.

25 QUESTION: They didn't say there was no

1 danger, did they?

2 MR. FELDMAN: I am sorry.

3 QUESTION: Did they say there was no danger?

4 MR. FELDMAN: Who is that?

5 QUESTION: The Ninth Circuit.

6 MR. FELDMAN: They said there was no evidence
7 of any organized crime.

8 QUESTION: Well, they didn't say there was any
9 danger.

10 MR. FELDMAN: They didn't address the danger
11 question. That's correct. Congress --

12 QUESTION: Which is the state's whole point.

13 MR. FELDMAN: Well, I suppose at some point
14 you have to determine how realistic, how credible is the
15 danger. Here Congress has studied the issue extensively
16 over the last two years. They have conducted field
17 hearings around the country, including California, and
18 both the Senate and the House reports on this
19 legislation conclude with no qualifications that there
20 is no organized crime involvement anywhere.

21 QUESTION: On what legislation?

22 MR. FELDMAN: H.R. 1920, the Indian Game and
23 Regulatory Act, the --

24 QUESTION: That didn't pass?

25 MR. FELDMAN: That did not pass. It passed

1 the House and was approved by the Senate Select
2 Committee on Indian Affairs. It did get caught in a
3 scheduling crunch at the end of the session.

4 QUESTION: Well, for whatever reason it didn't
5 pass.

6 MR. FELDMAN: It did not pass. That's
7 correct. Our belief is, based on some information, that
8 the legislation is going to be reintroduced immediately
9 upon Congress coming back into session and we have some
10 reason to think that it will perhaps be more successful
11 this time.

12 QUESTION: Suppose California doesn't allow
13 roulette wheel gambling. Would the reservations be able
14 to have roulette wheel gambling?

15 MR. FELDMAN: No, it is illegal under --

16 QUESTION: It is illegal.

17 MR. FELDMAN: -- 15 USC 1175 and it is
18 prohibited under PL -- it would be a criminal offense
19 under PL-280.

20 QUESTION: Why is the difference between
21 roulette wheels and bingo cards more significant as to
22 whether it constitutes a prohibition as opposed to
23 merely a regulation than the difference between bingo
24 for under \$250 and bingo for \$1 million.

25 MR. FELDMAN: Well, the difference between --

1 QUESTION: Don't you think that is more
2 important, that distinction is more important? In other
3 words, I am asking, are you sure that this is just a
4 regulation and not a prohibition? California prohibits
5 bingo for more than \$250. It is just like prohibiting
6 roulette wheels.

7 MR. FELDMAN: California permits but regulates
8 the playing of bingo.

9 QUESTION: Not for over \$250.

10 MR. FELDMAN: Well, the question is, are you
11 focusing on the penal sanction or are you focusing on
12 the total regulatory scheme?

13 QUESTION: I am focusing on the activity. Why
14 isn't it realistic here in light of the interest
15 involved to consider the activity to be bingo for more
16 than \$250, and that is absolutely prohibited in
17 California.

18 MR. FELDMAN: Because California has to
19 demonstrate that it has some authority --

20 QUESTION: And this wouldn't hurt your clients
21 a whole lot because from what you tell us they don't
22 have many games over \$250 anyway.

23 MR. FELDMAN: But that isn't what the state is
24 after. The state is out to prohibit tribes from playing
25 bingo under any circumstances.

1 QUESTION: But we wouldn't have to hold that
2 way.

3 MR. FELDMAN: No, certainly not.

4 QUESTION: I mean, we could just hold that the
5 state could prohibit over \$250 and therefore they
6 clearly win here, and if the tribes want to limit it to
7 under \$250 that will be another case.

8 MR. FELDMAN: There has to be some reasoned
9 basis upon which California can exercise jurisdiction
10 over these activities.

11 QUESTION: You say they can if they have a
12 prohibition throughout the state, and as I understand
13 what has been said --

14 MR. FELDMAN: If they have a --

15 QUESTION: -- they have a prohibition on bingo
16 for more than \$250.

17 MR. FELDMAN: But the issue isn't bingo for
18 more than \$200. The issue is what is being regulated
19 here, and it is bingo, bingo as opposed to slot machines
20 or roulette wheels. Bingo is treated differently. The
21 whole concept under California law is that bingo is
22 going to be widely permitted throughout the state. The
23 state -- that is the difference.

24 QUESTION: Maybe you know gamblers better than
25 I do, but I think a real gambler would probably consider

1 the difference between a \$250 roulette game and a \$250
2 bingo game as less significant than the difference
3 between a \$1 million bingo game and a \$250 bingo game.

4 I think California is prohibiting high stakes
5 bingo and the tribes are offering high stakes bingo.

6 MR. FELDMAN: The question becomes this. Does
7 the inclusion of a penal sanction in their regulatory
8 scheme give them jurisdiction over these tribal
9 activities? That is the question you are asking. If
10 the inclusion of that penal sanction, which establishes
11 the outside limit of their regulatory scheme, does that
12 give them jurisdiction? Our answer to that under Bryan
13 is absolutely not. If that were the law, Bryan would be
14 gutted.

15 Bryan says states were not authorized to
16 exercise general regulatory jurisdiction over Indians.

17 QUESTION: All Bryan held was that a tax
18 statute couldn't be applied in Itasca County.

19 MR. FELDMAN: Well, that was the issue, but
20 the Court used the phrase "civil regulatory
21 jurisdiction, including taxation," four times.

22 QUESTION: Well, California prohibits the
23 intentional taking of a human life but allows it in the
24 case of self-defense. Does that mean intentional
25 killing is prohibited or regulated?

1 MR. FELDMAN: It is prohibited.

2 QUESTION: Good.

3 (General laughter.)

4 QUESTION: (Inaudible.)

5 MR. FELDMAN: Right. Exactly. Certainly all
6 regulation involves some aspect of prohibition. No one
7 disputes that. And this test requires some judgment to
8 be made as to which is the more important aspect of the
9 statute. At one end, if they absolutely prohibit it to
10 everybody it is clearly prohibitory. At the other end,
11 if it is not dealt with under state law, then it is
12 clearly not applicable on the reservation.

13 There are going to be gradations in between.
14 There is no question about that. But the test that has
15 been developed and the test that has been applied has
16 been effective in allowing federal courts to determine
17 the extent of state jurisdiction. That is the
18 question. Has this test been a meaningful way in which
19 courts can protect tribal self-government from
20 unauthorized assertions of state jurisdiction? We think
21 it has.

22 We think the fact that every single federal
23 court that has considered the question, and there are
24 now ten decisions over the last five years, every single
25 federal court has concluded in this manner. We think

1 there must be something to those decisions. The test
2 must be workable or all these federal courts wouldn't
3 have decided to adopt them.

4 QUESTION: How many Courts of Appeals?

5 MR. FELDMAN: I am sorry?

6 QUESTION: How many Courts of Appeals?

7 MR. FELDMAN: Four Circuit Courts, six
8 District Courts.

9 QUESTION: What are the four circuits?

10 MR. FELDMAN: Two each in the Fifth and the
11 Ninth.

12 QUESTION: So it is really two circuits.

13 MR. FELDMAN: Four different decisions. In
14 any event the --

15 QUESTION: Is that District Courts or all in
16 the Ninth Circuit or the Fifth?

17 MR. FELDMAN: No, they are scattered all over
18 the country. I think there are six different courts.
19 There have been two out of Oklahoma. Other than that
20 they have been all over the country.

21 QUESTION: Let's talk for a minute about the
22 law enforcement void that the state claims is a concern
23 of theirs here. Again, there is no evidence that there
24 is a law enforcement void. These games have been in
25 operation for three, five, six, eight, ten years, and

1 there is no evidence in the record that there has been
2 any law enforcement problem with any of these
3 operations.

4 The federal government has clear jurisdiction
5 over these activities. The FBI has a wide range of
6 statutory tools available to it to deal with any
7 organized crime problem or any law enforcement problem
8 under -- as I have already indicated under 15 USC 1175,
9 mechanical gambling devices are prohibited.

10 QUESTION: Could California enforce an age
11 limitation on the reservation for gambling, bingo
12 gambling?

13 MR. FELDMAN: For bingo gambling? No. No,
14 that is part of -- bingo is civilly regulated under
15 California law. And the tribe --

16 QUESTION: What if the state had an age
17 limitation that nobody under 16 may gamble at bingo?
18 Could they enforce that on the reservation?

19 MR. FELDMAN: That would be a matter for
20 tribal regulation. The tribes in fact do have age
21 limitations on their -- both of them have them in their
22 bingo statutes, 18. If you are under 18 you can't --

23 QUESTION: But it would be -- the tribe would
24 be the -- if they said 18 and the state 16, it would be
25 the tribal rule that would govern.

1 MR. FELDMAN: That's correct. In our view
2 this activity is subject to federal and tribal
3 jurisdiction and not state authority.

4 QUESTION: Mr. Feldman, you said the FBI could
5 come in if there was any organized crime problem, but
6 what if a tribe hired a person that the FBI thought was
7 affiliated with organized crime to manage the bingo
8 game? What could the FBI do about it?

9 MR. FELDMAN: First of all, as part of that
10 management agreement it would require --

11 QUESTION: It is an oral contract. They don't
12 write anything out, they just hire him to run the game
13 and hire and fire personnel.

14 MR. FELDMAN: Section 81 isn't restricted to
15 written agreements, Your Honor. I think that that would
16 also require Secretarial review and approval and an FBI
17 background investigation.

18 QUESTION: You mean everybody that the bingo
19 game hires is subject to FBI approval?

20 MR. FELDMAN: No, under management agreements.

21 QUESTION: Well, no management agreement. As
22 Justice Stevens says, they just hire him week by week.
23 They say come on and come to work for us, just like a
24 waitress or anything else.

25 MR. FELDMAN: Oh, if it is simply a terminable

1 employee, no, that would not be -- that would not fall
2 under Section 81 .

3 QUESTION: Supposing the security people that
4 were to protect the customers from robbery and the like
5 were all employed and the FBI thought they were all
6 persons associated with organized crime. Could they do
7 anything about it?

8 MR. FELDMAN: Well, yes, they would come to
9 the tribe and they would come to the Secretary and
10 advise them. The state seems to be operating under the
11 assumption that --

12 QUESTION: And then the tribe could decide
13 whether or not to follow their advice.

14 MR. FELDMAN: -- that the tribe isn't
15 interested in organized crime.

16 QUESTION: No, I am just -- you indicated
17 earlier, I thought, that the FBI had the power to take
18 -- to solve this problem, and I think all they could do
19 is recommend, if I understand you correctly.

20 MR. FELDMAN: Well, if those individuals
21 engage in illegal activities, the FBI does have clear
22 criminal jurisdiction. If they are involved in stealing
23 from the tribe, for example, embezzling funds, it is a
24 federal offense. But more importantly, the tribes are
25 governments, and they have an interest in seeing that

1 these games are run as effectively and as efficiently
2 and as honestly as they can. They have the most to
3 lose. So there is no reason why a tribe would knowingly
4 employ or continue to employ somebody who is going to
5 provide trouble for them.

6 Now, the tribes have been very effective in
7 regulating these activities. Their ordinances are very
8 clear as to what is and what isn't permitted. They have
9 employed security personnel to avoid any problems, and
10 even the smallest tribe, even the smallest tribes have
11 the ability to regulate their games. They can bar
12 access to the reservation to any non-Indian whom they
13 choose. They can seek judicial relief if there is a
14 problem.

15 And finally, they can close the games entirely
16 until the matter is resolved, so the tribes -- this
17 question arose in New Mexico versus Mescalero a couple
18 of years ago where the state said, well, the tribes
19 don't have an enforcement mechanism. They can't do
20 anything about it, and the Court rejected that argument
21 for much the same reasons that I have indicated.

22 Now, we have talked -- the question was raised
23 earlier about the extent of federal support and
24 involvement for these activities. I think we need to
25 talk about that just for a moment because what we have

1 here is a very clear shared understanding among all
2 three branches of the federal government that these
3 activities are a legitimate means by which tribes can
4 raise revenues.

5 We have got an unbroken line of federal
6 authority which support these activities against state
7 and local Jurisdiction. Congress has not completed
8 action and didn't pass a bill but clearly took many
9 steps which indicate what is likely to happen. It
10 issued reports, for example, which provide a pretty
11 clear factual record as to the benefits that bingo is
12 providing to these tribes.

13 They are using their revenues for governmental
14 services. They are providing programs on the
15 reservation that have never been provided for. They are
16 doing this without relying on federal funds, and that is
17 the whole idea of what tribal self-sufficiency is
18 supposed to be about. Don't rely on the federal
19 government. Go out and raise the money yourselves and
20 then provide services to your members, just like any
21 government.

22 That is what we have been telling the Indian
23 tribes for 100 years, and they have never been able to
24 do it until now. Bingo is providing 100 or more tribes
25 around the country with that ability. It is not a

1 nefarious activity. It is not threatening. These are
2 games that are being subject to close scrutiny by the
3 Secretary of the Interior, by his personnel, and the
4 federal government is strongly supportive of these
5 activities.

6 QUESTION: Mr. Feldman, you started to tell us
7 earlier the only three ways in which these games don't
8 comply with California law. You got out the first,
9 which is that tribes are not allowed to do it under
10 California law.

11 I assume the second is the stake limit.

12 MR. FELDMAN: They exceed state limits.

13 QUESTION: Right. What is the third?

14 MR. FELDMAN: The third is that they employ --
15 they employ tribal members as employees in the games as
16 part of the reason -- in order to provide employment
17 opportunities on the reservation.

18 QUESTION: Thank you.

19 MR. FELDMAN: Thank you very much.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
21 Feldman.

22 Mr. Walston, do you have anything more? You
23 have six minutes remaining.

24 ORAL ARGUMENT OF RODERICK E. WALSTON, ESQ.,

25 ON BEHALF OF THE PETITIONER - REBUTTAL

1 MR. WALSTON: Just a few comments, Mr. Chief
2 Justice. First, the plaintiffs have stated that under
3 California law the Indian tribes in this case cannot
4 conduct charitable bingo. We differ very strongly with
5 that statement.

6 The California penal code defines a charity as
7 an entity that is exempt from state taxation under the
8 state revenue and taxation code, and Section 23701(f) of
9 the state's revenue and taxation code provides an
10 exemption for a not-for-profit entity that is engaged in
11 promoting the social welfare, and our view is that
12 Indian tribes can qualify as charitable organizations
13 within the meaning of that section and therefore can
14 conduct charitable bingo on the same terms as other
15 charitable organizations in California.

16 The plaintiffs also stated that the Coleville
17 case was not applicable in this case because the
18 incidence of state regulation there fell on
19 non-Indians. There are two responses. First, the Court
20 in Coleville seemed to regard the incident of state
21 regulation as irrelevant, and instead it held that
22 Indian tribes could not gain a commercial advantage over
23 non-Indian businesses by marketing products free of the
24 limitations that may apply to those non-Indian
25 businesses.

1 The second response is that the incidence of
2 state regulation here falls -- does indeed fall on
3 non-Indians. It falls both on the tribes and on the
4 non-Indian patrons. California law specifically
5 prohibits both the operation of and the participation in
6 a lottery, a prohibition that is found in Section 320 of
7 the California penal code.

8 Therefore it is illegal for non-Indians to
9 participate in these games. The plaintiffs also argue
10 that the tribes are required, are required to submit
11 their management contracts to the Secretary of the
12 Interior for his approval.

13 QUESTION: Excuse me. It comes under the
14 prohibition to participate in a lottery?

15 MR. WALSTON: Yes.

16 QUESTION: Why doesn't that statute cover
17 their attendance at charitable bingo within the state of
18 California?

19 MR. WALSTON: Well, at a lottery that is not
20 authorized by law. Charitable bingo is authorized by
21 law. Therefore it is not illegal under California law
22 to participate in an authorized charitable game. In
23 other words, charitable games are legal under California
24 law. Therefore the charity that runs the game can
25 lawfully operate the game, and the people who play the

1 games can lawfully participate in them, but lotteries
2 that are not permissible under California law impose the
3 sanctions both against the operator and the
4 participant.

5 The tribes also made the statement that the
6 tribes are required to submit their management contracts
7 to the Secretary of the Interior for his approval, and
8 that is simply not true. There is no requirement in
9 federal law that requires these management contracts to
10 be submitted to the Secretary for his approval, and
11 indeed the Cabazon tribe in this case commenced its
12 bingo operation in March, 1983, and didn't submit its
13 management contract for approval until September, 1986,
14 after this Court granted review of the case. So it ran
15 the operation for three years without submitting he
16 management contract for approval, and apparently got
17 around to doing that primarily to improve its position
18 in this litigation.

19 QUESTION: Has the Attorney General's office
20 or the -- who enforces this law, this lottery law,
21 California lottery law?

22 MR. WALSTON: Mainly local law enforcement
23 agencies, local sheriffs and police departments.

24 QUESTION: I suppose they've got a lot to do.
25 Who -- it must be that people complain to them.

1 MR. WALSTON: Well, when there is a potential
2 violation, yes, people do indeed complain, and --

3 QUESTION: Well, I know, but whom does it make
4 any difference to?

5 MR. WALSTON: Well, I suppose the --

6 QUESTION: Whom do you think -- you must have
7 some idea who is complaining about these Indian
8 lotteries.

9 MR. WALSTON: Actually, there are very few
10 complaints about charitable bingo.

11 QUESTION: This is just an energetic local
12 prosecutor in Riverside County?

13 MR. WALSTON: Are you talking now about the
14 tribal games or the charitable games?

15 QUESTION: No, the tribal games.

16 MR. WALSTON: Oh, the tribal games are --

17 QUESTION: Who is complaining about it?

18 MR. WALSTON: -- are opposed by a wide number
19 of law enforcement agencies in California. As a matter
20 of fact, the --

21 QUESTION: All right, but they just don't do
22 it on their own, do they?

23 MR. WALSTON: Well, they feel very strongly
24 about it, Your Honor. In fact, the last --

25 QUESTION: They must -- a lot of them are

1 elected, aren't they?

2 MR. WALSTON: Well, they are, and when the new
3 fellow gets elected he comes in and complains about it,
4 too.

5 QUESTION: Well, what part of his constituency
6 is complaining? Charities?

7 MR. WALSTON: The charities themselves are --

8 QUESTION: Are really --

9 MR. WALSTON: Yes.

10 QUESTION: There is competition. There is
11 real competition, isn't there?

12 MR. WALSTON: Yes. That is actually correct.
13 As a matter of fact, I recall the situation in
14 Arizona --

15 QUESTION: So I wouldn't think a local
16 prosecutor would get so excited unless there might be a
17 question of votes or something.

18 MR. WALSTON: Well, I -- no, there is a vast
19 opposition to charitable -- tribal bingo in California,
20 and much of the opposition --

21 QUESTION: From the charities.

22 MR. WALSTON: -- does indeed come from
23 charities. In fact, I am familiar with the situation in
24 Arizona involving the St. Keno Learning School that was
25 dependent strictly upon charitable -- or I should --

1 yes, charitable bingo proceeds, and it was forced to
2 shut down simply because of the competition from the
3 tribal games in Arizona.

4 The tribes have also made the argument that
5 the tribes need high stakes bingo in order to
6 effectively survive and obtain revenue for tribal
7 purposes and that they have no real options other than
8 tribal bingo. Well, President Reagan's policy statement
9 on which the tribes have relied so heavily in this case
10 indicates that a number of other types of options are
11 available to the tribes to generate revenues for tribal
12 purposes, and these purposes are listed at Pages 226 and
13 227 of the joint appendix, and they are as follows:
14 manufacturing, agribusiness, and modern technology;
15 second -- I am sorry, my time is up.

16 CHIEF JUSTICE REHNQUIST: Your time has
17 expired, Mr. Walston.

18 The case is submitted.

19 (Whereupon, at 2:35 o'clock p.m., the case in
20 the above-entitled matter was submitted.)
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CERTIFICATION

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

#85-1708 - CALIFORNIA, ET AL., Petitioner V. CABAZON BAND OF MISSION
INDIANS, ET AL.

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

BY Paul A. Richardson

(REPORTER)