OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS OF ALASKA, Petitioner V. NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE

CASE NO: 89-1782

PLACE: Washington, D.C.

DATE: February 19, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID HOFFMAN, COMMISSIONER, :
DEPARTMENT OF COMMUNITY AND :
REGIONAL AFFAIRS OF ALASKA, :
Petitioner :
v. : No. 89-1782
NATIVE VILLAGE OF NOATAK AND :
CIRCLE VILLAGE :

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Washington, D.C.

Tuesday, February 19, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:58 p.m.

APPEARANCES:

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

LAWRENCE A. ASCHENBRENNER, ESQ., Anchorage, Alaska; on behalf of the Respondents.

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P R O C E E D I N G S

(1:58 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-1782, David Hoffman v. Native Village of Noatak and Circle Village.

You may proceed, Mr. Lee.

The spectators are admonished the Court remains in session. There is to be no talking.

ORAL ARGUMENT OF REX E. LEE

ON BEHALF OF THE PETITIONER

MR. LEE: Mr. Chief Justice, and may it please the Court:

The principal issue in this case is whether an Indian tribe can sue a State without its consent. This Court has upheld unconsented waivers of State sovereign immunity in only two discrete circumstances. First, either the United States or another State can sue a State, because those suits, this Court has declared, are essential to the plan of the convention. And second, Congress, by statute can abrogate the State sovereign immunity so long as there is a clear textual statement that Congress really intended to do that.

The effort to show that suits against States by Indian tribes are either essential to the plan of the convention or that they have been approved by clear

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textual statement by Congress will not withstand scrutiny.

With respect to what is essential to the plan of the convention, quite unlike the United States and the States, neither foreign governments nor Indian tribes figured in the various compromises and other arrangements of which that convention consisted. The major players in the convention's plan were, of course, the States themselves. It was their surrender of sovereign prerogatives that brought into existence the new Constitution and the new republic, the United States.

All sides agree that, as stated very well by my opponents, there is not a shred of evidence that the ability of the Indian tribes to sue the States was even remotely in view during that time of the Constitutional Convention.

QUESTION: Mr. Lee, you are addressing, of course, the sovereign immunity point. When the petition for certiorari was filed it included a third question, asking whether Federal question jurisdiction was -- whether it exists, a point that was addressed by Judge Kozinski in his dissent below. Now in your brief on the merits I see that that isn't even addressed. Are you giving up that point?

MR. LEE: No, Justice O'Connor. Thank you for asking the question. We are not giving up the point. A

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tactical judgment was made along the line not to address it. We would welcome a victory on either ground. On the merits, we agree completely with what Judge Kozinski had to say, that there is no substantial Federal question.

The only point on which we disagree with Judge Kozinski is which is the easier ground, on which --

QUESTION: Is injunctive relief sought here? And if so, even if you were right on the Eleventh Amendment point, is there something left?

MR. LEE: We think not. And the reason is that the only injunctive relief has to do with what has happened, what would happen in the future. That, of course, is governed by a 1985 statute that is passed by the Alaska legislature, and I just can't see any possible way that anyone can take the position that Federal law, Fourteenth Amendment or otherwise, prohibits a State from lengthening the list of possible recipients. Now I realize that that also goes to the very question that you're asking, which is the substantial Federal question.

The only reason that we feel that the easier, the cleaner, and the better ground for reversal of the Ninth Circuit's judgment is sovereign immunity rather than the substantial Federal question -- and both of them of course are jurisdictional -- is twofold. The first is that, has to do with the respective burdens that are

imposed by those two doctrines.

On the one hand, under Hagans v. Lavine and Bell v. Hood and others, the burden is on us at this stage of the game to show that the Federal question is so attenuated as to be obviously frivolous, whereas the Court has made it quite clear, as I'd like to explain in just a moment, that the burden of establishing that sovereign immunity does not exist is, of course, on the respondents, and that is a similarly heavy one.

The second reason is, pertains really to the Court's considerations and ours as well, and that is that if the case is decided on Hagans v. Lavine grounds, that it becomes a rather inconsequential footnote, Hagans v. Lavine, that makes no difference to anyone in this courtroom, whereas the sovereign immunity issue involves a conflict in the circuits. It's one that affects my clients very deeply. It -- the two circuits involved are two major Indian population circuits and that need to be resolved.

So that while a victory on either ground would not be unwelcome, we would urge the Court to concentrate on the court's -- on the Ninth Circuit's sovereign immunity error.

QUESTION: But isn't it true --

QUESTION: Isn't it certainly true you didn't

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give much emphasis to the other point?

MR. LEE: That is correct.

QUESTION: And I really wonder why.

MR. LEE: Coming back to this concession, and I really do regard it as a concession by the respondents, that the Constitution makers simply did not have the Indian tribes in view, that acknowledged fact supports the petitioner and not the respondents. The issue here is whether a sufficiently compelling case can be made to overcome the sovereign immunity bar, and that burden, as I mentioned just a moment ago, is on the respondents and not on the petitioners.

QUESTION: Mr. Lee, can I ask this question? It goes to that. Is the sovereign immunity bar that you rely on one that predated the Eleventh Amendment, or is it the Eleventh Amendment?

MR. LEE: Both.

QUESTION: Because if it's the latter, then of course the, the Constitutional Convention business would be irrelevant.

MR. LEE: That is correct. That is correct.

QUESTION: Yeah.

MR. LEE: That is correct. Probably the best statement of that, incidentally, appears in the brief of the Academy for State and Local Governments that, really,

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sovereign immunity of both the United States and the states did preexist the Eleventh Amendment.

I would just ask in this respect that you consider the anomaly that would result if the Ninth Circuit's judgment remains the law, because it would mean that Indian tribes who were not participants in either the convention nor the Eleventh Amendment proceedings would be able to sue the States, but that States who were participants and who ceded powers were what made the convention possible could not sue tribes. And surely no one can say with a straight face that that kind of result was part of the plan of the convention.

QUESTION: The States were at least as -- at as high a degree of dignity, so to speak, as the Indian tribes?

MR. LEE: Oh, much higher.

QUESTION: Well, but all you have to show is --

MR. LEE: Insofar as the plan of the convention is concerned.

QUESTION: Yes.

MR. LEE: Yes, yes. But that's the anomaly. That's the anomaly, yes, Mr. Chief Justice.

QUESTION: Of course States can sue each other.

MR. LEE: That is correct. That is correct. And in that respect they have something to give and

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something to get from the compromise the States could sue each other. But again, it just points out the unevenhandedness. No one disputes that the State of Alaska cannot sue a tribe. Probably the principal argument --

QUESTION: Of course that one is specifically referred to in the Constitution.

MR. LEE: What is that?

QUESTION: The fact that States can sue each other.

MR. LEE: That is correct. That is correct.

The argument that the -- probably the principal argument on which the Ninth Circuit relies, indeed it's whole opinion rests on the foundation, that the naked Indian Commerce Clause, in the absence of any affirmative congressional enactment, somehow waives the State sovereign immunity. That argument proves too much, and it does so along two separate dimensions.

First, if the unexercised congressional power to regulate commerce with foreign nations, with the various States, with the several States, and among the Indian tribes, waives State sovereign immunity in all suits brought by Indian tribes, then why not also in suits brought by plaintiffs in the other two constitutionally recognized commercial categories, namely --

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QUESTION: Monaco against Mississippi was wrongly --

MR. LEE: Exactly. Exactly. Exactly. And not only Monaco v. Mississippi, but also State commercial plaintiffs, interstate commercial plaintiffs. Similarly, if the bare existence of congressional law-making power waives immunity, then why is there not also a waiver in all suits brought against States by plaintiffs in bankruptcy cases, in patent cases, and in admiralty cases?

Second, and even more important, it is now well established that Congress will not be assumed to have waived sovereign immunity -- waived the State's sovereign immunity unless there is a clear textual statement to that effect. Surely the law cannot be otherwise where Congress simply has the authority to act but has not done so. It makes no sense at all to say that something less than a clear congressional textual statement will not suffice, but that no statement at all will.

And this brings us to the argument that Congress, by enacting 28 U.S.C. Section 1362, has satisfied the clear statement rule. Not even the Ninth Circuit agrees with that proposition, and even a casual examination of the statute reveals why. Section 1362 just is not a statute that deals in any way with sovereign immunity. It is solely a jurisdictional statute. It does

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not even mention States. It does not even mention sovereign immunity. There is no statement at all, clear, textual, or any other.

The respondents appear to recognize as much, and their strongest argument with respect to 1362 is that the clear statement rule should not apply for any statute that was adopted between 1964, when pardon came down, and about the mid-1980's, when this Court in a series of cases -- probably Pennhurst, too, but clearly Atascadero, Welch, and Dellmuth -- laid down the clear statement rule.

Aside from its inherent illogic, and I submit that it is inherently illogical, that same argument would necessarily apply to a statute that was adopted in 1973, the date of enactment of Section 504 of the Rehabilitation Act, which was at issue in Atascadero, or in 1975, which was the date of the Education of the Handicapped Act, which was the statute involved in Dellmuth.

Indeed, the very argument that the respondents make here in that respect, that you ought to have one constitutional rule applicable for one 20-year period and another one for all else in history, was expressly made, addressed, and rejected in this Court's most recent pronouncement in this area, which is Dellmuth v. Muth.

After first observing the unlikelihood that what Congress was really doing in the Education of the

Handicapped Act was just trying to draw coy little hints, and that's the Court's language, about the meaning of the Eleventh Amendment, the Court then goes on to say this. The salient point, in our view, is that it cannot be said with perfect confidence that Congress in fact intended in 1975 to abrogate sovereign immunity, and imperfect confidence will not suffice, given the special constitutional concerns in this area. That statement, which is a correct statement of the law, applies just as much to a 1966 statute as it does to a 1973 statute, and the respondents' argument here comes 2 years too late.

We're told, however, that Indian tribes should be able to sue the States because the United States could bring the suit. The right of the United States to bring these suits on the Indians' behalf cuts solidly in favor of sovereign immunity, and not against it. One of the firmest pillars of our Eleventh Amendment, and generally sovereign immunity jurisprudence, is that it is a constitutional right; it will not be lightly abrogated.

But the Federal Government does have the right to abrogate it, and it can do so in either of two ways. First of all, Congress can abrogate, so long as it passes a statute that clearly says right in the text that Congress intended to do so. And the other way that the Federal Government can abrogate it is by the executive

branch bringing suit.

What these plaintiffs are really asking for is a rule that would set aside sovereign immunity in those cases where the Federal Government has not made, where the United States has not made the necessary judgment call that suit against a State is warranted, given the intrusion that -- by one sovereign of the prerogatives of another, that such suits necessarily --

QUESTION: Mr. Lee, do you think your argument is entirely consistent with our holding in Nevada against Hall?

MR. LEE: Now that's one I hadn't thought of. I remember Nevada against Hall. Well, of course -- I don't see --

QUESTION: The citizen of --

MR. LEE: Yeah, I remember. It was a citizen of California, and -- brought suit in Nevada.

QUESTION: Brought suit in the State court against him.

MR. LEE: Well, it found no sovereign immunity there, but Hall was certainly not an Indian tribe. As I'm just not --

QUESTION: It seemed to me your arguments would have required the -- a different result in that case.

MR. LEE: Might have.

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QUESTION: Yeah.

MR. LEE: Might have, but I'm not asking for a rehearing in Nevada v. Hall.

(Laughter.)

MR. LEE: I have one State to worry about, and not another.

But you see, Nevada v. Hall long antedated what I think in all fairness you have to regard as a rule that began to emerge within about the last 6 or 7 years.

QUESTION: You mean the clear statement rule.

MR. LEE: The clear statement rule, yes.

QUESTION: Because there was no congressional statement whatsoever there --

MR. LEE: There was no congressional statement whatsoever.

QUESTION: That's right.

QUESTION: Where was that suit brought? Federal, State court?

QUESTION: State court.

MR. LEE: I think it was brought in State court, but -- in State court of California, as I remember.

QUESTION: State court.

MR. LEE: Yes. I don't think that one really, really affects, really affects my analysis.

Similarly unpersuasive is the contention, for

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reasons that were alluded to just a moment ago by the Chief Justice, that sovereign immunity applies only to suits by individuals and not governments, assuming for the moment that you can -- that these respondents qualify as governments. And that, of course, is squarely rejected by the holding in Monaco v. Mississippi, which the respondents concede.

But they have an explanation for Monaco v. Mississippi, and it is that there was a subterfuge involved in that case. The assignment of the confederate State bonds by the individual holders to a government. The individuals couldn't bring the suit, but they assigned them to a government so that the government could.

There are two problems with that, with that argument. First is that the court simply didn't rely on that argument. And the second is that once again it proves too much because that identical circumstance, assignment of confederate State bonds by their individual holders to a State, was precisely what was at issue in the leading case standing for the proposition that a State can sue another State, namely South Dakota v. North Carolina. And indeed in South Dakota v. North Carolina that very argument was made and rejected.

The real difference, I submit, is not whether it's an individual or a government. The only difference

that really matters is what was in the plan of the convention. The States and the Federal Government were the participants in the convention, so that suits by either of them are essential to the convention's plan.

Now, if the Court agrees with our position concerning sovereign immunity, then it need never reach the question that the more I get into it the more I can see that it is complex and difficult and would have far-ranging consequences. And that is if you assume that there is some entity that is Indian related that can sue a State, how do you determine who those Indian-related entities are?

The one thing that is clear is that the Ninth Circuit's rule on this issue just cannot be the law, because what that court has done is to take two other statutes whose coverage and definition include far more than just tribes and whose purposes have nothing to do with either sovereign immunity or Section 1362, and declare that any group of natives covered by either the Indian Reorganization Act or the Alaska Native Claims Settlement Act automatically have all State sovereign immunity defenses waived in their favor in any suit they bring against the State.

It would mean, for example, that native-owned fishermen's cooperatives, purely commercial ventures, or I

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would assume, residential neighborhood watch associations composed of native members could sue the State. The reason is that the Indian Reorganization Act, which is one of the incorporation by reference statutes that the Ninth Circuit used, extends not just to tribes but also to -- and I'm quoting -- groups -- groups having a common bond of occupation or association or residence.

You're led to the conclusion that Judge Kozinski's footnote on this issue is probably right, that it extends to -- that any group of natives that has any kind of -- that has a Native American membership and has any common bond of association has Eleventh Amendment sovereign immunity waived in suits brought by them.

Finally, and perhaps worst of all, the Ninth Circuit's rule would make a shambles of existing sovereign immunity principles for this reason. You start from the proposition, and even the Ninth Circuit agrees with this, that Section 1362 does not waive sovereign immunity, and yet you end up in a rule -- with a rule that for a group of plaintiffs far broader, far broader than those identified by 1362, sovereign immunity is waived as to them.

Mr. Chief Justice, unless the Court has further questions, I'll save the rest of my time.

QUESTION: Very well, Mr. Lee.

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Mr. Aschenbrenner, we'll hear now from you.

ORAL ARGUMENT OF LAWRENCE A. ASCHENBRENNER

ON BEHALF OF THE RESPONDENTS

MR. ASCHENBRENNER: May it please the Court. Mr. Chief Justice, and may it please the Court:

Alaska and amicus States tell us that if tribes are permitted to sue the States directly it will upset the constitutional plan, endanger the States' treasuries, and violate the fundamental principle that sovereign States can't be sued without their consent. The States imply that there may be many cases pending if this Court should open the floodgates to direct tribal suits.

The facts are otherwise. It has been over 14 years since this Court decided Moe v. Salish and Kootenai, which the lower courts immediately construed to abrogate the State's sovereign immunity from suit by tribes, and there has been a grand total of nine tribal-State suits filed. And none of those nine have apparently been so damaging to the State treasuries that a single State has bothered to go back to Congress and seek the reversal. Nor can it be accurately stated that permitting direct tribal suits would upset the constitutional balance.

It's not as if the States came here with their historic sovereign immunity fully intact. To the contrary, they have already surrendered their immunity and

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consented to be sued by the United States on every Indian claim the Government chooses to bring.

QUESTION: Or on any other claim that the United States chooses to bring.

MR. ASCHENBRENNER: Yes, Your Honor.

QUESTION: It isn't peculiar to Indian claims.

MR. ASCHENBRENNER: Yes, Your Honor.

In short, though, with respect to Indian claims, the Federal courthouse doors are already wide open. Thus the question for -- before this Court is whether permitting tribes to bring the same identical suits which the States have already consented to be sued on would upset the constitutional balance. And we submit to you the answer is no.

QUESTION: You say that it makes no difference who the plaintiff in those suits is, whether it's the United States or some group of Indians?

MR. ASCHENBRENNER: That is correct. It would not upset the constitutional balance for the following reasons. First, the States consented to be sued on direct tribal claims inherently in the constitutional plan. In U.S. v. Texas and South Dakota v. North Carolina this Court held that a Federal forum for the peaceful resolution of Federal-State and State-State suits was essential to the peace and permanence of the Nation. At

the time the Constitution was adopted the threat of Indian wars was far more eminent and critical than wars between the States.

Recall that during the Articles of the Confederation numerous wars had occurred, the Federalist Papers tell us. And numerous lives had been slaughtered, Madison tells us. Recall that on the eve of the convention Georgia had invaded Creek territory and attempted to set up counties, and that North Carolina had intruded on the Cherokees and the Choctaws, and they were hostile. And New York had intruded on the Iroquois, and they were hostile. The historians tell us that the reason Georgia so rapidly ratified the Constitution was to get Federal defense in case the Creeks attacked. And that's the way it was when the Constitution was adopted.

If, therefore, a Federal forum was so essential to keep the peace of the Nation in the case of U.S.-State and State-State suits, far more so was such a forum necessary to keep the peace in tribal-State disputes.

QUESTION: I don't think they really expected the Creeks and the Choctaws to hire a lawyer, do you?

MR. ASCHENBRENNER: I think they did, Your Honor, for this reason, and I cite Justice Stevens' dissent in Oneida v. Oneida, where they quoted George Washington's speech to the Senecas. And George

Washington, recall, was the president of the constitutional convention, the lead framer, if you will. And when in 1790, just 1 year after the Constitution was adopted, he gave a speech to Corn Planter, Chief of the Senecas, he said if your rights have been violated under the Indian Non-Intercourse Act either by individuals or States, he said, "the Federal courts will be open to you."

But even assuming for a moment that Marshall was right and that most of the framers didn't have the tribes in view when they drafted Article III, the jurisdictional provision, that just begs the question. The question is -- this Court has many, there are many questions which the framers didn't contemplate which this Court has nonetheless been compelled to answer. And so the question is not what the framers actually had in mind, but whether a Federal court forum to resolve these kind of controversies was essential to the plan of the convention. So that --

QUESTION: Excuse me. If a Federal forum was essential to the plan of the convention, it didn't prove to be essential in the first 200 years, I take it, since this really is the first of these cases that has been brought to this Court, isn't it?

MR. ASCHENBRENNER: That is true, Your Honor, but following that reasoning, one could say that State

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versus State -- Federal jurisdiction over State versus States disputes was not essential to the constitutional plan either, because it took until 1892, 100 years later, before you first decided that one.

QUESTION: Maybe we should recognize one set each 100 years.

MR. ASCHENBRENNER: This is the year.

(Laughter.)

MR. ASCHENBRENNER: The more precise question then again before this Court is whether a Federal court jurisdiction over direct tribal suits is likewise essential to the constitutional plan, not just suits by the United States on Indian claims. And I submit this depends on whether all tribal-State controversies would be subject to resolution if only the Government could bring the claims, and that this Court has answered no. In Moe v. Salish and Kootenai and Arizona v. San Carlos Apache this Court found that the Government is not infrequently -- has a conflict of interest which precludes it from suing on behalf of the States, or it's otherwise unwilling to sue. Indeed this Court said that was one of the primary purposes for adopting 1362.

QUESTION: You mean suing on behalf of the Indians, don't you?

MR. ASCHENBRENNER: Yes. Yes, sir. As this

Court said in Poafpybitty v. Skelly, quote, "the Indians' right to sue should not depend on the good judgment or zeal of a Government attorney." Accordingly, because all tribal-State controversies could not be resolved unless the Indians could sue where the Government couldn't or wouldn't sue, Federal jurisdiction over direct tribal disputes is inherent in the plan of the convention.

This -- this Court's case in Arizona v. California supports the conclusion that Federal court jurisdiction is not strictly limited to -- Indian claims brought by the United States. Recall in that case this Court allowed five Indian tribes to intervene in a case that the Government had filed, over the objections of the States, the Eleventh Amendment objections of the States, even though the Indian claims were far more expansive than the Federal claims.

Now, if Federal court jurisdiction is strictly limited to -- and party based to the United States, they should have never been permitted to intervene. But Justice White, for the Court, said nonetheless the tribes are entitled to take their place as independent, qualified members of the body politic, and accordingly their participation in litigation critical to their welfare should not be discouraged, and they were admitted in.

QUESTION: Mr. Aschenbrenner, does your -- is

this a two-way street that you're urging? I guess the tribes have no sovereign immunity either, then, right?

MR. ASCHENBRENNER: All right, we'll get to that point right now, Your Honor.

QUESTION: Thank you.

MR. ASCHENBRENNER: It's true that what -- let me start -- preface that by saying it's true that the consents were not reciprocal. The States consented to be sued by the tribes, we submit, but the tribes didn't consent to be sued by the State.

QUESTION: That's extraordinary. I thought the States were in control of it, and they come out with the short end of the stick. The tribes have sovereign immunity and the States don't. They must have been very stupid people back then. I don't know how that happened.

MR. ASCHENBRENNER: No, it's a result of history and how the Constitution was constructed.

QUESTION: How did the States consent to these -- or to be sued by Indian tribes?

MR. ASCHENBRENNER: Well, in the first place they of course consented to be sued by the United States on Indian claims --

QUESTION: Yes.

MR. ASCHENBRENNER: -- and that benefit of that ran to the tribes --

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QUESTION: The United States --

MR. ASCHENBRENNER: -- even though they didn't --

QUESTION: Yes, but that -- that doesn't answer the question I asked you.

MR. ASCHENBRENNER: Pardon me.

QUESTION: I said that doesn't answer the question I asked you. I asked you how the States consented to be sued by Indian tribes.

MR. ASCHENBRENNER: How they did that?

QUESTION: Yes.

MR. ASCHENBRENNER: I -- we submit they did it the same way they consented to be sued by other States in the United States. It was inherent in the constitutional plan because it was necessary to keep the peace. But I'm trying to answer -- if that answers your question --

QUESTION: Go ahead.

MR. ASCHENBRENNER: I'm trying to get, to answer why the States can't sue the tribes. The tribes, the States -- well, the tribes can sue States because the States consented to it in the constitutional plan. On the other hand, the tribes were not participants in the constitutional plan, and therefore they cannot be said to have consented to anything.

Further, the sovereign immunity of States and

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the tribes developed along different lines. The sovereign immunity of the States has been justified almost solely on the ground of protecting the State treasury. Sovereign immunity of the tribes, on the other hand, has been based on that, but also on the Federal policy embodied in numerous laws to further tribal self-government and protect economic self-sufficiency of the tribes. Thus the Congress has codified the tribes' sovereign immunity, and therefore only Congress can abrogate it.

This Court's rationale in the leading tribal sovereignty case, U.S. v. Fidelity, tells us indeed that the United States holds the tribes' sovereign immunity in trust for the tribes, just like it holds their property in trust. Therefore, States cannot sue tribes because they would be suing the United States, the tribes' trustee.

QUESTION: I thought Fidelity -- was that Fidelity -- that was the counterclaim case, wasn't it?

MR. ASCHENBRENNER: Yes, sir, that was.

QUESTION: And that was also where they extended the tribal sovereign immunity to counterclaims. Is that also the leading reasoning for the immunity of the tribes at all?

MR. ASCHENBRENNER: This -- the statement I am relying on has been frequently quoted, and it says, quote, "it is as though the immunity which was the tribes, as

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sovereigns, passed to the United States for their benefit, as their -- tribal properties did."

QUESTION: That's the explanation for the whole thing?

MR. ASCHENBRENNER: That's the explanation of why tribes can sue States, but that Congress is the one that can abrogate the tribes' immunity and put the States on the same plan with the tribes. The same constitutional plan under which the tribes consented to suit by the States gave the Congress the power to rectify any imbalance, but thus far Congress has realized that sovereign immunity is important to the tribes, and it's important because it furthers the strong Federal policies supporting tribal self-government and economic self-sufficiency. To the extent tribes go bankrupt, a greater burden is placed on the Federal Government. Therefore Congress should be the one to abrogate tribal sovereign immunity --

QUESTION: Well, Congress --

MR. ASCHENBRENNER: Pardon me?

QUESTION: Congress can abrogate a State's Eleventh Amendment sovereign immunity as well, can't it?

MR. ASCHENBRENNER: Yes, it can.

QUESTION: So we can just leave it in the hands of Congress either way, I suppose.

MR. ASCHENBRENNER: Well, one could do that if one wanted to assume that the resolution of tribal-State conflicts at the time of the convention -- not now, we're dealing with at the time of the convention -- wasn't equally or more important to the peace of the nation than State-State or Federal-State controversies. It seems to me history -- history dictates one answer. And indeed there -- the States must have agreed partially because they did consent to suits by the United States on behalf of tribal claims. In other words, there was an imbalance between the States and the tribes from the very beginning. The balance was struck that way when the Constitution was adopted.

Now the States also argue that the Government has a trust responsibility to sue on behalf of tribal claims, and the States are entitled to rely on the good judgment of the Government in deciding which and when it will bring tribal claims. Well, I tell you in the first place, the Government's trust responsibility is for the protection of the tribes, not the States. Therefore the Government's -- they have, are not entitled to rely on the Government's discretion when the Government is exercising its trust responsibility.

QUESTION: Do you think an Indian tribe may sue a State in its own court, in the State's own courts

against the State's -- without the State's consent?

MR. ASCHENBRENNER: In the State's own courts? I haven't thought about that directly, but it -- it's not necessary to my argument to say yes, Your Honor. I think we're talking about the Federal courts and the Federal constitutional plan.

QUESTION: Well, why is the Federal court different?

MR. ASCHENBRENNER: Pardon?

QUESTION: Why is the Federal court different?

MR. ASCHENBRENNER: Because we're relying on the Federal structure, the constitutional plan, what did the framers believe.

QUESTION: I would think you would have answered -- at least you -- I'll ask you another question. Do you think Congress could constitutionally say that State sovereign immunity will not be good against a suit by an Indian tribe in the State's own courts?

MR. ASCHENBRENNER: Yes, I think it probably could.

QUESTION: But they haven't.

MR. ASCHENBRENNER: But they haven't, no.

QUESTION: But they have, you think, without saying a word -- State, the -- the States do not have sovereign immunity in the -- without Congress saying the

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word, the States do not have sovereign immunity in the Federal courts.

MR. ASCHENBRENNER: Right. It's inherent in the constitutional plan.

QUESTION: Mr. Aschenbrenner, I'm surprised at your answer. I thought one of -- there are three different theories for sovereign immunity. One is that a State can control in its own judicial system what cases it will entertain, and I would assume a State could have its own sovereign immunity for cases within its own State system. And I don't know what the power of Congress would be to tell a State it must entertain actions by Indian tribes in its own State's court system. I don't understand the basis for your answer to Justice White.

MR. ASCHENBRENNER: Well --

QUESTION: It's quite different when a different sovereign, when it's suing in the Federal system it's arguable under the Nevada against Hall rationale that they don't have any sovereign immunity there. I don't know how you can say that Congress can abrogate the State's sovereign immunity when it's governing its own court system.

MR. ASCHENBRENNER: Well --

QUESTION: Maybe you don't -- we don't have to argue about that in this case.

MR. ASCHENBRENNER: I haven't really addressed that in my own mind, Your Honor, so I shouldn't have committed myself.

I'm going to go back a moment to the State's argument that they should be allowed -- able to rely on the good judgment of the Government in determining what tribal claims should be brought. The unstated premise of that argument, I submit, is that the Federal Government would be less zealous in pursuing tribal claims than the tribes would be on their own behalf, and therefore there would be greater potential liability of the State treasury.

But we suggest the Court should not construe the constitutional scope of Federal jurisdiction on any assumption other than the Federal Government would fully, faithfully, and zealously carry out its sacred trust responsibility to the tribes. And operating on that assumption, it could mean no difference to the States whether they are sued by the United States or by the tribes, save and except those limited cases where the Government has a conflict or is otherwise unable to act.

QUESTION: You think the concept of the United States as a trustee for the Indian tribes is clear from the Constitution, or is that something that just developed by practice and statute after the Constitution?

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MR. ASCHENBRENNER: Well, the Court has said both, I think.

QUESTION: But, well -- what was the fact, do you think?

MR. ASCHENBRENNER: I think that the trust responsibility, the Court has said, arose from the power and the dependence of the tribes. From the power that was delegated the Federal Government in conjunction with the very dependent status of the tribes arose a duty to protect the tribes.

QUESTION: Well, but that isn't just -- that isn't a general duty to protect the tribes. It's a duty to, to deal faithfully with land that is held for the tribe, is it not?

MR. ASCHENBRENNER: Oh, far more than land, Your Honor. Even in your own case of Moe v. Salish and Kootenai, where you refer to it -- I can't quote you exactly, but you said something to the effect that it was -- the duty is to protect tribal self-government. And even the Cherokee Nation case was all about the annihilation of the Cherokee government.

QUESTION: Well, but that, that was at the hands of the Government of the United States itself, was it not?

MR. ASCHENBRENNER: No, it was at the hands of Georgia.

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QUESTION: Well, could an Indian tribe sue the United States and say we -- not with respect to any land or not with respect to anything the United States was doing, but just saying you're not doing enough for us?

MR. ASCHENBRENNER: Oh, certainly not, Your Honor. No. There has to be a breach, a clear breach of Federal law.

QUESTION: In order -- well, would it be a Federal -- a breach of Federal law if a tribe somewhere, say in Alaska, said we're very poor, we're losing our culture, and we really need lots of money to restore it. Would that be a cause of action against the United States?

MR. ASCHENBRENNER: Certainly not, Your Honor. No.

QUESTION: It has to be something a good deal more tangible than that, doesn't it?

MR. ASCHENBRENNER: I agree. No question.

In short what we're saying, that direct tribal suits would not upset the Federal constitutional balance because the States would not be subjected to a single Indian claim which they could otherwise claim immunity from. Now the States also ask how can the Indian commerce clause be self-executing and abrogate sovereign immunity when the interstate commerce clause isn't. It's not the Indian commerce clause that wipes out the States' immunity

from suit by tribes. It's the structure of the Constitution that is inherent in the constitutional plan.

QUESTION: That argument goes only to the Federal courts, apparently.

MR. ASCHENBRENNER: That's all I'm addressing here, Your Honor.

QUESTION: Well, I know, but earlier in your argument you said the States, when they -- waived their sovereign immunity.

MR. ASCHENBRENNER: Yes.

QUESTION: Just to the Federal courts?

MR. ASCHENBRENNER: Yes, that's the only part of the -- that's the only thing that's inherent in the -- in the Federal -- in the constitutional structure. That's the only thing this Court said in U.S. v. Texas and South Dakota v. North Carolina, is that they consented to be sued by the Federal Government and that sister States, to keep the peace, and therefore it was inherent in the constitutional plan. All we're saying, tribes are in the same situation.

QUESTION: Can the United States sue a State in a State court on an Indian claim despite the State's sovereign immunity?

MR. ASCHENBRENNER: I'm not sure of the answer to that question, Your Honor.

To finish up on the automatic self-executing claim that Alaska makes for our argument, we'd say on the other hand there isn't anything in the constitutional structure which dictates that private suits against States are necessary to keep the peace, and therefore Congress has to pass a law abrogating the States' sovereign immunity.

Now Monaco. The State says that Monaco v. Mississippi bars tribal suits, but the Court's rationale for barring suits by foreign countries simply doesn't apply to governments within the constitutional structure. Suits by foreign nations, the Court said, could involve international law questions and foreign relations, whereas tribal-State suits and State-State suits could not involve international relations, because both the States and the tribes were divested of their foreign relations authority, the States by delegating it to the United States, the tribes by -- as a result of their dependent status.

In fact in Hans v. Louisiana this Court held that Federal court jurisdiction over State-State disputes was, quote, "necessary" because of the extinguishment of diplomatic relations between the States. The precise same rationale applies to tribal-State disputes, because their diplomatic relations were extinguished in the Constitution.

QUESTION: Did the States have diplomatic relations with the tribes before the Constitution?

MR. ASCHENBRENNER: They certainly did. Under the articles they attempted to, and a number of times succeeded and constantly undercut the Federal Government. And of course before -- even before the articles and after --

QUESTION: You -- I mean diplomatic relations in the ordinary sense of the word, not just occasional --

MR. ASCHENBRENNER: Yes. New York entered into treaties with them, with the Iroquois.

QUESTION: Other States, too?

MR. ASCHENBRENNER: I'm sure they did, but I can't quote them to you, cite them to you.

All right, then we move onto the next point, and that is the 1362 argument. We say even if direct tribal-State suits were not inherent in the constitutional plan, Congress abrogated them under 1362. And 1362 must be read as construed in Moe and construed -- and as construed in Moe it satisfies the clear statement rule of Dellmuth.

Now you'll recall in Moe you held that a tribe could sue a State and override the anti-injunction act, because you held that 1362 was intended to put tribes in the place of the Government. Now it's true that Moe involved the anti-injunction act and not the Eleventh

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Amendment, but --

QUESTION: Was Moe -- was Moe a suit against the State?

MR. ASCHENBRENNER: By name, Your Honor.

QUESTION: The State of Montana?

MR. ASCHENBRENNER: Yes, sir. Yes, sir.

It's true that Moe involved the anti-injunction act rather than the Eleventh Amendment, but they are both broad jurisdictional barriers and both their purposes are identical: to protect the State treasury. Indeed this Court has called the taxing power the lifeblood of government. Nonetheless, you overrode the anti-injunction act and permitted tribes to sue, because you said the Government could sue.

But even if 1362 as construed in Moe does not satisfy the clear statement rule, we submit that rule is simply inapplicable to 1362 for this reason. This case is distinguishable from every other clear statement case you have had because in none of them had this Court previously construed the statute in question to permit suits against States. The purpose of the clear statement rule, after all, is to determine congressional intent, and this is what the Court already did in Moe.

To reinterpret 1362 now by applying the clear statement rule and reach a different result would be

anomalous. To construe a statute one way when one defense is raised -- the anti-injunction act, and construe the identical statute a different way when a different defense is raised -- the Eleventh Amendment, would put the meaning of the act in the hands of the defendant rather than the Congress.

Moreover, reinterpretation of 1362 is particularly unjustified here, where Congress has had 14 years to reverse the Court's construction of Moe and hasn't seen fit to do it.

Finally, under the contemporary legal context doctrine the Court will engage in the presumption that Congress knows the law, is familiar with this Court's precedents, and will draft its legislation to conform with the rules of construction this Court has laid down. In 1966, when 1362 was passed, the rule of construction for abrogating tribal sovereign immunity of this Court was pardon. And the rule in pardon was that when a State statute on its face is broad enough to include States, the States are included and their sovereign immunity has been waived.

In short the rule in pardon is almost directly opposite of the clear statement rule. Under pardon a State must be expressly excluded to avoid liability, whereas under the clear statement rule States must be

expressly included to be held liable. In pardon this Court refused to follow Justice White's four-justice dissent demanding a clear statement rule. And that's the way it was 2 years later when 1362 was adopted. This Court hadn't even given a --

QUESTION: Mr. Aschenbrenner, do you have at your fingertips a citation somewhere to the Moe opinion where it shows that the State of Montana was a party? Would you -- would you file it with the clerk after --

MR. ASCHENBRENNER: Yes, I will, Your Honor. I have doubled checked that.

This Court discussed the contemporary legal context doctrine in Dellmuth and implicitly approved of it while rejecting it, because the statute in question in Dellmuth was passed in 1975, whereas only 2 years earlier you had -- you had come down with Employees v. Public Health Department which had foreshadowed the clear statement rule, and therefore Justice Kennedy for the Court said that the clear statement rule applied because Congress -- was aware that it was on its way.

In our case, however, the rule was pardon. And this Court -- I mean Congress couldn't have dreamed that the clear statement rule was required when this Court had just expressly rejected it. For that reason, the clear statement rule should not be applicable, and 1362 should

be construed as this Court construed it in Moe.

Finally --

QUESTION: Thank you, Mr. Aschenbrenner.

MR. ASCHENBRENNER: Oh, pardon me.

QUESTION: Your time has expired.

Mr. Lee, do you have rebuttal? You have 10 minutes remaining.

REBUTTAL ARGUMENT OF REX E. LEE

ON BEHALF OF THE PETITIONER

MR. LEE: I'll only use one of them for just two brief points, Mr. Chief Justice.

I find nothing less than extraordinary the proposition that suits by tribes against States were built into the convention's plan. All agree that no one was thinking about this particular issue at the time of the convention, and it just isn't enough under this Court's well-established jurisprudence to say that such a core governmental right will be set aside in any case where it can't be shown that someone at the convention didn't stand up and say, look, affirmatively, we're going to say that tribes can't sue. That just is not the way the burden works. That's point number one.

Point number two is that my opponents have effectively conceded here in oral argument the same thing that they have effectively conceded in the briefs, that

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1362 can't pass muster under the clear statement rule. But neither Mr. Aschenbrenner nor anybody else has been able to come up with an answer to the obvious point that if his new rule were the law -- that is, one constitutional standard for one 20-year period and other constitutional standard for any other period -- it would have equally precluded the result in both Atascadero and Dellmuth.

Thank you.

QUESTION: May I ask you one question, Mr. Lee, since you've got a couple of minutes left?

Supposing that the tribe tried to sue the State of Alaska in the State of California -- say they were able to get jurisdiction as happened in the --

MR. LEE: It would make it completely comparable to Nevada v. Hall.

QUESTION: Correct.

And then the State of Alaska pleaded sovereign immunity. What law would govern that plea? Would it be California law, Alaska law, or Federal law?

MR. LEE: I will give you the answer, though I will say that I am uncertain.

QUESTION: Right.

MR. LEE: My -- my reaction is it would probably be California law.

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CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

The case is submitted.

(Whereupon, at 2:50 p.m., the case in the above-entitled matter was submitted.)

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NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE

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