

OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: KEYTON E. BARKER AND PAULINE BARKER,

Petitioners v. KANSAS, ET AL.

CASE NO: 91-611

PLACE: Washington, D.C.

DATE: Tuesday, March 3, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KEYTON E. BARKER AND PAULINE :

4 BARKER, ET AL., :

5 Petitioners : No. 91-611

6 v. :

7 KANSAS, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, March 3, 1992

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:59 a.m.

14 APPEARANCES:

15 KEVIN M. FOWLER, ESQ., Topeka, Kansas; on behalf of the
16 Petitioners.

17 JOHN F. MANNING, ESQ., Assistant to the Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting the
20 Petitioners.

21 JAMES A. D. BARTLE, ESQ., Special Assistant Attorney
22 General of Kansas, Topeka, Kansas; on behalf of the
23 Respondents.

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

2 (10:59 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-611, Keyton Barker and Pauline Barker v.
5 Kansas.

6 Mr. Fowler, you may proceed.

7 ORAL ARGUMENT OF KEVIN M. FOWLER

8 ON BEHALF OF THE PETITIONERS

9 MR. FOWLER: Thank you, Mr. Chief Justice
10 Rehnquist, and may it please the Court:

11 The question presented for decision in this case
12 is whether the Kansas Income Tax Act violates controlling
13 principles of intergovernmental tax immunity by favoring
14 retired employees of the State and its political
15 subdivisions over retired members of the United States
16 Armed Forces.

17 Just three terms ago, in the case of Davis v.
18 Michigan Department of Treasury, this Court applied
19 settled principles of intergovernmental tax immunity to
20 strike down Michigan's differential income-tax deduction
21 scheme because it uniformly favored all retired State or
22 local government retirees.

23 QUESTION: The Court also construed a statute,
24 didn't it?

25 MR. FOWLER: That is correct, Your Honor, it

1 construed a statute which this Court --

2 QUESTION: And just said that that incorporates
3 the intergovernmental rules.

4 MR. FOWLER: Your Honor, I believe in the Davis
5 case the Court said that 4 U.S.C., section 111 is co-
6 extensive with, and thus fully preserves the modern
7 doctrine of intergovernmental tax immunity.

8 QUESTION: So all you need is the statute?

9 MR. FOWLER: Your Honor, perhaps the statute is
10 sufficient in and of itself because it plainly prohibits
11 discrimination against Federal officers or employees
12 because of the Federal source of their pay or
13 compensation. And that is precisely what the Kansas
14 Supreme Court has endorsed here under State standards of
15 review.

16 For the reasons set forth in our briefs, which I
17 will attempt to elaborate on here, we respectfully submit
18 that the decision below should be reversed, because the
19 Kansas income tax structure plainly discriminates in favor
20 of all retired employees of the States and its political
21 subdivisions over retired members of the United States
22 Armed Forces in Kansas.

23 Petitioners represent a class of approximately
24 14,000 retired members of the Armed Forces in Kansas, and
25 their joint taxpayer spouses were applicable, who have

1 been subject to disparate income tax treatment by the
2 State of Kansas from at least tax year 1984 through tax
3 year 1989.

4 Several named petitioners brought suit in 1989
5 challenging that disparate tax treatment in the wake of
6 Davis v. Michigan Department of Treasury, on the basis
7 that the Kansas income tax structure, on its face and as
8 applied, violates governing principles of
9 intergovernmental tax immunity.

10 Notwithstanding the arguments raised below, the
11 Kansas Supreme Court held that differential tax treatment
12 of military retirement income by the State of Kansas was
13 constitutionally permissible, because it was directly
14 related to and justified by significant differences
15 between the classes of retirees.

16 However, in route to its decision, the Kansas
17 supreme court violated several cardinal principles of law
18 that this Court has recognized since at least 1960. Those
19 principles are as follows. Because the Federal
20 Government's interest must weigh in the balance whenever
21 intergovernmental tax immunity is at issue, the reviewing
22 court must examine the applicable tax structure as a
23 whole, and must focus on the nature of the classification
24 erected by statute to determine whether the proffered
25 reasons for discrimination furnish the actual basis for

1 differential treatment, and if so, whether those
2 differences furnish an adequate justification for
3 differential treatment.

4 The Kansas income tax structure utilizes Federal
5 adjusted gross income as the starting point for
6 determining an individual taxpayer's Kansas taxable
7 income. Because Federal adjusted gross income
8 incorporates and includes all forms of retirement
9 income -- from whatever source derived -- Kansas, one
10 would think, should uniformly tax all forms of
11 nondisability government retirement income. But it does
12 not.

13 Because of a specific, statutory exemption scheme
14 adopted by the Kansas legislature and in effect for more
15 than 30 years, Kansas exempts from State income taxation
16 all retirement benefits paid by the State and its
17 political subdivisions to their respective retirees.

18 QUESTION: Well, did Kansas rely on some Federal
19 cases that hold that military retirement benefits are not
20 deferred compensation, but instead are reduced pay for
21 current services?

22 MR. FOWLER: That is correct, Your Honor. The
23 Kansas Supreme --

24 QUESTION: Are those cases wrong?

25 MR. FOWLER: Your Honor, those cases are not

1 wrong for what they stand for. Those cases did not
2 involve taxation, they did not involve discrimination
3 against Federal military retirees, and they did not
4 involve 4 U.S.C. section 111 or the doctrine of
5 intergovernmental tax immunity.

6 For tax purposes, military retired pay is
7 substantially analogous to all other forms of pension or
8 annuity income. And that is a point that has been
9 expressly recognized by Congress.

10 QUESTION: Well, I guess the answer to the
11 question almost depends on the lens with which you're
12 viewing it. At what level of generality do we answer the
13 question that you raise? There are differences.

14 MR. FOWLER: Your Honor --

15 QUESTION: When do we recognize them and when
16 don't we?

17 MR. FOWLER: Your Honor, there are differences
18 between retired members of the military and other forms of
19 government retirees. The differences should be recognized
20 only if they are significant, and only if they are
21 directly related to the particular purpose and
22 classification at issue.

23 In this case, Kansas does not draw distinctions
24 based upon the characterization of retired income --
25 retirement income as either deferred compensation or

1 current compensation.

2 The tax structure does not draw that
3 classification. The purpose for the exemptions for State
4 and local government retirement income is unquestionably
5 to extend the value of that State and local retirement
6 income, while reducing and minimizing the State's
7 employment costs. And that, of course, is a purpose that
8 this Court recognized clearly in -- Davis as being
9 illegitimate.

10 Now --

11 QUESTION: Now if you win here, the holding
12 presumably would be retroactive?

13 MR. FOWLER: Your Honor, under the general rule
14 applicable in civil cases, I believe this Court has
15 recognized, we would assume that it would be retroactive
16 at least for the parties before the Court. That issue,
17 however, is not expressly presented by this case. But
18 moreover, we would submit that there is --

19 QUESTION: Well, it's certainly lurking there.
20 What do you suppose we're talking about, looking at all 50
21 States here?

22 MR. FOWLER: Your Honor, in our judgment, there
23 is no retroactivity question presented by this case for
24 the simple reason that reversal of the decision below
25 simply requires application of 4 U.S.C. section 111.

1 QUESTION: Well, but didn't the Jim Beam opinion
2 indicate that if we don't say anything about it, then it
3 is generally retroactive?

4 MR. FOWLER: That's correct.

5 QUESTION: So you're saying don't say anything
6 about it. And isn't that the consequence?

7 MR. FOWLER: Well, Your Honor, that would suit
8 just fine with me.

9 (Laughter.)

10 MR. FOWLER: But there is no retroactivity issue
11 in this case. Because reversal of the judgment below
12 simply requires application of section 111 of title 4 of
13 the United States Code.

14 QUESTION: Well, you don't think it's bad that
15 if these retirees' money has been taken from them
16 unconstitutionally it should be given back. You're --
17 you're not apologizing for that, are you?

18 MR. FOWLER: Absolutely not, Your Honor. We
19 believe it should be given back. But as this Court has
20 recognized previously, the remedial issues involved in
21 this case, which have not yet been passed upon by the
22 Kansas Supreme Court, are typically left to the State
23 courts to pass on in the first instance.

24 But back to my other point, there is no
25 retroactivity question in this case simply because it

1 requires application of a statute, which this Court, just
2 three terms ago, described as having unmistakable language
3 and meaning, which has been on the books for more than 50
4 years.

5 In order to hold that a decision in this case is
6 not retroactive, would in effect suspend the effective
7 date of a controlling Federal statute which has been the
8 supreme law of the land since 1939. And I think Fleming
9 v. Fleming certainly supports the proposition that that is
10 something that would be inappropriate to do.

11 QUESTION: May I ask --

12 MR. FOWLER: Now if this were an ambiguous
13 statute, perhaps the conclusion might be different. But
14 this is a plain and unambiguous statute.

15 QUESTION: Of course, it's a statute that gives
16 consent to tax. It's not a prohibition, isn't it?

17 But let me ask you a question about your basic
18 -- one of the differences in this case is that there is --
19 at least one or two categories of Federal retirees who are
20 not taxed by Kansas. Isn't that right?

21 MR. FOWLER: That's correct, Your Honor.

22 QUESTION: Now, what if Kansas, in its
23 retirement system, had several categories of State
24 employees, and didn't tax -- or did tax two or three of
25 those categories. Would that eliminate the

1 discrimination?

2 MR. FOWLER: It wouldn't eliminate the
3 discrimination, Your Honor. In fact, that was precisely
4 the case in Phillips Chemical Company v. Dumas Independent
5 School District, where the State of Texas imposed a
6 discriminatory tax which generally provided benefits to
7 lessees of State and local property, but there were some
8 lessees of State and local properties that didn't get the
9 same benefits and were subject to the same tax treatment
10 as the United States lessees.

11 The Court simply stated in passing that that may
12 reduce the extent of the discrimination; it obviously does
13 not eliminate it.

14 QUESTION: Well, supposing the State gave a tax
15 -- tax-free retirement benefits to only 10 percent of its
16 retirees, and Federal retirees, 90 percent were tax-free
17 under the State but there were 10 percent that were taxed.
18 Would that 10 percent also be entitled to the benefit?

19 MR. FOWLER: Your Honor, I think that it would
20 depend upon the purpose behind the exemptions, and the
21 classification as it's drawn.

22 QUESTION: Well, the purpose in the State
23 exemptions is to increase -- encourage people to work for
24 the State. It's a form of extra compensation. That's
25 perfectly clear.

1 MR. FOWLER: Your Honor, the Court recognized in
2 Davis that simply relying upon that legitimate State
3 purpose is not a basis for discrimination. Because it
4 says nothing about differences between the classes. It
5 needs to be kept in mind that in dealing with
6 intergovernmental tax immunity, that sovereign Federal
7 interest must be weighed in the balance. And the only way
8 that that can be accomplished is if the discriminatory
9 classification is truly intended to account for
10 significant differences between the classes, and it
11 furthers a legitimate State interest which does not trench
12 upon the prerogatives of the national Government.

13 Now, if that --

14 QUESTION: What all that boils down to is that
15 if they give a tax-free retirement benefit to any State
16 employees, they must give them to all Federal employees.
17 That's your position, I gather.

18 MR. FOWLER: We're not suggesting that, Your
19 Honor. But certainly, if the -- if preferential treatment
20 is being given -- especially to all State and local
21 retirees -- but if it is given to State and local
22 retirees, one must look to the purpose for it and how the
23 classification is drawn in order to properly evaluate it.

24 And that's all we're asking the Court to do
25 here. Because the Kansas Supreme Court failed to examine

1 the applicable tax structure, as a whole, and it failed to
2 focus on the nature of the statutory classification.

3 QUESTION: Because if you examine it as a whole,
4 the Federal employees are basically treated like everybody
5 else in Kansas. They're just not treated like this small
6 group of people who get a special benefit.

7 MR. FOWLER: Well, Your Honor, this small group
8 of people that get a special benefit, as this Court
9 recognized in Davis, because they are in privity with the
10 State, the danger that a State is violating the doctrine
11 of intergovernmental tax immunity is greatest in this
12 case.

13 Once a decision has been made to discriminate by
14 giving exemptions to a favored class of State and local
15 government employees, there is no political check in the
16 system to turn back the clock.

17 And the reason for that is simple. In order to
18 provide the check, to provide equal treatment which is
19 mandated under the nondiscrimination clause of section
20 111, that would either require an exemption for similarly
21 situated Federal retirees, which would reduce tax revenue;
22 or, if the tax were applied uniformly, as this Court
23 recognized in Davis, in order to provide State and local
24 retirees with the same level of benefits, benefits would
25 have to be increased in fact beyond the level of that

1 necessary by a tax exemption.

2 Which means once the decision to discriminate
3 has been made, there is no political check because there
4 are political, economic, and institutional forces against
5 changing the status quo. Because any way they turn, they
6 are going to be losing revenue. And it may result in a
7 tax increase across the board.

8 And the vast majority of voters in the State
9 will not stand for that, which is why we are here in
10 Court. Because military retirees in Kansas have been
11 fighting for equal treatment in the legislature for over
12 20 years. They haven't gotten it. And we are now asking
13 this Court to provide them with equal treatment, because
14 they are substantially analogous to every State and local
15 government retiree for all material purposes.

16 Military retirees must serve for at least 20
17 years in the Armed Forces before they are eligible for
18 retirement. They must meet statutory criteria before they
19 are eligible for retirement; when members of the military
20 retire, they lose their entitlement to active duty pay and
21 allowances and instead receive retired pay.

22 That retired pay is calculated based upon past
23 years of service. It's calculated in accordance with
24 their highest rank of paid rate held. While in retirement
25 -- retired members of the Armed Forces are not required to

1 perform any active, service, or affirmative duties to
2 receive military retired pay.

3 For these reasons, it isn't surprising that
4 under the Internal Revenue Code Congress has determined
5 that these military retired folks are entitled to the same
6 tax treatment as all other Government retirees. They're
7 given equal treatment by Congress, and as we noted in our
8 brief, Congress has expressly determined that there are no
9 substantial grounds for distinguishing the tax treatment
10 of the plan for the uniformed services from these other
11 plans.

12 The States are not given the power or the
13 authority to override or veto that authoritative
14 determination. There are no significant differences.
15 There is no justification for disparate treatment.

16 If there are no --

17 QUESTION: Well, don't -- don't the military get
18 some benefit? They get to go to the PX when they're
19 retired; they get military medical treatment that perhaps
20 Federal retirees, as a class, don't get?

21 MR. FOWLER: That's correct, Your Honor. And
22 those types of benefits, which are also available to
23 members of the military on active duty, are expressly
24 exempt from taxation under the Internal Revenue Code.
25 Since the State of Kansas has adopted the piggy-back

1 approach, those allowances or special entitlements don't
2 qualify as income to a retired person.

3 But it would seem to me, Your Honor, that if
4 Congress has decided to provide retired members of the
5 military who have provided honorable service to the United
6 States for 20 years or more with access to medical
7 services, so that they might remain fit in retirement,
8 with access to PX or commissary privileges, it's not a
9 proper domestic concern of the State that the Federal
10 Government has elected to provide these additional
11 services to them.

12 QUESTION: No, but it does tend to distinguish
13 the military retirees from the Federal Government as a
14 whole retirees that were involved in the Davis case.

15 MR. FOWLER: Your Honor, there may be
16 distinguishing features. We're not denying that. But
17 they must be relevant for tax purposes. Military retirees
18 can wear uniforms, too. And although the State of Kansas
19 is suggesting that that's another reason that they can tax
20 them, it must be relevant to some legitimate aspect of tax
21 policy.

22 QUESTION: I must say it's hard to say what's
23 relevant to a legitimate aspect of tax policy. I assume
24 it would be constitutional to impose a tax on uniforms. I
25 mean, I suppose you could -- a State could -- you know,

1 we're going to -- any uniform, nurses uniform, soldier's
2 uniform.

3 MR. FOWLER: Your Honor, perhaps I misspoke.
4 Part of the State's argument in this case is not that they
5 can tax retired members of the military because they --
6 well, they're saying precisely that they can impose an
7 income tax on retired members of the military in part
8 because they can wear a uniform in retirement. They're
9 not suggesting that they can tax the uniforms -- and
10 perhaps they could tax the uniforms. But certainly the
11 fact that they can wear uniforms doesn't seem to us to be
12 a legitimate justification for taxing the income received
13 by those members of our retirement -- retired community.

14 QUESTION: Do you really want to rest on the
15 question of what is a legitimate justification as opposed
16 to what is a generally applicable distinction within the
17 tax structure?

18 MR. FOWLER: Your Honor --

19 QUESTION: If Kansas generally drew a
20 distinction between the taxation of deferred income and
21 reduced income for reduced services you wouldn't be here,
22 would you?

23 MR. FOWLER: That may or may not be true, Your
24 Honor, because Kansas has not drawn that distinction. But
25 even if they were to do so, under the Davis and Phillips

1 test, it still becomes necessary -- even if one concludes
2 that a direct relationship exists -- whether that is
3 constitutionally permissible under the second prong of the
4 test, which is the ultimate standard of justification.

5 And in the event that Congress has foreclosed a State from
6 relying upon a particular justification because it doesn't
7 hinge upon a proper domestic concern and it trenches upon
8 the prerogatives of Congress, then certainly further
9 inquiry would be required.

10 QUESTION: So you're saying we can't avoid the
11 substantive inquiry, even though we would in a first-tier
12 equal protection case?

13 MR. FOWLER: That's correct, Your Honor. As the
14 Court has noted in the past, equal protection analysis is
15 not necessarily controlling here, because Federal
16 sovereign interests must be weighed in the balance.

17 If there are no --

18 QUESTION: Well, and because -- because of the
19 statute.

20 MR. FOWLER: Because of 4 U.S.C. section 111.

21 QUESTION: Yes.

22 MR. FOWLER: And the modern doctrine of
23 intergovernmental tax immunity, the heart of which is
24 nondiscrimination.

25 QUESTION: Well, why do you need more than the

1 statute?

2 MR. FOWLER: Your Honor, perhaps we don't need
3 more than the statute. We would like some relief either
4 under the constitutional doctrine, or its statutory
5 embodiment in 4 U.S.C. section 111. If the Court chooses
6 to give us relief under one, rather than the other, we
7 will be just as happy.

8 Thank you.

9 QUESTION: Mr. Manning, we'll hear from you.

10 ORAL ARGUMENT OF JOHN F. MANNING

11 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

12 SUPPORTING THE PETITIONERS

13 MR. MANNING: Thank you, Mr. Chief Justice, and
14 may it please the Court:

15 I'd like to begin by addressing Justice
16 O'Connor's question about the level of generality at which
17 this issue must be addressed.

18 The statute prohibits taxation that
19 discriminates against an officer or employee because of
20 the source of the compensation.

21 In Davis, this Court defined that test as
22 prohibiting discriminatory taxation between Federal and
23 State retirees unless there were significant differences
24 between the two classes of taxpayers.

25 QUESTION: It really doesn't prohibit it. It

1 just doesn't extend the consent.

2 MR. MANNING: It does -- by negative
3 implication, I believe -- in -- this Court, in Davis held
4 that by negative implication it also prohibits it and that
5 it's coextensive with the constitutional doctrine of
6 intergovernmental tax immunity.

7 But to return to the question of what a
8 significant difference would be, for purposes of Davis, we
9 believe that significance has to be assessed in terms of a
10 legitimate tax purpose.

11 Now, there are many differences between Federal
12 and State employees. To give one example, Federal patent
13 officers are different from any State or local government
14 employees, because unlike State and local government
15 employees, they're authorized to issue patents. That is a
16 significant difference between a Federal employee and a
17 State and local government employee. But it is not a
18 difference that has any significance for tax purposes.

19 And we believe that this Court would invalidate
20 a statute that taxed Federal patent officers more heavily
21 than State and local government employees.

22 QUESTION: Assuming the case in which a State
23 made a difference between contributory and noncontributory
24 plans for taxation or exemption of retirement benefits,
25 and it just so happened that Federal employees were

1 disadvantaged, would that be a legitimate tax distinction
2 in your view?

3 MR. MANNING: We believe that a neutrally drawn
4 classification that attempted to account for double
5 taxation by reference to the manner of funding would be a
6 legitimate classification and would survive scrutiny under
7 section 111. However, that is not that -- the -- what is
8 going on in this case.

9 In this case, it is true that no part of the
10 military retired pay is taxed before it is received
11 because it is not funded by employee -- in any part, by
12 previous employee contributions. It is also true that
13 State and local government retirement benefits are funded
14 in part through employee contributions that were
15 previously taxed.

16 But Kansas also exempts that portion of State
17 and local government retirement benefits that consist of
18 employer contributions and accumulated interest which,
19 like military retired pay, have never previously been
20 taxed.

21 Now, we submit that a nondiscriminatory tax
22 truly intended to avoid double taxation would not fully
23 exempt State and local government retirement benefits
24 based on their source, but would generally exempt
25 retirement benefits to the extent they reflect previously

1 taxed contributions. And that, by the way, is the way in
2 which the Federal Government taxes -- benefits disbursed
3 pursuant to qualified pension plans under section 72 and
4 section 402 of the Internal Revenue Code. So there is
5 ample precedent for Kansas to draw a classification in a
6 neutral way that accounted for the justification that they
7 cite.

8 I would also like to address Justice O'Connor's
9 point about the other Federal cases. The legal conclusion
10 that retired pay is current compensation in cases
11 involving such matters as bankruptcy or laches does not
12 necessarily govern the question in the context of section
13 111 and the doctrine of intergovernmental tax immunity.
14 As Mr. Fowler pointed out, Congress, in fact, treats
15 military retired pay not as current pay in the Internal
16 Revenue Code, but as deferred compensation in such
17 statutes as the -- as FICA, and in the individual
18 retirement account statute.

19 So there is certainly a recognition in the
20 Federal code that military retired pay can have aspects of
21 deferred compensation. And we believe --

22 QUESTION: How many other States have a plan
23 like Kansas that singles out retired military?

24 MR. MANNING: Justice O'Connor, I'm not aware of
25 the exact number. I'm certain that there are at least

1 three other States: Arkansas, Missouri, and Colorado; and
2 that a number of other States raised -- that the question
3 is presented in a number of States because statutes were
4 amended following this Court's decision in Davis to give
5 exemptions of various degrees to Federal retirees. Some
6 of them extended them fully to civil servants and military
7 retirees; some of them extended them only to civil
8 servants.

9 But prior to Davis, a number of States taxed
10 both in their refund claims pending, and in a number of
11 States --

12 QUESTION: But there've been amendments in some
13 of those States since Davis?

14 MR. MANNING: There have been -- 19 States, I
15 believe, have amended their statutes in the aftermath of
16 Davis to --

17 QUESTION: And three or four that have not?

18 MR. MANNING: At least three or four have not
19 taken into account the military retired -- have not
20 treated military retired pay the way they have treated
21 Federal civil servants. I believe there may be more than
22 that, but I am not aware of the exact number, Your Honor.

23 We submit that the State mischaracterizes
24 military retired pay in substance when it compares it to
25 the salaries of current State and local government

1 employees. We believe that military retired pay is much
2 more like the deferred compensation that's received by
3 State retirees.

4 As this Court noted in Davis, the earmarks of
5 deferred compensation are receipt of benefits based upon
6 past years of service, and highest pay-rank achieved. And
7 that's precisely the system that's used by the Kansas
8 retirement system, as well as the Federal military
9 retirement system.

10 But more --

11 QUESTION: Excuse me. I didn't want to
12 interrupt you if you weren't through with the point.

13 I was just wondering, in your view of Davis and
14 the statute, supposing that Kansas taxed -- did not have
15 tax-free retirement benefits for its State Police and all
16 its law enforcement officers. Would they then be able to
17 tax the military retirees?

18 MR. MANNING: I'm -- no, Your Honor, I don't
19 believe that they would. It would depend, of course, on
20 the justification that was proffered by the State for
21 granting the exemption. The Davis --

22 QUESTION: Say their reason for doing it was
23 they wanted to treat all law enforcement and military
24 people alike, figuring that they're somewhat -- the most
25 comparable State employees, and they wanted the tax. They

1 wanted to get this additional tax revenue, and then treat
2 Federal military retirees just like other Kansas citizens.

3 MR. MANNING: The assertion that military
4 retirees are most like State and local police would not be
5 sufficient to overcome the requirements of the quality
6 that are imposed by section 111, which states that the
7 State cannot discriminate against Federal employees -- as
8 extended to retirees in Davis, or as applied to retirees
9 in Davis -- because of the source of their compensation.
10 We believe that a conclusion that these are the closest
11 categories is not sufficient to establish that the
12 taxation of military retirees is not because of the
13 Federal source of their compensation. Rather, we submit
14 that the State would have to come up with some substantive
15 characteristic --

16 QUESTION: So that if they grant any tax-free
17 retirement benefits to even a tiny fraction of their
18 retired work force, they must grant all Federal employees
19 the tax-free --

20 MR. MANNING: It would depend on whether they
21 applied their classification in a neutral and even-handed
22 way. It might well be that if Kansas granted an exemption
23 for schoolteachers because they wanted to encourage people
24 to go and become schoolteachers that it might be a valid
25 justification if it was applied even-handedly to cover

1 schoolteachers on Indian reservations or schoolteachers
2 who taught in schools on military bases.

3 As long as the classification is drawn in a
4 neutral way and captures the policy that the State asserts
5 as the basis for its tax, then it doesn't violate section
6 111's prohibition against taxation because of the source
7 of the Federal compensation. That would be taxation that
8 was because of the social policy of encouraging people to
9 become teachers.

10 Now that's not to say that the State might not
11 draw a classification in that sort of circumstance that
12 would run afoul of section 111. For example, if the State
13 drew a classification that was very general, but that
14 burdened only a tiny, tiny percentage -- an
15 inconsequential percentage of State employees, but
16 burdened a large number of Federal employees, this Court
17 might well conclude that that was a pretext for
18 discrimination.

19 QUESTION: That's your -- that's your patent
20 officer example. That's why that was bad, really, because
21 they picked out a category that just doesn't exist except
22 at the Federal level.

23 MR. MANNING: That -- that's right, Your Honor.
24 And the -- we submit that that's exactly what they're
25 doing in this case with military retirees. The State has

1 not indicate that there are any tax consequences that flow
2 from the fact that military retirees are subject to recall
3 or must comply with the Uniform Code of Military Justice.

4 All they have asserted is that these are
5 characteristics that have substantial consequences, it's
6 true. But they have not suggested that there's any
7 relationship between those consequences and any legitimate
8 interest of the State in tax -- in taxation, except that
9 they want to get more money from military retirees and not
10 from any State or local government retirees.

11 In addition, we believe that -- we believe that
12 the facial discrimination is sufficient to invalidate --

13 QUESTION: Well, excuse me. You wouldn't mind
14 that if there were a sufficient number of State people who
15 were also irrationally burdened in that way. I mean, I
16 don't know what is a rational tax. If they -- if they
17 want to choose -- if they want to tax medals they can tax
18 medals, I presume, so long as -- so long as it doesn't
19 seem targeted at the Federal Government.

20 MR. MANNING: You're absolutely right, Your
21 Honor. They could tax medals, as long as they did it in
22 an even-handed and neutral way, and as long as the burden
23 that fell on State employees as opposed to Federal
24 employees was not so lopsided that it suggested that its
25 irrationality was merely a show for discrimination.

1 If there are no further questions --

2 QUESTION: Thank you, Mr. Manning.

3 Mr. Bartle, we will hear from you.

4 ORAL ARGUMENT OF JAMES A. D. BARTLE

5 ON BEHALF OF THE RESPONDENTS

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

8 In Kansas, military retired pay is taxable, and
9 State retirement benefits are not taxable. And it's our
10 position that this differential tax treatment is valid
11 because it satisfies the test set out in Davis v.
12 Michigan.

13 And that test requires that differential tax
14 treatment must be directly related to and justified by
15 significant differences between the two classes of
16 taxpayers.

17 And our position is, very simply, that these two
18 classes are taxed differently because they are different.
19 And the primary justification for different tax treatment
20 is the fact that military retirees receive current pay for
21 current services; and State retirees receive pension
22 benefits -- they receive deferred compensation for prior
23 services.

24 The character of the compensation received by
25 these two classes of taxpayers is fundamentally different.

1 And the different tax treatment is based on the nature --
2 on the character of the income. It is not based on the
3 source of the income. And taxation based on the source is
4 the only type of discrimination that the statute
5 prohibits.

6 The statute does not prohibit a State from
7 drawing reasonable distinctions in its income tax
8 structure where there's a legitimate reason for doing so.
9 The only prohibition is where it's discriminatory because
10 the Federal Government is the source of the income.

11 Now there really is no question that this Court
12 has characterized military retired pay as current pay for
13 current services. And in *McCarty v. McCarty*, this Court
14 stated that military retired pay differs in some
15 significant respects from a typical pension and retirement
16 plan.

17 QUESTION: But what indication is there that
18 that's the distinction that the State was drawing? The
19 State also taxes retired pay of CIA employees, I gather.

20 MR. BARTLE: Well --

21 QUESTION: And they are not in the same position
22 that military retirees are, subject to recall.

23 MR. BARTLE: First, I'm not sure that we have
24 any CIA retirees in the State of Kansas. And the record
25 does not reflect that we do.

1 QUESTION: What difference does that make?

2 MR. BARTLE: Yes, the CIA, that's secret.

3 QUESTION: Yes, that's right.

4 (Laughter.)

5 QUESTION: Good point, good point.

6 If you had any --

7 (Laughter.)

8 QUESTION: If you had any, they would be taxed,
9 wouldn't they?

10 MR. BARTLE: I believe that's correct, yes.

11 QUESTION: Yes, now that has nothing to do with
12 the distinction you're justifying the tax on the military
13 retirees by. I mean, I suppose you could also say
14 military retirees have brown uniforms or, you know -- it's
15 a distinction, but we have no reason to believe that's the
16 distinction that the State was using in creating the tax
17 code.

18 MR. BARTLE: I wanted to get to --

19 QUESTION: Good.

20 MR. BARTLE: -- that question of uniforms in a
21 minute.

22 As to the CIA retirees, I believe you're
23 correct, that they are substantially different. They're
24 not similarly situated with military retirees, and the
25 same set of justifications which would justify taxing the

1 military retirees would not necessarily also justify
2 taxing the CIA retirees.

3 QUESTION: But you'd have another one for them,
4 right?

5 MR. BARTLE: Perhaps we would.

6 QUESTION: I see.

7 MR. BARTLE: Or, Your Honor, perhaps we
8 wouldn't. Perhaps it is the case that the taxation of
9 certain Federal retirees, other than military retirees,
10 does not measure up to the Davis standard. Perhaps the
11 State, if it had to, would be unable to justify that
12 different tax treatment. And perhaps, as to certain other
13 Federal retirees, the tax might be unconstitutional.

14 But we don't believe that's the case here.

15 QUESTION: So is it -- is it your submission
16 that under a properly drawn statute -- and, of course, you
17 would say that this is one -- but under a properly drawn
18 statute, the State of Kansas could say if any retiree has
19 current obligations the payments received by him are
20 taxable? Is that the submission you're making?

21 MR. BARTLE: No, Your Honor. Our primary
22 justification is the distinction between current pay and
23 deferred compensation. And we --

24 QUESTION: So it's not the obligations; it's the
25 pay?

1 MR. BARTLE: We make the point of the continuing
2 obligations that the military retirees owe to the Federal
3 Government, because that is characteristic of a class of
4 people who are receiving current compensation. They have
5 ongoing duties and responsibilities.

6 QUESTION: And so we know whether or not there's
7 current versus -- pay versus some other kind of pay
8 because they have current obligations to perform. Is that
9 how we know that it's current pay?

10 MR. BARTLE: I think that is one indicia, yes.

11 QUESTION: And what are those current
12 obligations here?

13 MR. BARTLE: The current obligations are that
14 military retirees are not retired from the military
15 service. They are placed on retired status. But they
16 remain in the military service of the United States. They
17 are not discharged from the military. They are not
18 civilians. They can be recalled to active duty, and
19 that's a recall on an involuntary basis.

20 And just last year there were many military
21 retirees recalled and sent to the Persian Gulf. And
22 they're subject to the Uniform Code of Military Justice.
23 They're prohibited from engaging in certain employment and
24 civilian occupations. And there was some discussion
25 earlier that, consistent with their status as employees of

1 the Federal Government, they are entitled to various
2 employee benefits and privileges that, of course, are not
3 available to members of the general public.

4 We cite these things not because they, alone,
5 are significant -- not the fact that military retirees are
6 authorized to wear their military uniforms. But they can
7 wear their uniforms because they have military status.

8 QUESTION: But why do all of these factors
9 you've just mentioned -- how do they bear on any sort of
10 tax policy the State might have?

11 MR. BARTLE: Well, I cite all those differences
12 because I do believe they all go to our ultimate point:
13 that military retirees are receiving current compensation,
14 that they are current employees.

15 QUESTION: Well, I have the same problem as the
16 Chief Justice. If you're a tax policy planner, what is
17 the tax theory on which you justified this differential?
18 Why is it that the military person who receives current
19 pay -- and presumably, therefore, has more burdens -- is
20 not exempt from the tax?

21 MR. BARTLE: Well, the legislature, in drawing
22 these distinctions -- and, of course, our legislature is
23 keenly aware of the military retirees and the fact that
24 their retirement pay is taxable. They have looked at a
25 broad range of factors.

1 QUESTION: But what is it that would motive the
2 decision to tax, versus to exempt on this criterion?

3 MR. BARTLE: On the distinction between current
4 pay --

5 QUESTION: Yes.

6 MR. BARTLE: -- versus deferred compensation?

7 QUESTION: Yes.

8 MR. BARTLE: Well, that has traditionally been a
9 very significant for -- very significant difference for
10 purposes of taxation on both the Federal and the State
11 level. Taxation by its very nature treats certain classes
12 of income differently. It treats current pay differently.
13 It treats deferred compensation differently. It treats
14 capital gains differently. It's all income.

15 QUESTION: Well, is the -- is the theory that
16 it -- in the case of the military officer it's earned for
17 current status?

18 MR. BARTLE: It is. I believe that's --

19 QUESTION: Is that the theoretical difference?

20 MR. BARTLE: I believe it's correct that it is
21 earned on an ongoing basis, that it's not a vested right,
22 not an enforceable right to receive military retired pay.
23 So as long as you fulfill the conditions of your
24 retirement, you are able to receive military retirement
25 pay.

1 QUESTION: Well, you can say that about some of
2 your State employees who are disabled. Don't you have
3 restrictions on certain activities of State employees
4 after they leave State service?

5 MR. BARTLE: I think there are very narrow
6 restrictions.

7 QUESTION: Well, whatever they are, if they
8 violate those restrictions they can be deprived of their
9 retirement income. And yet you do not tax that retirement
10 income.

11 MR. BARTLE: That point, Your Honor, I don't
12 believe I could agree with. At least I'm not aware. The
13 only exception I know of is that if a person retires from
14 working for the State government and is receiving their
15 retirement benefits, and then elects to become re-employed
16 by the State, there is a limit on the amount of their
17 retirement benefits they can receive. That is the only
18 instance that I'm aware of.

19 The military retirement system has always been
20 regarded as unique. And that is not simply just our
21 contention. That is clearly the position of -- the
22 position of the Federal Government. And on page 15 of our
23 brief, we quote from a 1987 report by the United States
24 Department of Defense. And there they say that while
25 there may be a superficial resemblance between the

1 military retirement system and retirement systems that
2 exist in the private sector, there are, in fact,
3 substantial differences between the military retirement
4 system and all other retirement systems.

5 I'd --

6 QUESTION: Here's one of the examples I was
7 thinking of. If a State employee -- this is from the
8 Government's brief -- has participated in contracting with
9 any person or business within the employee's last 2 years
10 of public employment, the employee may not accept a job
11 with that person or business for a year after the
12 employee's public service terminates.

13 That's a restriction under the Kansas statutes.
14 And if he violates that, I gather that the retirement pay
15 can be -- can be terminated or withheld.

16 MR. BARTLE: The retired State employees have a
17 vested right to receive their retirement. And I think
18 there's very narrow limits on the extent to which the
19 State can discontinue or modify their right to receive
20 their retirement benefits. I think Your Honor is correct
21 in citing that proposition --

22 QUESTION: Well, I must say -- in fairness to
23 you -- the Government puts it in a footnote with a lot of
24 other things where -- the kind of things that you mention,
25 if a State employee goes back to work for the State he

1 would forfeit it. This is also cited in the same
2 footnote. But I don't see a citation to the statute that
3 says one of the consequences of violating that 1-year
4 prohibition is that you lose your retirement pay. It's
5 the implication, but I don't see the statute cited.

6 MR. BARTLE: Again, Your Honor, I'm not aware
7 that that is the case.

8 QUESTION: You may be right.

9 MR. BARTLE: I would like to focus, for a
10 moment, on the Davis case. And in Davis, the State of
11 Michigan taxed Federal Civil Service retirement benefits,
12 but it did not tax State retirement benefits.

13 And the Court recognized that there was
14 different tax treatment here. And if you'd like to call
15 it discriminatory tax treatment, we can call it that. But
16 the Court conducted an inquiry to determine if this
17 different tax treatment was justified. And I think this
18 demonstrates first it is not just the mere fact of
19 discrimination, not the fact that Federal retirees receive
20 less favorable treatment than retired State employees.
21 That is not conclusive.

22 And the Court proceeded to conduct this inquiry,
23 and searched for significant differences between the two
24 classes. Now, in Davis, it happened that the Court found
25 no such differences, and the conclusion therefore was that

1 since there were no differences between the two classes
2 themselves, no intrinsic differences, the taxation must be
3 based on some other factor, some outside factor.

4 And, of course, in Davis, the Federal Civil
5 Service retirees receive their pay from the Federal
6 Government, and the State retirees were paid by the State.
7 So that was determined to be a tax that distinguished
8 based on the source. And that is why, I believe, the
9 conclusion was that it was a violation of the statute.
10 Because it discriminated based on the source.

11 Now, there were many States just like Michigan
12 that taxed Federal Civil Service retirement benefits, but
13 did not tax State retirement benefits. But Kansas was not
14 one of those States. Kansas did not have to go back and
15 modify its Income Tax Act to conform with the Davis
16 decision.

17 At this point, I would like to mention a point
18 that was raised earlier, as to what would be the effect
19 upon the State if the law was struck down, and
20 retroactively -- retroactive relief was required.

21 That would be approximately \$91 million that we
22 would be required to refund to the Federal military
23 retirees.

24 QUESTION: What fiscal period does that cover?
25 Is it 2 years?

1 MR. BARTLE: That covers the tax year 1988 and
2 all years forward, together with interest calculated at
3 the statutory rate on the tax refunds.

4 QUESTION: And why do you cut it off at 1988?
5 Because of the State statute of limitations, or --

6 MR. BARTLE: Your Honor, did I say 1988?

7 QUESTION: Yes.

8 MR. BARTLE: Well, what I meant to say was from
9 tax year 1984 and all years forward.

10 QUESTION: '84. And why do you cut it off at
11 1984?

12 MR. BARTLE: That is the -- earliest year under
13 our statute of limitations that the taxpayers could claim
14 income tax refunds.

15 QUESTION: You mean anyone can come forward
16 now -- not merely the parties to this case -- but anyone
17 can come forward now and still file a timely claim as to
18 1984?

19 MR. BARTLE: Your Honor, this matter has been
20 certified as a class action. And the class embraces --

21 QUESTION: I see.

22 MR. BARTLE: -- all military retirees in the
23 State. So we would regard them --

24 QUESTION: I see.

25 MR. BARTLE: -- as covered by the outcome of

1 this litigation.

2 QUESTION: I take it Kansas does not have a
3 requirement to pay under protest, or to raise a protest in
4 payment in order to go after a refund later?

5 MR. BARTLE: That is not a requirement.

6 QUESTION: I don't -- most of the times when we
7 have objections to retroactivity we're talking about a
8 change in the law. We wouldn't be -- in finding against
9 you -- we wouldn't be reversing any decision of ours,
10 would we? I mean, as far as I know, this is a -- this is
11 a new issue. What is the great unfairness in finding a
12 new issue against you? And you say gee, I have to pay
13 back the money I wrongly took. I mean, that always
14 happens, doesn't it?

15 MR. BARTLE: I think the point, Your Honor, this
16 case is, of course, derived from the Davis case. And
17 Davis was a case of first impression. But there has been
18 considerable controversy over what was the effect of this
19 Court's decision in Davis. Does it have retroactive or
20 prospective effect? That is of great concern to the
21 States that have this issue.

22 Now --

23 QUESTION: Davis wasn't a constitutional case,
24 really. It was just interpreting 4 U.S.C. section 111.

25 MR. BARTLE: It was, Your Honor. But Mr. Fowler

1 stated earlier that that statute is regarded as co-
2 extensive with the constitutional doctrine. So the two
3 seem to go hand in hand.

4 QUESTION: Well, it -- I'm not sure whether
5 that's in your favor or not.

6 MR. BARTLE: Well, I'm just trying to say what I
7 believe is the case.

8 QUESTION: And 111 has been on the books quite
9 awhile.

10 MR. BARTLE: It has, Your Honor, over 50 years.

11 If there is any great unfairness here -- and, of
12 course, this is speaking to remedial issues which is not
13 presented in this case, but, of course, hang over it like
14 a black cloud.

15 Davis, to the States, was just like a bolt out
16 of the blue. States had always believed that they could
17 engage in this practice of exempting their own retirees
18 and taxing Federal retirees, just as they taxed all other
19 retirees from private sector retirement and other ordinary
20 income in the State. And it was --

21 QUESTION: The special class as viewed by the
22 States was really their own retirees, wasn't it?
23 Everybody else was treated differently.

24 MR. BARTLE: I think the States operated on the
25 assumption that there was nothing impermissible about them

1 according some favorable tax treatment to its own
2 employees and retirees.

3 QUESTION: Well, of course, you aren't arguing
4 here -- you aren't arguing to sustain that broad notion
5 that the States had. You don't defend that in this case.
6 You're just -- you just zero in on the military now.

7 MR. BARTLE: Yes, Your Honor. There are several
8 classes of Federal retirees who we do not tax.

9 QUESTION: And you're saying that -- awhile ago
10 you said well, maybe we're in trouble with respect to
11 other types of Government employees who might be taxed.

12 MR. BARTLE: I'm afraid I don't understand Your
13 Honor's question.

14 QUESTION: Well, I'm going back to the CIA
15 example. You went on to say that except for the military,
16 which you certainly try to justify, you might be in
17 trouble if you tried to tax other kinds of Government
18 employees.

19 MR. BARTLE: I believe that's true, Your Honor.
20 And I mentioned earlier that we do not necessarily contend
21 that the justifications for taxing the military retirees
22 would also justify taxing other retirees.

23 But that --

24 QUESTION: And yet you say the States, up until
25 the time of Davis, thought that they could tax all

1 Government retirees -- United States retirees -- including
2 Kansas.

3 MR. BARTLE: While exempting -- while exempting
4 their own retirees?

5 QUESTION: Yes.

6 MR. BARTLE: Your Honor, Kansas was not directly
7 affected by the Davis decision because Kansas does not tax
8 Federal Civil Service retirees, and it hasn't taxed them
9 for more than 30 years.

10 QUESTION: I know. But a lot of other States
11 did.

12 MR. BARTLE: Correct, correct.

13 At the time the Kansas legislature created the
14 Kansas Public Employees Retirement System, they provided
15 that the benefits paid from that system would be exempt
16 from State income tax.

17 And in that same legislative session, they also
18 enacted an exemption for Federal Civil Service retirement
19 benefits.

20 QUESTION: Why did they do that? Do you know?

21 MR. BARTLE: I can't tell you precisely, Your
22 Honor. But we would contend that it certainly is evidence
23 of an appreciation that similarly situated State and
24 Federal retirees should be treated equal -- equally.

25 QUESTION: Well, Mr. Bartle, there are, though,

1 some other classifications of Federal retired people who
2 are subject to the Kansas tax, in addition to the military
3 retirees.

4 MR. BARTLE: Correct.

5 QUESTION: And as to those other
6 classifications, Kansas does not have and does not purport
7 to rely on the differences that it's trying to articulate
8 with regard to military.

9 MR. BARTLE: Precisely. And that is because
10 military retirees are unique. They are different than
11 State retirees, and they are different than all other
12 classes of Federal retirees.

13 QUESTION: Well, the problem is, we have to look
14 at all of the classes of Federal employees, I suppose,
15 that Kansas says we can tax, and try to figure out if
16 there's some legitimate State policy being implemented.
17 And so it would clearly be easier to do if the reasons
18 extended across the board to all the classes that Kansas
19 purports to tax.

20 MR. BARTLE: It certainly would make the Court's
21 task much easier.

22 QUESTION: Well, at least the fact that you tax
23 some other classes of Federal employees for which you
24 don't have the military argument sort of impugns the
25 State's submission that you are not taxing military just

1 because of the source.

2 MR. BARTLE: I can see Your Honor's point.

3 I'd like to point out that in Kansas, we have
4 three large classes of Federal retirees: Federal Civil
5 Service retirees -- there are about 20,000 of them;
6 railroad retirees -- and there's almost 20,000 of them;
7 and military retirees -- between 14 and 15,000. These
8 other classes of retirees that we discussed today and that
9 are mentioned in the briefs, may be classes of one, two,
10 or three. I know we have one lady who's retired from the
11 Federal Foreign Service. I know we have less than half a
12 dozen retired Federal judges.

13 Some of these other classes, I don't know
14 whether we have any of those people residing in the State
15 or not. But --

16 QUESTION: What is the explanation for that, if
17 it's not too indelicate to inquire? You exempt the
18 retirement of State judges, but not the retirement of
19 Federal judges.

20 (Laughter.)

21 QUESTION: It seems like a very bad idea.

22 (Laughter.)

23 MR. BARTLE: I can see Your Honor's point. But
24 suppose we were called upon to defend that position. What
25 would we do? We would search -- first for what the

1 legislature has done. We would try to see if there were
2 concrete differences between these two classes.

3 For example, Federal judges, as I understand it,
4 have a lifetime appointment, and their compensation cannot
5 be reduced at any point. Maybe this is a significant
6 difference. Maybe State judges are treated differently.
7 That is the sort of thing we would look to to see if there
8 were legitimate differences between the two classes.

9 As to these other classes of Federal retirees,
10 I'm saying that perhaps there are justifications which
11 would permit us to tax them in the manner that we do. And
12 we would look to what they do, and what is the character
13 of their income, and how do they compare with similarly
14 situated State retirees.

15 That is, we are just simply applying the
16 rationale and the analysis that this Court set out in
17 Davis.

18 QUESTION: Now, would you refresh my
19 recollection? Are there some classes of State employees,
20 State retirees that you do tax?

21 MR. BARTLE: Virtually all State and local
22 government retirees are all exempt.

23 QUESTION: They're all exempt. Okay.

24 MR. BARTLE: I think that comparing the facts in
25 Davis to the facts of this case -- as I said, Davis

1 involved Federal Civil Service retirees and retired State
2 employees. And those two groups were both fully, and
3 unconditionally retired from Government service. They
4 both participated in contributory retirement plans. They
5 both received deferred compensation for prior services.

6 Now, of course, those differences simply
7 don't -- those similarities simply don't exist in this
8 case. Military retirees continue to remain in the
9 military service. State employees are completely severed
10 from employment.

11 State retirees contribute to their retirement
12 program, and they pay tax on those contributions.

13 QUESTION: Mr. Bartle, as a practical matter,
14 you know, how often are military retirees called up, do
15 you think?

16 MR. BARTLE: I mentioned earlier that there was
17 quite a few retirees recalled to serve in the Persian
18 Gulf. And, of course, how often they are recalled --

19 QUESTION: Now, was that a call-up of retirees
20 who put in 20 years, rather than National Guard or
21 Reserves?

22 MR. BARTLE: There were Reserves called up;
23 there were National Guard called up. There were also
24 military retirees called up.

25 QUESTION: Do you have any idea how many?

1 MR. BARTLE: I believe the number runs into the
2 thousands, Your Honor.

3 QUESTION: Throughout the country?

4 MR. BARTLE: Yes, they were assigned to both
5 foreign posts and posts here in the United States. I'm
6 looking right now at a press release that was issued by
7 the Pentagon. They said retirees are needed to fill
8 critical requirements as doctors, nurses, linguists,
9 aviators, water purification specialists.

10 QUESTION: But of course, when they were called
11 up, I suppose they got their regular pay, and not just
12 their retirement, for retired service.

13 MR. BARTLE: That's correct, Your Honor.

14 I think the point is that particularly now that
15 it appears to be the future policy of the Government to
16 downsize the active-duty forces, there is going to be an
17 increasing reliance on reserve and retirement personnel to
18 fill the need when the need arises.

19 At any rate in Davis, the State of Michigan came
20 forward and tried to justify their different --
21 differential tax treatment. And they said that on the
22 average, Federal Civil Service retirement benefits are
23 higher than the benefits that we pay to our State
24 retirees. And because of this disparity in the amounts,
25 we feel that there's a justification for according this

1 tax benefit to the State retirees, whereas we would not
2 give such a benefit to the Federal retirees.

3 But this Court rejected that justification
4 because, while it might have been true on the
5 average -- as a general proposition -- it certainly wasn't
6 true in every instance. There were, of course, some State
7 retirees who had a higher pension than the Federal Civil
8 Service retirees. And the Court said that this
9 justification is not directly related to the differences.
10 It does not apply in each instance.

11 But, of course, the justifications that we are
12 putting forward today, do apply across the board. An
13 even-handed application of the rationale that we advance
14 for justifying different tax treatment results in the
15 taxation of all military retirees, but it does not result
16 in the taxation of any State retirees.

17 QUESTION: Is there any indication of that
18 rationale in the history of this statute -- I mean, in the
19 legislative debates or anything else? What I'm worried
20 about is, it seems to me, as far as I can tell, it's just
21 an invented justification. Had the Kansas statute said a
22 tax shall be imposed -- despite the exemption for
23 everybody else, shall be imposed upon all retirees who
24 have an obligation to return to their former employee's
25 service upon call.

1 Then I think you -- you know, I'd feel quite
2 differently about this statute. But it doesn't say that.
3 It just says a tax shall be imposed on military retirees.
4 And then you come in and say well, this is why they are
5 different.

6 But do we know that that's why the State made
7 the distinction?

8 MR. BARTLE: Your Honor, our statutes do not
9 state that a tax shall be imposed on military retirees.
10 Military retired pay is included in Federal adjusted gross
11 income, which is the basis that the tax is imposed at the
12 State level. So it's -- it is not singled out in any
13 statutory manner.

14 QUESTION: It is not given the same exemption
15 that other retirement pay is.

16 MR. BARTLE: That is correct, yes.

17 QUESTION: That's singled out, I think.

18 MR. BARTLE: It's not singled out in the same
19 manner that there is a specific provision that says we are
20 setting aside this discrete group of taxpayers. We are
21 subjecting them to unusual tax burdens that do not apply,
22 as a general proposition, to other taxpayers of the State.

23 I believe I understood the Solicitor General
24 earlier to say that if Kansas had statutory provision that
25 said deferred compensation shall be exempt, and current

1 pay for current services shall be taxable, that they would
2 feel that would pass muster.

3 QUESTION: Well, I don't think he conceded that.
4 I think he conceded they would then look to the -- I think
5 he referred to the degree of lopsidedness, to see whether
6 there was still a whiff of the pretextual about it.

7 So I don't think he was precluding a further
8 substantive examination.

9 MR. BARTLE: Well, I took his comments to mean
10 that if the statute set out, in specific terms, a neutral
11 classification, a neutral basis for different tax
12 treatment, that that would be permissible.

13 For example, there are other States that have
14 such provisions. They say benefits reserved -- received
15 from contributory retirement programs shall be exempt, and
16 noncontributory retirement programs shall be taxable.
17 And, of course, that is what we have here in Kansas. It's
18 simply that our statute is not framed in that manner.

19 And I think the Court ought to look to the
20 practical effect of this tax, rather than the form in
21 which the statutory language appears.

22 I'd like to turn to the policy reasons that
23 underlie the doctrine of intergovernmental tax immunity.
24 And, of course, the principle that the Federal Government
25 is immune from certain State taxes does not arise from the

1 actual text of the Constitution. It's implied from the
2 supremacy clause. It's deemed to be necessary to protect
3 the operations of the Federal Government from interference
4 by the State.

5 And here, it is not alleged that the tax results
6 in any -- any interference to any Federal function. And,
7 of course, that is the purpose of this constitutional
8 doctrine. It does not exist for the benefit of individual
9 taxpayers, such as the petitioners.

10 QUESTION: Well, do you think the statute,
11 section 111, requires some sort of interference with the
12 Federal operations before it can be applied?

13 MR. BARTLE: I think the statute prohibits a tax
14 that discriminates because the Federal Government is the
15 source of the pay of compensation. And we believe that
16 that is Congress' way of prohibiting a tax that is trying
17 to reach out and interfere with, or hinder, a Federal
18 function. That if a tax is using its sovereign taxing
19 authority to interfere with Federal operations, that that
20 ought to be permitted.

21 QUESTION: Well, the statute certainly doesn't
22 contain that additional language. But you say that was
23 Congress' purpose in passing it?

24 MR. BARTLE: That's what I believe arises out of
25 the principle that they are prohibiting a tax that

1 discriminates based on the source.

2 Taxes will no be prohibited if it discriminates
3 for any other legitimate basis. It is only the source-
4 based taxation that is prohibited.

5 Now, this Court is not the petitioners' only
6 source for relief. And they can -- ought to seek relief
7 from Congress in the first instance. And if Congress
8 actually perceived that its interests were being
9 threatened by this State tax, why, you'd think that they
10 would do something about it.

11 Congress could pass a law --

12 QUESTION: Would that be under its power to
13 enforce sovereign immunity?

14 MR. BARTLE: Yes, Congress may, by statute --

15 QUESTION: Well, but that -- but I thought you
16 agreed that the Constitution and the statute here are
17 coterminous, so far as -- so far as the doctrine of
18 governmental Immunity is concerned.

19 MR. BARTLE: Yes, I did say that -- the current
20 statute. And what I'm saying is that Congress --

21 QUESTION: But if -- but if it fails under the
22 current statute, the Congress would have no constitutional
23 power to do that.

24 MR. BARTLE: Correct.

25 QUESTION: Unless it's under some other clause.

1 MR. BARTLE: Correct. But, of course, it's our
2 position that the tax does not violate the current
3 statutory provision. Congress could always step into this
4 field and extend Federal tax immunity by statute beyond
5 the limit that the Constitution would otherwise establish.

6 Thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bartle.

8 The case is submitted.

9 (Whereupon, at 11:59 a.m., the case in the
10 above-entitled matter was submitted.)
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CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies
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**No. 91-611 KEYTON E. BARKER AND PAULINE
BARKER, ET AL., Petitioners v. KANSAS ET AL.**
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BY Michelle Sanders

(REPORTER)