

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: EMERY L. NEGONSOTT, Petitioner v.  
HAROLD SAMUELS, WARDEN, ET AL.

CASE NO: 91-5397

PLACE: Washington, D.C.

DATE: Monday, January 11, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X  
3 EMERY L. NEGONSOTT, :  
4 Petitioner :  
5 v. : No. 91-5397  
6 HAROLD SAMUELS, WARDEN, ET AL. :

7 - - - - -X  
8 Washington, D.C.  
9 Monday, January 11, 1993

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

13 APPEARANCES:

14 PAMELA S. THOMPSON, ESQ., Stratford, Connecticut; on  
15 behalf of the Petitioner.

16 ROBERT T. STEPHAN, ESQ., Attorney General of Kansas,  
17 Topeka, Kansas; on behalf of the Respondents.

18 WILLIAM K. KELLEY, ESQ., Assistant to the Solicitor  
19 General, Department of Justice, Washington, D.C.; on  
20 behalf of the United States as amicus curiae  
21 supporting the Respondents.

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1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 91-5397, Emery L. Negonsott v. Harold  
5 Samuels, Warden.

6 Miss Thompson.

7 ORAL ARGUMENT OF PAMELA S. THOMPSON

8 ON BEHALF OF THE PETITIONER

9 MS. THOMPSON: Mr. Chief Justice and may it  
10 please the Court:

11 This case comes before the Court on a writ of  
12 certiorari from the Tenth Circuit Court of Appeals. The  
13 issue for decision is whether 18 U.S. Code section 3243  
14 prohibits the State of Kansas from exercising criminal  
15 jurisdiction over an offense defined by the laws of the  
16 United States and enumerated in the Major Crimes Act, 18  
17 U.S. Code 1153.

18 Section 3243 was passed by Congress in 1940, and  
19 it conferred jurisdiction on Kansas over intra-Indian  
20 offenses to the same extent as its courts had jurisdiction  
21 over offenses committed elsewhere within the State in  
22 accordance with the laws of the State. However, Congress  
23 added a proviso which states that the courts of the United  
24 States shall not be deprived of jurisdiction over offenses  
25 defined by the laws of the United States.

3

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1           The first court to interpret section 3243 was  
2 the Eighth Circuit Court of Appeals in the case of  
3 Youngbear v. Brewer. This 1977 decision upheld a lower  
4 court's finding that Iowa's jurisdictional statute, which  
5 is virtually identical to the Kansas act, did not grant  
6 Iowa concurrent jurisdiction with the Federal courts over  
7 offenses defined by the laws of the United States.

8           In 1982, the Kansas Supreme Court, following the  
9 reasoning and analysis of the Eighth Circuit in Youngbear,  
10 held that the Federal courts had exclusive jurisdiction  
11 over Federal offenses defined in the Major Crimes Act.

12           Then in 1986, in the case of State of Kansas v.  
13 Negonsott, the Kansas Supreme Court reversed itself,  
14 holding that the State had concurrent jurisdiction with  
15 the Federal courts over major crimes. It is that decision  
16 of the Kansas Supreme Court which ultimately gave rise to  
17 this case.

18           The facts of the case are not in dispute.  
19 Briefly, Mr. Negonsott was arrested, tried, and convicted  
20 by State authorities in State court for the crime of  
21 aggravated battery. Now, this crime occurred within the  
22 confines of the Kickapoo reservation, and both Mr.  
23 Negonsott and the victim were enrolled members of the  
24 Kickapoo Nation in Kansas.

25           QUESTION: What crime covered by the Federal

1 Major Crimes Act most closely parallels the State crime?

2 MS. THOMPSON: It would be those crimes found in  
3 18 U.S. Code section 113 (c) and (f), which is basically  
4 assault with a dangerous weapon.

5 QUESTION: (c) and (f).

6 MS. THOMPSON: (c) and (f).

7 QUESTION: Thank you.

8 MS. THOMPSON: Mr. Negonsott challenged his  
9 conviction by filing a writ of habeas corpus in the  
10 Federal district court, attacking, of course, the subject  
11 matter jurisdiction of the State courts. The Tenth  
12 Circuit upheld the district court's dismissal of the writ  
13 of habeas corpus, finding that 18 U.S. Code 3243 granted  
14 Kansas concurrent jurisdiction over Federal crimes which  
15 are also defined by State law.

16 It is our contention that this decision of the  
17 Tenth Circuit violates generally accepted principles of  
18 Federal Indian law, and is also contrary to the  
19 legislative history of the act.

20 QUESTION: Are you saying that it's inconsistent  
21 with the language of section 3243?

22 MS. THOMPSON: Yes, Your Honor, I'm -- Justice  
23 Rehnquist.

24 QUESTION: I don't see why that is. It seems to  
25 me that just taking that rather brief statute on its face,

1 concurrent jurisdiction in the State and Federal courts is  
2 perfectly consistent with everything that language says.

3 MS. THOMPSON: If you take the language of the  
4 proviso, where it says, shall not deprive the courts of  
5 the United States, it's our contention that shall not  
6 deprive is not language granting concurrent jurisdiction.

7 QUESTION: Why not?

8 MS. THOMPSON: Because it's mandatory -- shall  
9 not deprive the courts of the United States.

10 QUESTION: Well, but concurrent jurisdiction, if  
11 a court has concurrent jurisdiction, it surely has not  
12 been deprived of jurisdiction.

13 MS. THOMPSON: It has been deprived of exclusive  
14 jurisdiction, and as this Court has held for the -- at  
15 least the last 100 years, jurisdiction under the Major  
16 Crimes Act is exclusive with the Federal district courts.

17 QUESTION: The proviso doesn't say, shall not  
18 deprive the courts of the United States of exclusive  
19 jurisdiction, it just says of jurisdiction.

20 MS. THOMPSON: That's correct, Justice  
21 Rehnquist, but again, our contention is that you have to  
22 analyze this Kansas statute in conjunction with the Major  
23 Crimes Act.

24 QUESTION: Anyway, why does the United States  
25 not continue to have exclusive jurisdiction?



1 MS. THOMPSON: Because the --

2 QUESTION: It does continue to have exclusive  
3 jurisdiction over Federal crimes, doesn't it?

4 MS. THOMPSON: No. It's that jurisdiction that  
5 is shared by the State of Kansas.

6 QUESTION: Is it the Government's position that  
7 the State of Kansas can try Federal offenses in Kansas  
8 courts?

9 MS. THOMPSON: No. That's not the contention.

10 QUESTION: That's right --

11 MS. THOMPSON: The contention is that --

12 QUESTION: And therefore the United States  
13 courts continue to have exclusive jurisdiction over  
14 Federal crimes.

15 MS. THOMPSON: But that's not how it's been --  
16 our contention is that the Major Crimes Act is -- defines  
17 Federal offenses, and that therefore that fits right in  
18 with the proviso of the Kansas statute. The Tenth Circuit  
19 has held that in that situation, where you also -- for  
20 example, aggravated battery is of course defined by State  
21 law, and when it is defined by State law, then the Federal  
22 courts and the State courts have concurrent jurisdiction.

23 QUESTION: Well, I think there's a little  
24 confusion that arises from your use in your brief -- and  
25 maybe there's no other term, but usually when you say

1 concurrent jurisdiction you mean that two courts have  
2 jurisdiction over the same cause of action, or over the  
3 same criminal offense. That's not what's at issue here.

4 What's at issue here is concurrent legislative  
5 jurisdiction, in a sense. That is, the State courts --  
6 the State government can make criminal under State law  
7 certain acts on the reservation and try those offenses in  
8 State court, and the Federal Government may make  
9 criminal similar acts under Federal law and try those in  
10 Federal courts.

11 So that the State courts and the Federal courts  
12 don't have concurrent jurisdiction, they have exclusive  
13 jurisdiction of their separate crimes, but it's only the  
14 legislative jurisdiction that's concurrent --

15 MS. THOMPSON: That's true.

16 QUESTION: And that's really what you're talking  
17 about.

18 MS. THOMPSON: Yes.

19 Since, as this Court stated in *Canon v.*  
20 *University of Chicago* that Congress acts with knowledge of  
21 existing law and, therefore, absent a clear manifestation  
22 of contrary intent a newly-enacted statute is presumed to  
23 be harmonious with existing law and its judicial  
24 construction, any analysis of the Kansas act must be made  
25 in conjunction with the Major Crimes Act.

1           Now, the Major Crimes Act was passed by Congress  
2     in 1885 to fill the jurisdictional void left by this  
3     Court's decision in Ex parte Crow Dog, because prior to  
4     the passage of the Major Crimes Act, tribal courts had  
5     exclusive jurisdiction over crimes committed within their  
6     reservation boundaries.

7           Now, the Major Crimes Act has been interpreted  
8     by this Court since United States v. Kagama as vesting  
9     exclusive jurisdiction with the Federal courts for an  
10    Indian defendant committing one of its enumerated crimes,  
11    because the purpose of the act was to provide a Federal  
12    forum for the prosecution of major crimes and to protect  
13    Indians from prosecution in State court.

14           Now, in United States v. Kagama this Court  
15    detailed many reasons why it felt the Federal courts had  
16    to have exclusive jurisdiction over these major crimes:  
17    1) that Indian Nations were, and continue to be today,  
18    wards of the Nation, dependent on the United States  
19    Government for all political rights.

20           Secondly, because of local ill feeling, the  
21    people of the States where they are found are often their  
22    deadliest enemies, and therefore Federal jurisdiction was  
23    necessary for their protection.

24           In other words, the purpose of the act was to  
25    protect Indians from the prejudices of their non-Indian

1 neighbors, and to preclude State legislative interference  
2 in their affairs.

3 Now, despite Kagama and its progeny, the court  
4 of appeals found that Congress impliedly modified the  
5 exclusivity of the Federal courts under the Major Crimes  
6 Act. It is our contention that had Congress wished to  
7 modify the Major Crimes Act as it pertained to Kansas, it  
8 could have done so by passing the first version of the  
9 bill, which is found in '86 Congressional Record, 5596,  
10 and which is set forth verbatim in my brief.

11 Now, this version expressly provided for  
12 concurrent jurisdiction, and explicitly modified the Major  
13 Crimes Act as it pertained to Kansas.

14 QUESTION: Well, is it true, as the other side  
15 argues, that if it had done that, the act would in fact  
16 have constituted a misstatement about concurrent  
17 jurisdiction with respect to minor crimes?

18 MS. THOMPSON: At the time that the act was  
19 passed, it was unclear whether or not the Assimilative  
20 Crimes Act, the General Crimes Act, applied in Indian  
21 country, and that issue was not decided until the decision  
22 in Williams v. United States in 1946 --

23 QUESTION: But it could have been a good  
24 reason --

25 MS. THOMPSON: By this Court.

1           QUESTION: I'm sorry. It could have been a good  
2 reason to drop the word concurrent just because there was  
3 disagreement over that and those who finally passed the  
4 legislation were of one view, i.e., that there was not  
5 jurisdiction over the minor crimes.

6           MS. THOMPSON: It could have been a good reason,  
7 but on the other hand, Justice Souter, Congress has  
8 plenary power to deal with Indian affairs. Had it wanted  
9 to grant concurrent jurisdiction to the State and the  
10 Federal Government under -- well, what became the  
11 Assimilative Crimes Act, it could have done so.

12           QUESTION: Well, it could, but it clearly did  
13 not want to do so with respect to minor crimes.

14           MS. THOMPSON: That's clear from the history.  
15           It's our contention that deletion of the word  
16 concurrent and the failure to modify the Major Crimes Act  
17 shows that Congress did not intend to grant Kansas  
18 concurrent jurisdiction over major crimes. Now, both the  
19 Solicitor General and the Attorney General, and, of  
20 course, the court of appeals, excused the failure to  
21 modify and to delete the word concurrent with reference to  
22 Secretary Burlew's letter which is part of the legislative  
23 history of the act, and as you stated, Justice Souter,  
24 because it did not reflect the true situation.

25           However, as the court in Youngbear held, when

1 legislators delete language, we may assume that they  
2 intended to eliminate the effect of the previous wording,  
3 and since Congress chose not to include language modifying  
4 the Major Crimes Act, it can be assumed that Congress did  
5 not intend to convey that jurisdiction to the State  
6 courts.

7 QUESTION: Well, under your view of the meaning  
8 of the statute, Ms. Thompson, what jurisdiction is  
9 conferred on the Kansas courts by virtue of the first part  
10 of 2343 --

11 MS. THOMPSON: Our contention --

12 QUESTION: 3243.

13 MS. THOMPSON: I'm sorry. Our contention,  
14 Justice Rehnquist, is that Kansas has jurisdiction over  
15 small, misdemeanor crimes, that the Federal Government  
16 retains exclusive jurisdiction over major crimes.

17 QUESTION: Then you really read out of that  
18 first language the words, to the same extent as its court  
19 have jurisdiction over offenses committed elsewhere within  
20 the State in accordance with the laws of the State.

21 MS. THOMPSON: That's correct, and as we -- as I  
22 talked about before, the question as to whether the  
23 General Crimes Act and the Assimilative Crimes Act apply  
24 to Indian country has been -- this Court has held that,  
25 since Williams v. The United States, that they do in fact

1 apply to Indian country.

2 The Solicitor General brought up a point in his  
3 brief that, well, exactly what was the scope of  
4 jurisdiction given to Kansas? Who was going to have  
5 jurisdiction over general crimes or assimilative crimes?

6 I would urge the Court to hold as the -- well,  
7 while the Tenth Circuit has held that assimilative crimes  
8 are State offenses, the Ninth Circuit has held in U.S. v.  
9 Bear and U.S. v. Marseilles, that when the Federal court  
10 adopts these assimilative crimes, that they become Federal  
11 offenses, and I would urge the Court to hold that way.

12 QUESTION: Are there Indian tribes in the State  
13 of Kansas which have their own tribal courts?

14 MS. THOMPSON: Yes, Your Honor.

15 QUESTION: And the tribal courts punish minor  
16 offenses, I take it.

17 MS. THOMPSON: The -- let me give you one  
18 example. The Kickapoo Tribal Court has been in existence  
19 for the past 3 years. Just last week, they started to  
20 hear their first misdemeanor offenses.

21 QUESTION: And that jurisdiction, I take it,  
22 would be shared by the State of Kansas under your  
23 interpretation.

24 MS. THOMPSON: Yes.

25 QUESTION: All right. So, then, it's not

1 correct to say that Kansas has exclusive jurisdiction over  
2 minor crimes, is it?

3 MS. THOMPSON: No, I do not believe that it is.  
4 It's just the fact that -- well, one of the reasons for  
5 the law was the fact that there was a lack of tribal  
6 courts, and that the Bureau of Indian Affairs was very  
7 reluctant to provide funding for the tribal courts. There  
8 had to be a forum where these small offenses could be  
9 adjudicated. Now, of course, the tribal courts are  
10 hearing these offenses.

11 Again, if we take as an example when Congress  
12 wishes to convey criminal jurisdiction, Congress makes  
13 that intent unequivocally clear, as it did with Public  
14 Law 280 jurisdiction -- in particular, 18 U.S. Code 1162,  
15 which granted criminal jurisdiction to six States, and the  
16 law specifically modified the Major Crimes Act, the  
17 General Crimes Act and the Assimilative Crimes Act as it  
18 pertained to those States.

19 It -- and, of course, P.L. 280 was passed by  
20 Congress in 1953, only a few years after they passed the  
21 Iowa statute in 1948. It seems only logical that had  
22 Congress wished to convey total criminal jurisdiction to  
23 the State of Kansas, they would have specifically set this  
24 forth in the statute.

25 Absent a clear expression of congressional



1 intent, the interpretation of the statute by the Tenth  
2 Circuit Court of Appeals by the Attorney General and the  
3 Solicitor General violates the rules of statutory  
4 construction, which is applicable to Indians.

5 For example, laws must be liberally construed to  
6 favor Indians, and ambiguous statutes should be liberally  
7 construed in the favor of Indians and not to their  
8 prejudice. That, of course, comes from Bryan v. Itasca  
9 County.

10 To interpret the Kansas act as the court of  
11 appeals has done would, 1) eliminate the historically  
12 exclusive stewardship of the Federal Government over major  
13 crimes as found in Kagama, and secondly it would subject  
14 Indians in Kansas, in Iowa, in North Dakota to a double  
15 prosecution.

16 QUESTION: Well, on the other hand, you could  
17 look upon it as granting Indian tribes the great benefit  
18 of being protected by two criminal laws, Federal law and  
19 State law. They can get the FBI to protect them as well  
20 as local law enforcement officers.

21 I do not know why, in determining whether  
22 Indians are being harmed or benefited by this  
23 interpretation, we have to look at it from the point of  
24 view of the Indian criminal instead of from the point of  
25 view of the Indian noncriminal. Why isn't it an advantage

1 to the Indian tribes to be protected by both State and  
2 Federal criminal laws?

3 MS. THOMPSON: Justice Scalia, we're -- I am not  
4 looking at this from the point of the Indian criminal. I  
5 am looking at this from the point of Indian and tribal  
6 sovereignty. The more State interference --

7 QUESTION: They don't have sovereignty anyway.  
8 I mean, the criminal law is going to -- it's not tribal  
9 criminal law that's going to govern, no matter what,  
10 right?

11 MS. THOMPSON: No, it's going to be the State,  
12 but again, we're looking at this from the -- because the  
13 criminal -- the Indian criminal defendant, he's going to  
14 be punished one way or the other, whether it's State court  
15 or Federal court, but we're looking at this as an  
16 intrusion basically on the rights of the tribes to make  
17 their own laws and govern themselves.

18 QUESTION: Well, I thought the Indians supported  
19 the Major Crimes Act on the assumption the States would  
20 have the power.

21 MS. THOMPSON: Do you mean supported this Kansas  
22 act?

23 QUESTION: Yes, the Kansas act.

24 MS. THOMPSON: The Kansas act.

25 QUESTION: Yes.

1 MS. THOMPSON: Well, as brought out in the brief  
2 by amici Native American Rights Fund, as it turns out that  
3 at least one tribe, the Potawatomi Tribe, did not support  
4 the passage of this act, and in the letters that the  
5 chairman of the Potawatomi Tribe wrote to Chairman Rogers,  
6 it is quite clear that they disagreed with the passage of  
7 this act in its entirety. They did not want the State to  
8 have any kind of jurisdiction over them.

9 QUESTION: How about some other Indians?

10 MS. THOMPSON: We could not --

11 QUESTION: Did any Indians support it?

12 MS. THOMPSON: We could not find any -- any  
13 resolution supporting the act. The only thing that we  
14 were able to find in the archives were these letters from  
15 the Potawatomi Tribal Council to Chairman Rogers asking  
16 that the act not be passed, so there was not total  
17 support. There --

18 QUESTION: Well, was there some support from the  
19 Indians?

20 MS. THOMPSON: The only support that we know  
21 about is what is stated in Secretary Burlew's letter and  
22 in the memo from the Department of the Interior, which is  
23 found in the legislative history. Of course, that is his  
24 word as to what happened, and obviously that's not even  
25 true because of the letters that we found in the archives

1 from the Potawatomis to Chairman Rogers.

2 Other than that, there's no expression of --  
3 there are no letters from an Indian tribe saying yes, we  
4 support this bill, or from individual Indians saying yes,  
5 we want this bill passed.

6 QUESTION: Ms. Thompson, did the Colorado  
7 opposition surface rather late in all this?

8 MS. THOMPSON: I'm sorry, I don't understand  
9 your question.

10 QUESTION: You said there was opposition by the  
11 one tribe which I think you referred to as the Colorado  
12 something.

13 MS. THOMPSON: Oh --

14 QUESTION: Did this surface rather late in the  
15 litigation?

16 MS. THOMPSON: No, it did not, Justice Brennan.  
17 In fact, the first letter that was sent to Chairman Rogers  
18 was dated -- April 25th, 1940, asking that the law not be  
19 passed.

20 The second canon of construction, as found in  
21 Menominee Tribe v. The United States, states that Federal  
22 statutes should be construed so as to avoid implicit  
23 repeals. Holding that Kansas has concurrent jurisdiction  
24 over major crimes would repeal the Major Crimes Act as it  
25 pertains to Kansas.

1 QUESTION: But would it be implicit? Wouldn't  
2 that be an explicit repeal?

3 MS. THOMPSON: Well, because the -- it is not  
4 explicitly stated in the statute itself that the Major  
5 Crimes Act are -- that the Major Crimes Act is modified as  
6 it pertains to Kansas. Our feeling is that it would be  
7 more of an implicit repeal.

8 QUESTION: Well, what if the -- simply the first  
9 paragraph and not the second paragraph of 3243 were there,  
10 would you still say that that could not be applied  
11 according to its language because of the presumption  
12 against implied repeal?

13 MS. THOMPSON: Yes, because of -- again because  
14 of the exclusivity of Federal courts under the Major  
15 Crimes Act. However, the State of New York, which also --  
16 which has a law similar to the Kansas law except for the  
17 second proviso, in litigation under that law the Second  
18 Circuit in U.S. v. Cook has held that that statute  
19 standing alone provides the State and Federal Government  
20 with concurrent jurisdiction.

21 QUESTION: You know, Congress is certainly  
22 trying to effect some change in the status quo with this  
23 legislation.

24 MS. THOMPSON: They are, Justice -- Chief  
25 Justice Rehnquist, and what they are trying to cure, and I

1 believe this by reviewing the legislative history of the  
2 act. There are numerous references to the fact that there  
3 are no tribal courts on the reservation, that there is  
4 this jurisdictional void which has to be filled, that the  
5 Bureau -- the Department of the Interior is very reluctant  
6 to fund these tribal courts, and allegedly the tribes  
7 don't even want the tribal courts.

8 Now, there are, of course, references in the  
9 legislative history to the major crimes, but the main  
10 problem -- when you look at the situation in 1940, the  
11 Federal courts already have jurisdiction over the major  
12 crimes whether the State was assuming that jurisdiction or  
13 not. The problem was, there are no tribal courts, and the  
14 State did not have jurisdiction over misdemeanor offenses.  
15 That was the reason the act was passed, was to solve that  
16 problem.

17 Even today, the majority of crimes are small  
18 crimes, they're not felonies. They're not serious  
19 offenses.

20 QUESTION: It seems to me that if you have a  
21 prior statute that says grass is green and a later statute  
22 is passed that says grass is blue, that is not an implicit  
23 repeal of the earlier statute, it is an explicit repeal.

24 I don't think you have to say in the later  
25 statute to achieve an explicit repeal grass is blue and

1 not green. I think it's enough to say grass is blue. It  
2 repeals the earlier one, doesn't it, and that would  
3 certainly be the case if you only had the first paragraph,  
4 as the Chief Justice questioned.

5 MS. THOMPSON: Yes. Yes, it would be.

6 QUESTION: Yes.

7 MS. THOMPSON: At any rate, what has happened is  
8 that the Major Crimes Act has been repealed by this  
9 statute, without Congress ever allowing that or authorizing  
10 that to happen.

11 QUESTION: Well, that goes back to the question  
12 I think Justice Scalia asked you, because how does it in  
13 any way affect the authority of the United States to  
14 define, prosecute, and punish major crimes? It doesn't.  
15 So how is that some kind of a repeal?

16 MS. THOMPSON: Well, Justice O'Connor, in -- it  
17 may not affect the ability of the United States Government  
18 to define crimes or punish crimes, but as it's working  
19 out, the State of Kansas is assuming total jurisdiction.  
20 There is never a case that is going to go to Federal  
21 court, so for --

22 QUESTION: What would prevent the Federal  
23 Government from prosecuting this same man for a Federal  
24 offense?

25 MS. THOMPSON: Nothing would prevent -- in fact,

1 that's one of the problems with the --

2 QUESTION: So it's open to the Federal  
3 Government to do that.

4 MS. THOMPSON: It is.

5 QUESTION: How has it been deprived of anything?

6 MS. THOMPSON: Because it's been deprived of its  
7 exclusivity. When the State can prosecute an Indian  
8 defendant, when it is allowed to do that, the Federal  
9 courts no longer have exclusive jurisdiction. It's not a  
10 situation of depriving the Federal court.

11 QUESTION: Well, the Federal court still has  
12 exclusive jurisdiction of Federal crimes. It just doesn't  
13 have jurisdiction over State crimes, but it never did.

14 MS. THOMPSON: No, it doesn't have jurisdiction  
15 over State crimes, but the problem is -- from the other  
16 way is that the State has jurisdiction over these  
17 federally defined offenses, that's the problem.

18 QUESTION: No, the State has jurisdiction over  
19 the State-defined offenses.

20 MS. THOMPSON: Yes, I'm sorry, I should have --  
21 of an offense that is a crime under both the State and  
22 under the Federal Government.

23 Just very briefly I'd like to review the  
24 legislative history of the act, which the Tenth Circuit  
25 Court of appeals did, because it found the act ambiguous,



1 and I would urge the Court to pay the most attention to  
2 the letter from Congressman Lambertson which again is set  
3 forth in total in petitioner's brief.

4 In that letter, the Congressman, who of course  
5 was elected by the people on or near the reservation,  
6 states that all parties are agreed that the State of  
7 Kansas was to have full jurisdiction for full crimes.

8 Now, the Solicitor General and the Attorney  
9 General have basically made up -- or have determined that  
10 that letter perhaps should not be given the full credence  
11 that it should, because, again there is no mention in that  
12 letter that Kansas was to have any jurisdiction over the  
13 major crimes, and according to Woodward Manufacturing v.  
14 the NCRB, it is the sponsors that we look to when we are  
15 determining the statutory word in doubt.

16 Mr. Chief Justice, I would like to reserve a few  
17 minutes for rebuttal.

18 QUESTION: Very well, Ms. Thompson.

19 MS. THOMPSON: Thank you.

20 QUESTION: General Stephan, we'll hear from you.

21 ORAL ARGUMENT OF ROBERT S. STEPHAN

22 ON BEHALF OF THE RESPONDENTS

23 MR. STEPHAN: Mr. Chief Justice, may it please  
24 the Court:

25 I'd like to respond to some of the statements

1 made by Ms. Thompson, but first I would like to point out  
2 that the Kansas act has done exactly what the Congress  
3 intended. It's legalized the enforcement of major and  
4 minor crimes on the Kansas reservations, it's provided  
5 courts where there were none.

6 True, there is now one court on the Kickapoo  
7 Nation Reservation, but it is virtually just getting  
8 underway. The other three tribes have no tribal courts.

9 It met the requests of the four Kansas tribes in  
10 1940 when it was enacted. It eliminated the  
11 administrative nightmare at the time of trying to  
12 determine where the crime occurred on the reservation.  
13 Was it a part of an unrestricted allotment, or was it a  
14 part of trust property, a restricted allotment, and two-  
15 thirds of the land at the time of the enactment of this  
16 act was -- consisted of unrestricted allotments.

17 QUESTION: General Stephan, whereabouts in  
18 Kansas is the Kickapoo Reservation?

19 MR. STEPHAN: The Kickapoo -- all of the  
20 reservations are in the northeast part of the State of  
21 Kansas, and they're Brown County, Jackson County, in that  
22 area of the State.

23 QUESTION: General Stephan, can I ask you one  
24 question?

25 MR. STEPHAN: Yes.

1 QUESTION: Both the legislative history and your  
2 statement just now indicated the four tribes all supported  
3 this legislation.

4 MR. STEPHAN: Yes.

5 QUESTION: How does that square with the amicus  
6 briefs and the correspondence in the amicus briefs? The  
7 legislative history is all second-hand information, but  
8 the original tribal records seem to point in the other  
9 direction.

10 MR. STEPHAN: Well, the letter referred to, the  
11 Potawatomi Business Council, in those letters the author  
12 of the letters also referred to another Potawatomi  
13 Business Council, but he didn't agree with that council,  
14 so there was obviously a split of some kind in the tribe,  
15 but -- and they also indicated in the letter that they  
16 realized that this would maintain full jurisdiction to the  
17 State of Kansas, and seemed to be more concerned about an  
18 attempt by Brown and Jackson Counties in Kansas to collect  
19 taxes, and they thought this was a guise to collect taxes  
20 that evidently they'd received a judgment for in a Federal  
21 court, and that Brown and Jackson County were trying to  
22 evade those taxes.

23 And when you take that along with the statements  
24 of the Secretary of Interior -- Secretary Burlew at the  
25 time -- and the Superintendent and the memorandum

1 attached, they say all four tribal councils wanted this  
2 legislation, and I think that has to be given great  
3 credence.

4 QUESTION: Even though the records themselves  
5 say we, the business community, and so forth and so on,  
6 take the other -- voted by a majority the other way.

7 MR. STEPHAN: Well, the business council, but we  
8 don't know exactly who this business council is. In the  
9 letter --

10 QUESTION: If we don't know today, how do we  
11 know the Secretary knew back when the act was passed? I  
12 mean, his information is all second-hand, too.

13 MR. STEPHAN: Well, it's all second-hand, but I  
14 guess we've got one tribe and he's talking about all four,  
15 so at least it's three to one, and I would give great  
16 credence -- he was the trustee for the Indian tribes.

17 QUESTION: Maybe this is a pretty good argument  
18 for not looking at legislative history.

19 MR. STEPHAN: Well, it could be that, and I will  
20 do my best to stay away from it.

21 (Laughter.)

22 MR. STEPHAN: Counsel did indicate that the  
23 Kansas act is an implicit repeal of the Major Crimes Act,  
24 and I would point out that the major Crimes Act does not  
25 preclude the State from exercising jurisdiction, and

1 certainly there is nothing that is repealed in there.

2 I notice the Court's looking at the map, I  
3 presume of Kansas. They just got 14 inches of snow  
4 yesterday in that area.

5 The overriding issue in this case is over the  
6 words, exclusive jurisdiction, as used in section 1153,  
7 the Major Crimes Act, and do these words mean that the  
8 Federal Government has exclusivity over Indian country,  
9 thereby precluding the State from exercising jurisdiction  
10 over the major crimes listed, or do these words identify  
11 the body of law that is to be applied by the Federal  
12 courts when conducting a prosecution over crimes committed  
13 in Indian country?

14 The words, exclusive jurisdiction in the Major  
15 Crimes Act does not mean that the Federal Government has  
16 exclusive jurisdiction to prosecution. The words do not  
17 apply to prosecutorial jurisdiction extended over Indian  
18 country, but are only used as a description of the laws  
19 which are extended to it.

20 The clause refers to the body of law and  
21 procedure, and not to the exclusivity of prosecution. It  
22 does not confer the exclusive jurisdiction of the Federal  
23 courts, but identifies the law that is applied in those  
24 courts.

25 Of course, since jurisdiction over Indian

1 country can only be obtained through an act of Congress,  
2 only the Federal Government could exercise jurisdiction  
3 pursuant to section 1153, unless through another act of  
4 Congress Kansas was given jurisdiction in Indian country.

5 It is not the language, exclusive jurisdiction,  
6 as used in section 1153, that precludes the exercise of  
7 State jurisdiction over conduct by Indians in Indian  
8 country. The preclusion flows from the general principles  
9 that the State has no inherent jurisdiction over Indians  
10 in Indian country, and may exercise jurisdiction only  
11 where, as authorized in the Kansas act, there is a clear  
12 grant of authority by Congress.

13 Where does exclusivity come from in the Major  
14 Crimes Act? The exclusivity comes from the fact that  
15 Congress delegated authority to the United States in that  
16 act, and it means exactly what it says. You have to look  
17 at more than the word, exclusive, and examine the section  
18 in its entirety, and when this is done, you can see that  
19 exclusivity refers to the manner and body of Federal law  
20 which shall be applied, and that section --

21 QUESTION: Is the State acting as the agent of  
22 the Federal Government when it prosecutes under its own  
23 laws?

24 MR. STEPHAN: No, the State is not acting as the  
25 agent of the Federal Government. The Federal Government

1 has given the State authority to execute its laws, the  
2 State laws, in regard to crimes that occur on the  
3 reservation.

4 QUESTION: So I take it there would be no  
5 objection under the double jeopardy clause to multiple  
6 prosecutions.

7 MR. STEPHAN: That issue has never been met  
8 by -- I am convinced at this point that certainly the  
9 better line of thought is that there would be nothing to  
10 prevent a prosecution by both the Federal and the State  
11 Government.

12 QUESTION: In order for that result to obtain,  
13 is it necessary to say that what the Federal Government  
14 has done is to acquiesce in the exercise of State  
15 authority? Is that the way it works?

16 MR. STEPHAN: I don't know that there's  
17 acquiescence, because the State is not required to  
18 maintain the prosecution.

19 QUESTION: Well, there's either acquiescence or  
20 delegation. The only reason I ask is, if there is a  
21 double jeopardy problem, that might be one argument in  
22 favor of construing the statute as the petitioner wishes  
23 us to do.

24 MR. STEPHAN: Well, double jeopardy has  
25 certainly been an issue that has been raised in other

1 circumstances, and there are prosecutions today under both  
2 State and Federal law that arise from the same set of  
3 facts, and double jeopardy is not a problem in those  
4 instances, and the same is true in regard to Indian  
5 reservations.

6 QUESTION: That's like in *Barkus v. Illinois*,  
7 but there the State has its own sovereignty that it's  
8 exercising, and I'm just asking you if we can't interpret  
9 this act as allowing the State to exercise its own  
10 sovereignty.

11 MR. STEPHAN: Well, the State does exercise its  
12 sovereignty in accordance with these acts --

13 QUESTION: But that seems somewhat inconsistent  
14 with your -- excuse me.

15 MR. STEPHAN: I'm sorry.

16 QUESTION: That seems somewhat inconsistent with  
17 your saying that the United States has delegated its power  
18 to the States.

19 MR. STEPHAN: If I said that, then I misspoke,  
20 because no Federal power was delegated to the State. The  
21 Congress granted to the State authority to enforce its  
22 laws on the Indian reservations.

23 QUESTION: General Stephan --

24 MR. STEPHAN: Yes, sir.

25 QUESTION: I would agree with you that the Major



1 Crimes Act does not imply exclusive Federal jurisdiction  
2 but simply describes the jurisdiction whose laws are  
3 applied, namely those laws that exist where the United  
4 States has exclusive jurisdiction. I would agree with  
5 that but for one word.

6 Subsection (a) says, shall be subject to the  
7 same law and penalties -- it does not say, as persons  
8 committing any of the above offenses within the exclusive  
9 jurisdiction of the United States. It says -- not, as all  
10 persons, it says, as all other persons committing any of  
11 the above offenses within the exclusive jurisdiction of  
12 the United States.

13 Now, the implication of the word, other, is that  
14 an Indian committing such an offense is a person  
15 committing that offense within the exclusive jurisdiction  
16 of the United States. Isn't that the implication of using  
17 the word, other?

18 MR. STEPHAN: Well, if I understand your  
19 question correctly, this Major Crimes Act applies to an  
20 Indian perpetrator, whether or not the victim is an Indian  
21 or a non-Indian.

22 QUESTION: That's right, but does it not imply  
23 that that Indian perpetrator is a perpetrator acting  
24 within the exclusive jurisdiction of the United States,  
25 because it uses the word other? He shall be treated the

1 same as all other persons committing any of the above  
2 offenses within the exclusive jurisdiction of the United  
3 States.

4 MR. STEPHAN: The term, exclusive jurisdiction,  
5 is an extension of the laws on Federal enclaves, and is  
6 not -- the exclusive jurisdiction is not maintained from  
7 the language of the act itself, but from the fact that in  
8 the Major Crimes Act no authority is delegated to the  
9 States.

10 QUESTION: Well, you say that, but I find within  
11 the act itself the word, other, that certainly suggests to  
12 me that the act at least implies exclusivity.

13 Now, one can argue that it is nonetheless  
14 subsequently amended by 3243, but it seems to me the word,  
15 other, does imply that an Indian perpetrator is within the  
16 exclusive jurisdiction of the United States.

17 MR. STEPHAN: Well, the Major Crimes Act was  
18 originally enacted as a result of the Crow Dog case that  
19 said they did not have -- that the Federal Government did  
20 not have jurisdiction on the reservation in regard to a  
21 particular murder case where one Indian murdered another  
22 Indian because it was not a Federal enclave.

23 So when you -- so the Major Crimes Act was  
24 enacted, and its purpose was to solve that problem and to  
25 make certain that major crimes were prosecutable by the

1 United States, and even in that case, or the subsequent  
2 case of Kagama that construed the Major Crimes Act, this  
3 Court made it very clear that that did not express  
4 limitations upon the powers of the State. Even with the  
5 cases that have talked about the exclusive jurisdiction of  
6 the Federal Government, this matter has not spoken to a  
7 limitation in regard to the powers of the State.

8 Ms. Thompson referred to the fact that the  
9 language, shall not deprive, is mandatory, and therefore  
10 Kansas doesn't have concurrent jurisdiction, and I think  
11 that meets basically the same issue that we just  
12 discussed. This reserves a right to the Federal  
13 Government to proceed accordingly with the laws that it  
14 has enacted.

15 The Kansas act is unambiguous. The first  
16 sentence, standing alone, unambiguously confers on Kansas  
17 criminal jurisdiction over all criminal offenses committed  
18 by or against Indians on Indian reservations. Congress by  
19 the passage of the Kansas act granted to Kansas  
20 jurisdiction that had only been granted -- previously had  
21 only been granted to the Federal Government.

22 Just as unambiguously, the second sentence  
23 preserved the subject matter jurisdiction of Federal  
24 courts over crimes defined by Federal law. The Federal  
25 courts retained their jurisdiction to entertain any

1 prosecution under the Major Crimes Act.

2 The canon of construction that full effect  
3 should be given to all of the statute's language leads to  
4 the conclusion that the Federal Government has concurrent  
5 jurisdiction with the State's unqualified grant of  
6 authority.

7 Congress created a body of law that applies to  
8 Federal enclaves that are within the sole and exclusive  
9 jurisdiction of the United States by the enactment of the  
10 Federal Enclaves Act. This body of law was extended to  
11 Indian country by the Major Crimes Act and the General  
12 Crimes Act, but those acts do not make Indian country a  
13 Federal enclave, and for that reason, it is the body of  
14 law that applies and not the exclusive authority of the  
15 courts of the United States that was extended to Indian  
16 country.

17 And so reference to, within the exclusive  
18 jurisdiction of the United States, refers to the subject  
19 matter jurisdiction of the body of law to be extended to  
20 Indian country, and not the type of jurisdiction that was  
21 conferred upon the Federal courts, because Congress did  
22 not make Indian country a Federal enclave.

23 This act has worked as it should. It served the  
24 tribes and the people of the State of Kansas well, and the  
25 judgment of the Tenth Circuit was correct.

1 QUESTION: Thank you, General Stephan.

2 Mr. Kelley, we'll hear from you.

3 ORAL ARGUMENT OF WILLIAM K. KELLEY

4 ON BEHALF OF THE UNITED STATES

5 AS AMICUS CURIAE SUPPORTING THE RESPONDENTS

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

8 I just have a few points to make. First, on the  
9 language of the statute, it's quite clear, in our view,  
10 that the statute gave Kansas complete jurisdiction to  
11 prosecute offenses to the full extent of State law.

12 The second sentence of the statute, it seems to  
13 us, merely maintained Federal jurisdiction where it  
14 existed. It is not an implied repeal of the Major Crimes  
15 Act to give the State jurisdiction over a crime under  
16 State law, because after the passage of section 3243 and  
17 before, the Federal courts had jurisdiction to entertain  
18 major crimes prosecutions under section 1153.

19 Now, petitioner has referred to the first  
20 version of the bill and its inclusion of the word,  
21 concurrent, and the reference to modification of the Major  
22 Crimes Act as indicating that Congress must have meant  
23 something different in the final version of the bill.

24 In fact, we think Congress did mean something  
25 different, and it's fully explained in the legislative

1 history what Congress meant. Prior to the passage --  
2 excuse me, at the time this statute was under  
3 consideration, the Federal Government did not have  
4 jurisdiction over so-called minor crimes under what is now  
5 section 1152 between two Indians. The Federal Government  
6 does not have that jurisdiction today. It's quite clear,  
7 however, that under the Kansas act the State has  
8 jurisdiction over minor crimes between two Indians.

9 Moreover, at the time the act was under  
10 consideration there was some uncertainty as to the  
11 applicability of the Assimilative Crimes Act in Indian  
12 country. That uncertainty, of course, was removed by the  
13 Court's decision 6 years later in Williams v. United  
14 States, but it's quite clear that Congress meant, by  
15 removing the word, concurrent from the final version of  
16 the bill, to make clear that Kansas had more jurisdiction  
17 than the Federal Government had to that point. Thus, the  
18 amendment was intended to make the bill broader rather  
19 than narrower than the first version.

20 Now, another problem in petitioner's position,  
21 of course, is that the modification referred to in the  
22 first version of the bill referred to what was  
23 then -- what has now become section 1152, so-called minor  
24 crimes. Petitioner's position in this Court, however, is  
25 that that's all the State was granted jurisdiction over.

1           If the removal of the modification of the Major  
2 Crimes Act reference in the version of the bill was  
3 intended to retain exclusive jurisdiction over major  
4 crimes prosecutions, the same must be true of jurisdiction  
5 over section 1152 prosecutions. The States generally do  
6 not have jurisdiction over minor crimes involving Indians  
7 unless Congress grants it.

8           Thus, the petitioner can have it one way but not  
9 both, it seems to us. That is, under her view, there  
10 should be no concurrent jurisdiction at all.

11           QUESTION: You say under her view, then, or  
12 under the petitioner's view, the Kansas courts would have  
13 gotten no additional jurisdiction under the first  
14 sentence.

15           MR. KELLEY: Well, the Kansas courts would have  
16 gotten jurisdiction, Mr. Chief Justice, over minor crimes  
17 between two Indians, because Federal jurisdiction did not  
18 exist over those crimes then, and it does not today, and  
19 there's some question whether Kansas would have had  
20 jurisdiction over assimilative crimes that are defined by  
21 reference to State law rather than general Federal crimes  
22 defined by reference to Federal law.

23           The proviso in the Kansas act refers to not  
24 depriving Federal courts of jurisdiction over offenses  
25 defined by Federal law, and if assimilative crimes are

1 viewed as being defined by reference to State law, then an  
2 argument can be made that the State would have  
3 jurisdiction over those offenses as well.

4 But it's quite clear that Congress meant to  
5 grant the State more than concurrent jurisdiction. That  
6 is, more than the Federal courts had. It's also quite  
7 clear, however, that Congress meant to preserve Federal  
8 major crimes jurisdiction.

9 That jurisdiction was in one sense exclusive at  
10 the time. That is, only the Federal Government could  
11 prosecute crimes arising out of conduct that was made  
12 criminal under the offenses enumerated in the Major Crimes  
13 Act.

14 After passage of the act, the State has that  
15 power as well, to prosecute under State law. The Federal  
16 jurisdiction to prosecute crimes defined by Federal law,  
17 which is what the statute says, was exclusive then, and it  
18 remains exclusive today.

19 With respect to the lack of clarity as to the  
20 consent of the tribes at the time, Justice Stevens, in  
21 response to your question earlier, it is somewhat unclear  
22 from history what the positions of the tribes were. As  
23 General Stephan mentioned, there was some question as to  
24 the legitimacy of the Potawatomi Business Committee that  
25 sent the letter at issue.



1           We would submit, of course, that the Secretary  
2 of Interior was the person in a position to determine  
3 which group spoke for the tribe. All we know from the  
4 legislative history is that the executive branch  
5 understood the four tribes to want the legislation, and  
6 Congress, of course, acted on that understanding, so to  
7 the extent that we're trying to determine the meaning of  
8 what Congress enacted, its understanding of what the  
9 tribes wanted at the time, of course, should be what  
10 counts.

11           Now that, of course, does not undermine our  
12 position that the canon and the statutes should be  
13 construed liberally in favor of Indians does not warrant a  
14 different result here for at least two reasons: 1) it's  
15 unclear that the canon urged by petitioner is in favor of  
16 the Indians generally. Of course, it's in favor of him,  
17 but the concerns that animated this statute were to  
18 protect tribal law and order on the reservations at the  
19 time, and we submit that it was in the interests of the  
20 Indians for that statute to be passed for that end.

21           Moreover, no canon of construction can overcome  
22 what we regard as the plain language of the statute, and  
23 of course it's quite plain legislative history.

24           If the Court has any further questions --  
25 otherwise, I will submit it.

1 Thank you.

2 QUESTION: Thank you, Mr. Kelley.

3 Ms. Thompson, you have 3 minutes remaining.

4 REBUTTAL ARGUMENT OF PAMELA S. THOMPSON

5 ON BEHALF OF THE PETITIONER

6 MS. THOMPSON: The first point I'd like to make  
7 is regarding the argument of double jeopardy. It's not  
8 our contention that the State of Kansas, when it's acting  
9 under this law, and the Federal Government -- the State of  
10 Kansas when it's acting under this law is some sort of an  
11 arm of the United States Government.

12 Our contention has always been that the United  
13 States Government is one sovereign and the State of Kansas  
14 is another sovereign, and therefore an Indian person  
15 could, conceivably, be left wide open to double  
16 prosecution by both the Federal Government and by the  
17 State courts.

18 Secondly, regarding the legislative history of  
19 the act, again I would urge the Court to give full  
20 credence to what Congressman Lambertson said in his  
21 letter -- that the State of Kansas was to get full  
22 jurisdiction for small offenses.

23 This is an expression of the will of Congress.  
24 If the State of Kansas was to have jurisdiction --  
25 concurrent jurisdiction over major crimes, certainly

1 Congressman Lambertson would have put that in his letter.  
2 It would have taken another five or six words to say, and  
3 the State will have concurrent jurisdiction over major  
4 crimes.

5 Taking into consideration the fact that, as this  
6 Court has held for the past 100-plus years, jurisdiction  
7 in the Federal court over the major crimes is exclusive  
8 technically under this law, that does not do away with the  
9 exclusivity of the Federal courts. However, in reality it  
10 does, because if the laws --

11 QUESTION: Of course, in your view, it would  
12 have been very simple -- if I may just interrupt you on  
13 the textual point, it would have been very simple in the  
14 second sentence simply to add one more word. This section  
15 shall not deprive the courts of the United States of  
16 exclusive jurisdiction over offenses. That would have  
17 been the textually easier way to get to the point that you  
18 want us to reach, and yet Congress didn't follow that.

19 MS. THOMPSON: No, they did not do that, and  
20 again, when they -- Congress in 1953 was in the process of  
21 passing Public Law 280, they were very specific in  
22 granting the States given criminal jurisdiction that the  
23 Major Crimes Act and the General Crimes Act and the  
24 Assimilative Crimes Act would be modified accordingly.

25 QUESTION: Ms. Thompson, can I make one comment

1 that you might want to comment on. You take Congressman  
2 Lambertson as the gospel on these issues, and he said the  
3 Indians were in favor of the legislation.

4 MS. THOMPSON: Because I believe from that  
5 letter it is clear that he is interpreting the  
6 legislation. The will of Congress is that --

7 QUESTION: But he also says, as a matter of  
8 fact, all parties are agreed on this bill, the Indians and  
9 so forth. So he thought the Indians wanted this bill  
10 enacted.

11 MS. THOMPSON: But again, only for small  
12 offenses. As you know, the legislative history of the act  
13 is only four or five pages.

14 QUESTION: Yes, but your -- the amicus brief  
15 suggests that the Indians were opposed to the bill,  
16 period, not as to part of it, and this history suggests  
17 they were in favor of the bill.

18 MS. THOMPSON: I can't answer that question.  
19 Perhaps --

20 QUESTION: At least it is clear the record  
21 before Congress indicated the Indians favored this  
22 legislation.

23 MS. THOMPSON: That's true.

24 CHIEF JUSTICE REHNQUIST: Thank you,  
25 Ms. Thompson.

1 MS. THOMPSON: Thank you.

2 CHIEF JUSTICE REHNQUIST: The case is submitted.

3 (Whereupon, at 1:51 p.m., the case in the above-  
4 entitled matter was submitted.)

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# CERTIFICATION

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

*Emery L. Negonsott, Petitioner v. Harold Samuels, Warden, et al.*

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*Case No: 91-5397*

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

BY *Ann Marie Federico*

(REPORTER)