

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ARKANSAS, Petitioner v. FARM CREDIT SERVICES OF
CENTRAL ARKANSAS, ET AL.

CASE NO: 95-1918

PLACE: Washington, D.C.

DATE: Monday, April 21, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARKANSAS, :

4 Petitioner :

5 v. : No. 95-1918

6 FARM CREDIT SERVICES OF :

7 CENTRAL ARKANSAS, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Monday, April 21, 1997

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:05 a.m.

14 APPEARANCES:

15 MARTHA GRISSOM HUNT, ESQ., Arkansas Revenue Legal Counsel,
16 Little Rock, Arkansas; on behalf of the Petitioner.

17 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting the
20 Petitioner.

21 RICHARD A. HANSON, ESQ., Chicago, Illinois; on behalf of
22 the Respondents.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 95-1918, Arkansas v. Farm Credit Services of Central Arkansas.

Ms. Hunt.

ORAL ARGUMENT OF MARTHA GRISSOM HUNT
ON BEHALF OF THE PETITIONER

MS. HUNT: Mr. Chief Justice, and may it please the Court:

This case was decided incorrectly by the lower courts in two respects. First, the district court should have dismissed the case for lack of jurisdiction under the Tax Injunction Act.

Second, on the merits, the reliance of the lower courts on a doctrine of implied immunity of production credit associations from State taxation is erroneous when 12 U.S.C. section 2077 clearly provides the extent to which production credit associations are exempt from Arkansas or from any State sales and income tax.

QUESTION: I'm curious to know, was the Anti-Injunction Act point, the jurisdictional point argued in the Ninth Circuit -- pardon me, in the Eighth Circuit or in the briefs that were filed?

MS. HUNT: It was argued in the district

1 court --

2 QUESTION: I noticed that.

3 MS. HUNT: -- but not in the Eighth Circuit.

4 QUESTION: Not in the briefs and not in the oral
5 argument?

6 MS. HUNT: Not in either, that's correct.

7 The Tax Injunction Act, which is printed on page
8 2 in the petitioner's brief, 28 U.S.C. section 1341,
9 provides an absolute statutory bar to Federal court
10 jurisdiction so long as the state provides an adequate
11 remedy to taxpayers who are seeking to assert a claim
12 against State taxation.

13 The respondents concede that the State of
14 Arkansas's remedy is adequate. This is evidenced by the
15 fact that respondents have currently pending in State
16 court a claim for a refund of these income and sales taxes
17 based on the same theory for which they ask for a
18 declaratory judgment in Federal court.

19 The respondents filed the suit on their own
20 behalf. The United States did not appear with them as a
21 coplaintiff or to represent them. The Court has confirmed
22 that an implied exemption to the Tax Exemption Act exists
23 for the United States. In the Court's decision in
24 Department of Employment, the language of the Court leads
25 us to believe that this exemption applies when the United

1 States appears to protect its interest or that of its
2 instrumentalities.

3 QUESTION: When you say appears, Ms. Hunt, do
4 you mean appears as a party plaintiff, rather than just
5 perhaps files an amicus brief?

6 MS. HUNT: Yes, Your Honor. That would be my
7 contention, that that language does suggest that.

8 The respondents contend, however, that this
9 implied exemption for the benefit of the United States
10 should be extended to Federal instrumentalities.
11 Respondents are --

12 QUESTION: Well, certainly the courts have
13 recognized some implied exemptions from that Tax
14 Injunction Act, haven't they?

15 MS. HUNT: That is correct, Justice --

16 QUESTION: For example, for the NLRB.

17 MS. HUNT: I am not aware that in the context of
18 the Tax Injunction Act there has been an exemption applied
19 for the NLRB. I am aware that the Solicitor General has
20 analogized the Tax Injunction Act to the general Anti-
21 Injunction Act, to which there is an implied exemption.

22 QUESTION: Right.

23 MS. HUNT: One point that I would like to
24 make --

25 QUESTION: So what's the test? If we're going

1 to have an implied exemption, what's the test?

2 MS. HUNT: Our test that we would like to
3 advocate to the Court is a bright line test. If the
4 United States appears with the instrumentality to assert
5 its interest then jurisdiction is proper in the district
6 court.

7 QUESTION: And that's the only instance? I
8 don't think that's the position of the Government, is it,
9 the Federal Government?

10 MS. HUNT: I don't believe -- I believe they do
11 disagree with that in some respect. I believe that their
12 advocacy, though, would lead toward extending the applied
13 exemption to agencies of the Government, as I understand
14 their argument.

15 We make a distinction, we draw a distinction
16 between agencies and instrumentalities. Certainly there
17 is a much more compelling reason for extending the implied
18 exemption to agencies who would be functioning as arms of
19 the Government, who might be regulating. Their functions
20 would certainly be governmental functions in a much
21 greater respect than those of instrumentalities.

22 There are several

23 QUESTION: Why leave it to the executive branch
24 to decide what's an instrumentality that is deserving of
25 the exemption and what isn't? That's what your position

1 boils down to. If the Solicitor General, or at the lower
2 level, I suppose, the Civil Division of the Department of
3 Justice, decides to argue for immunity under the Tax --
4 from the Tax Injunction Act, then it wins. Otherwise, it
5 doesn't.

6 MS. HUNT: Yes, Your Honor, it does appear that
7 that would be the case. There is always the provision in
8 the Tax Injunction Act that provides that if an adequate
9 State remedy does not exist, then the entity can appear in
10 district court. If this is an instrumentality who is
11 seeking to assert its interest, then if there is an
12 adequate State remedy, it can assert those interests in
13 the State court.

14 QUESTION: Well, so far as the United States
15 being a party, you're stuck with the decision of the
16 Department of Employment Security. There is an exemption
17 if the United States appears as a party, and you don't
18 have any trouble with that, I take it.

19 MS. HUNT: That is correct, Your Honor. We
20 certainly have no problem with that.

21 Of course, we are advocating a bright line. We
22 understand that the lower courts have distinguished this
23 bright line and have not adopted that, and that there have
24 been lower court decisions who have looked at the
25 governmental nature, for example, of the instrumentality

1 to determine whether or not it should be allowed to appear
2 on its own behalf.

3 QUESTION: Your bright line -- I just want to be
4 sure I understand -- is a distinction between an agency
5 and an instrumentality.

6 MS. HUNT: That is correct.

7 QUESTION: And what is the difference between
8 the two?

9 MS. HUNT: I believe that in most cases an
10 agency would be designated by statute as an agency of the
11 Government. They would obviously --

12 QUESTION: Suppose the statute had called this
13 entity an agency instead of an instrument? What if they
14 just gave it that name? Would that be enough?

15 I mean, part of the problem here is we're not
16 sure the name has any legal significance.

17 MS. HUNT: The instrumentality --

18 QUESTION: And I'm just wondering how you know
19 so clearly as to such a bright line that tells us whether
20 it's an instrumentality or an agency. That's what --

21 MS. HUNT: That is why we would advocate an even
22 more bright line, actually, and draw the line and say, if
23 any entity appears the United States should appear.

24 Perhaps I was not entirely clear in trying to
25 distinguish between them.

1 QUESTION: And you would say, then, that Nash-
2 Finch, the NLRB case, deals with the Anti-Injunction Act
3 generally, not with the Tax Injunction Act.

4 MS. HUNT: That is correct, Your Honor, and
5 there are, too -- there is a difference in the purpose of
6 those two acts that I would also like to distinguish.

7 The purpose of the general Anti-Injunction Act
8 was to prevent conflict between Federal and State courts,
9 whereas the purpose of the Tax Injunction Act was to limit
10 Federal court jurisdiction when the subject that's being
11 considered is State taxation. This is in recognition of
12 the vast importance, the crucial importance to States of
13 their ability to deal with State tax matters that affect
14 them.

15 QUESTION: So you really expect us to hold that
16 if the President is annoyed with the National Labor
17 Relations Board and instructs the Solicitor General or the
18 Civil Division of the Justice Department not to appeal in
19 order to enable that agency to claim the benefit of the
20 exemption from the Anti-Injunction Act, then that's the
21 way it will be?

22 MS. HUNT: Yes, Justice Scalia. Under --

23 QUESTION: Regardless of what Congress -- it has
24 nothing to do with Congress' intention to establish the
25 NLRB as an agency of the United States. It's all up to

1 the executive whether he wants to appear in court or not.

2 MS. HUNT: Under the bright -- under the
3 absolute bright line test for the presence of the United
4 States, that would be necessary. As --

5 QUESTION: Can you tell me why I should do that,
6 why I should leave this issue of law under a congressional
7 statute to be decided dispositively by the President of
8 the United States?

9 MS. HUNT: Obviously, if the President of the
10 United States, the executive department, examines the
11 entity that it is there to represent and makes this
12 determination to appear, under the bright line test that
13 would be a decision that would be left to the executive
14 department.

15 As a practical matter, in instances of State
16 taxation, I would find it very difficult to think of an
17 example where a State would attempt to tax an agency.
18 State --

19 QUESTION: What if the President, during the
20 presidency of Franklin Roosevelt the Civil Division does
21 appear on behalf the labor board and says, this is an
22 agency of the United States. We claim an exemption from
23 the -- okay.

24 However, during the administration of Harry
25 Truman, with a similar suit, the Civil Division chooses

1 not to appear. Is the labor board branded once and
2 forever as an agency of the United States by reason of the
3 first appearance under the prior administration, or can it
4 be undone by the second?

5 MS. HUNT: Yes, Your Honor, I believe it could
6 be undone. If you are allowing the executive to make that
7 decision, then it appears that it would be within the
8 executive's discretion under that test.

9 Of course, on behalf of the State of Arkansas,
10 in considering that the entities here are production
11 credit associations, regardless of whether the Court
12 adopts a bright line test, and even if the Court should
13 determine that a much more flexible test is appropriate,
14 it is our contention that the production credit
15 associations would fail to meet the standard regardless of
16 what the test is, even if it's a more flexible
17 governmental nature of the organization.

18 QUESTION: Ms. Hunt, may I ask you a question
19 about the discrete jurisdictional issue, which this Court
20 asked the parties to address. It seems to me that the
21 answer to the jurisdictional question goes a long way, if
22 not all the way, to answer the question on the merits as
23 well. Would you agree with that, that how you categorize
24 this agency for purposes of the Tax Injunction Act --

25 MS. HUNT: No, Justice Ginsburg. I believe that

1 the tests are different here.

2 The test for purposes of the Tax Injunction Act
3 has not totally been established by this Court. However,
4 I believe the test for whether or not an instrumentality
5 has been -- tax immunity has been conferred on an
6 instrumentality is determined first of all by looking to
7 whether or not Congress has addressed the issue.

8 If Congress has clearly addressed the issue of
9 tax immunity, then I think that forecloses further inquiry
10 by the Court into the tax exempt status, so in that
11 respect I believe the tests are different.

12 QUESTION: Why wouldn't it make sense to have
13 the test simply be whether Federal dollars are at stake as
14 the exemption for the Tax Injunction Act?

15 MS. HUNT: If the only test were whether or not
16 Federal dollars were at stake, there would be many, many
17 entities who would then be entitled to the benefit of the
18 Tax Injunction Act.

19 There are so many entities that in some respect
20 have a stake in Federal money who do not execute agency
21 functions, so in that respect I don't believe that merely
22 the infusion of some sort of Government capital or access
23 to Government capital would be a sufficient test to decide
24 this case.

25 In addition to the other respects, Congress also

1 has the power to provide an exemption to the Tax
2 Injunction Act. For example, in the Moe decision this
3 Court construed a statute that had been passed, section 28
4 U.S.C. 1362 which deals specifically with the Indian
5 tribes, to be an implied exemption to -- not an implied
6 exemption, but to be a statutory exemption to the Tax
7 Injunction Act, which was passed sometime after the Tax
8 Injunction Act.

9 Since this is an implied immunity for the
10 benefit of the United States, it is our contention that
11 implied immunity should be strictly construed, and before
12 the Court would extend this implied immunity to another
13 entity, this Court should look very carefully at that
14 extension.

15 QUESTION: Ms. Hunt, could we borrow a test from
16 somewhere else? What about just applying the same test
17 that we would apply for sovereign immunity? You know, if
18 you sue the labor board you would not get anywhere. Why
19 don't we just say the same thing, it's any agency that
20 would come under our sovereign immunity rules?

21 MS. HUNT: In the sense of sovereign immunity
22 this has frequently been addressed by statute, by the sue-
23 and-be-sued statutes, so this alone would not be a
24 sufficient test because that might have been spoken to by
25 Congress already, and then you would have to enter into

1 that sphere of statutory language dealing with the sue-
2 and-be-sued provision.

3 May I reserve my time for rebuttal?

4 QUESTION: Yes, you may, Ms. Hunt.

5 Mr. Wallace, we'll hear from you.

6 ORAL ARGUMENT OF LAWRENCE G. WALLACE

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

8 SUPPORTING THE PETITIONER

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

11 The principle underlying the exception to the
12 Tax Injunction Act that was recognized in Department of
13 Employment was described by this Court in 1960 in Federal
14 Power Commission v. Tuscarora Indian Nation as, "General
15 statutes imposing restrictions do not apply to the
16 Government itself without a clear expression to that
17 effect," and in 1947 in United States v. United
18 Mineworkers, instead of to the Government itself the Court
19 said, will not be applied to the sovereign.

20 Now, who is the sovereign, or the Government for
21 this purpose in our modern, complex governmental
22 framework? While the term, instrumentality is often used
23 on the merits of questions of tax immunity, because
24 obviously the Government itself cannot be taxed, and the
25 issue is about whether an instrumentality is immune from

1 tax, the expression that the Court used when it addressed
2 this closely analogous question in NLRB v. Nash-Finch
3 under section 2283 of title 28, was the United States and
4 its agencies, or in one instance it used the term, public
5 authority.

6 QUESTION: When the Congress incorporates -- a
7 Federal corporation has a Federal charter, is it always an
8 instrumentality?

9 MR. WALLACE: Sometimes they're designated an
10 instrumentality. Sometimes that question is up in the
11 air. But the question is always, instrumentality for what
12 purpose?

13 QUESTION: I should have asked, and it's
14 apparent from your question, they are not always
15 designated instrumentalities apparently.

16 MR. WALLACE: Not always. Sometimes they're
17 just designated a Government enterprise, but in footnote 8
18 of our brief we try to explain that the same body can be
19 an instrumentality for one purpose but not for another
20 under various holdings.

21 But what is different about an agency from other
22 instrumentalities? One model for an answer, and these
23 terms are not always used in precisely the same way from
24 one context to another, but one model for an answer is in
25 the words themselves.

1 An instrumentality, or an instrument, is a tool
2 or a device through which the Government accomplishes an
3 objective. It may be a very important objective, but it
4 may be accomplished through a contractor, a corporation,
5 or what-have-you.

6 An agency is related to the law of agency. An
7 agent is someone who shares in the governmental authority,
8 or what we would call the regulatory authority of the
9 Government, and that in our system is at least an
10 important way of looking at it.

11 Another way of differentiating the group to whom
12 the exception should extend is whether it is a public
13 governmental body, or a privately owned enterprise.

14 QUESTION: Well, what about the Red Cross? I
15 mean, that -- it's hard to look at that as so much a part
16 of the Government that it should share the Government's
17 exempt status, and yet we have a case where at least when
18 the Government was a complaintiff it came within the
19 exception.

20 MR. WALLACE: There -- there it was held to be
21 entitled to a tax immunity, but it was not held to be
22 within the exception to the Tax Injunction Act. The
23 exception was recognized in that case because the United
24 States was a complaintiff. The Court did not address
25 whether the Red Cross could have brought the suit in

1 Federal court itself.

2 QUESTION: Mr. Wallace, I hate to go on creating
3 different tests for all these different purposes. Can we
4 agree that the test here is the same as the test for
5 sovereign immunity?

6 MR. WALLACE: Well, I --

7 QUESTION: Not -- not -- leaving out the
8 situation where the Government has said that a particular
9 instrumentality can or cannot sue or be sued. Let's
10 assume that, you know, there's nothing said. Would
11 applying the general rules for sovereign immunity of
12 agencies or instrumentalities of the United States produce
13 the same result that you're arguing for here?

14 MR. WALLACE: Well, I think it's closely
15 related, but I --

16 QUESTION: I know it's closely related. Is it
17 the same rule?

18 MR. WALLACE: There are reasons -- there are
19 reasons I would hesitate to say it's the same. In some
20 instances it would require the Court to address a
21 hypothetical constitutional question in order to answer a
22 question that really could be resolved without resort to
23 that.

24 There is -- if I can commend to the Court's
25 attention just one of the lower court cases that I think

1 particularly rewards study it would be the Federal Reserve
2 Bank of Boston case, in which Levin Campbell wrote for the
3 First Circuit a very thoughtful opinion about why he
4 concluded that the Federal Reserve Bank of Boston, because
5 it functions as an arm of the Government sharing an
6 important regulatory authority, would -- should have the
7 benefit of this exception.

8 I'm not sure that the considerations are the
9 same as whether it would be entitled to sovereign
10 immunity, whether or not the answer would be the same --

11 QUESTION: Mr. Wallace, would the answer be --
12 in your view, would the same test apply under both the Tax
13 Injunction Act and the -- 2283?

14 MR. WALLACE: I think that it's a good model,
15 and probably would be the same test. That view is not
16 universally held within the Government. I have many
17 nervous agencies and instrumentalities out there.

18 QUESTION: Given that, why isn't -- what's wrong
19 with Arkansas' approach? I mean, her approach is very
20 clear, and moreover, all it say is that Congress and the
21 President, who signed the bill, believe that State tax
22 laws are pretty important, and before you go mucking
23 around with an injunction, go into State court.

24 And if they're important enough for the United
25 States, namely the Justice Department, to think they're

1 that important, fine. Then you can set them aside. But
2 if no one in the Justice Department thinks they're that
3 important, that's the end of it. Okay, then you can't.
4 Go into State court.

5 Now, that would be a very clear administrative
6 way to do it, it would be simple, and I don't really see
7 what the policy is underlying this that would be seriously
8 interfered with.

9 MR. WALLACE: Well, what Judge Campbell
10 suggested --

11 QUESTION: What -- what does he -- yes.

12 MR. WALLACE: -- for the First Circuit on this
13 very point was that the Court should respect the reasons
14 why Congress has chosen to confer independent litigating
15 authority in the lower courts on certain agencies, because
16 they should to some degree be insulated from the executive
17 chain of command, and I think it's very well put. It's an
18 opinion that deserves --

19 QUESTION: Yes.

20 MR. WALLACE: -- and rewards study.

21 QUESTION: Is it clear that you could have
22 intervened here if you had chosen to do so?

23 MR. WALLACE: Yes, we could have.

24 QUESTION: Under Rule 24 you have an interest?

25 MR. WALLACE: I believe so. It would be very

1 similar to the interest in the intervention in Department
2 of Employment, the case itself, on behalf of the Red
3 Cross' exemption.

4 These farm credit institutions perform an
5 important Federal statutory function under the oversight
6 of the Farm Credit Administration, some of the others are
7 explicitly conferred tax exemptions, and the Government
8 might well come forward. They're part of the executive
9 branch in such cases.

10 Now, I might just say --

11 QUESTION: You're not saying that the executive
12 branch should have any leverage in deciding whether
13 there's an exemption or not. You're just saying if it's a
14 complaintiff that should survive the Tax Injunction Act.

15 MR. WALLACE: Exactly, so it's up to the courts
16 to decide the merits of the exemption issue. Obviously,
17 the willingness of the Government to come forward might
18 have something to do with its view of the merits, and if I
19 could just say a word about the merits -- since the court
20 of appeals addressed the merits, the Court may choose to
21 comment on the merits because of that.

22 We think that this is a clear case for
23 application of the rule of the Russello case that, when
24 different provisions of a statute address the matter
25 explicitly in different ways, that difference should be

1 respected.

2 This is a matter that Congress has addressed
3 from the outset. Under this scheme, the reliance on the
4 part of the respondents is on the part of a deletion of
5 two sentences which we have italicized --

6 QUESTION: Thank --

7 MR. WALLACE: -- on page 5 of their brief.

8 QUESTION: Thank you, Mr. Wallace. Your time
9 has expired.

10 Mr. Hanson, we'll hear from you.

11 ORAL ARGUMENT OF RICHARD A. HANSON

12 ON BEHALF OF THE RESPONDENTS

13 MR. HANSON: Mr. Chief Justice, and may it
14 please the Court:

15 I'd like to answer Justice Scalia's question as
16 to what standards ought to apply in determining
17 application of the Tax Injunction act, application of
18 sovereign immunity concepts, application of tax immunity
19 concepts, but I think it really has two pieces.

20 One is that the same standard should apply in
21 determining whether or not an entity is a Federal
22 instrumentality, and the Court's most recent discussion of
23 that is in U.S. v. New Mexico, where they talked about an
24 entity being so closely connected to the Government that
25 it cannot be viewed as a separate party.

1 Now, beyond that, and I think the Court said
2 this in Federal Land Bank v. Priddy, you then get to the
3 question of whether -- and let me back up just a second.

4 In Federal Land Bank v. Priddy the Court,
5 talking about a Federal Land Bank, which is one of the
6 institutions of the system, said that it would partake of
7 the sovereign immunity of the United States absent a
8 waiver by Congress, and there was sue-and-be-sued language
9 in the statutes, therefore the Court concluded that
10 sovereign immunity to some extent had been waived. The
11 issue in that case involved execution of a judgment.

12 The result which you get in a Tax Injunction Act
13 case, an immunity case, a sovereign immunity case, a case
14 involving punitive damages, and a case involving estoppel,
15 all of which are issues which have been addressed by this
16 Court or the lower courts, then turns on what has Congress
17 done?

18 And it becomes a question of, you know they're a
19 Federal instrumentality. You know they partake of the
20 sovereignty of the United States. Now, what does the
21 governing statute tell you about what Congress has done in
22 terms of waiver of tax immunity, waiver of sovereign
23 immunity?

24 QUESTION: And your position is that unless
25 Congress has affirmatively waived that immunity, they are

1 immune? This is a unique designation -- Federal

2 instrument. MR. HANSON: On the merits, unless Congress has
3 affirmatively consented to the taxation of these entities
4 by Arkansas, 180 years of case law says that we are
5 immune. I would like to discuss a bit further. They say

6 that these QUESTION: Well, there's a lot of case law
7 contrary to that, it seems to me. The cases that say you
8 have to look at what Congress has said, not saying that
9 the burden is necessarily on those who would show that
10 Congress had not waived the immunity. credit system as a

11 bridge be MR. HANSON: Well, I'm not aware of any case
12 where this Court has departed from the rule that immunity
13 is implied under the Supremacy Clause, and immunity exists
14 unless Congress has consented to taxation, and certainly
15 that has been --s, so what we will do is, we will provide

16 a federal QUESTION: And you would say this is true of
17 every single thing that is called a Federal
18 instrumentality? ON: Mr. Hanson, whatever this was

19 originally MR. HANSON: If it is a Federal instrumentality,
20 and that really in large part is the crux of this case. ng

21 that the You know, the Government of the United States on
22 brief said that these entities perform no governmental
23 function. Now, they say that in the face of a preamble an
24 which explains exactly what they do, in the face of being
25 repeatedly designated -- and frankly for current ment, but

1 institutions this is a unique designation -- Federal
2 instrumentalities, and in face of a number of decisions by
3 this Court involving various farm credit system entities.

4 But I think the other thing they say we need
5 to -- I would like to discuss a bit further. They say
6 that these entities exist to make profits for their
7 members, and that simply misconceives the nature of the
8 farm credit system.

9 When the Federal Land Banks were created back in
10 1916, Congress referred to the farm credit system as a
11 bridge between farmers and the credit markets. They said
12 the Federal Government cannot provide a mechanism to get
13 adequate credit to farmers, that the commercial banking
14 institutions cannot provide a mechanism to get adequate
15 credit to farmers, so what we will do is, we will provide
16 a federally supported mechanism, and that's all the modern
17 farm credit system does.

18 QUESTION: Mr. Hanson, whatever this was
19 originally when there was a Federal administrator
20 involved, is there anything that these entities are doing
21 that the farmers and ranchers couldn't have done getting
22 together for themselves?

23 Is there anything that they are doing that is an
24 exercise of Federal power, or are they just acting,
25 admittedly with the spark provided by the Government, but

1 as any privately arranged cooperative could act?

2 MR. HANSON: Well, if they are -- there are not
3 in any material way exercising any Federal regulatory
4 power. The regulatory power exists in the Farm Credit
5 Administration.

6 QUESTION: So the only power that they're
7 exercising is what the farmers and the ranchers choose to
8 confer on them.

9 MR. HANSON: With the support of the United
10 States, but there is a reason why the system was set up
11 this way.

12 Now, obviously there are all sorts of Federal
13 farm programs and there are all sorts of Federal lending
14 programs. There are lending programs for students. There
15 are lending programs for small business, for veterans, for
16 homeowners.

17 A determination was made that the unique nature
18 of agricultural credit required a system set up so that
19 the farmers would become the managers of their own system.
20 They could not have done it without Federal support. They
21 couldn't have done it in 1916, they couldn't have done it
22 in 1933, and they can't do it without Federal regulation.

23 What the -- and in 1985, it was again proven
24 that the system itself required and was in fact given
25 Federal help, so while it is true that the day-to-day

1 management operations have been given to the farmers --

2 QUESTION: Well, lots of private actors are
3 given Federal help. Universities and colleges are given
4 Federal help, but that doesn't make them Government
5 agencies.

6 MR. HANSON: The program under which that help
7 is given, the program may or may not be a Federal agency,
8 or a Federal instrumentality, but my point is that the
9 farm credit system does not exist to make profit for its
10 members.

11 The farm credit system exists to accomplish a
12 governmental objective, which is stated in section 2001,
13 which is to -- that a program needs to exist to provide
14 adequate secure and affordable credit to farmers.
15 Congress looked and said, the way we will do --

16 QUESTION: I don't think that's enough to answer
17 the question. The Federal Government provides help to
18 support the arts. That doesn't mean that a company
19 providing artistic service ought to be extended some form
20 of Government immunity.

21 MR. HANSON: No, I would absolutely agree, and
22 that in part was what was addressed in U.S. v. New Mexico.

23 QUESTION: Yet there's a Government purpose
24 there. It serves a Government purpose, and that's what's
25 happened now to the production credit association. Yes,

1 Congress wants to be sure that farmers and ranchers have
2 credit to help them over the hard times, but that doesn't
3 answer the question, it seems to me --

4 MR. HANSON: Well, I --

5 QUESTION: -- of whether immunity should exist
6 or whether you ought to go first into State court.

7 MR. HANSON: Well, let me contrast perhaps two
8 different institutions.

9 You have an independent contractor who is --
10 contracts with the Government to perform a governmental
11 function. What this Court has said is that that
12 contractor is a separate entity pursuing its own private
13 profit interests, and the fact that it is performing a
14 function for the Government doesn't make it a Federal
15 instrumentality, so the fact that a company assists the
16 National Endowment for the Arts doesn't make it a Federal
17 instrumentality under U.S. v. New Mexico and the prior
18 cases.

19 My point is here that these entities perform no
20 function except the specific governmental function that
21 the system was set up to perform. They have no separate
22 private existence.

23 Now, they certainly have private
24 characteristics, and I admit that. I mean, they have
25 officers, and they have directors.

1 QUESTION: Well, what functions ally them with
2 the Government rather than with the private members,
3 because I think you answered my question candidly that
4 they can do, these PCA's can do only what the members
5 choose to allow them to do.

6 MR. HANSON: Well, they can do only what the
7 Government allows them to do under the controlling statute
8 and regulations. The members have day-to-day control.
9 But that's the purpose of the system.

10 I mean, the governmental function, as has been
11 expressed by this Court, is to provide credit to farmers.
12 You've just defined the function.

13 QUESTION: Can you tell me if there are other
14 instrumentalities where all of the people, all of the
15 personnel are on private payrolls, not Government
16 payrolls, that would have this tax immunity --

17 MR. HANSON: Well, I think --

18 QUESTION: -- from income tax, State income tax?

19 MR. HANSON: Certainly the Federal credit unions
20 would be an analogous situation, and one of the ironies in
21 this case -- and frankly I want to come back to Justice
22 Scalia's question on the jurisdictional issue.

23 In a case called United States v. Michigan
24 before the Sixth Circuit Court of Appeals, the United
25 States did file suit on behalf of the Federal credit

1 unions with respect to a Michigan sales tax issue.

2 They argued not only a statutory exemption but
3 the instrumentalities were -- that the credit unions were
4 in fact instrumentalities. They did so by analogy to the
5 farm credit system. Now, we're being told that the farm
6 credit system somehow is not entitled to that kind of
7 representation.

8 QUESTION: There's a distinction between the --
9 a Federal credit union and the PCA's.

10 MR. HANSON: There is in the statutory provision
11 describing certain aspects of the tax exemption, but I'm
12 not sure that there's much other than that, and the Sixth
13 Circuit basically compares and contrasts the two and says
14 the only real distinction is one provides financial
15 services to a broader range of the public than the farm
16 credit system does.

17 But the system is probably fairly stated unique.
18 It was formed because there was a congressional
19 determination that this is how the congressional purpose
20 could be accomplished, that the Federal Government can't
21 do it because the farm economy is too complex, that you
22 can't run the system from Washington.

23 The legislative history on the '33 act explains
24 that a centralized Federal funding program during the
25 early stages of the Depression had managed to lose some

1 \$40 million and had not accomplished its purpose. They
2 said, we can't do this, so what we will do is we will set
3 up a farmer-supported system, or a federally supported
4 system, and we will engage the farmers.

5 Now, that doesn't mean that they get into this
6 system to make a profit. It means that if a farmer wants
7 to borrow money from the system, he has to buy stock, and
8 it's mandatory. It's not voluntary, because there is no
9 profit potential. It is a cost of entry, in effect, but
10 it was determined that that way the farmer would be
11 interested in the success of the associations, the success
12 of the system as a whole.

13 So the role of the farmer reflects Congress'
14 considered decision that this makes sense as a means of an
15 effective system for delivery of credit, but you know,
16 it's a closed system, too, except for periodic Government
17 investment.

18 When you talk about where the system gets its
19 "earnings" or its capital, basically that comes from its
20 members. They provide the capital. That provided the
21 source of funds to retire Government stock. It's
22 providing the source of -- to retire the Government --

23 QUESTION: Mr. Hanson suppose you were to say,
24 look, if it is a matter of degree, here we have an
25 organization that looks like an ordinary bank, performs

1 the functions of ordinary banks. The benefit of this tax
2 exemption or immunity, if they get it, will go entirely to
3 private shareholders or to other members outside the
4 Government. The United States Treasury is not affected by
5 a penny --

6 MR. HANSON: Well --

7 QUESTION: -- and given these similarities
8 between ordinary banks and what's going on here, and the
9 fact that the Treasury is not implicated, this is not a
10 Government instrumentality for purposes of the Tax
11 Injunction Act. That seems to track the kind of thing
12 that Judge Campbell was doing.

13 MR. HANSON: Well, it is interesting that the
14 Government's reference to the Federal Reserve Bank case --
15 for example, the Federal Reserve Banks are capitalized
16 solely by their member banks.

17 QUESTION: Ah, but he has large number of things
18 --

19 MR. HANSON: I know.

20 QUESTION: -- to say --

21 MR. HANSON: He talks about the regulatory
22 function and so on. I'm aware of that, but I go back to
23 the nature that there is somehow sort of a separate
24 private entity here, separate from the performance of
25 the --

1 QUESTION: I'm just saying look at the
2 similarities. It looks like a bank, acts like a bank,
3 talks like a bank, et cetera, and moreover the Treasury is
4 not involved to the tune of a penny, nor is the member,
5 nor are the taxpayers.

6 What's at issue here is private money that will
7 go either to the State of Arkansas or to private
8 shareholders or to their customers, who are private
9 people.

10 MR. HANSON: Well --

11 QUESTION: And given all that, we don't need to
12 go further.

13 MR. HANSON: Well --

14 QUESTION: I mean, that's -- that, it seems to
15 me, is what you face here.

16 MR. HANSON: The profits, the earnings, as this
17 Court recognized in Kiawah County, are not a distribution
18 of profits to the shareholder of the system. They are a
19 means, which is another part of the design of the system,
20 to reduce the interest cost to the farmer, and that was
21 part of the initial design in 1916.

22 QUESTION: But they do benefit the farmers --

23 MR. HANSON: The farmer --

24 QUESTION: -- rather than the Government.

25 MR. HANSON: Well --

1 QUESTION: Rather than taxpayers, let's say.

2 MR. HANSON: They benefit the Government to this
3 extent, and that is that currently, as part of the package
4 of assistance that was provided in 1987, the system owes
5 the Treasury some \$600 million, and not only do they owe
6 the Treasury \$600 million, but the Government has
7 implicitly guaranteed the system's bonds, and I realize
8 it's not a statutory guarantee, but the market believes
9 that the Government will support those bonds and, of
10 course, it always has.

11 So that any additional expense that you place on
12 the system, potentially at least, increases the likelihood
13 of the Government having to come back.

14 QUESTION: You can say that, though, about a lot
15 of the Government contractor cases that were involved --
16 that were discussed in New Mexico. You can say ultimately
17 the Federal Government is going to pick up the increased
18 tab. That didn't make -- for a contractor --

19 MR. HANSON: That did not make it.

20 QUESTION: You can say that about Chrysler
21 Corporation, come to think of it.

22 MR. HANSON: You could say it about them also.

23 QUESTION: *If it's just probabilities.

24 MR. HANSON: But as to none of those could you
25 say that Congress has said this is a federally chartered

1 instrumentality of the United States, and as to none of
2 those could you say that its sole function is to perform
3 an important governmental function.

4 I mean, what we have here, and we recognize
5 that, you know, one could say this looks like a bank.
6 Now, I disagree, because it looks far more like a Federal
7 Reserve Bank in its operations.

8 The Federal Reserve Bank performs significant
9 services to its member banks through discounting and
10 otherwise. Does that make it not a Federal
11 instrumentality? Obviously not.

12 Now, I grant that the Federal Reserve Banks also
13 have some regulatory authority.

14 QUESTION: What Campbell said, if we go into
15 that, if you want to, he says they're operated in
16 furtherance of national fiscal policy, not operated for
17 the profit of shareholders, do not provide ordinary
18 commercial banking services, act as depositories for money
19 held in the United States Treasury, hold the legal
20 reserves and any remaining earnings are paid into the
21 surplus fund where they may be used to supplement the gold
22 reserve. I mean, that was basically his --

23 MR. HANSON: Well, and --

24 QUESTION: And most of those things seem absent
25 here.

1 MR. HANSON: Well, I don't believe that's true.
2 I don't think there is any distribution of profits to
3 private persons. We do not perform normal banking
4 services. We do only one thing.

5 QUESTION: You mean there aren't private
6 shareholders who get the money here?

7 MR. HANSON: There are farmers who own stock for
8 which they receive no return, and if that stock is ever
9 redeemed, which is at the discretion of the banks

10 QUESTION: Yes.

11 MR. HANSON: -- and the system --

12 QUESTION: Yes.

13 MR. HANSON: -- they get what they paid in.

14 To suggest anybody has ever invested in the
15 system I think --

16 QUESTION: I see, so they don't get a profit.

17 MR. HANSON: They don't get a profit. What you
18 do see is a system set up to reduce their interest cost.

19 Now, obviously they get a benefit, but that's
20 the benefit that Congress intended in the first instance.
21 I keep coming back to that.

22 Congress has said we're going to set up a
23 system, we're going to provide it with an implicit
24 guarantee at the top, we're in fact going to provide some
25 support for it, if you will, at the bottom through farm

1 price support programs, and that was one of the things
2 that helped the farmers get out of the depression of the
3 mid-eighties, as the system itself recognized. So we have
4 this system which serves no purpose except to perform a
5 governmental function.

6 Now --

7 QUESTION: Mr. Hanson, it took me a while, but
8 the farm credit union example that you gave in answer to
9 my earlier question, as I understand, that is entirely
10 statutory. The code exempts them from Federal, State, or
11 local taxation except for their real and personal
12 property?

13 MR. HANSON: No. It is true that they have a
14 statutory provision which specifies those exemptions, but
15 the case also involved the proper statute of limitations,
16 and that turned on a constitutional question, whether they
17 were a Federal instrumentality for Supremacy Clause
18 purposes in the decision in the Sixth Circuit Court of
19 Appeals.

20 QUESTION: Well, perhaps it was a definition
21 that came. QUESTION: Well, you recognize that you can be
22 an instrumentality for one purpose but not for another?

23 MR. HANSON: Well now, I don't believe that
24 that's what this Court has ever said. What this Court has
25 said is, there is such a thing as an instrumentality.
Now, what its characteristics are with respect to various

1 immunities may differ depending on what Congress has said.

2 The lower courts have said, well, there's this
3 kind of instrumentality and that kind. I find that very
4 troubling, because I think --

5 QUESTION: Do you think there is a pattern in,
6 say, federally chartered institutions for when Congress
7 labels them Federal instrumentalities and when it doesn't,
8 say the Girl Scouts and the Boy Scouts, and the Red Cross
9 and the others?

10 MR. HANSON: Actually, the only pattern is that
11 we're the only institutions that currently bear that
12 designation. There were -- that specifically are
13 designated that way.

14 There are -- there were institutions in the
15 past, I believe the Homeowner's Loan Corporation, for
16 example, was designated as a Federal instrumentality.

17 But I do believe there are a set of
18 characteristics which define the Federal instrumentality.

19 QUESTION: Well, perhaps it was a definition
20 that came in originally when this -- these associations
21 were headed by a Federal administrator, and since the
22 character of the --

23 MR. HANSON: That designation changed --

24 QUESTION: -- association changed --

25 MR. HANSON: I'm sorry, Your Honor. I didn't

1 mean to interrupt.

2 That designation was reaffirmed in 1971, when
3 all the Government stock had been redeemed and when the
4 Farm Credit Administration was more independent than
5 originally, so it certainly doesn't --

6 QUESTION: You mean reaffirmed by some positive
7 act, or just so they didn't change it?

8 MR. HANSON: The Farm Credit Act of 1971, which
9 was a recodification of the entire act, said the
10 production credit associations continued to be Federal
11 instrumentalities, federally chartered instrumentalities
12 of the United States, so it was an affirmative act in
13 1971.

14 That's interesting, in 1987 various new entities
15 were added to the system. There was a Federal Systems
16 Corporation, a Federal Insurance, Federal Farm Insurance
17 Corporation, service corporations -- Congress gave each
18 one of them the same designation, federally chartered
19 instrumentality of the United States.

20 So as I say, I believe that statement, that
21 designation has some substance, and this Court has
22 recognized that substance in various circumstances, and I
23 go back to the Priddy case, which said that a Federal
24 instrumentality would partake of sovereignty of the United
25 States and would exercise sovereign immunity as against a

1 private suit absent waiver by Congress, so I mean, it is a
2 designation that does have significance.

3 I'd like to spend just a couple of minutes
4 talking about why we believe that a bright line rule that
5 requires that the United States to be -- or the Justice
6 Department, whoever it would be, to be the gatekeeper in
7 suing in Federal court we think is inappropriate.

8 The underlying policy, or the underlying reason
9 for Department of Employment, as I understand it, was the
10 notion that a sovereign should not be viewed as having
11 relinquished access to its own courts absent a very
12 explicit surrender. That's United Mineworkers and some of
13 the earlier cases.

14 If that's a fair statement, and if the farm
15 credit system institutions partake of the sovereignty of
16 the United States, then it doesn't seem to me to be any --
17 and I -- and if we are talking about things that we agree
18 are Federal instrumentalities I don't think it's a stretch
19 to say, as -- and this goes back to your question about,
20 Justice Scalia, the question of whether you use the same
21 standard for sovereign immunity or not.

22 I don't see it's any stretch to say that one
23 should ask whether Congress has explicitly said that the
24 Federal instrumentalities are -- have to sue in State
25 court to vindicate Federal rights which are based on the

1 Supremacy Clause. I mean, that seems unlikely, though it
2 may be true.

3 QUESTION: Of course, the Court could have said
4 that in Department of Employment Security, and it didn't.

5 MR. HANSON: Well, this Court is typically
6 careful about deciding the case in front of it, and the
7 case in front of it, United States had brought suit on
8 behalf of an instrumentality. Interesting, the cases it
9 cited were all suits -- I believe they were all suits
10 where the United States had sued in the lower courts on
11 behalf of what we would now say were not Federal
12 instrumentalities but were private contractors.

13 But the court specifically said suits by the
14 United States, so I grant that it -- its -- it clearly,
15 that decision does not give us permission to be in Federal
16 court --

17 QUESTION: It didn't reject your position.

18 MR. HANSON: It did not.

19 QUESTION: But it could have gone the way that
20 would have supported it.

21 MR. HANSON: Yes. But wha -- I think more
22 troubling than sort of the judicial question, while I
23 recognize that, is that if the Justice Department becomes
24 what I've described as the gatekeeper, their decision is
25 both sort of final and nonappealable as to the

1 instrumentality, except perhaps in the political arena,
2 because no court is ever going to look at it.

3 I mean, I can't go to Federal court say the
4 Justice Department won't represent me. That's simply
5 final. And what considerations the executive branch may
6 bring to bear on that I offer again as an illustration.
7 They sued on behalf of the Federal credits unions in 1986
8 and drew an analogy to us. 10 years later, we're --

9 QUESTION: You might try -- I mean, I don't mean
10 this necessarily seriously, but you could try a
11 distinction between those agencies where there are strong
12 reasons for independence of executive authority, the Fed,
13 for example, maybe the FCC and a few other traditional
14 independent ones, and those agencies where the
15 proliferation of independent legal authority to control
16 their own cases reflects nothing more than likely
17 administrative convenience, and I don't know that that
18 kind of distinction would work. It would be difficult to
19 apply, but so is the distinctions difficult to apply in
20 the absence of that.

21 MR. HANSON: Well, I certainly agree that trying
22 to write a bright line here --

23 QUESTION: What about a rule that said Nash-
24 Finch was the general Anti-Injunction Act and shouldn't be
25 carried over to the Tax Injunction Act, so that neither

1 Federal agencies nor Federal instrumentalities can get out
2 of the Tax Injunction Act. That would obviate the problem
3 of the Department of Justice. It would also make you lose
4 your case.

5 MR. HANSON: I appreciate that, so I'm not sure
6 I'm prepared to advocate that argument.

7 I think that that creates both a participation
8 by the executive branch in a decision which they are
9 not -- they are not permitted to partake.

10 QUESTION: The -- what's difficult is Congress
11 very often proliferates litigating authority for no reason
12 other than the general counsel's office or the agency
13 would like it, or there could be all kinds of reasons.

14 MR. HANSON: Right.

15 QUESTION: And it's unlikely Congress thought
16 about this part when they did that, and of course the
17 Fed's different. It absolutely wanted independence there.

18 MR. HANSON: Well --

19 QUESTION: I don't know how it works across the
20 banking agencies. That's what I can't --

21 MR. HANSON: Well, in -- but -- you know -- two
22 points. One is, obviously there are cases, there are
23 lower court cases permitting the FDIC to sue on its own
24 behalf. That is a different circumstance, and the New
25 Iberia case makes I think a pertinent point, is that all

1 of the considerations that led to the passage of the Tax
2 Injunction Act are completely missing here.

3 QUESTION: It would be nice to get --

4 QUESTION: Well, certainly -- certainly you
5 could file your suit in State court here. You admit that.

6 MR. HANSON: Sure. Yes.

7 QUESTION: And indeed, if you're going to get a
8 refund of any taxes paid you're going to have to, aren't
9 you?

10 MR. HANSON: Right.

11 QUESTION: So what's the harm in saying, gee,
12 this is the kind of situation where it ought to track the
13 Eleventh Amendment situation, go to State court?

14 MR. HANSON: Well, I think --

15 QUESTION: And you always have the right to
16 petition to this Court if you think the State courts have
17 erred on the merits.

18 MR. HANSON: Well, I think the concern that I
19 would have is that there is some taint associated with the
20 fact that this type of entity, unless you go back -- if
21 you adopt a bright line rule of the United States has to
22 be a party, and if you accept, as I certainly do as a
23 practicing attorney that, given a Federal question of this
24 type I'd want to be in Federal court, not State court, I
25 mean, with no disrespect to the Arkansas courts, my

1 preference, as the United States' would be, would be in
2 Federal district court.

3 If I have to go to State court, am I going to
4 have Arkansas, as the multi-State Tax Commission say, gee,
5 if you have to go to State court you're really not serving
6 an important governmental interest, are you, or did the
7 United States decide that, you know, you're wrong on the
8 merits.

9 We go into State court with some serious adverse
10 implications from the decision of the United States, and I
11 think those implications exist whether the United States
12 was asked, and to my knowledge they were not in this case,
13 or they're asked and turn you down.

14 Now, in fairness, of course, we have that same
15 problem here, because we have a brief by the United States
16 which I'm sure will be widely publicized.

17 It is a question of whether we are sufficiently
18 part of the sovereign that the principle of Department of
19 Employment, are we -- did Congress have to be more
20 specific?

21 QUESTION: Maybe it ought to be the same kind of
22 a test we'd employ to see if there's some exception to the
23 Eleventh Amendment.

24 MR. HANSON: Well, and -- I think that the test
25 may be in part the same, though -- though --

1 QUESTION: That worries me, because I don't know
2 about how many instances there are in borderline cases
3 where you never have to reach the issue because Congress
4 has said we give this the power to sue and be sued, and if
5 we suddenly took an Eleventh Amendment test, I'd worry
6 that all of a sudden we had to decide those things that
7 otherwise never had to be decided --

8 MR. HANSON: I --

9 QUESTION: -- which are difficult. I'm not
10 sure.

11 MR. HANSON: Well --

12 QUESTION: I'm just putting that forward.

13 MR. HANSON: I believe I misspoke, though,
14 because one difference between sovereign immunity is, of
15 course, that's a constitutional protection given the
16 State. This is simply -- not simply. This is a
17 congressional action.

18 The question is, Congress said, all right, for
19 various reasons, comity and federalism and so on, we want
20 private suit cases in State court and, of course, there's
21 nothing in the legislative history that anybody's
22 identified that suggests an intention to cover this kind
23 of a case.

24 And I observe that James v. Dravo, which I find
25 kind of interesting as sort of a landmark Federal

1 instrumentality case, was brought in Federal court by
2 private attorneys on behalf of the contractor, and granted
3 it was, I'm sure, litigation that started before the Tax
4 Exemption Act was adopted, but there's not even a comment
5 about it. It seemed perfectly natural. And the United
6 States participated as an amicus, taking a position
7 adverse to the taxpayer, and the Court decided the case.

8 But it -- you know, I admit that's simply --
9 maybe -- maybe it's just an historical anomaly.

10 On the merits, our view is, as expressed in
11 Professor Tribe's article, as expressed in the
12 Congressional Reference Bureau's analysis of the
13 Constitution -- thank you, Your Honor.

14 QUESTION: Thank you, Mr. Hanson.

15 MS. HUNT, you have 5 minutes remaining.

16 REBUTTAL ARGUMENT OF MARTHA GRISSOM HUNT

17 ON BEHALF OF THE PETITIONER

18 MS. HUNT: First of all, regardless of test that
19 the Court decides to apply, the respondents' arguments
20 that they are entitled to first of all status under the
21 Tax Injunction Act that would be the same as that of the
22 United States is certainly not something that they have
23 successfully been able to argue.

24 First of all, their argument that they are a
25 Federal instrumentality certainly does not imply that that

1 is the case for all purposes. There are --

2 QUESTION: What is your response to the Michigan
3 case where he says the Government took just the opposite
4 position in that case?

5 MS. HUNT: There is a specific statute, a
6 specific taxation statute that relates to the Federal
7 credit unions that gives them a very broad immunity from
8 taxation. In fact, that statute is very similar in
9 wording and in language to the statute that the PCA's had
10 prior to the amendment, and at the time that they were
11 Government-owned, so Federal credit unions may be
12 distinguished in that respect in that their tax immunity
13 is very clear by statute.

14 QUESTION: What would your position be if the
15 statute here had not been amended and were the same as it
16 had been?

17 MS. HUNT: If the statute were the same, where
18 the -- well, first of all I need to answer that in two
19 respects.

20 If the statute were exactly the same, then we
21 would make the argument that because the PCA's are now
22 privately owned, that they are not entitled to that
23 exemption because the last sentence of that original
24 statute provided that at the time they became privately
25 owned the broad exemption was waived, so my answer would

1 be they would still have essentially the same immunity
2 that they do today because they are privately owned.

3 In another respect there are many other Federal
4 instrumentalities other than production credit
5 associations. For example, the other Government-sponsored
6 enterprises like Ginnie Mae, Fanny Mae, Freddie Mac, and
7 all of those entities are designated by statute as Federal
8 instrumentalities.

9 If you look at the language of the enacting
10 statutes where Federal -- where production credit
11 associations are designated instrumentalities, which is
12 printed on the respondent's brief on page Roman i, first
13 of all it says each production credit association shall
14 continue as a federally chartered instrumentality of the
15 United States. This is quoting directly from 12 U.S.C.
16 section 2071(a).

17 It is my contention that this designation simply
18 implies that Congress has the power to create or to allow
19 these farmers to band together and to charter these
20 institutions, because again, on the same page at 12 U.S.C.
21 section 2071(b)(7), there's the same instrumentality
22 language relating to the fact that PCA's are federally
23 chartered body corporate and an instrumentality of the
24 United States.

25 Then, in their statute, the PCA statute relating

1 to their taxation, which is printed in the petitioner's
2 brief on page 2, we again see the instrumentality
3 language. Quoting from 2077, each production credit
4 association and its obligations are instrumentalities of
5 the United States and as such, going on with the language
6 of the exemption from tax.

7 It is my contention that that language is there
8 for a specific purpose, in the first instance to show that
9 Congress has power to create these institutions, and in
10 the second to show that Congress has the power to immunize
11 them to the limited degree that they did from tax, which
12 leads into the argument on the merits.

13 The respondents' attempt to apply the doctrine
14 of McCulloch to this case, there is a very specific reason
15 why the doctrine of McCulloch does not apply here. There
16 was no tax exemption statute in McCulloch which led the
17 Court to construe the implied immunity.

18 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Hunt.

19 MS. HUNT: Thank you.

20 CHIEF JUSTICE REHNQUIST: The case is submitted.

21 (Whereupon, at 12:06 p.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

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:

ARKANSAS, Petitioner v. FARM CREDIT SERVICES OF CENTRAL ARKANSAS, ET AL.
CASE NO. 95-1918

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

BY Donna M. Fedrico-----

(REPORTER)