

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JEFFERSON COUNTY, ALABAMA, Petitioner v.
WILLIAM M. ACKER, JR., SENIOR JUDGE, UNITED
STATES DISTRICT COURT, NORTHERN DISTRICT OF
ALABAMA, AND U.W. CLEMON, JUDGE, UNITED
STATES DISTRICT COURT, NORTHERN DISTRICT OF
ALABAMA.

CASE NO: 98-10

PLACE: Washington, D.C.

DATE: Monday, March 29, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEFFERSON COUNTY, ALABAMA, :

4 Petitioner :

5 v. : No. 98-10

6 WILLIAM M. ACKER, JR., SENIOR :

7 JUDGE, UNITED STATES DISTRICT :

8 COURT, NORTHERN DISTRICT OF :

9 ALABAMA, AND U.W. CLEMON, :

10 JUDGE, UNITED STATES DISTRICT :

11 COURT, NORTHERN DISTRICT OF :

12 ALABAMA. :

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14 Washington, D.C.

15 Monday, March 29, 1999

16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States at
18 10:02 a.m.

19 APPEARANCES:

20 JEFFREY M. SEWELL, ESQ., Assistant County Attorney,
21 Birmingham, Alabama; on behalf of the Petitioner.

22 KENT L. JONES, ESQ., Assistant to the Solicitor General,
23 Department of Justice, Washington, D.C.; for the
24 United States, as amicus curiae, supporting the
25 Petitioner.

1 ALAN B. MORRISON, ESQ., Washington, D.C.; on behalf of
2 the Respondents.
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5	KENT L. JONES, ESQ.	
6	For the United States, as amicus curiae,	
7	supporting the Petitioner	20
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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 98-10, Jefferson County, Alabama
5 v. William Acker.

6 Mr. Sewell.

7 ORAL ARGUMENT OF JEFFREY M. SEWELL

8 ON BEHALF OF THE PETITIONER

9 MR. SEWELL: Mr. Chief Justice, and may it
10 please the Court:

11 I want to speak to you first this morning about
12 the jurisdiction issues in this case. This case presents
13 the question of how, not whether, but how the Tax
14 Injunction Act applies to a tax collection case removed to
15 Federal court. That, in turn, depends on whether the act
16 is interpreted and applied as a broad jurisdictional
17 barrier or simply as a limitation on a court's remedial
18 power. We say that the -- the act should be applied
19 broadly to keep collection cases out of Federal court
20 altogether because any lesser approach, any more narrow
21 approach is just -- is unworkable.

22 QUESTION: Well, in this case, Mr. Sewell, the
23 -- the county brought the action in State court, didn't
24 it, to collect the taxes?

25 MR. SEWELL: Yes, sir.

1 QUESTION: And then the defendants -- the judges
2 removed it to Federal court.

3 MR. SEWELL: That's right.

4 QUESTION: And so, it -- you say at that point
5 the Tax Injunction Act applied to prevent the State from
6 -- from collecting a tax?

7 MR. SEWELL: I say that the Tax Injunction Act
8 ought to apply to a tax collection case whether it's
9 removed by a defendant by a taxpayer to Federal court or
10 whether we had brought the case ourself in Federal court.
11 I think the Tax Injunction Act should bar -- should keep
12 these cases out of Federal court for a number of reasons.

13 The --

14 QUESTION: Go ahead.

15 MR. SEWELL: The reason is, is because if you
16 have some lesser approach, it's just not workable. The
17 Tax Injunction Act is going to apply in some form or
18 fashion if a case is removed, a collection case is
19 removed. For -- for example, if you go into Federal court
20 in a tax collection case, the -- it seems to me that that
21 would allow the taxing authority, me in this case, the
22 government, to use the Tax Injunction Act as both a sword
23 and a shield to whipsaw a taxpayer.

24 QUESTION: Well, what -- what if this action had
25 been brought in State court to collect taxes on the basis,

1 say, of diversity of citizenship, and it was removed on
2 that basis to the Federal court and there was no claim
3 that the tax was unconstitutional? Maybe there was just a
4 claim that it had been paid and the county said, no, it
5 hasn't been paid. You think the Tax Injunction Act would
6 still apply?

7 MR. SEWELL: Yes, Your Honor, I do. I believe
8 -- and I look to footnote 22 partially of the Grace
9 Brethren Church opinion.

10 QUESTION: Well, that's not the greatest place
11 to look for controlling law.

12 (Laughter.)

13 MR. SEWELL: I thought it was a good place to
14 look.

15 (Laughter.)

16 MR. SEWELL: And -- and when I went back and
17 read that footnote, that footnote gives a very thorough
18 history and analysis of the Tax Injunction Act, and it
19 quotes the Senators and the Members of Congress that were
20 responsible for enacting that act. And that footnote
21 demonstrates -- demonstrated to me conclusively that the
22 purpose of the Tax Injunction Act, the central purpose,
23 was to keep a Federal court from interfering in any manner
24 in a State tax if there's an adequate State remedy. That
25 seems to me to be the -- the clear purpose.

1 QUESTION: Well, then why didn't the act simply
2 say the Federal courts have no jurisdiction in State tax
3 cases?

4 MR. SEWELL: I think that the act -- I wish that
5 the act had -- had said that, and I think that that's --
6 you know, the act talks in terms of Federal courts not
7 having the jurisdiction to -- to enjoin, suspend or
8 restrain a levy, assessment, or collection of a State tax.
9 But, in effect, Your Honor, that's what happened here.

10 QUESTION: I don't understand that because the
11 -- the suit didn't change its shape from being a suit to
12 collect, not a suit to enjoin, but a suit to collect.
13 That's what it was.

14 MR. SEWELL: That's right.

15 QUESTION: And that was what was removed, and it
16 remains a suit to collect.

17 MR. SEWELL: It does, and the -- I'm assuming
18 that the purpose of the Tax Injunction Act, the
19 overreaching purpose, is to prevent a Federal court from
20 interfering with the collection or the administration of
21 State tax, and I believe that's what the Court's Grace
22 Brethren Church opinion, specifically footnote 22 --
23 that's exactly what it said.

24 Now, the -- the way I see this, the -- in this
25 case, the Federal court did interfere with the collection,

1 not only of our tax. In this case -- this case has
2 stopped us from collecting the tax not only from the
3 respondents, but from all the Federal judges in the
4 Northern District. It's exposed us to refund suits from
5 the other judges who paid the tax other -- other than
6 these two respondents. It's resulted now in hundreds of
7 Federal employees that work in Jefferson County refusing
8 now to pay the tax, demanding explanations from us as to
9 -- as to why they have to pay if the judges don't have to
10 pay. We're having now to respond to all of that, and it
11 looks as though we may -- we may have to --

12 QUESTION: Well, why would that be any different
13 as if it were just in State court and a State court judge
14 said, well, I have real problems with this? I'm going to
15 take it under submission, and the word gets out. It's the
16 same thing.

17 MR. SEWELL: I think that there would -- we may
18 have some -- some of the same results, but I think again
19 the purpose of the Tax Injunction Act is to keep the
20 Federal court from doing that.

21 QUESTION: But the purpose of diversity
22 jurisdiction is to provide a -- basically a more neutral
23 forum perhaps than the State court but to resolve the case
24 in exactly the same way that the State court would have
25 resolved it. So, if -- if there had been a decision of

1 the Alabama court saying that this was -- couldn't be
2 applied to -- you'd have the same claims, wouldn't you, on
3 the part of Federal employees?

4 MR. SEWELL: I think that you may have some of
5 the same results and you may have some of the same
6 displeasure from the Federal employees, certainly.
7 Certainly.

8 QUESTION: What if the Alabama Supreme Court
9 finally decides that the tax can be collected and then
10 certiorari is sought here? I mean, it stays in the
11 Alabama court. It goes all the way --

12 MR. SEWELL: This case.

13 QUESTION: Yes. It goes all the way to the
14 supreme court, and the supreme court says the tax can be
15 collected. And then the judges seek certiorari. We grant
16 certiorari. If we reverse the Alabama Supreme Court,
17 would we be enjoining a State tax?

18 MR. SEWELL: Well, Your Honor, I think that --

19 QUESTION: Under your analysis, we would I
20 suppose.

21 MR. SEWELL: I think this Court would certainly
22 have appellate jurisdiction to review the decision of the
23 Alabama Supreme Court.

24 QUESTION: Yes, but under your broad definition
25 of what constitutes the -- the -- enjoining of a State tax

1 -- namely, to give a judgment against a person who is
2 resisting the collection of a State tax -- we would be
3 violating the Anti-Injunction Act.

4 MR. SEWELL: I think that your jurisdictional -
5 - and I understand your point and you're correct, but your
6 -- your basis for an appellate review of a State court
7 decision is different from what I'm suggesting to you.
8 I'm talking about jurisdiction at the trial level, the
9 initial Federal jurisdiction. Perhaps I'm using -- I'm
10 painting with too broad of a brush. Maybe I am.

11 QUESTION: Do you plan to argue that removal was
12 improper under section 1442(a)(3)?

13 MR. SEWELL: Yes, ma'am.

14 QUESTION: I'm not sure you're going to win on
15 your tax injunction argument. I wondered if you wanted to
16 pursue that other inquiry.

17 MR. SEWELL: Yes, ma'am. I had planned to argue
18 that.

19 We feel that under 1442 that -- that neither
20 test is met because refusing to pay taxes is not an act
21 done under the color of a judge's office, and it's not
22 done in the performance of any judicial duty. I know of
23 no Federal statute, I know of no act of Congress that --
24 that instructs a judge to not pay his or her taxes.

25 QUESTION: I guess the inquiry under 1442 is

1 pretty much tied up with the merits of whether the tax can
2 be imposed.

3 MR. SEWELL: I think that -- that perhaps it is,
4 and I certainly -- and I don't suggest to you that -- that
5 -- that the judge would have to win on the merits to -- to
6 have jurisdiction. But I -- I do suggest to you that
7 there has to be something colorable about the defense
8 that's pled, and to me if -- if -- if the people in Mesa
9 v. California couldn't convince the Court that -- that
10 when they ran over somebody in their -- in their postal
11 buggies that they were engaged in their official function,
12 I don't see how not paying a tax would satisfy that.
13 Certainly if these judges didn't pay Alabama's income
14 tax --

15 QUESTION: But -- but this tax says that it's
16 unlawful to perform the function, i.e., it's unlawful to
17 be a judge if you don't pay the tax.

18 MR. SEWELL: No, sir. I disagree with that.
19 The tax -- the ordinance says that it's unlawful to work
20 in the county without paying the tax. The court of
21 appeals seized on that language, but that -- what they
22 failed to do -- they failed to do two things. One of
23 those things was they failed to recognize the difference
24 between a license tax which is for revenue purposes, which
25 is what ours is, which stems from our taxing power, versus

1 a license tax for regulatory purposes which stems from the
2 police power.

3 QUESTION: Let me ask you this. Does the county
4 have any authority to impose an income tax?

5 MR. SEWELL: No, ma'am. We're prohibited from
6 doing that by the Alabama constitution.

7 QUESTION: And yet, for you to prevail, you have
8 to persuade us that this is in fact an income tax.

9 MR. SEWELL: Under Federal law it clearly is an
10 income tax.

11 QUESTION: Even though the county lacks the
12 power to --

13 MR. SEWELL: Under State law.

14 QUESTION: -- impose an income --

15 MR. SEWELL: Just as in Howard v. Commissioners,
16 yes, ma'am.

17 QUESTION: Why is it clearly an income tax? It
18 doesn't say it's an income tax.

19 MR. SEWELL: No, sir. It is clearly under
20 Alabama law a license tax.

21 QUESTION: Yes, fine. So, you said, to win,
22 which I think you're right, that you'd have to persuade us
23 it's an income tax. All right. Why is it an income tax?
24 Persuade us or me.

25 MR. SEWELL: I will persuade you, Your Honor.

1 I'll try to persuade you with the -- with the Howard v.
2 Commissioners decision where you all persuaded me --

3 (Laughter.)

4 MR. SEWELL: -- that a -- that a license --

5 QUESTION: I must not have written that.

6 (Laughter.)

7 MR. SEWELL: -- that a license tax in
8 Louisville, Kentucky that is indistinguishable from our
9 tax was an income tax under the Buck Act.

10 QUESTION: And why -- why is it -- I mean, this
11 -- why is it basically an income tax?

12 MR. SEWELL: Because the Buck Act makes it an
13 income tax. Congress -- Congress converted all State and
14 local license taxes to be income taxes under Federal law.

15 QUESTION: So -- so, if you pass a tax that says
16 anybody who -- anybody -- take an unpopular matter.
17 Anyone who applies the Federal sentencing guidelines will
18 pay a tax measured by their income. Is that an income
19 tax?

20 MR. SEWELL: That is a -- I would think, a
21 discriminatory tax that would violate the --

22 QUESTION: Yes, but is it an income tax?

23 MR. SEWELL: I don't know.

24 QUESTION: All right. Now, here they're -- we
25 read the opposition's brief and they say, first, it

1 doesn't say it's an income tax, and second, there are vast
2 numbers of employees who don't pay it measured by their
3 income. They pay it measured by \$50 a year. They include
4 -- we just have the A's I guess -- architects, attorneys,
5 auctioneers, automobile dealers, automobile accessory
6 dealers, and that's only the A's and I'm only halfway
7 through. All right? So -- so, vast numbers of people pay
8 \$50 a year, \$125 a year. Some people pay it measured on
9 their income, and it's also not called an income tax and
10 it would be illegal to -- to have one under State law.
11 Okay, now, why is it an income tax?

12 MR. SEWELL: Your Honor, in answer to your
13 question, I disagree first with the word vast. 92 percent
14 of the people who earn wages in our county pay our tax.
15 92 percent. 8 percent pay license fees to the State of
16 Alabama, and those are predominantly Federal employees.

17 QUESTION: Where does that number come from?

18 MR. SEWELL: It comes -- that is -- that number
19 is not in the record because this issue was never raised
20 until we got to this Court.

21 QUESTION: Well, how would I find out whether -
22 - you know, I see a big list of occupations. How do I
23 know -- how am I supposed to find that out?

24 MR. SEWELL: Well, this -- this information is
25 not in the record, nor is the fact that 1,209 of the

1 12,000 Federal employees in Jefferson County -- 1,209 of
2 them -- pay State license fees and do not pay our tax.

3 QUESTION: In the Howard case that you rely on,
4 were there categories by business as -- as your ordinance
5 has it?

6 MR. SEWELL: Exemptions. Some, yes, there are
7 some. Some of them were. Some were, of course, domestic
8 servants --

9 QUESTION: So, you could be either an employee
10 in sort of a catchall group or a person with a specific
11 business and you had to pay different rates according --

12 MR. SEWELL: As I understand it, yes.

13 QUESTION: -- to your business? That -- that
14 was -- that was the -- the pattern of ordinance in Howard?

15 MR. SEWELL: There was -- there was -- yes, sir.
16 There was a separate law, and whether it was a State law
17 or whether it was a city law, that I don't know. But it
18 -- but when you read it carefully, you see that it applies
19 to insurance companies and then other corporations,
20 persons that are taxed by these other sections of
21 Louisville law or by Kentucky law. So, the Louisville
22 occupational tax had exemptions. I don't know how broad
23 they were. I don't know how narrow they were.

24 I know how narrow ours are. It's only 8 percent
25 of the people. I don't know how -- how broad or narrow

1 Louisville's was.

2 QUESTION: Yours -- yours doesn't look like an
3 income tax because it's -- it's on gross receipts. There
4 are no deductions. But that was also true of the Howard
5 case.

6 MR. SEWELL: That's right.

7 QUESTION: And the Buck Act defines income tax
8 very broadly, doesn't it?

9 MR. SEWELL: It does.

10 QUESTION: It's any tax levied on with respect
11 to or measured by net income, gross income, or gross
12 receipts.

13 MR. SEWELL: And ours is, yes, sir. There's no
14 dispute about that.

15 QUESTION: But don't you have the additional
16 problem, your license fee or tax or whatever it is is
17 arguably discriminatory under Davis against Michigan?

18 MR. SEWELL: No, sir. No, sir. Our tax does
19 not -- our tax does not discriminate against any person,
20 Federal or otherwise.

21 QUESTION: All the people -- all the people on
22 the list that Justice Breyer referred to don't pay it.

23 MR. SEWELL: The -- I understand.

24 QUESTION: The architects, barbers, hair
25 dressers, all that list.

1 MR. SEWELL: As I understand --

2 QUESTION: And they do not pay it.

3 MR. SEWELL: Well, I think that there is -- I
4 think that there is factual discrimination because we have
5 -- our tax applies to this group and the State levies its
6 license fee on the others. And what that is is just a
7 simple division of taxing authority.

8 QUESTION: Yes, but the -- but the amount that
9 is paid by the respective people in the different jobs is
10 quite different from the amount the judges have to pay.

11 MR. SEWELL: Some. Some are and -- and some are
12 not.

13 QUESTION: Well, they all are, aren't they?

14 MR. SEWELL: It depends on how --

15 QUESTION: They're all flat fees, aren't they?

16 MR. SEWELL: It depends on how much -- how much
17 money a person makes.

18 QUESTION: Are there any of those which the
19 license fee is as high as the income tax on the judges?

20 MR. SEWELL: Well, if -- if a -- yes. Depending
21 on -- depending on a -- how much a person would make, they
22 could pay more instead of less --

23 QUESTION: Well, you know what Federal judges
24 make and you know what the license fees are. I was under
25 the impression that none of the license fees were as high

1 as the tax on the judge.

2 MR. SEWELL: Okay, I'm with you, and I don't --
3 I don't know if it is. I really don't. I doubt that it
4 is, but --

5 QUESTION: But assuming that's true, why -- how
6 then do you get around Davis against Michigan?

7 MR. SEWELL: Because I read Davis v. Michigan as
8 -- as the problem with that tax was that it discriminated
9 against Federal employees by favoring State employees --

10 QUESTION: Right.

11 MR. SEWELL: -- because of the source of the
12 compensation, which is what the Public Salary Tax Act
13 says. There may be other forms of factual discrimination.

14 QUESTION: That wasn't the basis, though, of the
15 Eleventh Circuit's decision here, was it, that it
16 discriminated?

17 MR. SEWELL: The Eleventh Circuit said -- noted
18 that the trial court found that the tax did not
19 discriminate and went on to say the judges didn't appeal
20 it, and so they were not going to address it.

21 QUESTION: And is it true, Mr. Sewell -- Mr.
22 Sewell, is it true that this tax would apply to State
23 court judges in the same way it applies to Federal judges?

24 MR. SEWELL: It applies to all constitutional
25 officers of the State of Alabama.

1 QUESTION: And the same with prosecutors.

2 MR. SEWELL: Yes, ma'am, who work in Jefferson
3 County, Alabama.

4 QUESTION: So, the State court judges are taxed
5 on their income in the same --

6 MR. SEWELL: Just like the Federal judges, and
7 the Alabama Supreme Court Justices, three of those who
8 have offices in our county, satellite offices, pay the --

9

10 QUESTION: Prosecutors are not. The prosecutors
11 are not.

12 MR. SEWELL: Prosecutors may be -- I think
13 prosecutors are required to have a State law license.

14 QUESTION: So, they pay -- they don't pay one-
15 half of 1 percent of their income.

16 MR. SEWELL: They pay the State law license.

17 QUESTION: They pay \$200 a year flat or
18 something like that.

19 QUESTION: That would be the same for the U.S.
20 Attorney, though, wouldn't it?

21 MR. SEWELL: Yes, ma'am. That's very important.
22 It's also true for the doctors who work at the VA
23 hospital. We have a large VA hospital. All of the
24 doctors and all of the nurses are required by their
25 Federal job descriptions to have a State physician's

1 license to practice medicine and the nurses are required
2 to have a State nursing license to be a nurse for the
3 Federal Government.

4 QUESTION: Mr. Sewell --

5 MR. SEWELL: Yes, sir.

6 QUESTION: I want to erase a -- a stupid
7 question I asked. The answer to my question about the
8 supreme court in deciding this case would be violating the
9 Tax Injunction Act. Unfortunately, the act was not
10 reproduced in your brief. Having dug it out, I find it
11 only applies to district courts, doesn't it?

12 MR. SEWELL: Yes.

13 QUESTION: That's the right answer.

14 MR. SEWELL: Yes, sir. Thank you. I wish I had
15 thought of that.

16 (Laughter.)

17 MR. SEWELL: I would like to reserve the rest of
18 my time, please, if there's no more questions.

19 QUESTION: Very well, Mr. Sewell.

20 Mr. Jones, we'll hear from you.

21 ORAL ARGUMENT OF KENT L. JONES

22 FOR THE UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING THE PETITIONER

24 MR. JONES: Mr. Chief Justice, and may it please
25 the Court:

1 The Tax Injunction Act bars only anticipatory
2 relief against State taxation in Federal courts. As
3 Justice Stone said for this Court in *Matthews v. Rodgers*,
4 which is cited in the legislative history of the Tax
5 Injunction Act, although injunctions against State taxes
6 should not be heard in Federal courts, Federal courts
7 remain competent to decide questions of State law, and
8 therefore can adjudicate collection and refund cases
9 brought in Federal court so long as the essential elements
10 of Federal jurisdiction are present.

11 It's our position that in this case, the
12 essential elements of Federal jurisdiction are not
13 present. The only asserted basis for Federal jurisdiction
14 is the Federal removal statute which does not apply here
15 because the action of the judge in refusing to pay a tax
16 on his private income is not an act taken under color of
17 authority or pursuant to his duties as a Federal officer.

18 In the removal petition, respondents incorrectly
19 stated that the tax was imposed on the act of performing
20 their official duties. That's not correct. The tax is
21 imposed on, it's calculated on and assessed on their
22 earnings. And this Court made clear in the *O'Malley v.*
23 *Woodrough* case that the responsibility of Federal judges
24 to pay taxes on their earnings derives from their private
25 responsibilities as citizens and that they have the same

1 responsibility as everyone else to share in the costs of
2 paying for the benefits the government provides.

3 QUESTION: But the way the tax is designed is
4 that you are -- it is illegal to engage in the duties
5 unless you pay the tax. You don't have simply a financial
6 liability for the tax.

7 MR. JONES: I don't --

8 QUESTION: There -- there is a prohibition to -
9 - against engaging on the duties themselves.

10 MR. JONES: What it really says is it's unlawful
11 to do it without paying the tax, and then you have to see
12 what that means. What that means is if you don't pay the
13 tax, you have to pay interest and penalties. There are no
14 other enforcement mechanisms in this case.

15 We would have a vastly --

16 QUESTION: Does it matter at all that under
17 State law, the county is prohibited from imposing an
18 income tax? Do we care about that?

19 MR. JONES: Not on --

20 QUESTION: They can't do it. It's ultra vires.

21 MR. JONES: Well, let's go right to the merits.
22 I've just been talking about jurisdiction.

23 But on the merits, no. The income --

24 QUESTION: I think the removal argument is
25 tangled up a little bit with --

1 MR. JONES: Well, it shouldn't be because the -
2 - there is no question that they -- they need to show a
3 colorable Federal defense. But the existence of a
4 colorable Federal defense doesn't dispose of the
5 requirement that the act for which they were sued be one
6 that they took in their official capacities. And it's our
7 position that -- that any Federal officer who doesn't pay
8 his Federal -- his State or local taxes is acting in a
9 private capacity.

10 QUESTION: Some judges in this jurisdiction have
11 paid the tax. Right? And -- and presumably would have
12 been violating their duties if -- if resisting the tax was
13 part of the Federal responsibilities of these people.

14 MR. JONES: I just don't think Federal duties
15 apply in any direction on -- on the private decision about
16 paying your tax on your personal income. The Supreme
17 Court in -- in O'Malley seems to me to have made that
18 point.

19 QUESTION: It seems to me a Federal judge could
20 have taken the position that it is simply unlawful to
21 condition under State law my performance of my Federal
22 powers and exercise of my Federal responsibility. And --
23 and if the case is looked at that way, then the -- the
24 removal I suppose is in a different posture.

25 MR. JONES: If -- we have -- in deciding whether

1 removal is proper, you have to look at what case was
2 brought in State court. If there were a case brought in
3 State court that said that this judge should be enjoined
4 or should be prevented from performing his official
5 functions, then the judge could remove the case and say
6 that what's at issue is my official acts, whether I can
7 perform my official function.

8 QUESTION: Well, here the judges I suppose could
9 have taken the position that the -- that the disposition
10 of the case that was brought was simply a -- a predicate
11 to what could have been an injunction against their
12 performance of their -- their Federal responsibilities.

13 MR. JONES: Well, I don't think it is a
14 predicate to an injunction. I don't think and none of the
15 courts below thought that an injunction could possibly be
16 issued.

17 QUESTION: Why not?

18 MR. JONES: Well, if for no other reasons,
19 inequity wouldn't -- the legal remedy of collecting the
20 tax is sufficient, but beyond that, what this tax says is
21 what's unlawful -- what happens when it's unlawful and the
22 tax isn't paid is interest and penalties. It doesn't say
23 anything beyond that.

24 QUESTION: Well, it provides for interest and
25 penalties, but I suppose if there is arguably a

1 prohibition against the exercise of the -- of the
2 professional responsibilities, State equity would -- would
3 enforce it.

4 MR. JONES: If this -- again, if the State -- if
5 the suit in State court arose in connection with that act,
6 that would be the act at issue in the removal. The act at
7 issue in this case was paying the tax and that was a
8 private act, not an official act.

9 On the merits --

10 QUESTION: Well, just -- just -- on -- on that
11 point, in -- this district has multiple locations. If the
12 chief judge of the district says you must come to
13 Birmingham and try this class action for a year and a
14 half, the judge has no choice. That's -- he's exercising
15 his official duty.

16 MR. JONES: That may well be and it may well be
17 true too that when a Federal goes to different States -- I
18 mean, an appellate judge goes to different States, he
19 might become subject to their taxes also.

20 On the merits --

21 QUESTION: Doesn't it say on -- the language of
22 it is it is called a license fee for the privilege of
23 engaging in or following such vocation or occupation. It
24 doesn't -- it says in the statute that it's for the
25 privilege of engaging in the vocation.

1 MR. JONES: The -- this issue is already well
2 plowed in this Court's cases. In Howard v. County
3 Commissioner, the Court upheld a similar business
4 privilege tax against the very objection that the tax was
5 an improper license fee on Federal workers.

6 QUESTION: No. The objection here is it isn't
7 income tax. They don't even measure it by income. They
8 measure it by gross receipts.

9 MR. JONES: Well, the tax doesn't have to be an
10 income tax to be valid. The Public Salary Tax Act
11 authorizes a tax on pay or compensation. The Buck Act
12 authorizes a tax on -- authorizes an income tax but
13 defines that by statute to mean any tax on income.

14 QUESTION: Or gross receipts.

15 MR. JONES: Yes, and -- well, income as used in
16 the broadest sense, as near as we can tell from looking at
17 that statute. And this Court has defined that term to
18 mean any accretion to wealth. So, this tax doesn't have
19 to be a Federal income tax or a State income tax. It has
20 to be a tax on income, which it is.

21 And in -- in Howard v. Commissioner, the Court
22 said the fact that the tax is described is in the form of
23 or labeled as a license fee doesn't make it invalid. What
24 is -- what matters is that it's practical operation is to
25 tax the income of Federal officers. If in its practical

1 operation it taxes their income, it is valid regardless of
2 the form or label applied.

3 QUESTION: Do you have any thoughts on the
4 merits?

5 MR. JONES: That's what I was kind of working on
6 there, Justice Scalia.

7 (Laughter.)

8 MR. JONES: The only other thought I have on the
9 merits is that their contention that discrimination
10 prohibits this tax is simply wrong. In Davis v. Michigan,
11 the kind of discrimination the Public Salary Tax Act
12 prohibits is discrimination based on the sovereignty of
13 the employees. This is not like the pension
14 discrimination involved in Davis v. Michigan where State
15 workers were treated better than Federal workers. Under
16 this tax scheme, it appears that regardless of whether
17 you're a Federal worker, a State worker, a private worker,
18 the tax applies the same way to you.

19 It's true that there are exemptions in the State
20 -- in the county tax provision for undertakers and
21 barbers, for people who are already licensed under the
22 State licensing scheme, and the evident purpose of those
23 objections is to avoid a double tax on these previously
24 licensed professions.

25 Those kinds of equalizing adjustments don't

1 discriminate on the basis of sovereignty. They apply
2 equally and this case does not present any question about
3 equal protection issues whether these kinds of
4 discriminations satisfy the rational basis standard
5 because those issues weren't raised below.

6 The only discrimination issue involved under the
7 Buck Act is -- under the Public Salary Tax Act is whether
8 the statute discriminates because these are Federal
9 workers, and the answer to that is not.

10 QUESTION: Mr. Jones, if we should agree with
11 you about that issue on the merits, what about the issue
12 that the Eleventh Circuit didn't decide and that is the
13 diminution of compensation? Would we --

14 MR. JONES: Well, the O'Malley v. Woodrough, the
15 Court held that -- that a tax on the incomes of Federal
16 judges would not be a diminishment of their compensation
17 for Article III purposes.

18 QUESTION: Mr. Jones, I don't think the tax in
19 Michigan discriminated against the Federal workers because
20 they were Federal workers. It just treated them like
21 every other citizen in the State, discriminated in favor
22 of a very small group of State workers.

23 MR. JONES: It did discriminate on the basis of
24 sovereignty, though, and I believe you dissented in this
25 case.

1 QUESTION: I did.

2 (Laughter.)

3 QUESTION: I think the cases are quite similar.

4 MR. JONES: It's the majority's view is what I
5 was trying to describe.

6 (Laughter.)

7 QUESTION: Yes. You're not asking us to
8 reexamine Davis, though.

9 QUESTION: Mr. Jones, you've repeated several
10 times about your reliance on O'Malley against Woodrough,
11 and yet it isn't cited in the government's brief. Could
12 you file a citation to that with the clerk?

13 MR. JONES: It's certainly cited, if not in our
14 brief, in one of the briefs. But I will -- I'll provide
15 you with the citation, and -- and perhaps Mr. Sewell can
16 give it to you in his reply.

17 QUESTION: Thank you, Mr. Jones.

18 Mr. Morrison, we'll hear from you.

19 ORAL ARGUMENT OF ALAN B. MORRISON

20 ON BEHALF OF THE RESPONDENTS

21 MR. MORRISON: Mr. Chief Justice, and may it
22 please the Court:

23 Before turning to the merits, I want to deal
24 with the justiciability Tax Injunction Act issue and the
25 removal which are all kind of tied together in our view.

1 This case was removed from the small claims
2 division of the State court of Alabama by the respondents,
3 two Article III Federal judges, and they alleged in their
4 removal petition that the provision that the -- both the
5 Justice Kennedy and Justice Souter focused on about the
6 unlawful -- making it unlawful to engage in the occupation
7 was tantamount to an imposition of a licensing requirement
8 by the county upon Federal judges, which if carried out,
9 would interfere with their Federal -- carrying on the
10 duties of Federal judges. For purposes of removal, that
11 is clearly a kind of Federal immunity defense, saying that
12 the Constitution does not allow Jefferson County to do
13 that.

14 If ultimately we are wrong on the merits -- and
15 I'll try to explain why we don't think we are -- that
16 would not have allowed us -- that would not defeat the
17 removal.

18 But significantly for removal I want to point
19 out that at no time did Jefferson County in the district
20 court or in the court of appeals suggest that removal was
21 improper. And the rules -- the statute requires that
22 removal be objected to within 30 days or at least by the
23 -- if you allege that this is subject matter jurisdiction,
24 which I'm not sure whether it is or not, that has to be
25 done by the time of final judgment. So, even this Court's

1 decision in the Caterpillar case -- Mr. Chief Justice, I
2 do not cite that in my brief, but it was a recent decision
3 a couple of years ago -- allowing these removal issues to
4 be raised later --

5 QUESTION: You do not cite decisions that are
6 only 2 years old?

7 (Laughter.)

8 MR. MORRISON: Your Honor, I -- I didn't think
9 of it until I saw what their reply brief said, and that -
10 - I wasn't sure that it was going to come up until I was
11 actually preparing for my argument today.

12 In any event, I'm not sure whether it's
13 jurisdictional or not, but in any event, it was never
14 raised and we think it's --

15 QUESTION: If it is, it's pretty important
16 because the Court would then have an obligation to remand
17 on its own.

18 MR. MORRISON: That is correct.

19 QUESTION: And in Caterpillar, that was -- going
20 in, that was recognized that this Court should have
21 remanded. The problem was we were at the end of the line.
22 There was at that point complete diversity. So, it was a
23 very practical oriented decision. It said that the
24 district court did wrong in not remanding. It should have
25 done that in the beginning.

1 MR. MORRISON: But in this case they were never
2 asked to remand on the grounds of 1442(a)(3). The
3 provision that allows officers of the courts of the United
4 States to remove should not have been invoked. The only
5 basis for saying that the case was not properly in Federal
6 court was the provision of the Tax Injunction Act, and
7 that was what the petitioner relied upon.

8 In any event --

9 QUESTION: I don't follow that because I don't
10 think the tax collector in Alabama could originally have
11 brought this case in Federal court. Not -- he -- he has
12 no Federal question on the face of his complaint. There
13 is no diversity. On what basis could it come into Federal
14 court originally?

15 MR. MORRISON: I think that's correct, Your
16 Honor. It could not have come into Federal court
17 originally.

18 But I believe that the -- the -- under
19 1442(a)(3), we must have a colorable Federal immunity
20 claim. As I've explained, we have a colorable Federal
21 immunity claim in this case because we claim that the
22 license fee is tantamount to a licensing requirement which
23 would interfere with our Federal -- our Federal duties as
24 Article III judges, if that was imposed.

25 QUESTION: And even if you're wrong about that,

1 there's enough -- it's an arguable --

2 MR. MORRISON: Yes.

3 QUESTION: -- proposition --

4 MR. MORRISON: And as this Court has said on
5 many occasions, the -- one should not confuse the issue of
6 jurisdiction with the issue of the merits, and that -- and
7 that so long as we have a colorable Federal immunity
8 defense, we would -- we would be able to be in court.

9 Now, if our only claim were, however, that the
10 tax was unduly discriminatory -- that is to say, it
11 violated the -- the Public Salary Tax Act -- and that it
12 was not a license of any kind, we might be in a different
13 situation then.

14 In any event --

15 QUESTION: I -- I don't think that's confusing
16 jurisdiction with the merits. I mean, the -- the question
17 of whether, in making this claim, your clients are acting
18 pursuant to their official duties has nothing to do with
19 the -- with the merits of the case. That is a question
20 that just goes to the jurisdiction.

21 MR. MORRISON: Well, I agree with that, Your
22 Honor. I was -- the -- the Government has made a great
23 deal of saying that we -- that this is not in fact a
24 license fee and therefore we lose. And that may be right
25 on the merits.

1 QUESTION: Right.

2 MR. MORRISON: But -- but it is -- it doesn't
3 defeat our jurisdiction.

4 And I think one ought to take a practical
5 construction of the statute, and the question is did
6 Congress intend to allow Article III judges, who are the
7 principal persons covered by 1442(a)(3), when they are
8 sued and they believe that the suit involves matters
9 directly relating to their official functions. They raise
10 a claim of Federal immunity, whether they have the right
11 to have that case heard in the Federal courts or,
12 nonetheless, have to have it heard in the State courts.

13 QUESTION: Well, is a colorable claim enough?

14 MR. MORRISON: Yes, it is, Your Honor.

15 QUESTION: What's the authority for that?

16 MR. MORRISON: Willingham and I believe that
17 Mesa against California also is. The Willingham case is
18 -- is --

19 QUESTION: Well, if you don't have it handy, you
20 have it covered --

21 MR. MORRISON: I have --

22 QUESTION: You cover it in your brief.

23 MR. MORRISON: Yes, on page 25. Also, Jamison -
24 - Jamison against Willy from the Fourth Circuit, Mesa
25 against California, and Moe against the Salish and

1 Kootenai Tribes, as well as the Willingham case, all stand
2 for the proposition that on issues of -- of removal, as
3 long as the colorable Federal defense of a Federal
4 immunity applies, it is -- it is sufficient.

5 QUESTION: That's the merits question.

6 QUESTION: Yes, I think --

7 QUESTION: That's not -- that's not the question
8 of -- of whether the official is acting in official
9 capacity in -- in bringing the suit. A purely
10 jurisdictional --

11 MR. MORRISON: Well --

12 QUESTION: I understand the Chief Justice to be
13 asking whether it is enough that you have merely a
14 colorable claim under the jurisdictional provision.

15 MR. MORRISON: Oh, I'm sorry. I did not
16 understand you correctly, Mr. Chief Justice.

17 QUESTION: I thought that's what he was asking.

18 MR. MORRISON: The question is -- as I
19 understand it, there's no question that these persons are
20 covered persons by 1442(a)(3).

21 QUESTION: Okay. You have to establish --

22 MR. MORRISON: We have --

23 QUESTION: -- that, period.

24 QUESTION: Not colorably but --

25 MR. MORRISON: Period and they are. They are

1 officers of -- of the courts. All right. That's point
2 number one.

3 Point two is, is the claim that they are raising
4 -- are they raising a Federal immunity defense and their
5 claim of Federal immunity defense must not be proven but
6 must be colorable. And their Federal immunity defense is
7 that the county is trying to license them. It is not
8 imposing an income tax. It is trying to license them, and
9 by trying to license them, just as much as if they tried
10 to get an injunction against them, if the end in this case
11 would say they must submit to the licensing scheme, which
12 we contend is unconstitutional, then we have a Federal
13 immunity not to be part of that licensing scheme. And
14 that is the basis of our Federal defense on which
15 1442(a)(3) says that we must have one in order to be able
16 to get into the Federal -- Federal courts. And the
17 Congress has said in those circumstances, Federal judges
18 should be entitled to have Federal cases litigated in
19 Federal courts before Article III judges instead of the
20 State courts in which the action happens to be brought.

21 Now, I want to turn now to the merits of this
22 case which I believe turns on the proper characterization
23 of the ordinance.

24 QUESTION: And in the course of your remarks,
25 please present them as you wanted to, but the Howard case

1 stumps me.

2 MR. MORRISON: Well, let me --

3 QUESTION: I -- I just don't know how to get
4 around that.

5 MR. MORRISON: Well, let me -- let me begin with
6 Howard since it has taken up some attention.

7 The first thing I think we ought to recognize is
8 that the Howard ordinance, insofar as it was before the
9 Court, was only -- the single footnote in note 2 in the
10 Howard opinion quotes all of the ordinance that was
11 actually in this Court. I have gone and looked at the
12 joint appendix, and there is nothing about exemptions in
13 the Howard ordinance at all. So that insofar as the Court
14 was aware, and despite whatever may have been the actual
15 state of the law at the time in terms of Louisville
16 ordinance, there were no exemptions.

17 It now appears -- and there has been several
18 rounds of submissions on this, but it appears that the
19 Louisville ordinance in effect at that time did have three
20 exemptions.

21 One for domestic servants and the ordinance
22 specifically says with respect to that that the -- the
23 exemption is because of the great costs of administration
24 and difficulty of collection involved, domestic servants
25 are excluded.

1 Second, there is an exclusion for ministers. I
2 don't want to get into another constitutional issue here
3 today, but whatever that exclusion is and the questionable
4 nature of it under First Amendment law, it was not a broad
5 exclusion.

6 The other exclusion was for insurance companies
7 who had other taxes, and there was another provision that
8 said other businesses that had licenses. They didn't lose
9 their licenses, but they still had to pay the tax under
10 the ordinance.

11 Stated another way, instead of the 140
12 exemptions across a broad range of issues that we have in
13 this statutory scheme here, we had a very narrow set of
14 exemptions, one for obvious administrative convenience
15 reasons.

16 QUESTION: Well, I think your problem isn't so
17 much the Howard case as the definition in the Buck Act
18 that says an income tax is any tax levied on, respect to,
19 or measured by net income, gross income, or gross
20 receipts, which the Court was simply interpreting in
21 Howard.

22 MR. MORRISON: Well, I want to be clear. The
23 fact that this is not an income tax like the Federal
24 income tax is not the reason that we say that this is not
25 a tax covered by -- by the statute.

1 Second point. The Buck Act is principally a
2 provision to remove the possibility that someone would
3 claim, well, you cannot tax someone because you're working
4 on a Federal enclave.

5 QUESTION: Well, whatever it may be principally,
6 do you dispute the fact that this -- this tax was measured
7 by either gross income or gross receipts?

8 MR. MORRISON: I do not, Your Honor.

9 QUESTION: Then why -- why doesn't the Buck Act
10 cover it by its very terms?

11 MR. MORRISON: The Buck Act is not an enabling
12 provision. The Public Salary Tax Act is an enabling
13 provision. The Buck Act, which was passed 2 years
14 subsequent to that, was a provision intended to close a
15 possible loophole. That the argument is that even though
16 in this -- in the case of Louisville, the ordinance there
17 was physically within the confines of the City of
18 Louisville. It was actually -- the property was actually
19 owned by the United States, and the concern was that
20 someone would say, as someone did in that case -- and that
21 was the principal focus of the issue. In that case, the
22 -- the United States Government has right to the property
23 and therefore no locality may impose the tax.

24 The Buck Act didn't impose any tax or authorize
25 it. It removed an impediment. Indeed, those are I think

1 the words in the -- in the Howard opinion itself.

2 But even if this is an -- and then that gets me
3 to my next question which is while one might think of this
4 as a -- as a tax on pay or compensation, that we believe
5 that the fact that there are these massive exemptions,
6 exemptions which are totally unrelated to income --

7 QUESTION: But they're also totally unrelated to
8 the source. You're not -- or maybe you are -- making an
9 equal protection case, that it's arbitrary to let the
10 barbers pay less than the judges.

11 MR. MORRISON: I am not making an equal
12 protection argument.

13 QUESTION: But here all the State judges are in
14 the same boat. The U.S. Attorney pays the -- the other
15 fee, and so does the district -- local district attorney.
16 So, there's no discrimination between like groups.

17 MR. MORRISON: Well, I want to -- I want to take
18 on the -- the direct thrust of your question, but first I
19 want to make what I believe is a -- is a -- a
20 clarification. If you are a lawyer working for the
21 Federal Government and you are assigned to go to Alabama
22 to be an Assistant U.S. Attorney or work in the Small
23 Business Administration of the Internal Revenue Service,
24 you may have to be a lawyer, but you don't have to be
25 admitted to the bar of the State of Alabama. You must be

1 a lawyer someplace, and the same I believe is true for
2 doctors and others. You must have a law license, but
3 Alabama can't say that you must have an Alabama law
4 license to engage in legal activities in Alabama. That's
5 up to the lawyers.

6 All right. Leaving that aside, when one looks
7 at the statute initially, the discrimination as to source,
8 one could believe that since Federal judges pay and State
9 judges pay, it's the same. I do not believe that this
10 Court's decision in Davis against Michigan allows that
11 kind of construction. That was the very argument that was
12 made there, that there was only a narrow group of -- of
13 discrimination there.

14 The Court said -- and Justice Stevens is
15 perfectly aware of this because he wrote the dissent
16 there. He said the Court has adopted, in effect, a most
17 favored nation provision under which if Federal employees
18 are treated worse than State employees, then that it the
19 proscribed discrimination, different from an equal
20 protection discrimination. And the Court, 8 to 1, said
21 that that is entirely correct.

22 That is, in essence, what we have here, that
23 there are 140 occupations in the State of Alabama who pay
24 license fees which are not calculated on income.

25 QUESTION: We -- we began with the case being

1 removed because you have a Federal defense, and now, all
2 of a sudden, it's discrimination which is --

3 QUESTION: Yes. You didn't argue --

4 MR. MORRISON: We have two claims. We have a
5 first claim that it's a -- there are two separate but
6 related claims based on the exemption.

7 One is that the exemptions destroy the essential
8 licensing aspect -- destroy the income tax aspect. That
9 is, they turn it into a licensing scheme. It is what it
10 says it is. It's an attempt to license, and it's not a
11 tax on pay or compensation of the kind envisioned in the
12 Public Salary Tax Act. That is our first argument. That
13 is the argument that gets us into the Federal court under
14 1442(a)(3).

15 Our second argument -- and I would agree this
16 would not get us into the Federal court. I believe I said
17 that earlier -- is if it is an income tax, there was no
18 question about it being an income tax, there were none of
19 the -- of the evidences such as the language making it
20 unlawful to engage in our profession, the language calling
21 it a privilege tax, calling these license fees, we would
22 still have a discrimination argument based on Davis.

23 QUESTION: But was that -- was that argument
24 passed on by the Eleventh Circuit?

25 MR. MORRISON: They said there was no

1 discrimination, Your Honor.

2 QUESTION: Yes.

3 MR. MORRISON: The argument based on Davis was
4 not. I was not counsel of record then.

5 QUESTION: Yes, and did you file a cross
6 petition for certiorari?

7 MR. MORRISON: No. I don't believe I have to,
8 Your Honor. I believe that so long as I'm asking for the
9 same judgment, which is that the tax is declared unlawful,
10 that I do not have to file a cross petition.

11 QUESTION: So, you're asking us to reverse a
12 holding. The district court said there was no
13 discrimination. The court of appeals said they would not
14 consider that.

15 MR. MORRISON: Your Honor, I'm asking you to
16 affirm the judgment. You could do it on either of two
17 grounds: that it's a license, in which case we're
18 affirming exactly what the district court and the court of
19 appeals said; or in the alternative, that it's an unjust
20 discrimination. And either of those grounds would result
21 in the identical judgment of the district court and of the
22 en banc court of appeals, although --

23 QUESTION: If the basis for your removal under
24 the Federal part of the removal statute fails, shouldn't
25 the district court simply remand to the State court to

1 hear the discrimination issue? It's kind of like a
2 pendent issue here.

3 MR. MORRISON: If the --

4 QUESTION: In other -- in other words, if your
5 business privilege tax argument falls away, which was
6 the --

7 MR. MORRISON: On the merits.

8 QUESTION: -- on the merits, which was the basis
9 for you to get into Federal court, the Federal court --
10 you want it to go on and decide the discrimination issue
11 on the grounds that it's pendent jurisdiction here at
12 issue?

13 MR. MORRISON: Yes, I would say that would be
14 correct, Your Honor. And under 28 U.S.C. 1367, the
15 supplemental jurisdiction provision, which -- since this
16 question had not been presented, I didn't -- I didn't note
17 it -- allows for pendent jurisdiction for claims arising
18 out of the same transaction or occurrence. I believe it's
19 case or controversy. The terms actually are there. So
20 long as -- as there are no additional facts.

21 And in the case of Federal questions, which this
22 would be -- this is not even -- indeed, it's not even a
23 different claim. It's a different defense to the same
24 claim raised by the State given the purpose to promote
25 economy and the fact that we are here and everybody has

1 briefed this issue. There's no facts in dispute. There's
2 no --

3 QUESTION: Mr. Morrison, may I just interrupt
4 you there because 1367, the supplemental jurisdiction
5 provision, applies when the claim -- there is a claim
6 within the original jurisdiction of the Federal court.
7 This case, whatever, is not within the original
8 jurisdiction. You agreed with me there was no diversity.
9 The suit to collect is not based on Federal law. It's in
10 the removal -- it's -- it's removed based on a Federal
11 defense. And there's no provision for original entry into
12 the Federal court based on a Federal defense. So,
13 supplemental jurisdiction I think would not apply because
14 there is no claim here --

15 MR. MORRISON: Well --

16 QUESTION: -- over which the Federal court has
17 original jurisdiction.

18 MR. MORRISON: I believe it attained original
19 jurisdiction if the removal was proper in the first
20 instance.

21 But in any event, 1367 -- and I was thinking on
22 my feet a little bit -- principally relates to additional
23 claims, not to additional defenses. And what we have here
24 is an additional defense by the judges, the discrimination
25 as opposed to the license defense. And given that the

1 common nucleus of the operative facts, there would be no
2 reason not to decide this -- this question.

3 QUESTION: Mr. Morrison, we have held, I guess,
4 that whether the tax should be characterized as an income
5 tax is a matter to be determined on Federal law.

6 MR. MORRISON: That is correct. Howard so held
7 that.

8 QUESTION: And in making the Federal law
9 determination, do we look at all at State law which says
10 that the county has no authority to levy an income tax?

11 MR. MORRISON: I --

12 QUESTION: Is that part of the Federal law --

13 MR. MORRISON: It is certainly --

14 QUESTION: -- calculus or not?

15 MR. MORRISON: It is part of it.

16 QUESTION: And how have we dealt with that?

17 MR. MORRISON: Well, I think you've dealt with
18 it in the context of looking at the statute as a whole
19 which includes both the fact that the -- the State forbids
20 the collection of income tax, the fact that this is
21 designated a license fee, that it's an occupational
22 license tax for the privilege of engaging in the business.

23 But the Court has made it clear that the labels
24 are certainly not controlling. They are some -- some
25 assistance to the Court in trying to understand -- and I

1 think I would put it this way. When Congress in 1937
2 passed the Public Salary Tax Act, it permitted States and
3 localities to tax pay or compensation. And what we are
4 trying to do here is to understand the meaning of that
5 term.

6 Obviously, the pay and compensation tax does not
7 have to be a mirror image of the Federal income tax in
8 whatever iteration we're talking about, 1937 or 1997. It
9 must be a tax related to -- a tax, for instance, on wages
10 alone that didn't tax passive income would be perfectly
11 acceptable. Or conversely, a tax on passive income would
12 be -- would be acceptable. There could be deductions
13 allowed. They could be the same as Federal. They could
14 be different. All of that would be a tax on pay and
15 compensation.

16 The question is, does a scheme like this one in
17 which there are massive exemptions for persons whose
18 exemptions are not based on anything related to pay or
19 compensation -- they are based upon a fixed license fee
20 paid to the State in an amounts that range from \$2.50 in
21 fixed amounts up to \$250 or \$500. But regardless of what
22 those amounts were --

23 QUESTION: Was this not argued in -- in the --
24 the Howard case?

25 MR. MORRISON: No, Your Honor.

1 QUESTION: Because the Howard case applied
2 simply to area discrimination.

3 MR. MORRISON: Yes. It was a -- it was a
4 geographic fight. The principal issue in Howard was
5 whether a complicated annexation by the United States and
6 then giving back to the City of Louisville had somehow
7 made this no longer part of the City of Louisville, and
8 that was the first issue the Court dealt with. The
9 opinion is only six pages.

10 The second part was whether the Buck Act applied
11 and whether this was the kind of Federal enclave that
12 permitted it. There was no question in the majority
13 opinion as to whether this was an income tax. Mr. Justice
14 Douglass, Mr. Justice Black in their dissent said, I find
15 it hard to understand how there can be an income tax under
16 Federal law that's not an income tax under State law.

17 And our answer to that is, all right, we accept
18 that proposition. The label alone doesn't control it, but
19 with that plus all of the remaining indicia, we think that
20 this is not the kind of tax that Congress said that
21 Federal employees should have to pay when they cannot get
22 an exemption.

23 QUESTION: Why does the Buck Act apply, or -- or
24 does it, or why does it not apply? That is, the Buck Act,
25 the Court said, says income tax, any tax measured by gross

1 receipts.

2 MR. MORRISON: Well --

3 QUESTION: This is a tax --

4 MR. MORRISON: That definition --

5 QUESTION: -- measured by gross receipts.

6 MR. MORRISON: That definition, Justice Breyer,
7 applies only to the Buck Act. The Buck Act is sections
8 106 through 110 of title 4. The Public Salary Tax Act,
9 which is the authorizing provision for taxation here, is
10 in section 111, and the definition does not apply to that.

11 QUESTION: Why does it not apply here? The Buck
12 Act.

13 MR. MORRISON: The Buck Act is not an
14 authorizing provision.

15 QUESTION: The Buck Act says it applies only to
16 Federal enclaves.

17 MR. MORRISON: It --

18 QUESTION: This is not a Federal enclave. Am I
19 right about that?

20 MR. MORRISON: Well, I don't know whether the
21 Federal courthouse is a Federal enclave, Your Honor. I
22 think the Court has not decided that.

23 But what the Buck Act does -- and I'll read the
24 language, and this is in the appendix to the petition for
25 certiorari at page 119. It says, no person shall be

1 relieved from liability on -- by reason of his residing
2 within a Federal area or -- or receiving income from an
3 area in a Federal enclave, to paraphrase. It is a
4 relieving -- it's a loophole closing provision.

5 The Public Salary Tax Act is the imposition or
6 the authorizing provision, the consent or, as the history
7 of the act makes clear, it is confirming that which this
8 Court had decided just a few years ago, just immediately
9 preceding it in the Graves case, that the Constitution did
10 not present any independent barriers. And they wanted to
11 be sure that there was never any backsliding. So, the
12 Buck Act in itself doesn't give them any authority to
13 impose anything. It simply says, by the way, these two
14 possible exceptions do not apply in this case.

15 QUESTION: Well, couldn't one say even though it
16 doesn't strictly apply, Congress gave a definition of a
17 tax on income there and it didn't have a different one in
18 the Public Salary Act? So, one can assume that acting so
19 close together, what they said about what constitutes a
20 tax on income in the one case also applies in the other.

21 MR. MORRISON: They certainly could, Your Honor.
22 And we do not suggest that simply because this is a gross
23 receipts tax in and of itself, it loses its character as
24 an income tax, and the tax is impermissible. It's the
25 fact that it's a gross receipts tax and there are these

1 massive exemptions and there are the provisions making it
2 a license fee --

3 QUESTION: If it were called a professional
4 income tax, would your argument be any different?

5 MR. MORRISON: Based on the exemptions, no, it
6 wouldn't, Your Honor.

7 QUESTION: Everything is the same. The label is
8 different.

9 MR. MORRISON: It would be a little bit less of
10 an indication that this is a licensing scheme which is,
11 after all, what the State says it is, but it wouldn't be
12 dispositive.

13 QUESTION: But the county has to say that
14 because of an impediment under State law that it can't
15 have a, quote, income tax.

16 MR. MORRISON: Well --

17 QUESTION: But you don't deny that something can
18 be a tax on income for one purpose and not for another.

19 MR. MORRISON: I do not deny that at all, Your
20 Honor, and I wanted to be clear. I hope I was clear about
21 that.

22 We recognize that the county and the State may
23 properly take into account the fact that persons who are
24 licensed by the State and pay fees -- in the case of
25 lawyers, a considerable fee; in case of most other

1 professions, a quite modest fee in Alabama -- that all of
2 those persons have -- the State could properly take the
3 payment of those fees into account.

4 QUESTION: Well, can't the -- doesn't the State
5 also speak of licensing people who engage in certain kinds
6 of businesses and collect a sales tax from them based on
7 gross receipts? Most States do I think. They call it a
8 license tax, but it's simply measured by gross receipts
9 and it's a sale tax.

10 MR. MORRISON: Well, that is in addition to all
11 the taxes that are at issue here, and that I don't think
12 -- whatever the State sales tax is, it doesn't -- as far
13 as I am aware, doesn't distinguish between persons who are
14 licensed under these 140 --

15 QUESTION: Just hypothetically, what if -- what
16 if a State said that, you know, in order to engage in the
17 following businesses -- and it names virtually every
18 business -- you need a license and the -- you're going to
19 have to pay a sales tax measured by gross receipts? That
20 would be an income tax under the Buck Act, would it not?

21 MR. MORRISON: It -- I'm trying to think how it
22 applies to Federal employees or Federal judges. I assume
23 that nobody is going to talk about them paying taxes on
24 their opinions --

25 QUESTION: No, no.

1 MR. MORRISON: -- that they issue.

2 QUESTION: Just -- just assume -- assume it
3 applies to -- to anybody who engages in certain kinds of
4 businesses that produce gross receipts.

5 MR. MORRISON: Well, the Buck Act, of course,
6 doesn't talk about how States and localities can do it.
7 It only applies -- the Buck Act only applies when there
8 are Federal officers or employees involved.

9 QUESTION: Yes, but -- that's true of the Public
10 Salary Act too, isn't it?

11 MR. MORRISON: Yes. They're both limited to
12 Federal employees, Your Honor.

13 QUESTION: But it seems to me you're -- you're
14 trying to say that a license tax is something quite
15 peculiar to just certain professions, and I don't -- don't
16 think it is at all. I think --

17 MR. MORRISON: Oh, I didn't mean to say that.

18 QUESTION: I think you have a license tax in
19 most places to engage in any kind of business. It's
20 called a sales tax.

21 MR. MORRISON: Well, most of them are fixed
22 fees.

23 QUESTION: Certainly a sales tax is not a fixed
24 fee.

25 MR. MORRISON: Of course, not. Of course, not.

1 But the Public Salary Tax Act doesn't talk about sales
2 taxes at all. It's clear that that's measured on income.

3 Now, there --

4 QUESTION: But under the Buck Act, a sales tax
5 would be an income tax.

6 MR. MORRISON: A gross -- a gross receipts tax.
7 For instance, the court reporter in the City of Pittsburgh
8 case sold transcripts. We have no question about the fact
9 that the transcripts that were sold to the public are
10 properly taxable under the Public Salary Tax Act, and
11 that's in large part because it's not a licensing scheme
12 in any way and also because there are no exemptions for
13 other kinds of reporters and others in similar situations,
14 no arguable discrimination.

15 In any event, we -- we are confident that the
16 State of Alabama can construct a licensing tax scheme, or
17 whatever kind of scheme they want to call it, that takes
18 into account the fact that persons pay licensing fees to
19 the State, and they can do it in a number of ways. They
20 can give a credit against the payment. They can allow it
21 as a deduction.

22 But the one thing they cannot do, consistent
23 with the Constitution and with the Public Salary Tax Act,
24 is to give a total exemption to those who pay State
25 licensing fees that are unrelated to income, while at the

1 same time attempt to tax Federal employees, and in this
2 case Federal judges.

3 Accordingly, for those reasons, the judgment
4 should be --

5 QUESTION: And why can't they do that?

6 MR. MORRISON: They cannot do that for two
7 reasons. One, because the scheme is no longer a scheme -
8 - a tax scheme based on pay or compensation, argument
9 number one. And argument number two, it is discriminatory
10 against Federal employees under this Court's decision in
11 Davis against Michigan.

12 QUESTION: Thank you, Mr. Morrison.

13 Mr. Sewell, you have 4 minutes remaining.

14 REBUTTAL ARGUMENT OF JEFFREY M. SEWELL

15 ON BEHALF OF THE PETITIONER

16 MR. SEWELL: Yes, sir. A couple things very
17 quickly.

18 Our motion to remand does include 1442. I'm
19 holding a copy of it in my hand.

20 The Buck Act -- Buck Act has to be as broad as
21 the Public Salary Tax Act to accomplish the purpose of
22 putting employees in a Federal area in the same posture as
23 those who are not in a Federal area. What Mr. Morrison is
24 telling you is, is that the Public Salary Tax Act doesn't
25 consent to a license tax. And I say that it does, and I

1 won't repeat what I've told you in my briefs because I
2 think that it's very clear that it does. And it -- and it
3 has to.

4 The O'Malley cite that you asked for is 307 U.S.
5 277. Also another case on the issue, United States v.
6 Will, W-i-l-l, 449 U.S. 200.

7 Final thing. This case -- where the trial court
8 went wrong, where the court of appeals went wrong is by
9 blurring the distinction between the Government, the
10 United States, and its employees. And I think it really
11 is just that simple. Certainly when you all sit on this
12 Court and you're asking me questions, you're performing
13 your duties, but when you all are paying your taxes,
14 you're acting as citizens. You're not -- I just don't
15 think that you're the United States Government when you
16 pay your taxes any more than you're the United States
17 Government when you pay your credit card bills.

18 QUESTION: Mr. Sewell --

19 MR. SEWELL: Yes, ma'am.

20 QUESTION: -- what about the argument that this
21 discriminates against Federal employees? Because if that
22 were so, there would be a case here, wouldn't there?

23 MR. SEWELL: If that were so, there would be,
24 but that's not so. And this -- that argument -- every
25 time we go to a different court, that argument changes,

1 and it has changed now. Now -- now, for the first time,
2 we're claiming that there's some discrimination, and Mr.
3 Morrison told you that Federal employees can't get our
4 exemptions. I told you this morning, a while ago, that
5 1,209 of the 12,000 Federal employees in Jefferson County
6 have our exemptions. They can get them. They have them.
7 That's 10 percent.

8 QUESTION: The point on discrimination I think
9 is not -- one point is that it's unlawful because of that,
10 but the other is that it just -- it helps to characterize
11 the tax. If it were really an income tax, they wouldn't
12 charge lawyers \$250 flat and judges depending on their
13 salary. If it were really an income tax, they'd run it
14 like an income tax. What's your response to that?

15 MR. SEWELL: My response is, is that Kentucky
16 also prohibits its cities by State law from levying an
17 income tax, and that all of the exemptions, the exemptions
18 for insurance companies and the others, in -- in the
19 ordinance that this Court considered in Howard -- those
20 other exemptions -- my understanding is, when you go back
21 -- you've got the ordinance. You go back and look at it,
22 you will see that they are flat fees. It's the same
23 situation.

24 QUESTION: Of course, Holloway was decided long
25 before Davis against Michigan.

1 MR. SEWELL: You mean Howard? Howard v.
2 Michigan. 1953.

3 And you all -- we struggled to get that
4 ordinance. You've got it now. You've got the actual
5 ordinance that was at issue in that Howard v.
6 Commissioners case. And it's just -- it's virtually
7 identical.

8 How did -- how did the Court reach the
9 conclusion in that case, which the Court reached and it
10 had to reach, that there was any basis at all for a
11 Federal employee to pay a license tax if Congress didn't
12 consent to a license tax?

13 QUESTION: Well, was Federal immunity argued
14 other than the fact that it was a former enclave?

15 MR. SEWELL: I think that -- that there --

16 QUESTION: Maybe that question almost answers
17 itself. It's no longer an enclave.

18 MR. SEWELL: I think it answers. I think it
19 does answer itself. I think that there -- there's no --
20 there has to be some -- Mr. Morrison says the Buck Act
21 doesn't consent to anything. There has to be some consent
22 for the Court to have reached its conclusion in the Howard
23 case that Federal employees must pay a license tax,
24 otherwise there's --

25 QUESTION: Thank you, Mr. Sewell.

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MR. SEWELL: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:02 a.m., the case in the
above-entitled matter was submitted.)

CERTIFICATION

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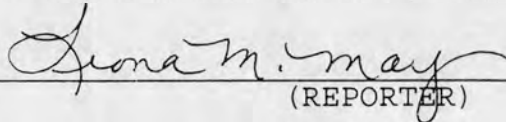
The United States in the Matter of:

JEFFERSON COUNTY, ALABAMA, Petitioner v. WILLIAM M. ACKER, JR., SENIOR JUDGE, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ALABAMA, AND U.W. CLEMON, JUDGE, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ALABAMA.

CASE NO: 98-10

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