January 2, 1980

Re: 78-630 - Washington v. Confederated Tribes of The Colville Indian Reservation

Dear Bill,

I shall likely be in partial dissent, in this case and before coming to rest, I am awaiting other writings.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

cmc
January 16, 1980

RE: No. 78-630 State of Washington v. Confederated Tribes

Dear Bill:

Thanks so much for your response. Since you are altering your draft dissent I'll await its circulation before making my changes.

Sincerely,

Mr. Justice Rehnquist

cc: The Conference
January 17, 1980

78-630 Washington v. Confederated Tribes

Dear Bill:

Thank you for your memorandum on this case. For the reasons stated in my Nov. 27 letter, I still am inclined to adhere to my view that the state sales tax is not pre-empted. I will await the end of this second round of "voting," however, before I decide whether to dissent on that issue.

While I continue to agree with most of what you have written, I think that WHR's dissent makes a point when it says that the Court has not fully identified the source of the pre-emption in this case. Since it is no mere stroke of the tribal pen, but federal power that ousts the state tax, perhaps it would be well to address the gap that Bill identifies.

Here, the Secretary of the Interior--acting under lawful regulations--has approved tribal constitutions that give these tribes the power to tax non-Indians. See, e.g., Colville Constitution art. V, § 1(e) (1938) [App. 66]. The Secretary also has approved the taxing schemes at issue. Our decisions show that such expressions of federal authority and policy can confer additional authority upon the Tribes and pre-empt inconsistent state laws. United States v. Mazurie, 419 U.S. 544 (1975), recognizes that the federal government can give the Indians authority over non-Indians who come within the reservation because the tribes traditionally have had substantial independent authority over non-Indians within their territory. And Fisher v. District Court, 424 U.S. 382 (1976), holds that federal approval of a tribal court could pre-empt state court jurisdiction over matters otherwise within the state's power.
I do not, of course, insist upon changes along these lines, but perhaps some reference to these factors would emphasize the continuity in our Indian law decisions.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference
January 17, 1980


Dear Bill,

As you know, my vote in Conference was contrary to the view expressed in Part IV of your circulating opinion in this case. I have not changed my mind on the cigarette and sales tax questions, and in all likelihood I shall join John Stevens in this respect.

With respect to sales to Indians not members of the tribe, I agree with Bill Rehnquist. Since I believe the state taxes on cigarettes are valid, I would also sustain the record-keeping requirements. Otherwise, I agree with your Part V.

Sincerely yours,

[Signature]

Mr. Justice Brennan

Copies to the Conference

cmc
Mr. Justice White, concurring in part and dissenting in part.

I view this case much as Mr. Justice Stevens does and have joined his partial dissent. I add only that the majority opinion proceeds on the assumption that federal law requires state tax laws to give way to Indian taxes on transactions between Indians and non-Indians on Indian reservations. I find nothing in our prior cases to support this result. Of course, the tribal tax involved here is a valid tax, but that alone does not warrant pre-empting state taxing power absent more definitive guidance from Congress than we have.

Moe held that the States could impose a sales tax on sales by Indians to non-Indians, even though the tax, by removing a competitive advantage that otherwise would have existed, had serious economic impact on the Indians and their federally licensed Indian smoke shops. The Court does not disturb that holding here; and the result should be no different simply because the tribes have chosen, in effect, to substitute for their lost competitive advantage a tribal tax on sales to non-Indians and hence, absent a rollback of state taxes, to make-
cigarettes purchased by non-Indians at Indian smoke shops more expensive than those purchased off the reservation. I see nothing in the federal law that gives the Indians first taxing preference with respect to sales to non-Indians. Any competitive disadvantage, as the Court calls it, can easily be removed by the tribes, rather than the State, rolling back their taxes. Sales to Indians, of course, remain completely free of state taxation.

At the very least, the Court’s competitive disadvantage rationale would not invalidate the entire state tax but require only a rebate or credit up to the amount of the Indian tax. But if it does not say so expressly, the Court strongly implies that any tribal tax automatically pre-empts the taxable incidents of these sales for the benefit of the tribe and completely ousts state taxing power. It also seems to me that despite the Court’s protestations to the contrary, its opinion striking down these state taxes would be equally applicable to Indian retailing enterprises dealing in other lines of goods: the tribes could create their own competitive advantage by taxing at a very modest rate all reservation sales to non-Indians, thereby foreclosing state taxes on these sales. Until and unless Congress clearly construes and applies the Indian Commerce Clause to bar state taxes on reservation sales to non-Indians, I would sustain state revenue measures such as the cigarette and sales taxes involved here.
Mr. Justice,

I had lunch today with the Brennan clerk who's been working on Confederated Tribes. You might be interested to know:

(1) Mr. Justice Brennan probably won't circulate anything more until he has heard from the Chief;

(2) Mr. Justice Brennan probably will write that reservation Indians who are not members of the governing tribe are not entitled to a tax immunity; he is swayed by the number of votes for this view as expressed by the Rehnquist dissent; he is also surprised that you have not joined Mr. Justice Rehnquist on this point;

(3) The next draft from the Brennan chambers will incorporate the suggestion that your last letter made about the pre-emption argument.

Greg
MEMORANDUM TO THE CONFERENCE

Re: No. 78-630 - Washington v. Confederated Tribes

At our conference of October 12, I voted to affirm in part and to reverse in part. I am still of that view. Accordingly, on the assumption that the several opinions that have been proposed remain as they are, and that no different consensus develops, I propose to file one reading as follows:

"I join Parts I, II, and III of the Court's opinion. I am in agreement with Mr. Justice Rehnquist's analysis of the Washington motor vehicle excise tax issue, and I therefore join Part IIC of his separate opinion.

"I also join the respective opinions of Mr. Justice White and Mr. Justice Stevens, except to the extent that they are inconsistent with Part IIC of Mr. Justice Rehnquist's opinion."
February 1, 1980

Re: 78-630 - Washington v. Confederated Tribes of the Colville Indian Reservation

Dear Bill:

In reviewing our "inventory" before taking off for the Mid-Year ABA session, I find the above.

I will await word from you as to anything you want me to do - other than join you!

Regards,

[Signature]

Mr. Justice Brennan

Copies to the Conference
CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 4, 1980

RE: No. 78-630 - Washington v. Confederated Tribes

Dear Chief:

Assuming that your memorandum of last Friday constitutes a vote against my position in the above, I offer the following score sheet: There is a court for my facts and jurisdiction sections (parts I, II & III) and for the portions of part V setting forth my views of the motor vehicle tax and the State's assumption of jurisdiction over the reservations. My positions on the cigarette and sales taxes (part IV) and the proper treatment of Indians not enrolled in the subject Tribes (part V) have not carried the day. And my position on the single enforcement issue before us -- whether the state may require tribal retailers to keep records of exempt sales of goods other than cigarettes to facilitate collection of sales taxes on nonexempt sales of such goods -- has yet to be the focus of attention in several chambers (although my impression is that it is entirely uncontroversial since the District Court found that the requirement served no purpose).

In light of this, it seems that you should reassign the opinion, presumably to someone whose views are in line with those of at least four others on all issues. Whoever winds up with it is of course free to take whatever he pleases from my draft.

Sincerely,

The Chief Justice

cc: The Conference
Mr. Justice,

You asked me whether you could help out Mr. Justice Brennan by saying that you could join all of his opinion except for the slight part striking down the general sales tax. That, of course, is the position that you have taken ever since Conference. From talking to the responsible Brennan clerk, I think that Mr. Justice Brennan has been counting you as with him on substantially all of the opinion.

Other votes are a little difficult to follow, but I count only 4 votes against the principal holding on the cigarette tax. They are from PS, BRW, WHR, and JPS. I count only 3 votes against the holding that the tax exemption extends to all reservation Indians. They are BRW, WHR, and JPS. Nevertheless, Mr. Justice Brennan seems to have concluded that he does not have a Court for most of his opinion. The reason, his clerk tells me, is that he counts the CJ's memo of 1 Feb. as a negative note—shifting the majority on the principal cigarette tax holding to the other side. Thus, it seems that the ball is in the CJ's court and that nothing you could add at this point would make much difference.
If you want to lend moral support, however, you could send Mr. Justice Brennan a short note saying explicitly that you are prepared to join everything he has written except for the sentences and the footnote that invalidate the general sales tax. I would advise against that—although not strongly—for two reasons. First, you might well find yourself in substantial agreement with a new majority opinion on such issues as the tax exemption for all reservation Indians. Second, you later might think that Mr. Justice Brennan's opinion is inadequate as a dissent from a new majority opinion for substantially the reasons that you identified in your 17 Jan. letter to him.

Greg
February 25, 1980

RE: No. 78-630 - Washington v. Confederated Tribes

Dear Bill:

As I indicated to you earlier, I cannot join your opinion in this case. I could join Parts I, II, and III, and although I agree with the results you reach in Part V on the motor vehicle tax and the State's assumption of jurisdiction over the reservations, I find that I do not agree with you regarding the cigarette and sales taxes, or on the issue of the proper treatment of Indians who are not enrolled members of the relevant tribes.

Accordingly, I have decided to act on your suggestion that the case be reassigned, and will ask Byron to try his hand at an opinion that accommodates the positions of those who have expressed views similar to his own.

This is a hard case to unravel and there will have to be some accommodation.

Regards,

Mr. Justice Brennan

Copies to the Conference
February 25, 1980

RE: No. 78-630 - Washington v. Confederated Tribes

Dear Byron:

Will you try your hand at an opinion for the Court in this Case?

Regards,

[Signature]

Mr. Justice White

Copies to the Conference
April 17, 1980

Re: 78-630 - State of Washington v. Confederated Tribes, etc.

Dear Byron:

Please join me.

Respectfully,

Mr. Justice White

Copies to the Conference
April 17, 1980

RE: No. 78-630 Washington v. Confederated Tribes, etc.

Dear Byron:

I'll be attempting a dissent on the basic issue. I hope to get it around shortly.

Sincerely,

Mr. Justice White

cc: The Conference
Re: No. 78-630 - State of Washington v. Confederated Tribes, etc.

Dear Byron:

I await the dissent.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference
MEMORANDUM

To: Mr. Justice Powell 17 April 1980
From: Gregory May

No. 79-630: Washington v. Confederated Tribes

Mr. Justice White has written a very good opinion that can be summarized as follows:

I. History of this Litigation (pp. 2-4)

II. Factual Background (pp. 4-8)
   A. Description of Washington cigarette, sales, and vehicle excise statutes (pp. 4-6)
   B. Description of the Tribes (pp. 6-7)
   C. Description of tribal cigarette regulation and tax schemes (pp. 7-8):
      1. Colville tribes act as retailers; tax must be passed on to consumers
      2. Yakima Tribe acts as wholesaler; tax on retailer need not be passed on
III. Jurisdiction (pp. 8-13)

A. 28 U.S.C. § 2281: three-judge court properly convened because tribal Commerce Clause claims were not frivolous (pp. 8-12)

B. 28 U.S.C. § 2101(b): Colville appeal timely because motion for partial new trial tolls time for appeal on all issues in the judgment (pp. 12-13)

IV. Cigarette and Sales Taxes (pp. 13-25)

A. Moe and the principles derived from it (pp. 13-15)

1. Principles established by Moe:
   a. State sometimes may impose a nondiscriminatory tax on non-Indian customers doing business with Indian retailers on the reservation
   b. Tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians
   c. State may impose at least minimal burdens on the Indian retailer to aid in enforcing and collecting the tax

2. Moe left open:
   a. Effect of tribal taxes and regulations on the State's ability to tax
   b. State's power to impose detailed record-keeping, as opposed to simple precollection requirement, upon Indian retailers
c. State's power to tax on reservation purchases by Indians not members of the governing tribe

d. State's power to enforce its tax laws by seizures

B. Basis and limitation of tribal tax powers (pp. 15-22)

1. Tribes have inherent power to tax non-Indians within the reservation (pp. 15-17)

2. Tribal cigarette taxes do not oust state cigarette or sales taxes on cigarette transactions between Indian retailers and non-Indian consumers (pp. 17-22)

   a. Tribes have no legitimate interest in marketing a tax exemption—a value not arising from activity upon the reservation (p. 18)

   b. No federal statute or treaty shows that Congress meant to occupy the field of taxation on non-Indians within a reservation; ****although tribes themselves might be able to preempt through exercise of properly delegated authority, no such delegation in this case**** (p. 18-19)

   c. State taxes here do not interfere with tribal self-government; tribal interest in raising governmental revenues is weakest when the values taxed do not arise within the reservation (pp. 19-20)

   d. State taxes here do not burden commerce in violation of the Indian Commerce Clause; Moe said as much (p. 20)
e. State need not credit the tribal tax against the state tax because Tribes have not shown that such a credit would significantly reduce the impact on their cigarette business (pp. 20-21)

f. State taxes do not conflict with tribal taxes or tribal regulation of cigarette trade; so, no preemption on this ground (pp. 21-22)

C. State collection practices (pp. 22-23)

1. Simple collection burden is valid under Moe (p. 22)

2. Tribes have not borne their burden of proving that the state-imposed record-keeping requirements are not reasonably necessary for enforcement of the valid state tax (pp. 22-23)

D. State tax on reservation Indians not belonging to the Tribes (pp. 23-24)

1. No federal statute preempts state power to tax persons not belonging to the governing Tribes (p. 24)

2. Nor can such state taxes interfere with tribal self-government, because the objects of the tax stand on the same footing as non-Indian residents (p. 24)

E. State enforcement practices (pp. 24-25)

1. State can seize cigarettes off the reservation in order to enforce Indians' obligation to collect the tax on the reservation (p. 25)
2. Question whether State can enter upon the reservation to make seizures is not before the Court (p. 25)

V. Vehicle Excise Tax (pp. 25-27)

Although called an excise tax, Washington's tax is legally indistinguishable from the personal property tax on vehicles invalidated in Moe

VI. State Jurisdiction Over Reservation (p. 27)

Resolved last Term in favor of the State, Washington v. Yakima Indian Nation, 439 U.S. 463 (1979); companion appeal on this issue disposed of in footnote 32.

* * * * *

Only Part IV of the new draft departs from Mr. Justice Brennan's earlier draft. Mr. Justice Brennan probably could accept Mr. Justice White's characterization of Moe. See Part IV-A, supra. And although it goes beyond anything that he said in his own opinion, WJB also would accept the new draft's discussion of the Tribe's inherent tax powers. See Part IV-B(1), supra.

But WJB will dissent from BRW's conclusion that the state taxes are not preempted and do not interfere with tribal self-government. See Part IV-B(2), supra. WJB also will dissent from the holding that the State may impose record-
keeping requirements upon Indian retailers. See Part IV-C. Unless he has changed his mind (as his clerk once indicated that he had), WJB will dissent from the determination that the State can tax reservation Indians who do not belong to the governing tribe. See Part IV-D. Finally, WJB now may find it necessary to take a position on the off-reservation seizures sustained in Part IV-E of BRW's draft.

* * * * *

In the outline above, I have set off with asterisks the part of BRW's holding that most directly conflicts with your view of this case: viz., the conclusion that these tribal taxes were not exercises of lawfully delegated federal authority. See Part IV-B(2)(b). WJB goes a bit further and suggests that the state taxes are invalid because they interfere with the interest in tribal self-government manifested through each tribe's tax. Perhaps because he takes that perspective, WJB also thinks that a tribal cigarette tax preempts all state taxes on cigarette transactions.

After reading BRW's opinion, I still am inclined to think that the tribal taxes preempt the state cigarette tax, but not the state sales tax. I am inclined to agree that the Tribes have not borne their burden of proving the invalidity of the record-keeping requirements associated with the sales tax law.
Finally, I think that BRW makes a very good argument for not extending blanket tax immunity to reservation Indians who do not belong to the governing tribe. I am concerned, however, about situations where a tribal Indian marries an Indian from another tribe and brings the outsider to live upon the reservation; it seems a bit odd to tax one but not the other. I assume that at least some tribes do not treat a member's spouse as being a member of the tribe.

I recommend that you continue to await the dissent. When it arrives, you will have to consider whether you (1) continue to differ with WJB over the scope of preemption—i.e., the sales tax issue, (2) continue to agree with WJB's comments about tribal self-government, (3) differ with WJB on whatever he says about the record-keeping questions, and (4) differ with WJB on whatever he now says about reservation Indians not belonging to the governing tribe.
April 17, 1980

78-630 State of Washington v. Confederated Tribes

Dear Byron:

I will await the dissent

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference
April 23, 1980

Re: No. 78-630 - Washington v. Confederated Tribes

Dear Byron:

I anticipate circulating an opinion concurring in part and dissenting in part as soon as I can.

Sincerely,

Mr. Justice White

Copies to the Conference
Re: No. 78-630, Washington v. Confederated Tribes

Dear Byron,

In due course I shall circulate a short separate opinion, concurring in part and dissenting in part.

Sincerely yours,

Mr. Justice White

Copies to the Conference
May 22, 1980

Re: No. 78-630 - Washington v. Confederated Tribes

Dear Byron:

Bill Brennan and you have done basic and helpful work on the many issues of this complicated case. I think there is some merit in having as much unanimity as possible.

I still have some mild concern as to certain minor issues, but they are not overwhelming, and I am willing to accommodate. You therefore may join me.

Sincerely,

[Signature]

Mr. Justice White

cc: The Conference
Dear Byron:

In view of the difficulties - unusual even for a complex Indian case - that we have had putting a Court together on a majority of the issues in this case, I write to say that I am willing to join your opinion if my vote will give you a Court.

I may join you even if you end up only with a plurality of four, although in that situation I reserve the right to take a second look.

The principal difference between your conclusions and the views I have heretofore held is that you sustain the state's cigarette tax. I had rather thought the Indians had the better of it on the preemption argument. I have not thought, however, that the principle of tribal self government was strong enough in itself to prevent the state from taxing cigarette sales to non-Indians. I note that Bill Brennan now rests his view primarily on this ground.

In any event, I think you have written a persuasive opinion. It is important to put a Court together, and settle these questions of power to tax. I therefore am willing to join you as above indicated.

Sincerely,

Mr. Justice White

cc: The Conference

lfp/ss