

1 NEW YORK STATE SENATE

2 STANDING COMMITTEE ON INVESTIGATIONS AND
3 GOVERNMENT OPERATIONS

4 -----

5 Public Hearing in the Matter to
6 Investigate New York State's Attempt to
7 Collect Taxes Generated by Native Americans
8 both on Indian Reservations and over the
9 Internet to Non-Native Americans
10 -----

11 Richard Harris Terrace
12 Borough of Manhattan
13 Community College
14 199 Chambers Street
15 New York, N.Y.

16 October 27, 2009
17 Tuesday
18 10:30

19 PRESIDING: Senator Craig M. Johnson
20 Chair

21 Senator George H. Winner

22 Senator Michael Nozziolo

23 Senator Jeffrey Klein

24 Senator Martin Golden

Senator Joseph A. Griffo

Senator Ruben Diaz

Senator Eric Adams

Senator George D. Maziarz

Also Present: Roger Adler
Counsel

24

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

2 SENATOR JOHNSON: Good morning,
3 ladies and gentlemen and on behalf of the
4 New York State Senate Standing Committee on
5 Investigations in Government Operations, I
6 would like to thank every one of you for
7 taking time out of your busy lives to
8 actively participate in the legislative
9 process.

10 My name is State Senator Craig Johnson
11 and I am privileged to serve as the
12 Committee Chair.

13 Joining me this morning are ranking
14 member George Winner, along with committee
15 member Michael Nozziolo.

16 As our hearing notice advised, we are
17 here today for inquiry to the State's two
18 decade plus failure to collect taxes
19 generated by cigarettes sold in non-Native
20 Americans on Native American reservations.
21 These sales include a substantial internet
22 component.

23 While many other states have been able
24 to negotiate mutually beneficial Compacts

5

1 with Native American nations with respect to
2 these sales, New York State has not.

3 Over the year there has been talk and
4 there have been threats. We pass laws to
5 aid in this collection and there have been
6 lawsuits, and yet this State's policy of
7 forbearance remains in effect.

8 This hasn't stopped officials
9 throughout New York State from using the
10 collection of these taxes as legitimate
11 revenue streams to justify budget proposals,
12 fund new projects and even bail out the MTA.

13 Frankly, this situation, especially in
14 light of our looming budget deficit, is
15 embarrassing.

16 The goal of this hearing is to help the
17 State and these Nations chart a new path and
18 to find a real and lasting solution to this
19 issue.

20 But first this committee and this
21 public needs to hear what has transpired to
22 date and this committee has a fiduciary
23 obligation to investigate this issue.

24 We have invited a full spectrum of

6

1 State and local government officials,
2 effective private sectors interest and
3 representatives of the Native American

4 Nations in this State to address this issue,
5 to address this committee to provide us with
6 the relevant information that we need and to
7 answer any questions that the members of
8 this panel may have.

9 We are very, very well aware that the
10 emotions on this particular issue run high,
11 and resentments likely run very deep.

12 It is our hope to undertake a
13 respectful dialogue through this public
14 hearing format.

15 We hope that the emphasis will be upon
16 shedding maximum light and minimum vocal
17 heat to the hearing process.

18 I urge all witnesses to be focused and
19 factual, avoiding rhetorical flourishes
20 which may impede a global solution to a
21 complex, longstanding fiscal issue.

22 At the conclusion of today's testimony,
23 we will review the hearing transcript and
24 the written submissions, those who wish to

7

1 further provide written submissions may do
2 so, we hope to release a committee report by
3 early next year.

4 Following each witness' initial
5 statement I will recognize each Senator from

6 the committee, from the committee, to
7 provide questions.

8 And now without further ado, Senator
9 Winner, do you want to add something?

10 Without further ado we will now call
11 our first witness, William J. Comiskey,
12 Deputy Commissioner for Enforcement of the
13 State Tax Commission.

14 W I L L I A M C O M I S K E Y,
15 called as a witness, having been first duly
16 sworn by the Counsel to the Committee, was
17 examined and testified as follows:

18 SENATOR JOHNSON: Let me also add to
19 my right is Roger Adler, counsel to the
20 Investigations Committee.

21 SENATOR WINNER: I would like to add
22 Michael Nozziolo is here also. You
23 introduced him?

24 SENATOR JOHNSON: I did introduce

8

1 him, you can introduce him as well.

2 Mr. Comiskey.

3 MR. ANDERSON: Can I have a
4 transcript of all the reports that are being
5 sent? I am Doug Anderson, Ambassador
6 Anderson.

7 MR. ADLER: If you will please
8 communicate with us, we will take it under
9 advisement.

10 Thank you very much, we will try to be
11 of service. Thank you, sir.

12 Mr. Comiskey.

13 MR. COMISKEY: Thank you, Mr. Adler.

14 Senators, it is truly a pleasure to be
15 here and it is a pleasure to see this
16 committee take on such a difficult, vexing
17 emotionally charged issue that has plagued
18 the administrations of three or four
19 Governors over the past several decades.

20 The questions are unquestionably
21 complex and they are unquestionably
22 important, and I am going to talk a little
23 bit about that.

24 I have submitted fairly extensive

9

1 written comments that were designed to
2 address some of the issues that Mr. Adler
3 indicated to me he might want to hear about.
4 I have also added some statistical
5 information that I thought might be of use
6 to you and relative to your inquiry.

7 I say the issue is important because
8 there are so many different aspects of it

9 and so many parties who are affected by what
10 goes on.

11 If you look at the numbers, and I point
12 you to the -- to some of the charts that are
13 in my testimony, if you look at the numbers
14 you get some sense of the proportions and
15 the staggering size of this issue.

16 The statistic that jumps out is that
17 today one in three cigarettes in the City of
18 New York sold by licensed stamping agents
19 who have one primary, one sole function
20 under the law, and that is to affix stamps,
21 are not stamped.

22 One in three cigarettes sold by our
23 licensed agent are funneled into the
24 cigarette market by sales made to Native

10

1 American Reservations and merchants.

2 It's a huge problem and it grew
3 exponentially, I trace the history of
4 forbearance in my papers.

5 When in 1997 Governor Pataki threw up
6 his hands and said this is not an issue we
7 are going to pursue, I am not going to
8 enforce the cigarette tax law on Reservation
9 lands, the conduct of a handful of licensed

10 agents in their sales activity with Native
11 Reservations skyrocketed.

12 In the next -- between 1997 and 2007
13 sales jumped from around 15 million cartons
14 through Native Reservation merchants to a
15 height in 2005 of 47 million.

16 They are still high, they have declined
17 in the last several years, but they are
18 still going to be around 25 million.

19 At the center of this, if you look at
20 the situation from both ends of the
21 perspective and outside of the Reservation
22 you see two things at work, one, ten
23 licensed agents, I name them in my reports,
24 I show you their sales numbers, ten licensed

11

1 agents spend the bulk of their time not
2 affixing stamps, which is their primary
3 mission, but selling cigarettes without a
4 stamp and without a tax imposed on it to
5 Native American merchants.

6 Those ten agents are responsible for
7 the volume of sales that you see. We
8 license them, we regulate them, and they are
9 sworn to uphold the law and follow the law.

10 In addition to those ten agents, if you
11 look at the other side, and they are

12 enriching themselves with this, if you look
13 at the other side of the transactions as
14 they emerge from the Reservations, there is
15 no doubt, our investigations show it, we see
16 it all the time, that these cigarettes that
17 come off the Reservations that were untaxed,
18 fuel organized criminal groups that
19 proliferate in the black market, sometimes
20 we have seen that those organized groups
21 have terrorist ties.

22 The sale of huge volumes of cigarettes
23 funneled by our licensed agents through the
24 Reservations compromises our societal

12

1 interest in reducing consumption and
2 increasing the public health and it
3 facilitates across the nation.

4 This situation is important because the
5 situation is unfair, completely unfair to
6 legitimate retailers, to legitimate
7 wholesalers and to legitimate stamping
8 agents.

9 They are -- their numbers have shrunk
10 over the years and they have no chance of
11 competing in this market.

12 The issue is important because the

13 pipeline of untaxed cheap cigarettes
14 compromises the public health, and the issue
15 is important because if you know anything
16 about me, I landed here two and a half years
17 ago, we have spent that time building what I
18 think is the most credible, professional,
19 effective tax enforcement agency in the
20 country.

21 We are committed to the fair
22 application of the laws, and when laws are
23 not uniformly applied, when there are
24 exemptions made to particular groups who

13

1 operate at a competitive advantage, then we
2 undermine the respect entirely for the law.

3 This issue is important, of course, in
4 these days because we cannot afford the lost
5 tax revenue.

6 I am heartened and I go to my written
7 comments, the bulk of what I am saying in
8 the history of this, but I am harkened this
9 committee is interested in this issue.

10 I am harkened this Governor in his
11 short tenure has shown his interest, has
12 signaled his desire to achieve an equitable,
13 fair system.

14 He signed and allowed implementation of

15 the certification statute, he has allowed us
16 to use our investigative resources to
17 provide essential service to the federal
18 lawsuits brought by the New York City and by
19 other federal agencies, and he has allowed
20 us to pursue agents who engaged in
21 fraudulent activity at the same time they
22 are selling to Native American merchants.

23 I am hopeful this is the perfect time
24 that all of these events will come together

14

1 and that finally after decades we will have
2 a resolution to this problem in the coming
3 months.

4 Thank you.

5 SENATOR JOHNSON: Thank you, Mr.
6 Comiskey. I have a few questions.

7 So let me just understand, is it
8 correct that Native Americans in New York
9 State purchase tobacco products as well as
10 petroleum products, lawfully, without having
11 to pay New York State Sales and Use Taxes as
12 well as Local Sales and Use Taxes?

13 MR. COMISKEY: Well, there is no
14 doubt that some portion of the cigarettes
15 purchased by Native Americans, and fuel,

16 used for their own consumption is lawfully
17 purchased without tax, that is the law.

18 SENATOR JOHNSON: With respect to,
19 though, to non-Native Americans who purchase
20 cigarettes on Native American Reservations,
21 perhaps you can expand your likeness on the
22 current law that addresses this particular
23 issue?

24 MR. COMISKEY: The current law is

15

1 slightly amiss. There is a flurry of
2 judicial decisions coming out of two
3 different directions.

4 On the State level, the highest
5 Appellate Court has held that until the
6 State implements the Indian exemption coupon
7 system contained in the statute you passed
8 in 2005, that provides a mechanism for
9 Native Americans to obtain tax free product,
10 until we implement that, the tax is not --
11 the tax provided by 471.1, is not in effect.

12 SENATOR JOHNSON: My understanding is
13 there was a decision recently issued by a
14 Federal District Court, a decision that came
15 down, I believe, two months ago, that the
16 case, City of New York versus the Golden
17 Feather Smoke Shop involves sale,

18 transaction of guts in the Poospatuck
19 Reservation lands and in that decision, I
20 believe it's District Court Judge Amon very
21 cogently reviewed both the decision from the
22 Fourth Department in upstate New York, and
23 using well recognized legal principles made
24 the determination that it was the District

16

1 Court's position that the Court of Appeals
2 would conclude that the Fourth Department
3 was wrong, and misconstrued Tax Law 471 and
4 471(e) and indicated that there is a very
5 big difference between imposing a tax and
6 collecting a tax.

7 My understanding was that this is the
8 most recent decision interpreting the tax
9 law.

10 What's your view on the Golden Feather
11 Smoke Shop, and with that decision what is
12 the Tax Department going to do with respect
13 to that?

14 MR. COMISKEY: At this stage I think
15 we are bound to adhere, until the Court of
16 Appeals determines that they are wrong, the
17 Fourth Department decision.

18 I think it's uniformly accepted in the

19 Department that we could get the better of
20 the argument, the better of the case decided
21 in the federal courts, and also expressed by
22 the dissenting opinion at the appellate
23 court in the Cayuga Seneca case.

24 It seems plain to us that the tax

17

1 imposed by 471.1 is the tax, that's where
2 it's imposed, in 471(e) was a statute
3 enacted by the legislature to provide a
4 mechanism for us to collect the taxes on
5 sales to non-Indians on the Reservations.

6 SENATOR JOHNSON: Correct me if I'm
7 wrong, 471(e) also addresses the issue of
8 coupons?

9 MR. COMISKEY: 471(e), that's the
10 entire thrust of it, it creates a tax
11 exemption coupon system in which the
12 department will only distribute tax
13 exemption coupons to Native American
14 Reservations to permit them to buy and
15 consume cigarettes without a tax being
16 imposed on them.

17 SENATOR JOHNSON: Because under --
18 the law indicates that the sale of
19 cigarettes to Native Americans is tax free,
20 correct?

21 MR. COMISKEY: When a sale is for
22 their consumption, correct.

23 SENATOR JOHNSON: Okay, thank you,
24 for their consumption.

18

1 These tax exempt vouchers, have they
2 been printed for distribution to Native
3 Americans?

4 MR. COMISKEY: They have been,
5 indeed.

6 SENATOR JOHNSON: And where are these
7 tax vouchers currently being stored?

8 MR. COMISKEY: I don't know the exact
9 location, but they are within the
10 Department. We have them, we have not only
11 the coupons but in addition the Fourth
12 Department determined that the statute
13 471(e) contemplated the issuance of
14 implementing regulations, a position we
15 don't necessarily agree with, but there are
16 draft regulations drafted as well and ready
17 to be promulgated.

18 SENATOR JOHNSON: What were the draft
19 regulations, when were the regulations in
20 draft?

21 MR. COMISKEY: I don't know the exact

22 date, but sometime following the enactment
23 in 2005 of 471(e).

24 SENATOR JOHNSON: But the tax

19

1 vouchers, have they been distributed?

2 MR. COMISKEY: No, sir.

3 SENATOR JOHNSON: Who in New York
4 State government has made the determination
5 to withhold the distribution of these
6 vouchers?

7 MR. COMISKEY: Well, initially the
8 decision was made by, and I don't know the
9 individual, but it was made by the Pataki
10 administration and included in -- the
11 materials provided an advisory opinion that
12 the Department issued to a cigarette
13 stamping agent on March 16th of 2006, which
14 was 16 days after 471(e) was by its terms to
15 become effective, which stated that the
16 department was going to adhere to its
17 longstanding policy of forbearance and not
18 issue the coupons.

19 I can say this, it was my
20 understanding, it's my understanding the
21 directive in that decision was a policy
22 decision made out of the Governor's office.

23 SENATOR JOHNSON: And that policy

24 decision has been maintained by the

20

1 Governor's office since then?

2 MR. COMISKEY: Well, during -- yes, I
3 would say the short answer to that is yes,
4 but the landscape has changed a little bit,
5 but we have not received from the Governor's
6 office the green light to issue coupons,
7 correct.

8 SENATOR JOHNSON: Has anybody
9 requested from that department the so-called
10 green light to distribute the vouchers?

11 MR. COMISKEY: Yes, sir.

12 SENATOR JOHNSON: Who is that, who
13 has made that request?

14 MR. COMISKEY: I have.

15 SENATOR WINNER: To whom?

16 SENATOR JOHNSON: To whom have you
17 made that request?

18 MR. COMISKEY: To representatives of
19 the Governor's staff.

20 SENATOR JOHNSON: Who in particular?

21 MR. COMISKEY: Mr. Rose is one peter
22 Manners is another, I don't know where else
23 my requests have landed.

24 SENATOR JOHNSON: Bob Megna?

1 MR. COMISKEY: Bob Megna was the
2 Commissioner of Tax and Finance, I worked
3 for him, we certainly talked about
4 implementing 471(e) through the issuance of
5 coupons.

6 SENATOR JOHNSON: And by you making
7 request -- he was at the time you made the
8 request he was your supervisor, I don't want
9 to use the word supervisor, but he was
10 directly above --

11 MR. COMISKEY: He would use that
12 word.

13 SENATOR JOHNSON: He was your
14 supervisor, and you wouldn't make that
15 request without his knowledge and authority?

16 MR. COMISKEY: Well, I am trying to
17 think whether I had direct communications to
18 make that request when Mr. Megna was the
19 Commissioner and I can't tell you that I
20 did, but I know that we spoke and that we
21 did have communications with the Governor's
22 office in which we talked about a variety of
23 options designed to secure compliance of the
24 cigarette tax law with the folks downtown.

1 SENATOR JOHNSON: Are you aware of
2 the Jenkins Act?

3 MR. COMISKEY: Yes, sir.

4 SENATOR JOHNSON: What is the Jenkins
5 Act?

6 MR. COMISKEY: The Jenkins Act
7 requires those who ship cigarettes in
8 interstate commerce to provide -- to
9 maintain and provide a list of customers to
10 whom they are shipping out-of-state
11 cigarettes and make them available to the
12 federal government and to states so that
13 they can collect the use tax that is on the
14 cigarettes shipped to the customers
15 out-of-state.

16 SENATOR JOHNSON: Does New York State
17 have an analogous Act to require a reporting
18 or recording for interstate sales?

19 MR. COMISKEY: I don't believe so,
20 but New York State has a law that forbids,
21 as this committee well knows, that forbids
22 the shipment of cigarettes through carriers
23 to consumers, so the law is stronger, it
24 doesn't require a list, it criminalizes that

1 shipment.

2 SENATOR JOHNSON: Are you aware, the

3 Native American website operators who sell

4 cigarettes report to you their sales of

5 cigarettes pursuant to the Jenkins Act?

6 MR. COMISKEY: No, sir. Well, I take

7 that back, I do know that there is at least

8 one Native American merchant that does.

9 SENATOR JOHNSON: Do you have the

10 name?

11 MR. COMISKEY: I don't want to be

12 wrong, I can get it.

13 SENATOR JOHNSON: Would you provide

14 it?

15 MR. COMISKEY: Yes.

16 SENATOR JOHNSON: You send out tax

17 due notices, correct?

18 Do you send out tax due notices with

19 respect to the sales of these cigarettes.

20 MR. COMISKEY: With respect to the

21 sales of these cigarettes, to consumers?

22 SENATOR JOHNSON: To consumers.

23 MR. COMISKEY: No, sir, because we

24 don't know in the majority of instances who

24

1 the consumers are.

2 We have historically done it

3 periodically, there have been audit bills
4 that we have issued.

5 But in the main we don't get -- we
6 don't get that information and therefore we
7 have not issued those notices.

8 SENATOR JOHNSON: What is the process
9 that your office, your department uses to
10 obtain information concerning the numbers of
11 cigarettes sold on Native American
12 Reservations?

13 MR. COMISKEY: We don't have a
14 precise picture of the total amount, the
15 information we get that is set out in my
16 appendices comes from our licensed agents,
17 they are required to report to us the volume
18 of cigarettes that they sell to the Native
19 American Nations and merchants every time
20 they -- they are required to report on all
21 untaxed cigarette distributions and the
22 information is included there.

23 We know that there are other sources of
24 supply that some Native American merchants

25

1 turn to, and we did note that on that.

2 SENATOR JOHNSON: Do Native American
3 merchants sell amongst themselves, like one

4 tribe will go to another location and buy
5 cigarettes in bulk?

6 MR. COMISKEY: We have seen that.

7 SENATOR JOHNSON: I think one of the
8 big issues facing the committee and what's
9 out there is really the amount of tax
10 revenue that is not collected on an annual
11 basis, numbers get thrown out there.

12 To the best of your knowledge or
13 experience, how long -- by the way, how long
14 have you been doing this, so to speak?

15 MR. COMISKEY: I have been involved
16 in tax enforcement now for about two and a
17 half years.

18 SENATOR JOHNSON: So you are pretty
19 familiar with the sales of cigarettes on
20 Native American Reservations.

21 MR. COMISKEY: It's one of the areas
22 I focus my energy and attention, yes.

23 SENATOR JOHNSON: So in your own
24 expert knowledge, how much tax revenue is

26

1 not being collected annually by virtue of a
2 policy of forbearance?

3 MR. COMISKEY: Well, I don't know
4 that I can pinpoint it solely to
5 forbearance, but our economists have

6 estimated that the amount of untaxed -- of
7 tax that's not collected is in the vicinity
8 of a couple of hundred million, \$200
9 million.

10 Our analyses have also indicated what
11 we think we might collect is a smaller
12 number than the number that's reflected in
13 the budget.

14 I have seen other estimates, I am going
15 to tell you from my perspective I don't know
16 which one is right, but I think the number
17 is unquestionably large, I think that it's
18 unquestionably a number that involves tens
19 or hundreds of millions of dollars.

20 I think that estimates that I have
21 heard in the \$1 billion range based upon
22 sales from prior years miss the mark because
23 they fail to recognize that a substantial
24 portion of the trade through the Native

27

1 American merchants is with individuals
2 through the internet that are out-of-state.

3 Back that out and it sounds -- the
4 estimates I have seen sound reasonable.

5 SENATOR JOHNSON: Do you know how
6 much it would cost to collect, what would be

7 the cost of the state to collect this tax,
8 assuming no -- no issues of collection, if
9 you understand what I'm saying?

10 MR. COMISKEY: I would like to -- I
11 would love to have that part of no issues of
12 collection illuminated for us, but assuming
13 that how much would it cost? I think it
14 turns on how you approach enforcement.

15 If we don't learn from the mistakes of
16 the late '90s where enforcement represented
17 blockades and surrounding Native American
18 Reservations in a clearly in your face forum
19 of enforcement, I will be shock, history
20 should teach us something and that was an
21 inappropriate, I think, way of going at it.

22 If we focus our efforts on those who
23 are not Native Americans but on our licensed
24 agents who have one function under the law,

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1 I think we can in short order without a
2 major investment curtail the flow of
3 cigarettes from those agents.

4 That doesn't mean that's the end of the
5 problem. We can curtail the easy pipeline,
6 but there is a lot of money involved in
7 cigarette smuggling and in the cigarette
8 business.

9 And I have no doubt that if we close
10 one pipeline, others will rise up, and we
11 won't collect all of that, we just won't
12 collect all of the tax that's due, because
13 people will be -- there is a lot of money
14 and people will be ingenious about how they
15 are going to evade it, but we can cut off
16 the source from our legal supply easily.

17 SENATOR JOHNSON: Mr. Comiskey, one
18 thing you raised in your testimony that I
19 think raised my eyebrows a little bit, this
20 issue that the cigarette sales, the bootleg
21 sales fuel -- these are you're are your
22 words -- organized criminal groups, maybe
23 you can expand upon that and shed a little
24 bit more light on that?

29

1 MR. COMISKEY: I would really be
2 happy to.

3 You should know this, we have the
4 largest, most professional, clearly most
5 creative enforcement police force for the
6 cigarette tax in the nation, by far, there
7 is no one that compares to us.

8 The agents who work for me go deep
9 undercover all the time, and in the first

10 two pages of my appendix I lay out some of
11 the cases that they have been involved in,
12 and they are simply staggering.

13 When I say there are organized criminal
14 groups that are trafficking in smuggled
15 cigarettes, it's based upon their dealings
16 with him and they are undercover for two
17 years, they are rubbing elbows with them for
18 two years.

19 So I hear firsthand what's involved.
20 There is money to be had, there are
21 organized groups that focus on territorial
22 allocations, that focus on customer
23 allocations that are in competition with us
24 -- with each other, rather.

30

1 And these organized groups, I spent 10
2 years working for the State Organized Crime
3 Task Force, these groups bear all the
4 indicia of what we call organized crime.

5 SENATOR JOHNSON: Does organized
6 crime also mean links to terrorists?

7 MR. COMISKEY: Well, I don't -- the
8 way I would answer that is to say that the
9 money is good here and there have been
10 instances documented where the money
11 generated by the sale of bootlegged

12 cigarettes was funneled back to terrorist
13 organizations operating in the Middle East,
14 that's been documented.

15 SENATOR JOHNSON: Are the sellers of
16 these cigarettes, in your experience, have
17 knowledge that the sale of these cigarettes
18 are going to generate monies that are going
19 to fund organized crime and/or terrorist
20 activities?

21 MR. COMISKEY: Well, I would say that
22 they have to know based upon the volume that
23 the Native American Reservations are not
24 consuming all of the cigarettes they sell to

31

1 them.

2 Therefore, they have to be -- to have
3 knowledge that some portion of this, that
4 they are selling is ending up in
5 transactions that are not legal in New York.

6 I don't know, although it's fairly well
7 publicized, Congressman King wrote a report
8 and it's been in the media, that the
9 organized trafficking of cigarettes involves
10 criminal enterprises and sometimes there is
11 a terrorist link, it's been there.

12 So maybe they know, but I don't think

13 you would have specific knowledge. They are
14 not doing this because they see that these
15 cigarettes are going to a particular spot, I
16 think they are doing it without giving a
17 concern for where they go.

18 And a big chunk of them, I can't say
19 what portion of them, end up on the
20 internet, so equally, as equally bad as it
21 is to provide bootleggers with the source of
22 cigarettes, it's bad to start to ship them
23 where you could be shipping them to kids
24 around the country.

32

1 SENATOR JOHNSON: Senator.

2 SENATOR WINNER: Thank you.

3 Commissioner, thank you for being here.

4 Just a few questions relating to some
5 of the history here.

6 Suffice it to say that in your opinion
7 and your understanding that if 471(e) is
8 implemented and enforced, with the exception
9 of the smuggling that you referred to, that
10 that would basically be the sufficient State
11 response to collecting the taxes?

12 MR. COMISKEY: I don't know that I
13 would say that. I think that it would be a
14 starting point of any enforcement effort,

15 because it is the primary supply of
16 cigarettes that end up either in the
17 internet market or in the bootleg market.

18 I think that the primary enforcement
19 effort would focus on the conduct of our
20 licensed agents, but I don't know if at the
21 end of the day that would be sufficient to
22 end all of the smuggling that goes on.

23 SENATOR WINNER: Well, with the
24 exception of the smuggling, but from the

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1 State's standpoint as far as implementing
2 statutes that are necessary to assist you in
3 your efforts, do you feel that you need an
4 additional statutory assistance other than
5 471(e) if 471(e) was properly utilized?

6 MR. COMISKEY: Well, there are a
7 number of ideas, they haven't been fully
8 vetted, but I believe they have some
9 potential, those idea would be a legislative
10 clarification, for example, of the role of
11 471.1, the tax, and that the Fourth
12 Department's interpretation is in error,
13 that would be a useful thing.

14 Moving a tax up the chain to the agent
15 is something that people are considering,

16 and I can't say that it's a good idea
17 because we haven't vetted it, but I know
18 that internally we are talking about it.

19 Other legislative fixes would be to
20 limit the sources that licensed agents could
21 potentially buy their cigarettes from,
22 perhaps the manufacturer, and there are a
23 whole bunch of options we circle around that
24 might make it better, but I do think any

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1 time you have a legislative fix here we are
2 going to see that we miss something, and I
3 think that's driven by the fact there is a
4 lot of money, in a high tax state like this
5 there are going to be people who work pretty
6 much overtime to avoid the taxes.

7 SENATOR WINNER: Are those remedies
8 you are referring to that you're, I guess,
9 deliberating in-house as you refer to it,
10 are they going to be in the form of a
11 departmental submission to the legislature
12 for action?

13 MR. COMISKEY: Well, they very well
14 may be, but Bob Megna wasn't the only
15 supervisor that I have had, Bob Megn when he
16 was Commissioner was my supervisor and there
17 are others in the Department as well, so

18 they might be -- I think that that's clearly
19 something we are considering and we are
20 talking with the Governor's office about it
21 as well, and I think that we are all open
22 for any legislative fix that can achieve a
23 fair and equitable distribution, fair and
24 equitable tax system without unduly

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1 intruding upon Native American sovereignty
2 without raising the spectre of public unrest
3 and respecting everybody's rights.

4 We are clear that everybody is looking
5 for that.

6 SENATOR WINNER: Suffice it to say
7 471(e) is an important component of your
8 efforts?

9 MR. COMISKEY: I am not fighting that
10 at all, I am with you on that.

11 SENATOR WINNER: And the status of
12 471(e), as you indicated, was there is an
13 injunction in the what is the Day Wholesaler
14 case that has been relied upon by the
15 Department as their reason for not pursuing
16 their action and yet that is sort of a
17 self-induced injunction, is that not
18 accurate?

19 MR. COMISKEY: I can understand
20 exactly are you are coming from, the path
21 out of the injunction is to issue coupons
22 and promulgate regulations, there is no
23 question about that.
24 Self-induced, I don't know that I would

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1 agree, but it is certainly something we
2 could overcome, the injunction would pass.
3 We have deferred, I think
4 appropriately, given the complexity of the
5 issues involved, to the leadership of the
6 Governor on these issues.
7 So there is a path out, 471 can be
8 implemented under the judicial stays, and it
9 requires promulgation of coupons and
10 regulations.
11 SENATOR WINNER: Of which you have
12 said are all ready to go in the event the
13 injunction is lifted?
14 MR. COMISKEY: Absolutely.
15 SENATOR WINNER: Who is handling that
16 case for the Department, is that the
17 Attorney General?
18 MR. COMISKEY: Yes, sir.
19 SENATOR WINNER: Does the Attorney
20 General have any role here with regard to

21 moving this forward?

22 MR. COMISKEY: We have requested that
23 the Attorney General appeal the decision of
24 Judge Schuyler's last injunction, we have

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1 discussed with the Attorney General's the
2 role that they should play with respect to
3 all of the litigation that's pending, but we
4 do know that these issues are going to be
5 brought to the -- to a head in short order
6 because they are going to land on the Court
7 of Appeals in coming spring.

8 SENATOR WINNER: Again, is the
9 Attorney General moving forward, or has he
10 taken a position with regard to the
11 appropriateness of the enforcement of
12 471(e)?

13 MR. COMISKEY: The last that I
14 understood, he was going to move forward on
15 appeal and that we requested that he
16 perfect, but I haven't had those
17 communications I have had only one with him,
18 with his staff.

19 SENATOR WINNER: Now, you indicated
20 that the Governor's office is basically
21 solely responsible for not moving forward

22 with regard to getting the injunction
23 removed.

24 MR. COMISKEY: I am going to say

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1 this, if I may, just interject, I think it's
2 an overstatement to say that the Governor's
3 office is solely responsible.

4 I believe that agencies under
5 legislation and in a whole host of areas
6 have an obligation to exercise independent
7 discretion and to implement the laws that
8 are passed and to make their own decisions,
9 in a wide variety of cases.

10 In this instance I know that the
11 Department has deferred to the Governor, and
12 for good reason, because we are not at all
13 versed in all of the issues that relate to
14 Native American sovereignty, to casinos, to
15 land use issues, and to a whole host of
16 them.

17 So while it may be theoretically true
18 that agencies can act independently,
19 regardless of the consequences that might
20 fall on you by doing that, but nonetheless I
21 think in this instance the Department has
22 deferred and will continue to defer, because
23 the issues are so complex.

24

SENATOR WINNER: Now, in what form

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1 has the Governor indicated not to go forward
2 with going -- marching back into court and
3 presenting coupons and saying they are ready
4 to be distributed as well as the regulations
5 are ready to be promulgated, in what form
6 has his office told you not to do that?

7 MR. COMISKEY: Verbal communications.

8 SENATOR WINNER: Verbal
9 communications?

10 MR. COMISKEY: Yes, sir. Well, we
11 did ask, the request to go forward has not
12 been granted.

13 SENATOR WINNER: But you had
14 indicated earlier that you made a written
15 request to the Governor's office.

16 MR. COMISKEY: I have had
17 communications by e-mail, correct.

18 SENATOR WINNER: E-mail.

19 MR. COMISKEY: Correct.

20 SENATOR WINNER: Has any response to
21 those e-mails been received?

22 MR. COMISKEY: We have not gotten a
23 green light from the Governor's office.

24 SENATOR WINNER: That wasn't my

1 question, have there been any responses to
2 the e-mails?

3 MR. COMISKEY: I have to look. I
4 don't know, I'm sorry.

5 SENATOR WINNER: Would you look?

6 MR. COMISKEY: I have had
7 conversations.

8 SENATOR WINNER: Would you look and
9 if you have those, would you be willing to
10 provide those to the committee?

11 MR. COMISKEY: As far as I'm
12 concerned I would be willing to, yes.

13 SENATOR WINNER: As far as --

14 MR. COMISKEY: I am concerned -- I
15 would be willing to, yes.

16 SENATOR WINNER: So we can look
17 forward to some communication as to whether
18 or not you have those e-mails, or whether
19 you do not have those e-mails?

20 MR. COMISKEY: I would be happy to
21 provide you with that, yes.

22 SENATOR WINNER: Now, you have
23 indicated that, in your testimony that I
24 think there is a paragraph or a sentence in

1 here I just would like you to elaborate on,
2 and it's I understand that the issues that
3 the Governor faces are broader and more
4 complex than tax enforcement.

5 I think you started to allude to those
6 as far as the casino issues and the other
7 land issues.

8 Are there other concerns that the
9 Governor has that you understand, that you
10 understand to be there?

11 MR. COMISKEY: I would say there are
12 a number, they include the land use, they
13 include with respect to for the sovereignty
14 of the Native American Nations, they include
15 sensitive relations with them, they include
16 the economic relationship that exists
17 between the State and those Nations, they
18 include concerns of public safety.

19 So I would think that they would
20 include the status in negotiations, because
21 even 471(e) -- 471(e) especially recognizes
22 that a negotiated outcome with the Native
23 American Nations is a preferable outcome
24 than mere enforcement of 471(e).

1 If it can be achieved and if recognized
2 and accepted by the Senate, that is the path
3 I think that the statute contemplates we
4 would prefer.

5 SENATOR WINNER: Thank you.

6 SENATOR JOHNSON: Thank you, Senator.
7 Senator Nozziolo, just I would -- we are
8 joined by two Senators not on the committee,
9 but Senator Eric Adams and Senator George
10 Maziarz and we are joined by committee
11 member Senator Reverend Ruben Diaz.

12 Thank you gentlemen for joining us
13 today. Senator Nozziolo.

14 SENATOR NOZZIOLO: Thank you Mr.
15 Chairman, and thank you for conducting this
16 hearing.

17 Commissioner Comiskey, we appreciate
18 your testimony and your elaboration on some
19 very important issues. I would like to
20 elaborate a little further on some of the
21 comments you have made.

22 You estimate that the amount of
23 cigarette sales have increased from 15
24 million to 47 million over basically a 15

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1 year period.

2 Does that 47 million carton figure

3 include internet sales?

4 MR. COMISKEY: That 47 million is the
5 number representing the amount that our
6 licensed agents sold to Native American
7 merchants. It's what goes into the
8 Reservation from licensed agents and we are
9 absolutely -- I think the answer, the short
10 answer is yes, a portion of those 47 million
11 in cigarette sales end up in Native American
12 internet or mail order businesses and they
13 are shipped.

14 SENATOR NOZZIOLO: But it's difficult
15 to say how much?

16 MR. COMISKEY: It's impossible to
17 say, I think.

18 SENATOR NOZZIOLO: It could be great?

19 MR. COMISKEY: I think the internet
20 business, there have been estimates just
21 looking at the volume of websites and the
22 like, that around the nation New York Native
23 American internet shops represent a
24 significant portion of the overall internet

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1 business.

2 SENATOR NOZZIOLO: You elaborated
3 under the questioning of Chairman Johnson

4 and Senator Winner about the coupon system.

5 Basically it's my understanding based
6 on your comments that the system is
7 developed, coupons are printed, the law is
8 ready to be implemented; is that correct?

9 MR. COMISKEY: Yes, sir.

10 SENATOR NOZZIOLO: My understanding
11 further suggests, though, that you are
12 looking at deferring -- the Tax Department
13 has deferred the implementation of this law
14 waiting for a so-called green light from the
15 Governor.

16 Is that green light a standard
17 operating procedure the Tax Department,
18 rather than enforcing a law that the
19 legislature passes, that the Governor signs,
20 does the Tax Department do such due
21 diligence with the enforcement of other laws
22 that it's entrusted to enforce?

23 MR. COMISKEY: I would imagine that
24 we do, but I can say that in an area like

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1 this, it is, at least to me, readily
2 apparent that there is good reason to look
3 to the Governor for leadership and to defer
4 to the Governor's judgment as the Governor
5 explores all of the possibilities for

6 peaceful resolution that's fair and
7 equitable to everyone.

8 So as a general matter there are some
9 rules that we just implement and where the
10 rules carry consequences that are so broad,
11 I think we turn to the Governor's office and
12 say, as we should, we are part of the
13 executive, how should we proceed?

14 SENATOR NOZZIOLO: It just is very
15 puzzling to me that you would, in fact,
16 defer implementation of a bonafide statute
17 signed by the current Governor for this type
18 of policy review.

19 Is this the type of review you give for
20 taxes placed on corporations, taxes placed
21 on developers, taxes placed on individuals?

22 It seems as though the process that
23 you're discussing is a process that,
24 understanding certain sensitivities is one

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1 thing, delaying the implementation of a
2 bonafide enacted statute is quite another.

3 And that's why I would like to have you
4 elaborate more about the processes that the
5 Department is going through that are
6 impeding its implementation.

7 MR. COMISKEY: Well, I think one
8 thing can jump off the pages in this area
9 and that's recognizing that as a matter of
10 public record, the Governor is looking for
11 closing this tax gap in the way that would
12 be the least confrontational, the safest and
13 the most effective.

14 And in that regard, he signed
15 legislation last December enacting the
16 certification system.

17 We thought, and we still think that the
18 certification system is a mechanism that
19 focuses on ages and manufacturer's conduct
20 and that would lead to a significant
21 reduction in the volume of cigarettes
22 landing on Native American Reservations,
23 because we would be looking to them to
24 certify adherence to the law.

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1 We thought and think that that
2 represents a completely alternative way of
3 approach that, if successful, would make the
4 potentially more confrontational
5 implementation of a coupon system not be
6 necessary.

7 We get to the same place in the same
8 way.

9 The courts have linked them together,
10 we think that's wrong. We are hopeful that
11 when they are reviewed again, separate them
12 and would be for us, I think, and for the
13 Governor a good day, a happy day if we are
14 able to accomplish limitation of this
15 evasion and control of our agents' behavior
16 through a certification system through --
17 rather than through coupon system which has
18 us facing sometimes emotional responses from
19 those in the Native American Reservations.

20 SENATOR NOZZIOLO: Can you tell the
21 committee how long this deliberative process
22 is anticipated to continue?

23 MR. COMISKEY: I don't have an end
24 date, but I can tell you that the

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1 certification was only stayed earlier this
2 year, that the litigation that may separate
3 that out and give it a chance to happen is
4 going to happen in the spring.

5 So I don't have a crystal ball, and no
6 one has told me this will be the turning
7 point, but I also think that I do know that
8 the Governor and his staff are actively
9 pursuing negotiations, I am not privy to

10 what they are doing or how that's happening,
11 but as the reality that there may be some
12 form of implementation or enforcement
13 becomes clear, I am hopeful, anyway, this is
14 me personally speaking, I am hopeful that
15 that reality will lead the parties that have
16 been so far over the decades unable to
17 resolve this through negotiation to resolve
18 it.

19 SENATOR NOZZIOLO: Thank you.

20 SENATOR JOHNSON: Thank you, Senator
21 Nozziolo.

22 I know we are joined by Senator Marty
23 Golden as a member of the Committee.

24 Senator Diaz any questions?

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1 SENATOR DIAS: Yes, thank you, Mr.
2 Chairman.

3 I got here a little late, but if as far
4 as I understand we are dealing with the
5 taxes on the Indian Reservation, right?

6 MR. COMISKEY: We are dealing with
7 the taxation of cigarettes sold by Native
8 American merchants to non-Indians, correct.

9 SENATOR DIAS: The Indian children,
10 are they going to public school, or they
11 have their own schools?

12 MR. COMISKEY: I am afraid that I do
13 not know the answer to that.

14 I believe that they -- I think, I think
15 it would be wrong for me to speculate.

16 I do not know the answer. I think,
17 actually I do know for some tribes, for
18 example and there are representatives I
19 believe here who can speak directly on that,
20 because they have knowledge, I do know that
21 for some of the Reservations I was told only
22 recently that they attend public school; for
23 example the tribes on Long Island.

24 SENATOR DIAS: They attend public

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1 school paid by --

2 MR. COMISKEY: Taxpayer dollars, yes,
3 sir.

4 SENATOR DIAS: Do you know if they go
5 to public hospital or they have their own
6 hospitals?

7 MR. COMISKEY: Sir I think they go to
8 public hospitals.

9 SENATOR DIAS: They go to public
10 hospitals.

11 Do you know if they use public
12 transportation or they have their own

13 transportation?

14 MR. COMISKEY: They use public
15 transportation, as far as I know.

16 SENATOR DIAS: Thank you.

17 SENATOR JOHNSON: Senator Golden?

18 SENATOR GOLDEN: No questions, thank
19 you.

20 SENATOR JOHNSON: Senator Adams and
21 Senator Maziarz, we are trying to limit
22 questions. I would like you to limit your
23 questioning, if you don't mind.

24 We appreciate you participating at the

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1 hearing, Senator Adams, again, just limit
2 the amount.

3 SENATOR ADAMS: Thank you very much,
4 Senator Johnson.

5 We are not on the committee, so I
6 appreciate you extending us an opportunity
7 to ask questions on this important issue.

8 I just wanted to ask you two questions,
9 if possible, one dealing with the terrorist
10 incident, that's plural.

11 You stated that there is a direct
12 correlation between the cigarette sales and
13 terrorist incidents.

14 Have those incidents been reported to

15 the FBI or this committee, and are there
16 more than one incidence?

17 Is this something that is prevalent
18 among all the tribes, or do we have -- can
19 you just help me with this?

20 MR. COMISKEY: I can and I really
21 want to make this clear, it's not at all
22 prevalent with the tribes at all, the
23 intersection between terrorist activities
24 and cigarette smuggling isn't a tribal

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1 issue, it is an issue in which some of the
2 organized groups that smuggle cigarettes,
3 from whatever sources, and we know that they
4 buy cigarettes by traveling to out-of-state
5 stores, we know that they get cigarettes
6 sometimes through counterfeit sources coming
7 in from other countries, and as well as
8 buying sometimes from Native American
9 merchants.

10 Some of those organizations and
11 individuals involved send the money that
12 they generate illegally through the
13 cigarette bootlegging activity to
14 organizations in the Middle East that
15 operate and fund terrorist activities.

16 SENATOR ADAMS: This is not the
17 separate tribes?

18 MR. COMISKEY: I am so pleased you
19 asked that question. That's not at all what
20 I'm trying to say, I'm trying to say if you
21 look at the entire cigarette transaction,
22 what comes in from the agents, what is sold
23 by the Native Americans then look at the
24 outside, what happens when that reaches

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1 cigarette smugglers I am focusing entirely
2 on the conduct of the cigarette smugglers.

3 SENATOR ADAMS: I want to be clear, I
4 don't want to give the insinuation that the
5 Seven Tribes are participating in selling
6 cigarettes for terrorist activity; you are
7 not stating that.

8 MR. COMISKEY: I am not.

9 SENATOR ADAMS: Okay, my second
10 question is in several parts of the state or
11 the country, in some areas you have the 7
12 sins tax, in New York City you have the 4.25
13 tax.

14 Do we have enforcement in place to go
15 after those New Yorkers that leave the State
16 and bring cigarettes into New York State
17 from those other states that they also have

18 a low tax?

19 MR. COMISKEY: Well, we certainly --
20 the 54 police officers who work for me and
21 do this pretty close to a full time
22 occupation spend the bulk of their time
23 focusing on cigarette traffickers, many of
24 whom buy their cigarettes out-of-state.

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1 So is that an answer?

2 SENATOR ADAMS: You are saying the
3 bulk of your manpower which you use, 45
4 officers you say?

5 MR. COMISKEY: 54 officers assigned
6 to the enforcement, primarily enforcement of
7 the excise taxes, that includes fuel, that
8 includes alcohol and that includes -- but
9 it's a big chunk -- cigarettes.

10 SENATOR ADAMS: I just want to drill
11 down, you are talking about cigarettes
12 today.

13 MR. COMISKEY: Understood.

14 SENATOR ADAMS: Out of the 54, the
15 bulk of the enforcement activity looks at
16 those who are selling cigarettes
17 out-of-state or the Seven Tribes, within the
18 Seven Tribes?

19 MR. COMISKEY: I think it involves
20 both. I don't know the percentage
21 breakdown.

22 SENATOR ADAMS: Okay, thank you.

23 SENATOR JOHNSON: Thank you, Senator
24 Adams, and thank you for your questions. I

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1 think you did provide some important
2 clarification.

3 Senator Maziarz.

4 SENATOR MAZIARZ: Thank you very
5 much, Mr. Chairman.

6 I appreciate not being a member of this
7 committee the courtesy you have shown both
8 to me and to my colleague and good friend,
9 Senator Adams.

10 SENATOR JOHNSON: You are lucky.

11 SENATOR MAZIARZ: Commissioner
12 Comiskey, the coupon system, I just want to
13 get back to that for a minute.

14 I assume this would be some type of a
15 system, at least, that I have heard of
16 different, a couple of different coupon
17 systems that were proposed, this is one
18 where Native Americans would be issued a
19 coupon and they would redeem this coupon
20 after they made a sale?

21 MR. COMISKEY: The coupons would be
22 issued to Native American Nations to be
23 distributed to Native American cigarette
24 retailers and merchants, they would use the

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1 coupons, they are issued based upon probable
2 demand and population and the rest, and the
3 Nations would be asked to weigh in on what
4 the appropriate amount of the coupons would
5 be.

6 They would give them to the Native
7 American merchants, the merchants would use
8 those coupons in dealing with our licensed
9 agents to avoid having to pay the tax on the
10 cigarettes that the agents would be
11 providing the merchants.

12 SENATOR MAZIARZ: Has the State
13 Department of Taxation and Finance ever had
14 a system like that with any other
15 individuals or any other groups?

16 MR. COMISKEY: We have exemption
17 certificates that are used in the sales tax
18 area by not for profits.

19 Not for profits can avoid the sales tax
20 by using an exemption certificate.

21 SENATOR MAZIARZ: Are you aware, and

22 I realize this may not be a question for tax
23 and finance, but are you aware of the total
24 amount of revenue paid by the Seneca Nation

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1 for the operations of gaming?

2 I realize we are here to talk about
3 cigarettes, but gaming in Buffalo, Niagara
4 Falls and Seneca.

5 MR. COMISKEY: I am not.

6 SENATOR NOZZIOLO: One follow-up
7 question, Commissioner Comiskey, could you
8 explain the federal tax collection of the
9 same product that we are talking about here?

10 It's my understanding that there is a
11 federal excise tax, that excise tax is
12 collected a certain way, can you explain how
13 that's collected?

14 MR. COMISKEY: It's a much different
15 process, the tax is imposed and collected
16 from the manufacturers and the federal
17 government gets it at its source, and
18 monitors volume and collects it there.

19 SENATOR NOZZIOLO: So that the Native
20 Americans would, in fact, in acquiring those
21 would be paying taxes to the federal
22 government?

23 MR. COMISKEY: Certainly for the

24 cigarettes they are buying from our licensed

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1 agents the answer is yes.

2 They may be buying some from illegal
3 sources where the tax wasn't paid and wasn't
4 collected, and there may be instances where
5 Native American manufactured product may not
6 have had taxes paid as well.

7 SENATOR NOZZIOLO: Thank you.

8 SENATOR JOHNSON: Senator Golden.

9 SENATOR GOLDEN: I have one question,
10 but probably three answers; it's three
11 questions.

12 What is the total loss to the City of
13 New York over the last 10 years because of
14 the non-collection of taxes on cigarettes
15 from Indian Reservations and from untaxed
16 cigarettes on the whole?

17 MR. COMISKEY: I don't have a number
18 breaking it down, I don't have that number
19 for the State, let alone breaking it down
20 for the City.

21 SENATOR GOLDEN: What would it be for
22 the City of New York that you would put in
23 for your budget that you would have realized
24 had you been able to collect the taxes from

1 the Indian Reservation?

2 MR. COMISKEY: I am afraid I don't
3 know the answer to that.

4 SENATOR GOLDEN: Could you please get
5 that? I understand it's \$300 million, in
6 that category, just for the City of New
7 York?

8 MR. COMISKEY: I could find out what
9 the taxes also are, but my guess is Mr.
10 Proshansky, who is here and who is
11 representing the City in its federal
12 lawsuits, is going to have his arms
13 completely around that issue.

14 SENATOR GOLDEN: Thank you very much.

15 SENATOR JOHNSON: Senator Diaz.

16 SENATOR DIAS: Commissioner I have to
17 go back to my previous question, and I do
18 this because I have in my hand a written
19 testimony from James Ransom, the tribal
20 chief of one of the tribes in upstate.

21 And I don't know if I am -- if I am
22 going to be here to question, but I have to
23 question you about something he's going to
24 say, I am going to read you something.

1 He said the Boston Tea Party in 1773 a
2 group of American colonists dressed up as
3 indians and dumped tea into the Boston
4 harbor. The Boston Tea Party was the
5 primary catalyst leading to the American
6 Revolution and the eventual founding of the
7 United States.

8 What is relevant is that the underlying
9 reason for this historic act of civil
10 disobedience it was the British trying to
11 impose taxes on the colonies in the process
12 getting them to, in essence, they were
13 trying to get them to help pay for a huge
14 British financial deficit that was none of
15 their making.

16 So the Chief is going to testify that
17 the colonies turned against the British
18 because the British were trying to impose
19 taxes on them when they had nothing to do
20 with the taxes.

21 So what I asked you before was if the
22 education that they get are paid by the
23 state or by their own?

24 MR. COMISKEY: And I will go back to

1 that, because I am confident that many
2 services are paid out of the State public
3 tax dollars that are provided to Native
4 Americans, health services, I believe,
5 transportation, public roads, public safety,
6 in all of those areas state taxpayers are
7 picking up the tab.

8 SENATOR DIAS: So we agree if the
9 State paid for Medicaid, if the State paid
10 for education, that the State is paying for
11 health services, the State is paying for a
12 lot of other services that they use, then to
13 impose taxes on them on the cigarettes is
14 not imposing taxes on something that they
15 have nothing to do with.

16 MR. COMISKEY: I am with you
17 entirely, Senator. I think that the
18 significant false -- we are not imposing
19 taxes on the Native Americans, this plan
20 requires them to collect the tax from
21 non-Indians, not from Indian transactions.

22 SENATOR DIAS: To impose taxes to
23 help them pay for what they are using.

24 MR. COMISKEY: That's true, too.

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1 SENATOR DIAS: Thank you.

2 SENATOR JOHNSON: We are joined by

3 Deputy Majority Leader Jeffrey Klein, a
4 member of the Committee who is going to ask
5 a couple of questions.

6 He's the last member of the panel to
7 ask questions.

8 SENATOR KLEIN: Thank you, Chairman
9 Johnson.

10 I have a question, I think it may have
11 been covered, but please bear with me.

12 Was there ever an analysis conducted
13 over the years by the State Department of
14 Taxation and Finance that got into how much
15 we actually lose in cigarette tax revenue
16 through internet sales or sales that emanate
17 directly from the Reservations?

18 MR. COMISKEY: Yes, sir.

19 SENATOR KLEIN: Do you have the
20 number or range?

21 MR. COMISKEY: The number that I
22 talked about earlier was that our
23 economists, and they don't break it
24 necessarily into internet and smoke shop

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1 sales, but the number based upon 2008 sales
2 number, sales figures would be about \$220
3 million.

4 I lay it out in my testimony.

5 SENATOR KLEIN: Is that just from
6 internet, or is that everything?

7 MR. COMISKEY: That's from
8 everything.

9 SENATOR KLEIN: I guess my follow-up
10 question would be why isn't it more exact?

11 We have the tobacco wholesalers, who
12 are the tax agents, in essence in New York
13 State, and they really know exactly how many
14 untagged cigarettes are out in the market.

15 They prepay for all the stamps.

16 MR. COMISKEY: Well, the ten agents
17 that sell to Native American merchants, they
18 certainly know the volume they sell, I would
19 start by saying that's not the only source
20 of supply for Native American merchants,
21 they have additional sources there.

22 Secondly, when I say that we don't get
23 information from the vast majority of Native
24 American merchants about what they do with

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1 the cigarettes.

2 We don't have a breakdown, there is no
3 Jenkins Act compliance for the majority of
4 these merchants to identify what portion is
5 sold out-of-state, what portion is sold to

6 New York residents by the mail, even though
7 it violates Public Health Law, as you know
8 well, and what portion is sold through the
9 walk-in traffic with both retail customers,
10 and there is a steady volume of retail
11 customers, and in some tribes especially
12 there is a steady volume of wholesale
13 cigarette smuggling.

14 Nobody is telling us that, we will
15 never -- we are not getting that data, so we
16 can estimate what it is, but it is really a
17 guess.

18 SENATOR KLEIN: I guess my follow-up
19 question would be to enforcement, I wrote
20 the law which bans the sale of cigarettes
21 over the internet and through mail order,
22 which was upheld by a Federal Circuit Court.

23 How is it, I guess, the State
24 Department of taxation and Finance, as far

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1 as enforcement is concerned, do you have the
2 ability to dismantle these websites?

3 MR. COMISKEY: I think that if --

4 SENATOR KLEIN: Just to backup, I'm
5 sure you are aware that Federal Express and
6 other common carriers are not delivering the

7 cigarettes, they are also not accepting
8 credit card payment.

9 Do you have the authority to just sort
10 of dismantle these websites?

11 MR. COMISKEY: I think if the choice
12 were made to do direct enforcement activity
13 against the Native American merchants, we
14 could enforce the Public Health Law directly
15 against them.

16 SENATOR KLEIN: Thank you, sir.

17 SENATOR JOHNSON: Mr. Comiskey, thank
18 you very much for your testimony this
19 morning, we appreciate your time.

20 The next witness to testify will be
21 Steve Rosenthal.

22 S T E V E N R O S E N T H A L,
23 called as a witness, having been first duly
24 sworn by the Counsel to the Committee, was

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1 examined and testified as follows:

2 SENATOR JOHNSON: Please state your
3 name and affiliation for the chair and the
4 members of the Committee and we will receive
5 your testimony.

6 MR. ROSENTHAL: My name is Steven
7 Rosenthal, I am here today representing --

8 SENATOR JOHNSON: Mr. Rosenthal, if

9 you could put the microphone close to you,
10 it's a large room.

11 MR. ROSENTHAL: Thank you, Senator
12 Johnson, and the other distinguished members
13 of the panel.

14 I am an economics finance and Wall
15 Street graduate, but I have spent the last
16 40 years of my life in distribution in New
17 York, I have been the largest independent
18 beverage distributor in New York and also
19 more to the point in today's discussion, I
20 was the largest distributor of tobacco and
21 cigarettes in the City of New York for many
22 years.

23 I have held more than 20 wholesale and
24 retail cigarette licenses, I have been

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1 President of the state-wide Association of
2 Tax Stamping Agents, and I basically lived
3 in the streets of New York City with my
4 sales staff and probably understand the
5 distribution of cigarettes as well as
6 anybody.

7 I am very, very impressed with
8 Commissioner Comiskey, who in his two and a
9 half years seems to know most of what it

10 took me 40 years, but I am sure if he hangs
11 around for another 37 and a half years he
12 will know even more.

13 I have left the industry. I have no
14 economic interest in being here today, I am
15 not being paid as a consultant, but this is
16 the industry that supported myself and my
17 family for a very long time.

18 I have seen a lot of injustice and I am
19 here today hopefully in my own small way to
20 clarify and hopefully help this committee do
21 something about it.

22 I think the major contribution I can
23 make, to begin with, is to give the
24 committee a full understanding of how

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1 cigarettes are marketed in New York, both
2 legally and illegally.

3 The manufacturer manufactures
4 cigarettes and puts it in his bonded
5 warehouse adjacent to his plant, when he
6 removes those cigarettes from bond he pays
7 the federal excise tax on those cigarettes.

8 All of the cigarettes that are here
9 that aren't black mark or coming in from
10 China or where have you have a federal tax
11 on them.

12 Each state requires its tax stamping
13 agents who are the entities that are
14 permitted to import cigarettes from the
15 manufacturer into the State, to tax stamp
16 each and every cigarette within a 24 hour
17 period.

18 Those tax stamps are purchased through
19 Albany. The distributor pays cash for them
20 which come out of his bank account the
21 morning that he receives the stamps and he
22 applies them.

23 These stamps have a State tax element
24 to them, if they are to be sold outside of

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1 New York City. If they are to be sold in
2 New York City they have both the City tax
3 and the State tax included in the value of
4 the stamp.

5 Additionally, since 1995, the
6 pre-collection of sales tax is also added to
7 the value of the stamp and moves through the
8 channel of distribution from the distributor
9 to the retailer.

10 It's a very heavily regulated industry
11 and each license has its responsibilities.

12 If a distributor sells to an Indian

13 Reservation, Native American store or sells
14 to the military or sells out-of-state, the
15 following month on his tax return he gives
16 copies of those invoices to the Tax
17 Department and the Tax Department removes
18 those from his requirements.

19 So that each month the manufacturers
20 give the Tax Department a listing of what
21 cigarettes they provided the tax stamping
22 agent, and that has to be matched against
23 his purchases of tax stamps.

24 If, in fact, there is a problem, he's

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1 audited and he pays the difference.

2 In fact, if there is a fire in his
3 warehouse and those stamps are burnt, he
4 paid the tax on them.

5 There is no reimbursement. If a
6 retailer purchases cartons of cigarettes on
7 credit and does not pay, doesn't matter, the
8 State gets paid.

9 There is a 100 percent incidence of
10 collection on the part of the State on this
11 particular tax like no other.

12 Now, this is not unique to New York, I
13 believe today it's 49 states out of the 50
14 states require the tax stamping of

15 cigarettes.

16 We talked about counterfeit cigarettes,
17 Commissioner Comiskey talked about
18 cigarettes coming in from other states and
19 so on and so forth.

20 Let me point out a counterfeit tax
21 stamp has no value whatsoever in and of
22 itself, intrinsically, it's only value is
23 when someone illegally applies it to an
24 unstamped package of cigarettes.

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1 The only source of unstamped packages
2 of cigarettes here in New York State is from
3 the Native American stores.

4 There is no other means. If a
5 distributor attempted to do that, within a
6 month he would be taken away in handcuffs.

7 Next, I would like to point out since
8 the committee is very, very interested in
9 the collection of taxation and why it hasn't
10 been corrected for two decades, your
11 questions seem to center around how much tax
12 are we talking about.

13 And let me tell you, no one understands
14 that better than the distributors who have
15 lost a certain amount of volume in this

16 State which is incompatible with the amount
17 of fall off in national consumption.

18 If we look at 1995, for instance, when
19 -- in the aftermath of the Supreme Court
20 ruling that the State of New York was
21 perfectly within its right to tax Native
22 American sales to non-natives, and having
23 taken into consideration all of the
24 arguments concerning treaties and concerning

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1 other rights, they decided 9 to 0, 9 to 0
2 that New York's scheme of taxing was
3 correct.

4 And what was that scheme? That scheme
5 was coupons.

6 Tax every carton of cigarettes as
7 prescribed by New York Law and the law of
8 every other state in the union, and at the
9 same time, at the same time preserve
10 sovereign rights by issuing coupons to an
11 acceptable amount for every Native American
12 who wishes to smoke on his Reservation to
13 receive that coupon that he would use in
14 payment of cigarettes that would be
15 purchased, so that he would only pay the
16 cigarette portion and the tax portion, in
17 effect, would be paid by the coupon,

18 therefore no taxation for American Indian
19 consumption.

20 The illegal sales of cigarettes come by
21 differently.

22 Within these past 15 years our industry
23 has been besieged by the ravages of
24 contraband, criminal and terrorism elements

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1 and governmental interference. Most
2 distributors have gone out of business.
3 From well over 100 tax stamping agents we
4 have a handful now.

5 The ones who have survived have taken a
6 chance.

7 The chance they have taken is that the
8 Governor's, starting with Governor Pataki,
9 would not enforce the law and would not claw
10 back the taxes that they were not applying
11 to cigarettes and selling them to the Indian
12 Reservation stores.

13 And what happened as a result of this
14 is ten distributors decided to begin to sell
15 to them, and from 15 million cartons a year,
16 as Deputy Comiskey said, it grew two years
17 ago to a high of 47 million cartons.

18 Since Native Americans, although they

19 are responsible to report under the Jenkins
20 Act, which is a Federal Law, and they are
21 responsible to report under federal laws,
22 they do not do so, so we really have no
23 knowledge of how many of these cartons are
24 going interstate and how many are coming

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1 into this State.

2 Of those 47 million or what
3 Commissioner Comiskey says now is down to 25
4 million.

5 But we have empirical data and that's
6 the following; when New York in the late
7 '80s was doing almost 200 million cartons of
8 taxed cigarettes and today we tax only 44
9 million cartons of cigarettes, one must ask
10 where the missing cartons are?

11 Now, they can be in two places; one is
12 less demand, and the other is illegal sales.

13 So let's address the first. Cigarette
14 consumption in the United States during this
15 period has declined by approximately 1.5
16 percent.

17 If I go back to 1995 when we first
18 tried to implement regulations concerning
19 the coupon scheme, New York State was doing
20 at that time 122 million cartons of

21 cigarettes.

22 Today they are doing 44 million. If we
23 look at the reduction in national
24 consumption in that same period of time,

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1 it's 28 percent.

2 If we look at what's happened in this
3 State, it's fallen by 64 percent.

4 The difference, I maintain, is not that
5 New York smokers are smarter than smokers in
6 the rest of the country and have chosen to
7 give it up at 3 times the rate, but rather
8 as Native American usage went up, legitimate
9 usage went down.

10 And each time that the legislature
11 increased taxation they increased the
12 differential between what a person could pay
13 legitimately and what a person could pay
14 illegitimately.

15 So two things happened, number one,
16 Native American sales increased greatly
17 through the internet, and secondly,
18 secondly, as has been documented hundreds of
19 times, we have organized crime and cottage
20 industry crime picking up large quantities
21 of cigarettes from the Native American

22 Reservations and selling them on the street
23 corners of New York with street merchants
24 and what I call schoolyard pushers.

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1 The difference is this, go over to a
2 licensed store and pay \$9 or \$10 for a pack
3 of cigarettes, or buy it for \$5 or \$6 from a
4 street merchant standing right outside the
5 front of that store.

6 Now that's what started to happen in
7 the late '90s and particularly after the
8 City excise tax increased from 80 cents a
9 carton to \$15 a carton in 2002, but that
10 wasn't good enough.

11 Bodegas were being put out of business
12 and they recognized at that time that there
13 was no way that policemen were going to
14 arrest kids with backpacks, many of them
15 gang members, incidentally, and some of them
16 with other organized crime selling these
17 cigarettes in competition with them.

18 Because the few arrests, in 2003 the
19 Tax Department arrested 234 of these
20 individuals of the 234 individuals the
21 largest fine issued was \$250, and most of it
22 never went to court.

23 The courts really can't be bothered in

24 New York City with a kid with a couple of

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1 cartons of cigarettes, it's not going to
2 happen.

3 So as they were being put out of
4 business and as they couldn't pay their rent
5 anymore, they decided to do something
6 differently, induced by ads, these
7 particular ads from the Seneca stores, for
8 instance, we will not tell any government
9 about this transaction.

10 Buy ten cartons at a time and pay no
11 freight.

12 Well, let me ask you a question, ten
13 cartons of cigarettes are 100 packs, how
14 many of us, how many of us as individuals,
15 individual consumers are going to buy 100
16 packs of cigarettes at a time?

17 It's ridiculous. It wasn't being
18 bought for that purpose, it was being bought
19 for the purposes of resale.

20 Why get in my car and drive all the way
21 up to Salamanca, New York or some place else
22 to buy 49 cartons, not 50 mind you, because I
23 might be in violation of the Federal
24 Contraband Act, so I buy 49 cartons at a

1 time, maybe come back tomorrow for another
2 49, or go next door to another outlet and by
3 another 49 and try to get -- and maybe have
4 a State Trooper stop me, when I can just
5 order 10 cartons or more every day on the
6 internet.

7 So what did some of my storekeepers do
8 when I saw that there were no more Newport
9 and Marlboro's on the orders anymore?

10 I said where are you getting your
11 cigarettes?

12 Well, I found out, what they were doing
13 is they were buying it on the internet 10
14 cartons, 15, 20 cartons at a time and
15 turning around and giving it to their kids
16 when they came out of school to stand in
17 front of their own stores and hawk them for
18 a buck less than the street merchants were
19 hawking them for to get rid of the
20 competition and then raise the price a buck
21 or two, and hopefully they didn't have any
22 war with the crime elements that pretty much
23 thought that street corner was their
24 territorial place to sell cigarettes.

1 So what we did, what we did eventually
2 is we took 10 wholesalers who couldn't make
3 a living otherwise and we converted them to
4 become Native American sellers, and we took
5 perfectly legitimate retailers who were
6 being threatened with their businesses,
7 whose cartons went down 75 percent from 2001
8 to 2003 after the excise tax increase, and
9 we made thieves out of them as well, and
10 their children, by the way.

11 Now most of these are first and second
12 generation immigrants. What have we taught
13 these people who came from countries where
14 the rule of law wasn't quite as meaningful
15 as it is here in this country?

16 We have taught them that we are the
17 same, that the rule of law here does not
18 exist, that respect, respect for the law,
19 okay, is secondary to staying in business,
20 feeding your family and making a profit.

21 That's what we have done Now, let's
22 talk about selling to minors. I have owned
23 23 retail smoke shops around, Smokers'
24 Paradise store, State Street in Albany, is

1 an example of a store that I own.

2 The point of the matter, the point of
3 the matter is I have lost two of my stores
4 because my clerks foolishly sold to some 6
5 foot 4 kid with a beard who they thought was
6 27 years old who turned out to be 17 years
7 old with state representatives coming in
8 behind him.

9 I have lost two of my stores. More
10 than \$200,000 in profit. I did so with my
11 head held high, anybody can make a mistake.

12 That's the price you pay, okay, for not
13 taking care of your business and not
14 respecting the law.

15 Guilty as charged. However, the kids
16 who are selling, kids, men, others, middle
17 eastern types, particularly, that are
18 selling cigarettes on street corners of New
19 York, okay, they have no license to lose.

20 Yes, they are selling to our youth and
21 they are selling cheaply to our youth, and
22 many of them are hanging out around
23 schoolyards at 3:00 and selling cigarettes
24 to our children.

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1 Where do they come from? Well, my
2 people have gone, they have looked, they

3 have seen, they have no tax stamp on it,
4 what does that tell me?

5 There is only one place that these
6 cigarettes come from. I am not accusing the
7 Seven Tribes of aiding and abetting, I am
8 not accusing them of doing anything other
9 than being smart merchants, using their
10 political pressures in an attempt to
11 influence government, spending millions of
12 dollars on ad campaigns and a couple of
13 million dollars on -- which I have the
14 figures here -- on lobbying.

15 However in the past 15 years they have
16 made not hundreds of millions of dollars,
17 but several billions of dollars of profit.

18 SENATOR JOHNSON: Would you mind, if
19 you could sum up, take a couple of more
20 minutes, but I've got a lengthy list of
21 people to testify.

22 MR. ROSENTHAL: Certainly. I will
23 sum up very quickly by saying --

24 SENATOR JOHNSON: Thank you.

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1 MR. ROSENTHAL: The question I think
2 that addresses the committee is simply this,
3 can the special interests of the few who

4 have made fortunes in the past 15 years, be
5 more important than the 18 million New
6 Yorkers that each of you have pledged
7 responsibility for?

8 SENATOR JOHNSON: Thank you, Mr.
9 Rosenthal.

10 My questions are limited, but given
11 your vast experience in the industry, would
12 you be able to -- do you know or do you have
13 a belief as to how much revenue, sales tax
14 revenue, cigarette tax revenue New York is
15 losing by the failure to collect sales tax
16 on sales to non-Native Americans?

17 MR. ROSENTHAL: Yes, I do, I have a
18 very, very good number and it goes like
19 this.

20 According to national consumption, New
21 Yorkers are now smoking approximately 90 to
22 92 million cartons of cigarettes and we are
23 taxing 44 million.

24 Of the 44 million that we are taxing,

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1 we would be taxing approximately 52 million
2 if 8 million were not coming in out-of-state
3 from other sources, usually with tax stamps
4 from lower tax jurisdictions like North
5 Carolina.

6 The difference between 52 million and
7 \$92 million is 40 million cartons.

8 If we take the ratio of cigarettes that
9 are sold in the state to the ratio that's
10 sold in the City and we add the sales tax
11 and excise taxes, we average approximately
12 \$41 to \$42 a carton, let me round it out to
13 \$40.

14 40 million cartons times \$40 is \$1.6
15 billion, that's the number, with all due
16 respect to Commissioner Comiskey.

17 Any other questions?

18 SENATOR JOHNSON: Senator Klein.

19 SENATOR KLEIN: Thank you for
20 testifying today, Mr. Rosenthal.

21 I have two questions, the first you
22 talked about briefly I would like you, if
23 you can get into some detail, it's clear
24 when they crack down on a lot of the people

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1 who dealt with counterfeit stamps that it
2 was actually tied to terrorist activities.

3 I know you mentioned a little bit, can
4 you elaborate on that?

5 MR. ROSENTHAL: Yes, I can. There
6 have been approximately a dozen incidents of

7 terrorist funding due to that.

8 Large amounts of cigarettes are
9 purchased, and there have been, as I said,
10 approximately a dozen different arrests that
11 have been made, usually these are massive
12 amounts of cigarettes that wind up in a
13 warehouse either in Queens or Brooklyn,
14 typically.

15 One was in the Bronx, one was in
16 Yonkers, and they buy the cigarettes from
17 Indian Reservations, they turn around and
18 buy the tax stamps, I have been told, that
19 some of the Russian mob artists are
20 extremely good at this and now the Chinese
21 are doing very well with it, and they buy
22 these stamps for 2.5 cents a stamp.

23 Now, the stamp is worth with the sales
24 tax approximately \$5 in New York City, but

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1 the stamp is purchased for 2.5 cents because
2 really it's only a cockamamie on a sheet of
3 paper.

4 They take an iron and they put it on
5 each pack of cigarettes and then what they
6 do is they sell them through intermediaries
7 in small panel vans usually to middle
8 eastern smoke shops around the City where

9 they are being sold as counterfeit.

10 SENATOR KLEIN: I guess the reason
11 why they are purchased from Native American
12 Reservations is because there isn't a tax as
13 a compared to some of the low tax
14 jurisdictions which I think Virginia is 25
15 cents.

16 MR. ROSENTHAL: Northern Virginia
17 would be, Virginia would be, that is a
18 secondary consideration, because when you
19 are talking about making \$50 on a carton,
20 whether you pay 25 cents or not is not the
21 issue.

22 The issue is if you have a tax stamp
23 already on a pack it's almost impossible to
24 get it off without mutilation.

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1 And it's almost impossible to exactly
2 aim carefully and put the other tax stamp on
3 top of it without it being recognized, it's
4 far easier to take raw materials.

5 SENATOR KLEIN: Let me interrupt your
6 answer.

7 So in other words, if you are -- if you
8 are going to put a counterfeit stamp onto a
9 pack of cigarettes, you need a pack of

10 cigarettes that doesn't have a stamp at all?

11 MR. ROSENTHAL: Bingo, thank you.

12 SENATOR KLEIN: One more question.

13 The age verification that you talked about
14 when this purchase is made over the
15 internet, is there any kind of license
16 required, is there any kind of way that
17 somebody is required to show an ID when they
18 purchase cigarettes from a Native American
19 website?

20 MR. ROSENTHAL: The answer is no.

21 There is a statement that you have to admit
22 that you are more than 18 years of age, but
23 there is no verification of that fact.

24 Likewise, when the U.S. Post Office

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1 delivers such cigarettes --

2 SENATOR KLEIN: That was my next
3 question, when they deliver the cigarettes
4 and it's now only the United States Postal
5 Service, do they require that you have to
6 deliver it to someone who is of age?

7 MR. ROSENTHAL: The Postal Service,
8 unlike liquor that will not deliver it
9 without a signatory being over 18 years of
10 age, refuses to go through the trouble of
11 age verification and therefore does not do

12 so.

13 SENATOR KLEIN: Thank you.

14 SENATOR JOHNSON: Senator Klein.

15 Senator Nozziolo.

16 SENATOR NOZZIOLO: Thank you, Senator
17 Klein, thank you Mr, Rosenthal. Very
18 telling, compelling testimony. If your
19 understanding of the law as these problems
20 were listed, one after the other, businesses
21 being forced out, using illegal activity to
22 survive and compete, fostering tobacco
23 products on the youngsters of our
24 communities, do you believe that these

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1 problems did not exist before, the uneven
2 taxation process and the explosion of sales
3 from the Indian Reservations?

4 MR. ROSENTHAL: I would say
5 approximately 6 to 7 percent of them did and
6 93 to 94 percent did not.

7 SENATOR NOZZIOLO: It's been my
8 opinion that the only thing worse than
9 taxation is taxation that's distributed
10 unevenly.

11 And that this type of process, these
12 types of processes that we are trying to get

13 to are to establish fairness across the
14 board.

15 You mentioned briefly the Jenkins Act.

16 MR. ROSENTHAL: Yes.

17 SENATOR NOZZIOLO: How does that work
18 in terms of its implementation in the
19 marketplace?

20 MR. ROSENTHAL: The Jenkins Act works
21 as follows; any entity that sells cigarettes
22 to a jurisdiction other than the one he's
23 domiciled in whereby he is not responsible
24 to collect that tax directly but that does

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1 have a tax, he's under an obligation to
2 report to that taxing authority who he sold
3 to, when he sold to and how much he sold to
4 so that taxing authority has the ability to
5 send out a Sales and Use Tax form to collect
6 the tax on its own.

7 SENATOR NOZZIOLO: How is the
8 enforcement of this law, the federal
9 government?

10 MR. ROSENTHAL: The enforcement has
11 been fairly good by the federal government,
12 there has been some -- between the Justice
13 Department, the FBI and BATF.

14 There has been some juggling as to who

15 has ultimate responsibility, but I believe
16 that that has now been worked out under the
17 present administration.

18 SENATOR NOZZIOLO: One last question,
19 we asked the Deputy Commissioner of Taxation
20 about the implementation of federal tax; who
21 pays that federal tax, is it being paid
22 universally.

23 What's your experience been with the
24 federal excise taxes relative to

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1 particularly internet and Indian sales?

2 MR. ROSENTHAL: Well, as I said
3 before, the domestic manufacturers have
4 their bonded warehouses adjacent to their
5 plants.

6 When they remove from bond they pay the
7 federal excise tax of \$10 a carton.

8 The two areas of concern would be
9 cigarettes coming in from outside of the
10 United States illegally, and cigarettes that
11 are produced by -- well, I must say it,
12 there is an \$18 million taxes due by an
13 upstate Native American Reservation that was
14 producing their own brand of cigarettes, and
15 the federal excise taxes were found not to

16 be paid and there was an \$18 million due
17 bill.

18 The resolution of that I don't know, I
19 believe it wound up in court.

20 SENATOR NOZZIOLO: Thank you, Mr.
21 Rosenthal. Thank you, Mr. Chairman.

22 SENATOR JOHNSON: Senator Golden.

23 SENATOR GOLDEN: A similar follow-up
24 question and it's where I was, where I was

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1 going to take -- the Nations that are
2 sending in, where are these untaxed
3 cigarettes coming from, other Nations that
4 are coming in and where are they coming in
5 from?

6 MR. ROSENTHAL: There are several
7 websites which were recently closed down, I
8 don't know if any new once came up from
9 Switzerland.

10 Whereby you can buy not an American
11 Marlboro, but a Marlboro made with -- for
12 the European market, slightly different
13 mixture, for as little as \$18 a carton.

14 I believe that site was closed down, I
15 don't know of any others right now, except
16 I'm told by representatives of both Philip
17 Morris and Lorillard Tobacco Companies that

18 occasionally black market cigarettes i.e.,
19 counterfeit Marlboro's and counterfeit
20 Newports, occasionally come in from China
21 and North Korea.

22 It's rare, but it happens.

23 SENATOR GOLDEN: Have there been
24 seizures by the ATF or other seizures along

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1 the coastlines along New York?

2 MR. ROSENTHAL: There was one seizure
3 a while back in upstate New York, there were
4 two of them in New Mexico and one in
5 California in the last three years.

6 SENATOR GOLDEN: The one in New York,
7 where was that going?

8 MR. ROSENTHAL: I don't want to
9 mention names, I might be wrong.

10 However somebody, did go to jail over
11 it in the industry, and a particular Native
12 American wound up in jail as well.

13 SENATOR GOLDEN: That would not be
14 privileged information, that's not
15 privileged information, we should be able to
16 get that information for our committee, what
17 that seizure was, where that seizure came
18 from, where that seizure was earmarked for.

19 And I would like to have that
20 information.

21 Do you believe that there is presently,
22 and when I say believe, I am going to be
23 very careful on that word, do you have an
24 understanding, any understanding that is

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1 verifiable that Indian Reservations are
2 currently manufacturing cigarettes in the
3 City of New York?

4 MR. ROSENTHAL: I know there is a
5 Seneca brand and there is another brand of
6 smoking Joes, there are several other
7 brands, I'm not at this time aware of
8 precisely where they are being manufactured
9 or what the legality of that is, so I cannot
10 opine on that.

11 SENATOR GOLDEN: Because there has
12 been conversation that shipments from China
13 have arrived in the State of New York
14 untaxed and are being taxed with, some would
15 say, with a phony tax stamp, others are
16 saying coming right out of the Indian
17 Reservation.

18 Those are strong statements, unless we
19 can verify those statements.

20 That's the type of statements that I am

21 hearing, but we have to find a way of
22 verifying those statements, and that the
23 cigarettes on some of these Indian
24 Reservations are not necessarily New York,

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1 but across the nation are manufacturing
2 cigarettes and have -- they have a complete
3 work force of 1,000 people working on some
4 of these Indian Reservations to manufacture
5 these cigarettes.

6 That is verifiable, correct?

7 MR. ROSENTHAL: It is.

8 SENATOR GOLDEN: Thank you. Last
9 question, the policy that we have used here
10 in the State of New York to collect taxes
11 under the Pataki administration, the last
12 administration and now the present
13 administration has had difficulty in coming
14 up with a Compact or a way, a vehicle in
15 which to get these Indian Reservations to
16 pay taxes on their cigarettes and oil.

17 Do you think it should have taken the
18 State of New York 10 years so far, I
19 believe, since we began those negotiations
20 to get to collect these?

21 MR. ROSENTHAL: Senator, they were

22 begun in 1988 in contemplation of the taxing
23 scheme which led to the Attea case which led
24 to the 1994 Supreme Court ruling.

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1 The State recognized at that time that
2 sin taxes were going to be -- were going to
3 greatly cause a differential between taxed
4 and untaxed product and that they needed to
5 close that loophole.

6 They ran into a problem with political
7 will, and do I think it should have taken
8 this long? For 90 percent of my industry
9 not to be with us any longer, for me to be
10 out of the business for the same reason and
11 for the State of New York to have lost
12 billions of dollars, no, I don't.

13 I think it's a crime.

14 SENATOR GOLDEN: I happen to agree
15 with you, sir, and I think it is beyond a
16 crime.

17 Especially when we have today the State
18 of New York with a drop dead date of
19 December 15th of \$4 billion and if we don't
20 come up with that \$4 billion, we are going
21 to have to start issuing IOUs like that of
22 the State of California.

23 We have the same problem in the City of

24 New York here with a \$2 billion deficit

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1 coming up the deficits keep growing and
2 people just keeping on finding ways to hide
3 paying taxes.

4 This is supposed to be the greatest
5 State in the greatest nation in the world
6 and we seem to be held up here in
7 negotiations and in collecting money that is
8 owed the State of New York.

9 And we all believe, and so does the
10 courts, that it should be collected legally.

11 I thank you for your testimony, sir.

12 SENATOR JOHNSON: Thank you very
13 much, Senator Golden. I just want to also
14 acknowledge Senator Griffo is here, and with
15 that said, thank you very much, Mr.
16 Rosenthal, for your testimony today.

17 I am now going to invite up Peter
18 Kiernan, Counsel to the Governor's office,
19 Governor's counsel as the next witness.

20 MR. ROSENTHAL: Thank you, sir.

21 P E T E R J. K I E R N A N,
22 called as a witness, having been first duly
23 sworn by the Counsel to the Committee, was
24 examined and testified as follows:

1 SENATOR JOHNSON: Mr. Kiernan, if you
2 could just state your name and title for the
3 record.

4 MR. KIERNAN: Certainly. It's Peter
5 J. Kiernan, I am counsel to the Governor.

6 I am joined by David Rose, who is
7 assistant counsel to the Governor.

8 Much of Mr. Rose's portfolio has to do
9 with Native American affairs.

10 SENATOR JOHNSON: Mr. Kiernan, is Mr.
11 Rose going to provide any type of testimony?
12 If so, would you mind, we would like to
13 swear him in as well.

14 MR. KIERNAN: Sure I think he's going
15 to be here to answer questions that I can't.

16 D A V I D R O S E

17 Called as a witness, having been first
18 duly sworn by the Counsel to the Committee,
19 was examined and testified as follows:

20 SENATOR JOHNSON: Thank you.

21 MR. KIERNAN: Members of the
22 Committee, good morning, thank you for your
23 invitation.

24 The complex issues presented by the

1 sales of untaxed cigarettes on Native
2 American territories are subject to very
3 frequent review, and this is an update.

4 It is very important to stress at the
5 outset that meaningful analysis requires a
6 broad and realistic view.

7 The arguments involved are legal and
8 historic, they are deeply rooted in culture,
9 human nature, antiquity, treaties and
10 principles of comity amongst sovereign
11 Nations.

12 The issues involve the rights of both
13 individuals and groups and of generations
14 not yet born.

15 The issues also involve government
16 policy objectives that may be in conflict.

17 For example, it is the State's policy
18 to discourage smoking as a matter of public
19 safety, excuse me, as a matter of public
20 health.

21 But it is also the State's policy and
22 duty to protect and promote public safety.

23 We seek to reconcile circumstances that
24 bring those objectives into conflict.

1 So, too, we are obligated to endeavor
2 to see all contours and dimensions of the
3 problems we fund.

4 The velocity of money circulating in
5 the State's economy is an important
6 consideration in that endeavor.

7 A U.S. dollar spent on an Indian
8 Reservation in New York is a dollar put into
9 motion in the New York State economy.

10 Every time that dollar is respent or
11 invested it is good for New York.

12 So there is a texture to these issues
13 that we try to recognize.

14 Within this analytical framework and at
15 a time when the State is experiencing a
16 severe and unprecedented revenue crisis, it
17 is wise to discuss the central questions
18 raised by this hearing.

19 Permit me to begin with the policy of
20 forbearance as established by the Pataki
21 administration.

22 That policy simply stated was not to
23 pursue collection of sales and excise taxes
24 on cigarettes and fuel sales at Native

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1 American Reservations, or sales of
2 cigarettes and fuel to Reservation

3 facilities.

4 That policy is well described by Mr.
5 Comiskey, was not continued by the Spitzer
6 administration and is not embraced by the
7 Patterson administration.

8 Rather, each administration subsequent
9 to Governor Pataki has pursued active
10 negotiation and litigation in an effort to
11 achieve a peaceful resolution of this
12 complicated matter.

13 The Paterson administration also is
14 vigorously enforcing against bootlegging and
15 smuggling and is assisting federal
16 enforcement actions.

17 There are many who argue that the only
18 correct policy choice is to enforce existing
19 law with respect to tax collection. While
20 that remains an option, it is a one
21 dimensional choice that could have
22 deleterious consequences that could include
23 resistance, violence, retrenchment, crime,
24 economic harm and poison relationships that

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1 otherwise should be nurtured and
2 characterized by mutual respect.

3 A policy choice preferred by Governor

4 Paterson within the context of negotiation
5 is to arrive at a variant of tax parity.

6 Under such a regime, cigarette and fuel
7 products sold by Native Americans on Native
8 American lands would be at a price that
9 would be roughly equivalent to prices
10 charged by non-Indian merchants on
11 non-Indian land.

12 This would create a roughly level
13 competitive landscape and also would
14 discourage cigarette consumption.

15 A principal of comity, however, namely
16 that each purveyor of product be it a native
17 or non-native American has a right to pursue
18 profit maximization.

19 That also should be respected. Thus an
20 objective sought is that the Indian Nations
21 would establish minimum price floors for
22 their tobacco and fuel products, and if that
23 minimum price were to be lower than the
24 State's prescribed minimum price, then the

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1 differential would be contributing to a to
2 be created -- to be created regional
3 entities and served as a revenue stream that
4 would back the issuance of tax free debt by
5 those entities.

6 The differential contributions would be
7 matched by the State and the proceeds of the
8 ensuing borrowings would be supplied to
9 regional economic development and
10 infrastructure projects designed
11 specifically to benefit equally Native
12 Americans and New York residents living
13 adjacent to or near tribal Reservations.

14 The to be created infrastructure
15 projects would result in roads and bridges,
16 water projects, environmental measures and
17 healthcare facilities.

18 Now, the State broached this approach
19 in intense negotiations it held with the
20 United Nations this past spring, the United
21 Nations projected a tax parity stream in
22 exchange for a variety of State and county
23 actions primarily, but not exclusive,
24 concerned with land claims and real property

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1 tax disputes.

2 The United's version of tax parity was
3 that they would add to their pricing schemes
4 the amount of applicable State taxation.

5 With respect to cigarettes where the
6 State requires the minimum price and the

7 United Nations does not, that meant that a
8 carton of cigarettes sold at a tribal
9 facility would cost about \$7 less than the
10 same carton sold at a non-tribal facility in
11 the same area.

12 Similarly, the differential for each
13 gallon of fuel sold at a Save On gas station
14 owned by the United would be about 5 cents a
15 gallon.

16 The State proposed that there be tax
17 parity with price equality. Pursuant to
18 that proposal, the differentials of \$7 a
19 carton and 5 cents a gallon would be
20 contributed to an entity qualified to issue
21 tax free debt.

22 The State estimated that just the
23 United contribution alone would support a
24 borrowing of \$38 million, an equal State

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1 match, about \$2.5 million a year would allow
2 a borrowing of about \$76 million, all of
3 which would be invested in Oneida and
4 Madison counties where the Oneida Indian
5 lands and lands in dispute among the Oneidas
6 and the counties are located.

7 If some of the proceeds of the land
8 issue were to be employed as a local match

9 for federal highway funds or other federal
10 programs requiring matching funds, the
11 leverage effect of the borrowing in the
12 infrastructure improvements the borrowings
13 would support would be substantially
14 greater.

15 Now, the United negotiations did not
16 come to flower because Madison County
17 opposed land concessions the Oneidas sought
18 from it and Oneida County ultimately
19 rejected the land claim settlement its
20 County Executive had negotiated.

21 These land claim dimensions were not
22 items of discussions between the Oneidas and
23 the State, although they are evidence of the
24 complexity that can affect State and Indian

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1 Nation negotiations.

2 As the Paterson administration has
3 learned, there are a variety of issues
4 between the State and each Indian Nation.
5 Each issue that arises deserves careful
6 attention and openmindedness.

7 Solving them and other issues that may
8 evolve requires healthy courses of dealing,
9 cooperation, comity and trust.

10 Any precipitous action that would
11 adversely affect these essential elements of
12 positive dialogue would set back progress on
13 all important matters of concern among the
14 Indian Nations and the State.

15 Although negotiations with the Oneidas
16 stalled, a principle was established and the
17 State intends to pursue a tax parity
18 approach with respect to cigarette and fuel
19 sales by other Indian Nations.

20 There can be many useful variations on
21 this theme, and the Paterson administration
22 is open to creative approaches and it
23 endeavors to develop variations designed to
24 reduce cigarette consumption and share

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1 economic development.

2 All negotiations require strategy and
3 the tactics necessary to implement the
4 strategy.

5 A strategic element that has been
6 achieved is that Governor Paterson has met
7 personally with representatives of the
8 Indian Nations.

9 The Nations have no reason to doubt the
10 Governor's good faith or his commitment to
11 meaningful negotiations.

12 They also have no reason to doubt his
13 commitment to law enforcement action against
14 blatant disregard of the tax laws as
15 witnessed by the state's robust actions
16 against smuggling, bootlegging and sham
17 financial transactions involving cigarette
18 sales.

19 The State's very vigorous pursuit of
20 litigation with respect to cigarette taxes
21 underscores its commitment to peaceful
22 resolution.

23 But litigation also should be viewed as
24 a tactic, one designed to promote productive

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1 negotiations.

2 As Mr. Comiskey described, the question
3 whether the injunction imposed -- excuse me,
4 imposed by the Fourth Department against tax
5 enforcement focused on licensed stamping may
6 be before the New York Court of Appeals this
7 winter.

8 If the State prevails, as it hopes to
9 do, it immediately will proceed to
10 enforcement against licensed agents who will
11 be required to pay the applicable taxes.

12 The State will be able to do so by

13 issuing coupons to Indian Nations. A move
14 that likely would be resisted, perhaps with
15 violence, but certainly with widespread
16 noncompliance.

17 Until there is a litigation result, the
18 State will endeavor to reach a negotiated
19 solution.

20 At all times the option to promulgate
21 resolutions and issue options will be a
22 possibility.

23 Selective enforcement, taking the paths
24 of least resistance also remains a possible

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1 tactic.

2 Members of the Committee, some final
3 words about possible violence and its cost.

4 In 1992 and 1997 there were violent
5 reactions to attempts to collect cigarette
6 taxes.

7 Members of the Seneca Nation engaged in
8 activities that caused serious injury, major
9 disruptions and threats to public safety
10 that required deployment of substantial
11 state police resources at a significant
12 cost.

13 On both occasions the State suspended
14 its collection efforts.

15 The latter episode gave rise to the
16 policy of forbearance and subsequent
17 legislative efforts to proscribe less
18 intrusive methods of enforcement, as, for
19 example, the proscription to issue coupons
20 allowing native members to purchase
21 cigarettes tax free at Reservation
22 facilities, but requiring full taxation of
23 purchases of cigarettes by non-Native
24 members at such facilities.

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1 Governor Paterson has been several
2 times advised that were he to order tax
3 enforcement, technically at Seneca Nation
4 facilities, there again would be violence.

5 Interpolating to today's values, the
6 actual costs incurred in 1992 and 1997 which
7 costs are projected to be quite similar in
8 scope, the Governor has been advised that
9 the cost of law enforcement would offset
10 whatever gains might be achieved by tax
11 collections.

12 And that is without trying to assess
13 the costs of physical injury, or the loss of
14 life, or possible property damage or the
15 psychical harm of foregone opportunity to

16 live in peace with those who are entitled to
17 sovereignty and their interpretation of what
18 that means.

19 It is the product of state police
20 intelligence that violence and resistance at
21 other Indian Nations also may occur.

22 I also should relate that the Governor
23 is advised that should he not relent, and
24 the cost of relenting may be incalculable,

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1 that a police problem could quickly escalate
2 to a military one.

3 The assumptions underlying such advice
4 are formed by intelligence gathering, but
5 the assumptions are untested and the
6 intelligence is being reviewed.

7 As part of that review, on September
8 23rd Governor Paterson wrote to the U.S.
9 Attorneys for the Western, Northern and
10 Eastern Districts of New York, each of whom
11 have Sovereign Nations who engage in
12 cigarette sales within their jurisdictions.

13 The Governor asked them for their
14 assessments of the likelihood of violence
15 were he to commence enforcement.

16 He also asked them what they would
17 intend to do to mitigate any violent

18 resistance they foresaw.

19 Although I have called these U.S.
20 attorneys several times, there has been no
21 formal response.

22 On an informal basis I am advised that
23 the Department of Justice will defer all
24 threat assessments and law enforcement

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1 decisions to the State Police.

2 That is one more reason why the
3 decisions the Governor considers are fraught
4 with difficulty and uncertainty.

5 In due course information may be
6 received, negotiation advanced and
7 litigation determined.

8 And in due course the Governor will
9 make the decisions he wants.

10 In mid course, though, this is the
11 update I can present to you.

12 Thank you for your attention.

13 SENATOR JOHNSON: Mr. Kiernan, thank
14 you very much for being here today.

15 It may not surprise you that a number
16 of members of the Committee do have
17 questions.

18 Let me start by maybe you can clear up,

19 I am a little confused, I am trying to
20 understand what is the Paterson
21 administration's position with respect to
22 the collection of cigarette taxes from the
23 American sales to non-Native Americans?
24 You indicate in your statement that,

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1 and correct me if I'm wrong, you don't
2 embrace the policy of forbearance.

3 MR. KIERNAN: That's correct.

4 SENATOR JOHNSON: You testified that
5 your policy, or you are pursuing what's
6 called tax parity as a resolution, yet while
7 you don't embrace forbearance, has the
8 Paterson administration undertaken any
9 efforts to collect these taxes?

10 MR. KIERNAN: Well, thank you,
11 Senator, I appreciate that.

12 I think Mr. Comiskey outlined some of
13 the steps that the administration has taken,
14 and I certainly alluded to them, I will
15 elaborate some more.

16 I think there was an appendix to Mr.
17 Comiskey's submission that outlines in
18 detail, more detail than I can offer, many
19 of the operations of law enforcement.

20 They are mostly focused on unlicensed

21 stamping agents, on bootlegging, on
22 counterfeiting and other means of evasion,
23 including smuggling.

24 The Department of Taxation and Finance,

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1 Enforcement Division also has been working
2 with the federal government and with the
3 City of New York in its enforcement efforts.

4 Now, if you are asking me specifically,
5 Senator, the State's policy other than that,
6 I think I will try to state that the
7 Governor's policy is one of negotiation and
8 litigation.

9 With respect to litigation, as I am
10 sure you are aware, the Fourth Department
11 has affirmed a lower court's holding
12 enjoining implementation of the statute that
13 the Governor signed in December of 2008
14 which would authorize the State to proceed
15 against licensed stamping agents.

16 I believe as Mr. Comiskey probably
17 related to you, forgive me, I wasn't here
18 when he spoke, but that there are 5 of 10
19 licensed agents that 100 percent of their
20 sales are of unstamped cigarettes to Indian
21 Nations, and four others have a large

22 majority of their sales to Indian Nations.

23 It this statute was designed to allow
24 the State to proceed directly against the

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1 licensed stamping agents and in conjunction
2 with actions against the licensed stamping
3 agents would allow the State to interdict
4 the supply of illegal cigarettes, illegal in
5 the sense under State law because they are
6 not stamped.

7 And it would not be intrusive against
8 the Indian Nations as the '92 and '97 --
9 1992 and 1997 actions were.

10 Just to wrap that up, we are hopeful
11 that the litigation circumstance will be
12 resolved no later than this spring.

13 In the midterm or during that period of
14 time we hope to, as you indicated, negotiate
15 an alternative, which is tax parity with
16 price equality.

17 SENATOR JOHNSON: But based on your
18 testimony, the only negotiation -- the
19 Oneida negotiation where you are using tax
20 parity method, that negotiation broke down,
21 is that correct?

22 MR. KIERNAN: It did, although it --
23 that's not to say it cannot be revived, it

24 broke down for reasons I described which

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1 involve -- the Oneidas were seeking specific
2 relief that only the counties could give
3 them, and they were not matters of the
4 State.

5 SENATOR JOHNSON: Are you currently
6 in active negotiation with any Native
7 American tribes that sell cigarettes to
8 collect on -- either collect on cigarette
9 taxes or impose this tax parity plan?

10 MR. KIERNAN: We have brought to the
11 attention of several of the Nations our
12 desire to pursue this course from several of
13 the Nations in meetings with the Governor
14 have brought to him and to us the issues
15 that they have.

16 Many of these issues are completely
17 unrelated to tax parity or cigarette
18 taxation.

19 Some of them link them, others refuse
20 to link them.

21 It's not our policy to link, but rather
22 to address issues separately and try to
23 achieve resolutions of all the issues.

24 SENATOR JOHNSON: So while you have

1 had conversations and you may categorize
2 them as negotiations or not, you have a
3 feeling of where particular tribes have
4 particular positions, you are, though, not
5 making any effort to collect on the
6 cigarette taxes on the Reservations?

7 MR. KIERNAN: If you mean by that,
8 which I take it that you mean, that we are
9 not issuing coupons which would cause the
10 injunction of the Fourth Department to be
11 lifted, the answer is correct, we are hoping
12 that the Court of Appeals will do that for
13 us, but as I indicated, that is something
14 that is under frequent review, the most
15 frequent review, formal reviews occurred in
16 mid-September, but I can assure you that one
17 occurred last night when the Governor and I
18 discussed this rather thoroughly.

19 SENATOR JOHNSON: So in a nutshell,
20 while you may not embrace the term
21 forbearance, you are currently forbearing on
22 collecting the sales tax, correct?

23 MR. KIERNAN: We are forbearing
24 currently for issuing the coupons.

1 SENATOR JOHNSON: Has the office of
2 budget, or anybody in the executive
3 department, budgeted how much could be
4 collected with respect to the sales tax?

5 MR. KIERNAN: Well, I believe in Mr.
6 Comiskey's testimony which I read, I think
7 he estimates that if there were to be full
8 compliance the revenues to the state would
9 be \$225 million on an annual basis.

10 But he then goes on to describe how
11 there would not be full compliance or that
12 it would be imprudent to expect full
13 compliance.

14 In the division of budget has
15 promulgated an estimate for each of the last
16 several years and its most recent estimate
17 for the current fiscal year, I believe, is
18 in the neighborhood of \$95 million, and I
19 would add to that what I said in my
20 testimony, the Governor is advised that the
21 costs, the likely costs of getting that
22 revenue just in terms of outlays to the
23 police department, State Police Department,
24 would exceed that which the State would

1 receive.

2 SENATOR JOHNSON: Well, let's focus
3 on that, since you brought that up, who
4 advised the Governor as to the costs of
5 enforcing the collection of the sales tax?

6 MR. KIERNAN: The State Police.

7 SENATOR JOHNSON: Who in the state
8 police?

9 MR. KIERNAN: Well, it's been -- it's
10 not one individual, over time the last
11 meeting that I referred to was Deputy
12 Superintendent Perez.

13 SENATOR JOHNSON: Deputy
14 Superintendent Perez?

15 MR. KIERNAN: Yes. But the Deputy
16 Superintendent was speaking for the
17 Department, not for himself.

18 SENATOR JOHNSON: And did Deputy
19 Superintendent come up with a number, a
20 figure, an amount as to what it would cost
21 to enforce the collection efforts?

22 MR. KIERNAN: As I indicated in my
23 testimony, Senator, he gave us an
24 interpolation of prior costs. It's just

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1 taking prior costs on a daily basis and
2 interpolating them to the value of the

3 dollar today.

4 It is not -- it's a mathematical
5 calculation that's not necessarily the apt
6 calculation.

7 SENATOR JOHNSON: My understanding is
8 there was a public pronouncement by the
9 Governor, and I believe the figure that he
10 stated was \$2 million a day.

11 MR. KIERNAN: Well, I think I didn't
12 hear the Governor say that, I will take your
13 word for it.

14 But the -- that actually would be
15 somewhat less than he was advised, but
16 that's close.

17 SENATOR JOHNSON: So why don't you
18 put a figure on it?

19 How much, according to the
20 conversations you have had with the State
21 Police, who is not here to testify, how much
22 would it cost or what is the number that
23 you're being advised it would cost per day
24 to collect these sales taxes?

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1 MR. KIERNAN: Well, as he indicated,
2 the number \$2 million was laden with
3 assumptions and the assumptions all have to

4 be analyzed, that number is in the
5 neighborhood of \$2 million a day, but it's
6 not, to us, anyway, I would let you make --
7 draw your own conclusions.

8 Obviously, that number is not -- it's
9 not one that should be taken as gospel, it's
10 -- as I said it's an interpolation of what
11 actual costs were in 1992 and 1997.

12 SENATOR JOHNSON: But my problem is
13 that when a public pronouncement is made
14 with respect to a cost, it essentially
15 becomes gospel out into media, that's the
16 number that's thrown around.

17 I think the other week there was when
18 the Obama administration for instance
19 indicated they were going to cut back on
20 bonuses, the Governor announced that we were
21 going to lose \$1 billion, which the number
22 was immediately pushed back by experts
23 saying that's not really the number.

24 My concern is that numbers are thrown

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1 out that we have to undertake as whether or
2 not it's true or not, and then now it's
3 being told it's an interpolation of what the
4 possible costs are, so we don't actually
5 have an actual fixed cost, we have a guess.

6 We have a guess of what --

7 MR. KIERNAN: Yeah, you have an
8 estimate, and because there is no actual
9 fixed cost, there is no way of knowing what
10 the actual fixed cost would be.

11 One can calculate how many State Police
12 personnel would have to be deployed at
13 various places, how much cost that is to the
14 State Police Department, they have to be
15 housed, they have to be -- there are
16 logistic costs, all those elements go into
17 it, but the underlying assumption is that
18 you need X number of police, X number of
19 places for X period of days; that's hard to
20 know. Circumstances change.

21 The circumstances in 2009 may be very
22 different than those in 1997, we would hope
23 they would be.

24 SENATOR JOHNSON: Did Mr. Perez

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1 provide you with any documentation?

2 MR. KIERNAN: No.

3 SENATOR JOHNSON: This is all oral at
4 a meeting?

5 MR. KIERNAN: This is confidential
6 advice that he gave to the Governor in a

7 confidential meeting and a conversation that
8 goes with it and all of that would be
9 privileged.

10 SENATOR JOHNSON: But he provided no
11 documentation to indicate how he came up
12 with the number of \$2 million?

13 MR. KIERNAN: Well, I think I was
14 sent a table which showed the interpolation,
15 but it doesn't show all the assumptions.

16 SENATOR JOHNSON: So, you are in
17 possession of a document that indicates how
18 \$2 million, how this \$2 million figure came
19 up?

20 MR. KIERNAN: Well, I guess that's
21 one way of interpreting it. He sent me a
22 table that shows an interpolation, it
23 doesn't show the assumptions and it doesn't
24 test the assumptions, it doesn't go into a

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1 discussion of the assumptions, it's a
2 mathematical calculation.

3 SENATOR JOHNSON: So my question is
4 why then is there a public pronouncement
5 that it would cost \$2 million if you're not
6 sure what the figure is going to be?

7 Why go out there and claim it's going
8 to cost \$2 million?

9 MR. KIERNAN: Well, you have to ask
10 the governor that, I never heard the
11 Governor say that, state that.

12 The administration did not make that
13 pronouncement, if the Governor was asked the
14 question and he said in my view it could
15 cost, I don't know what his actual words
16 were, but that's what it would have been
17 based on, the confidential advice he
18 received from the police department.

19 SENATOR JOHNSON: In your testimony,
20 you also indicated that, "The Governor
21 Paterson has been several times advised that
22 were he to order tax enforcement,
23 particularly at Seneca Nation facilities,
24 there again would be violence."

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1 MR. KIERNAN: There likely.

2 SENATOR JOHNSON: Sorry, there likely
3 would be violence.

4 Who told the Governor that?

5 MR. KIERNAN: That's also the State
6 Police, it's the same advice that we
7 understand that was provided to Governor
8 Spitzer and Governor Pataki.

9 SENATOR JOHNSON: In that

10 conversation with the State Police, was that
11 Mr. Perez again who gave that information to
12 the Governor?

13 MR. KIERNAN: At the mid-September
14 meeting it was Pedro Perez, but at other
15 meetings it has been other personnel.

16 SENATOR JOHNSON: What do they base
17 this information on?

18 MR. KIERNAN: On intelligence.

19 SENATOR JOHNSON: I'm sure that you
20 are aware that there is a section of Penal
21 Law Section 40.20 which involves making
22 terroristic threats; are you aware of that?

23 MR. KIERNAN: Sorry?

24 SENATOR JOHNSON: Making a

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1 terroristic threat, are you aware of that
2 this particular section of the penal law?

3 MR. KIERNAN: Not specifically, but
4 generally I am, yes.

5 SENATOR JOHNSON: My understanding it
6 established a Class D felony for anyone who
7 tries to influence the policy of a unit of
8 government by intimidation or coercion by
9 threatening to commit certain violent
10 crimes.

11 Has the State Police investigated as to

12 whether or not persons providing them with
13 the information there likely would be
14 violence have committed this particular
15 crime?

16 MR. KIERNAN: Senator, I don't think
17 it's -- I would understand the advice that
18 they have received and passed on to be in
19 that form, I don't think they were
20 responding to threats.

21 There is a daily interaction among the
22 personnel of the State Police and members of
23 Indian Nations.

24 There is a lot of reasons for that,

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1 there are Compacts involving State Police
2 involvement in the Indian Nations, some of
3 it welcomed and others not so welcomed, and
4 the State Police have intelligence gathering
5 which is -- I am not at liberty to discuss
6 and I know very little about it.

7 And that is constantly being refreshed
8 and upon that, on the basis of that
9 intelligence and the basis of pass
10 circumstances, they arrive at conclusions.

11 And they give, as I indicated, as we
12 are advised, the same advice to Governor's

13 Pataki, Spitzer and now Paterson.

14 And we believe that all their
15 assumptions are subject to tests and all of
16 their intelligence is subject to review, and
17 that is ongoing.

18 SENATOR JOHNSON: So the State Police
19 have been given you assessments, correct, as
20 to --

21 MR. KIERNAN: That's correct.

22 SENATOR JOHNSON: Why, then, I'm just
23 curious, did you also then ask for the
24 assessments from the U.S. Attorney's office

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1 for the Western, North and Eastern
2 Districts, because you have asked them for
3 their assessments of the likelihood of
4 violence.

5 MR. KIERNAN: Yes, because they have
6 separate sources of information, it's part
7 of their responsibility to be monitoring the
8 enforcement of State laws, and you asked
9 questions earlier today about State Laws
10 that are in effect that are intertwined with
11 this and we thought it prudent, the Governor
12 thought it prudent to ask them, and as I
13 indicated so we don't have a question.

14 SENATOR JOHNSON: That request was

15 made a week ago?

16 MR. KIERNAN: September 23rd.

17 SENATOR JOHNSON: Thank you. Going
18 back to the amount of tax collection or tax
19 revenue that Mr. Comiskey indicated was \$225
20 million on an annual basis involving -- not
21 taking into any noncompliance, the number
22 you mentioned today was \$95?

23 MR. KIERNAN: With divisional budget.

24 MR. ROSE: Fair enough, is it in the

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1 budget, meaning if I go to -- if we review
2 the budget or I leave here and look through
3 the budget books, will there be a line item?

4 MR. KIERNAN: In the forthcoming
5 executive budget it will not be in the
6 budget.

7 SENATOR JOHNSON: Was it in past
8 budgets was it in 2009, '10?

9 MR. KIERNAN: It's in past financial
10 plans.

11 SENATOR JOHNSON: But in the actual
12 budget, is it in the budget?

13 MR. KIERNAN: Yeah, no, I understand
14 your question and I appreciate it.

15 I'm not sure. I suspect it was, but

16 remember there is the executive budget then
17 there is the enacted budget, I'm not sure
18 the enacted budget contained an estimate of
19 revenue from taxation of cigarettes and fuel
20 on the Indian Reservations, I don't know the
21 answer.

22 That's easy for me to find out, and I
23 will provide it.

24 SENATOR JOHNSON: Us, too, but for

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1 the proposed 2010, 2011 budget that's going
2 to be --

3 MR. KIERNAN: The executive budget
4 will not contain an estimate.

5 SENATOR JOHNSON: With respect to the
6 negotiations, so the Oneida negotiations
7 have broken down, they are hopeful maybe
8 they get resurrected and you have had
9 conversations with other tribes, can you
10 elaborate which tribes have you had those
11 conversations?

12 MR. KIERNAN: Yes, there have been
13 conversations with the Senecas, with the
14 Mohawks, with the Cayugas, the Onondaguas,
15 the Assistant Counsel has reminded me the
16 Tuscaroras, I don't remember that one, and
17 it's part of the Onondaguas meeting, the

18 Shinnecocks, forgive me.

19 SENATOR JOHNSON: The Shinnecocks
20 haven't received federal recognition yet?

21 MR. KIERNAN: No, but that was part
22 of the conversation.

23 SENATOR JOHNSON: And the Governor
24 did put in a letter supporting the

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1 recognition.

2 MR. KIERNAN: That's correct.

3 SENATOR JOHNSON: Can you tell me,
4 Mr. Kiernan, in economic terms what benefits
5 does New York State presently provide to the
6 Native American tribes located in New York
7 State?

8 MR. KIERNAN: Well, I can't quantify
9 it, but I think other people may have tried
10 that, but I can certainly make an effort to
11 describe it.

12 Some of the Nations actually are large
13 employers and they employ New York State
14 residents.

15 They have engendered economic
16 development, some of the casinos are large
17 employers and generate ancillary tax revenue
18 to the State, they certainly bring people to

19 the State that spend money in the state.

20 So the facilities that they construct,
21 involve New York State contractors and
22 laborers, and I think when one were to do an
23 analysis that will be well beyond my
24 capacities, but if one were to do a proper

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1 economic analysis of that, I suspect that we
2 would find a substantial net benefit.

3 SENATOR JOHNSON: What does New York
4 State provide to the Native American tribes?

5 I don't disagree that Native American
6 tribes are terrific partners in certain
7 regions of New York State, but I wanted it
8 the converse, so what do we provide?

9 What does New York State provide to the
10 Native American tribes?

11 MR. KIERNAN: Well, I'm hesitating
12 because I'm not sure exactly if I understand
13 you, but I'm going to give my answer, if I
14 haven't addressed your question I would be
15 delighted to try again.

16 I think what first of all New York
17 State provides, compliance with the various
18 treaties that have been entered into with
19 the sovereign Indian Nations and addresses
20 its obligations under those treaties, but

21 very specifically as residents, not
22 citizens, but as residents, obviously the
23 tribal members use the State's roads, and
24 State facilities, that's true of the

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1 counties in which they are located as well.

2 They may avail themselves of healthcare
3 facilities of the State, they certainly
4 benefit from environmental protection
5 measures that the State undertakes, so they
6 are benefited by the State's efforts to
7 combat the pandemic of H1N1 flu virus, I'm
8 sure there are legions of examples that
9 clearly benefit, from law enforcement
10 actions and a host of others, and if that's
11 what you were driving at.

12 SENATOR JOHNSON: With respect to
13 gaming, for instance my understanding is the
14 Race and Wagering Board provides a 24/7
15 presence in all Native American run casinos,
16 is that correct?

17 MR. KIERNAN: That's my
18 understanding.

19 SENATOR JOHNSON: My understanding
20 also is pursuant to Compacts, the Native
21 Americans are required to pay for those

22 services, is that correct?

23 MR. KIERNAN: That's correct, there
24 is a negotiated fee.

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1 SENATOR JOHNSON: Have they paid?

2 MR. KIERNAN: Sorry?

3 SENATOR JOHNSON: Have they paid?
4 Have the respective Native American tribes
5 paid this fee?

6 MR. KIERNAN: Well, there have been
7 many disputes with respect to how much they
8 are obligated to pay, a Compact, like any
9 contract, often leads to differing
10 interpretations.

11 So I know with respect to the St. Regis
12 Mohawks, there is clearly a dispute ongoing
13 that has been brought to the attention of
14 the Governor, and that also is true of the
15 Seneca Nation.

16 My understanding with respect to each
17 is that there are discussions ongoing, the
18 Compacts require for arbitration to resolve
19 disputes, I believe that arbitration is
20 going to, if not underway, it is going to
21 occur and that -- at least I know with
22 respect to the Senecas that the amount of
23 money in dispute has been put into escrow,

24 so in that sense if there has been payment

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1 it's into an escrow fund, arbitration will
2 decide whether it's an adequate amount or
3 whether there has to be an allocation
4 different than the State believes.

5 And I think with respect to, although I
6 stand to be corrected because I may be
7 wrong, this is from memory and a meeting I
8 attended, that although there is a dispute
9 with the St. Regis Mohawks, they have paid.

10 SENATOR JOHNSON: How much is in
11 escrows with respect to the Senecas?

12 MR. KIERNAN: I believe it's \$40
13 million.

14 SENATOR JOHNSON: When were these
15 Compacts entered?

16 MR. KIERNAN: Maybe Mr. Rosen has the
17 answer to that, they were entered at the
18 time the casinos were allowed to open and
19 they were certainly not during the Paterson
20 administration, I don't think during the
21 Spitzer administration.

22 SENATOR JOHNSON: Mr. Rose, could you
23 maybe help us?

24 MR. ROSE: I probably should know the

1 exact dates, I don't, they were prior to our
2 administration.

3 The Senecas, as you know, we have a
4 Compact that involves three casinos with
5 them currently, and the Mohawks we have a
6 Compact with one -- with a single casino on
7 the Reservation, I don't know the exact
8 dates, there are representatives from here
9 the tribes who may be able to tell you.

10 SENATOR JOHNSON: You communicate
11 there is a dispute with respect to the New
12 York State and the Mohawks with respect to
13 these payments has there always been a
14 dispute, or is this something new?

15 MR. KIERNAN: There are current
16 disputes and I can only surmise that there
17 have been --

18 SENATOR JOHNSON: Have they paid for
19 the security back in the past?

20 MR. KIERNAN: I believe they have.

21 SENATOR JOHNSON: Let me just go over
22 to Senator Winner, but my understanding,
23 it's my understanding that during the Cuomo
24 administration there was a position Deputy

1 Senator for Native American Affairs, do you
2 believe that the creation or filling of this
3 position would actually provide a benefit to
4 Governor -- the Governor's office when it
5 comes to negotiating with the Native
6 Americans in New York State?

7 MR. KIERNAN: I think the answer to
8 that is probably yes.

9 When the short lived Spitzer
10 administration, there was a Special Counsel
11 to the Governor who worked within the
12 Counsel's Office named Richard Rivkind, some
13 of you may know him.

14 And he took over -- and he devoted
15 probably about 75 percent of his time to
16 Indian Nation affairs.

17 When the Spitzer administration left,
18 so did Mr. Rivkind, Sean Maloney, who was
19 First Deputy Secretary to the Governor then
20 assumed his responsibilities with a large
21 delegation of those responsibilities to Mr.
22 Rose.

23 Mr. Rose, now similar to Mr. Rivkind,
24 devotes about 75 percent of his time to

1 these items.

2 As the Paterson administration
3 gradually put into place its own panel, as
4 you know, all know he suddenly became
5 Governor and it wasn't with a lot of
6 planning, certain individuals have been
7 replaced.

8 Mr. Maloney left for a while, Dr. Cohen
9 assumed his responsibilities, now I largely
10 have them and I rely heavily on Mr. Rose.

11 Tax and Finance obviously is under
12 enforcement, he is very, very involved and
13 there are other individuals involved.

14 So were there to be as hoped results in
15 the negotiations or, excuse me, in the
16 litigations, so guidance, litigation as a
17 way of keep things happening and the
18 landscape changes as court decisions come
19 down, it probably would be useful to have
20 someone spending all of their time on
21 negotiations.

22 SENATOR JOHNSON: Mr. Kiernan, thank
23 you very much. I will turn it over to
24 Senator Winner and then Senator Klein.

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1 SENATOR WINNER: Mr. Kiernan, a few
2 questions, please. Thank you for being

3 here.

4 You testified earlier that the Court of
5 Appeals this winter was likely to hear a
6 resolution of, in particular, the tax
7 stamping issue of the legislation that was
8 signed by Governor Paterson in December of
9 2008.

10 MR. KIERNAN: Correct.

11 SENATOR WINNER: Does that litigation
12 include an appeal of the ruling of the
13 injunction that is also under 471(e) of the
14 Tax Law with regard to the collection of or
15 the issuance of the coupons, and then the
16 requirement that the taxes be collected
17 against individuals who are non-Indian
18 purchasers of cigarettes on Reservations?

19 MR. KIERNAN: Yes, thank you for
20 clarifying my statement, and the answer to
21 that is yes.

22 SENATOR WINNER: So that you have
23 specifically appealed that decision?

24 MR. KIERNAN: We have asked the

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1 Attorney General to appeal it and we have
2 done two things, we have asked the Attorney
3 General to appear as an amicus participant

4 in the Cayuga case, which is the case I
5 think you are referring to where the
6 enforcement actions were taken by Cayuga
7 Seneca Counties, and we have asked the
8 Attorney General to appeal the -- they have
9 also, they have also the Tuagel case,
10 whether that appeal has been perfected yet,
11 I don't believe it's been perfected yet, and
12 then the --

13 SENATOR WINNER: So the answer really
14 is you have not appealed the Day Wholesaler
15 case as of yet?

16 MR. KIERNAN: That's up to the
17 Attorney General as to when he files the
18 actual appeal, but I think they are awaiting
19 because there is an ancillary case, the
20 Cayuga case that may affect that, I believe.

21 As I started to say, there is a case in
22 the Second Circuit, a federal case in which
23 involves the Poospatuck smoke shops and the
24 Second Circuit has asked for briefing to

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1 certify that case to the Court of Appeals
2 and the Attorney General wanted to see the
3 result of that.

4 But we have asked and have insisted
5 that the Attorney General appeal the Day

6 Wholesale case, there is legal tactics
7 involved, but we expect the resolution
8 certainly the case to be heard in the winter
9 and resolution in the spring, at the latest.

10 SENATOR WINNER: So while it has not
11 been specifically appealed, it is your
12 understanding and your testimony here that
13 the issue of individual collection of sales
14 tax or cigarette taxes on sales will be also
15 addressed as well as the tax stamping issues
16 of the statute in 2008?

17 MR. KIERNAN: Correct.

18 SENATOR WINNER: Mr. Kiernan, I was
19 particularly troubled by your one statement
20 or one sentence on Page 2, and I would like
21 to have you clarify for me, you stated and I
22 quote, that "There are many who argue that
23 the only correct policy choice is to enforce
24 existing law with respect to tax collection,

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1 and that while that remains an option."

2 MR. KIERNAN: Yes.

3 SENATOR WINNER: Doesn't that send a
4 message that there are rewards for
5 misbehavior with respect to complying with
6 existing law?

7 MR. KIERNAN: No, I don't believe it
8 does, Senator.

9 SENATOR WINNER: Well, are there
10 other options out there that people can take
11 with respect to existing law as far as
12 noncompliance?

13 Does the Paterson administration have
14 some other laws out there that they don't
15 enforce, or another option?

16 MR. KIERNAN: Not that I'm aware of,
17 but what I was trying to convey in the
18 sentence that you are disheartened by, is
19 that, and as I said in my opening remark
20 that this is an update, that this is under
21 constant review and asking the Tax
22 Department to promulgate the regulations
23 which are ready and issue the coupons is an
24 option the Governor has at all times.

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1 He certainly has it now. But the
2 Governor is undertaking, as I have tried to
3 indicate, a review of some of the
4 assumptions underlying -- that underlie the
5 opinions of the State Police and not only
6 the assumptions but a review of some of the
7 intelligence that informs those assumptions.

8 Also the Governor is waiting for some

9 litigation developments and he is pursuing
10 some negotiation tactics, but the other
11 point that I hope to make in that sentence
12 is, and in my entire testimony, is to convey
13 from at least the perspective of the
14 Governor and not only this Governor, but
15 previous Governor's, that these issues are
16 extraordinarily complex.

17 Movement right now with respect to the
18 tax collections may produce more deleterious
19 consequences than benefit. And I was trying
20 to give a sense of that.

21 SENATOR WINNER: So you have
22 basically done a cost/benefit analysis as to
23 whether or not compliance with this dispute
24 is going to cost the State more money than

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1 the money that it's going to be brought in?

2 MR. KIERNAN: Well, I would say we
3 are doing that, but certainly I believe the
4 police have done that and their conclusion
5 is that there is no cost/benefit, there is
6 no benefit.

7 That's not necessarily our view, but
8 that is something that we need to entertain.

9 SENATOR WINNER: You need to

10 entertain that.

11 MR. KIERNAN: By entertain I mean to
12 engage in a further analysis.

13 SENATOR WINNER: And you believe that
14 that's a proper function of the Governor's
15 office, to make a determination whether or
16 not they should comply with the Law of the
17 State of New York as it relates to whether
18 or not it's going to cost too much to comply
19 with the law that he signed?

20 MR. KIERNAN: Well --

21 SENATOR WINNER: And voted for?

22 MR. KIERNAN: Yes, I understand,
23 Senator.

24 I mean you are sort of stating it in a

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1 highly charged manner and I don't think we
2 see it in that fashion.

3 I think the Governor's requirement is
4 to act in the best interest of the state,
5 and I think the question before him is would
6 it be in the best interests of the state to
7 have these coupons issued.

8 Now he's being advised in some quarters
9 that it would not be and being advised in
10 other corners that it would be and that
11 final decision hasn't been made.

12 SENATOR WINNER: Mr. Kiernan, to get
13 back, what if there were another
14 organization such as, for instance, for an
15 example the Convenience Stores Association
16 of the State of New York that made a
17 determination that they didn't want to pay
18 the tax or they don't want to collect the
19 taxes and that they have issued some threats
20 that they are going to be disruptive as a
21 result of their requirement to pay the tax.

22 Is that something that then it would be
23 an option of the Governor as to whether or
24 not that tax should be collected?

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1 MR. KIERNAN: Well, I think the
2 Governor would be dutybound to review all
3 the factors, but I don't think the
4 convenience stores, which are not a
5 sovereign nation, and which are not -- and
6 not parties to treaties, would pose any
7 kind, anywhere near the kind of threat or
8 whose resistance wouldn't be manageable or
9 whose fact of noncompliance would have other
10 deleterious consequences other than the fact
11 that's a much more linear question.

12 That they are obliged to pay, they

13 don't pay, it seems to me the State Police
14 would intervene and force them to pay; I
15 don't know.

16 SENATOR WINNER: I want to follow-up
17 on what you just indicated, you raise the
18 issue of sovereign nation status and I think
19 that's an extraordinarily important issue to
20 discuss.

21 Is the Paterson -- is it the Paterson's
22 administration's opinion that the sovereign
23 nation status of the Senecas, in particular,
24 and the other tribes, gives them the right

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1 not to collect the tax on sales on the
2 Reservation?

3 MR. KIERNAN: No, but it is --

4 SENATOR WINNER: Then why did you
5 mention that?

6 MR. KIERNAN: I was about to explain.

7 But it is a fact that Sovereign Nations
8 in this State believe that they are not
9 subject to this taxation.

10 Now they believe that that's their
11 right.

12 The Supreme Court of the United States
13 has said otherwise, that doesn't change the
14 fact that they accept the decision.

15 So it puts a little more texture into
16 the decisions, it makes some of the
17 decisions a little bit more exquisite.

18 They also, some of them, not all of
19 them, have a record of violent resistance
20 and so the likelihood of violent resistance,
21 it's impact has to be weighed in the
22 decision.

23 The decision hasn't been made, Senator.

24 SENATOR WINNER: Thank you.

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1 SENATOR JOHNSON: Thank you very
2 much.

3 Senator Nozziolo, then Senator Maziarz.

4 SENATOR NOZZIOLO: Thank you Mr.
5 Chairman. Thank you, counselors, for
6 elaborating in detail on these issues.

7 They are very important issues and we
8 appreciate your candor.

9 I also want -- I also appreciate the
10 support of the administration to the
11 property owners of those counties whose
12 lands are in question by a trust
13 application, there are a number of Indian
14 Nations, Native American Nations that are
15 pushing trust applications and we appreciate

16 the balance that you have provided in
17 supporting the questioning of those
18 applications.

19 But I need to continue Senator Winner's
20 inquiry here, because it is very troublesome
21 and appears to be almost upside down when
22 you have a United States Supreme Court
23 decision, which is the highest court in our
24 Nation, giving the sovereign States rights

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1 to implement taxation policies, not to
2 Native American Sovereign Nations, but to
3 those who purchase products from Native
4 American Sovereign Nations.

5 The purchasers of cigarettes, the
6 purchasers of petroleum products can be
7 taxed according to the Supreme Court
8 decision in Attea, which I think you have
9 referred to.

10 MR. KIERNAN: Yes.

11 SENATOR NOZZIOLO: I believe the
12 record in making this decision has to be
13 weighed very heavily on what the United
14 States Supreme Court has indicated and what
15 the State legislature in compliance with a
16 direct opinion of the United States Supreme
17 Court in four square put before the Tax

18 Department for implementation.

19 And I hope in your matrix these other
20 issues are given much less weight than the
21 fact that the law is the law. The Supreme
22 Court of the United States has spoken, the
23 State legislature, the State of New York has
24 spoken, and that you need to give much

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1 greater weight to those determinations than
2 a survey by Officer Perez whether or not
3 this implementation of the law would, in
4 fact, be welcome.

5 We just saw a 30 percent increase in
6 the state income tax, that was not a welcome
7 policy change.

8 We just saw the decertification of
9 hundreds of jobs in the empire zone program,
10 that was not a welcome decision, yet there
11 was never, ever, the hint of violence made
12 by those people who were directly impacted
13 economically by those decisions.

14 I just, I'm not -- I'm very hopeful
15 that fairness and peacefulness be the watch
16 word here.

17 And I do not proscribe to the fact that
18 this issue should be on the table because it

19 may be a revenue raiser for the State of New
20 York.

21 I believe strongly that this issue,
22 which I was the proponent of this tax
23 equality, be on the table because fairness
24 should be the governing doctrine of our

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1 state.

2 I hope you put that in your matrix.

3 And getting to the tax parity question,
4 and thank you for listening to my comments,
5 I hope you take them to the Governor.

6 On the tax parity issue, we have given
7 you tax parity to negotiate from in
8 establishing equal taxation among all the
9 Native American businesses in this State who
10 do business not with Native Americans, but
11 who do business with non-Native Americans.

12 Each of the Native American Nations,
13 you mentioned each of the groups, Oneidas,
14 Quaropas, Senecas and Shinnecocks, would be
15 receiving a parity if this law was
16 implemented.

17 If you get the negotiations, for
18 instance for the Senecas to engage in tax
19 parity, how would that be enforced among the
20 Senecas?

21 MR. KIERNAN: If they were to agree
22 to it, which they certainly have not to this
23 point, but if they were to agree to it,
24 obviously the -- there would be negotiation

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1 which would result in some sort of a
2 document, I don't know what the nature of
3 that document would be, it might be a
4 memorandum of understanding, or a Compact,
5 probably, preferably.

6 SENATOR NOZZIOLO: So what happens
7 then if, and let's not mention any
8 particular nation, let's just say you have
9 an agreement with nation X or Y, that
10 whatever that agreement is it would be
11 subject only to a parity for only those
12 nation run businesses, is that not correct,
13 a Compact in other words couldn't be
14 enforced if it was to an individual Native
15 American who set up business within a --

16 MR. KIERNAN: I think the endeavor
17 would be to have it cover not only nation
18 run businesses or sanctioned businesses, but
19 individual businesses that are advantaging
20 themselves by virtue of the tax exempt
21 status that they claim on Reservation lands.

22 And any Compact or writing would
23 obviously have to have enforcement
24 provisions and verification provisions if it

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1 were to be workable, so that would be part
2 of the negotiation.

3 If I could just add one further thing
4 to your comment which I will take to the
5 Governor, I assure you, but one of the
6 things that this Governor has done, occurred
7 when he signed the legislation promulgated
8 by the legislature in December of 2008 and
9 he said he was going to enforce that.

10 He chose that course because it was
11 less intrusive, it was full enforcement of
12 the law, but one that would be designed to
13 reduce the specter of violence.

14 Now, that was enjoined by the court and
15 we are hoping that that injunction will be
16 lifted because the Governor intends to
17 enforce that law.

18 SENATOR NOZZIOLO: When Mr. Comiskey
19 testified earlier, my understanding that
20 there was a green light or a stoplight in
21 the intersection of policy in Governor
22 Paterson's administration and the Tax
23 Department was awaiting the light to go from

24 red to green to be able to begin the

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1 implementation of the law.

2 Would you comment on that description?

3 MR. KIERNAN: Well, green light red
4 light, we haven't used that parlance, but
5 certainly the Tax Department is ready to
6 promulgate the regulations and issue the
7 coupons.

8 And the Tax Department also believes
9 that the injunction that's pending in the
10 Fourth Department would be self-vacating if
11 we were to issue the regulations and the
12 coupons.

13 The Governor doesn't believe the court
14 is right and wants to see and hopes to see
15 that the law will be settled by a higher
16 Court which will say the injunction should
17 be lifted, rather than us do it on our own,
18 which would probably spawn more litigation.

19 SENATOR NOZZIOLO: Thank you. One
20 last question. Back to the parity issue,
21 wouldn't we not have the same problem if
22 somehow you did get the Nations across the
23 State to agree to the parity, and you should
24 add assuming the parity issue could be

1 enforced, what happens if one Nation holds
2 out, aren't we back to the same situation
3 that we are in now, where one nation would
4 have a -- their own distribution and
5 marketing issues not restricted by any
6 parity agreement, putting everything, every
7 other Nation who agreed to a parity
8 agreement, if the same both as those
9 businesses who are now being put out of
10 business because of the unequal taxation
11 system?

12 Unless you have agreement with
13 everyone, how can you have an agreement with
14 anyone?

15 MR. KIERNAN: Well, I mean what if
16 questions are always hard to answer.

17 However, I think that positing the
18 premise that you articulated, if there were
19 to be agreement with all except one tribal
20 Nation, seems to me you have a much more
21 manageable problem.

22 And arguably, if one were to resist
23 then the others were to comply that
24 enforcement against the one that refuses to

1 comply would not be burdened by the other
2 Nations joining in as an act of solidarity,
3 it would be a different problem.

4 But you certainly would have an
5 entirely different dynamic, there might be
6 trouble, but I think that would run to the
7 category of good trouble.

8 SENATOR NOZZIOLO: Thank you very
9 much. Thank you, Mr. Chairman.

10 MR. KIERNAN: You are welcome,
11 Senator.

12 SENATOR JOHNSON: Senator Golden,
13 then Senator Maziarz.

14 SENATOR GOLDEN: Thank you, Mr.
15 Chairman.

16 Thank you, Mr. Chairman. The -- I,
17 along with some of my colleagues, definitely
18 have some issues with some of the testimony,
19 and if you think they were charged, let me
20 tell you, Mr. Kiernan, this is not a good
21 day for us here in this great State.

22 One on the first page you say a U.S.
23 dollar spent on Indian Reservation in New
24 York is a dollar put into motion in the New

1 York State economy. Every time that dollar
2 is respent or invested, it's good for New
3 York.

4 I don't think there is a person in this
5 room that would disagree with that
6 statement.

7 But I think for the people across this
8 great State that do everything by the books
9 and do it legally, you're saying for those
10 people today it's all right to go to the
11 Indian Reservation and get your untaxed
12 cigarettes because that's going to be good
13 for New York.

14 Because those dollars are going to be
15 recirculated, is that what you're saying,
16 sir?

17 MR. KIERNAN: No, of course not,
18 Senator.

19 SENATOR GOLDEN: Then explain to me.
20 Can you break that down any other way than I
21 just broke it down?

22 MR. KIERNAN: First of all, I think
23 the statement stands on its own, but what
24 you're saying is that the State thinks it's

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1 a good thing people break the law, and
2 that's obviously not true.

3 SENATOR GOLDEN: Your statement would
4 give people across this great State -- that
5 one statement would indicate exactly that,
6 that it's okay to break the law when it
7 comes to purchasing untaxed cigarettes in
8 Indian Reservations.

9 MR. KIERNAN: Well, one of the
10 problems with being a lawyer is whenever you
11 say something by the nature of the whole
12 profession is that some people agree and
13 some people disagree, and I guess that's
14 true of politics also.

15 I think what I was trying to convey is
16 that these issues are very complex and the
17 economic benefit that comes from good
18 relations with the sovereign Indian Nations
19 is substantial.

20 And it would not be in our interest to
21 disrupt what otherwise are very good
22 relations.

23 And so we are seeking a way, and this
24 is what I was trying to convey it in such a

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1 way that matters proceed by agreement.

2 Now, that is not to say that this
3 government does not intend to enforce the

4 law. As I indicated to Senator Nozziolo, if
5 the injunction were to be lifted on the
6 statute that the Governor signed on December
7 2008, we would enforce.

8 SENATOR GOLDEN: We want to work with
9 our Sovereign Nations in the great State of
10 New York.

11 We just want what we believe is fair
12 and right for every taxpayer here in the
13 State of New York.

14 There is a question here the Paterson
15 administration is also vigorously enforcing
16 against bootleggers and smuggling and
17 assisting the federal enforcement actions.

18 Could you please tell me what great
19 seizures we have made and what great hires
20 we have made, what task force has been
21 increased in dollars to do this?

22 As a matter of fact, I believe if
23 anything they have cut dollars from the task
24 forces that were going in and going into

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1 these different bodegas that were selling
2 the untaxed cigarettes.

3 Can you help me with that?

4 MR. KIERNAN: I believe I can give
5 you only limited help.

6 But Commissioner Comiskey's testimony
7 has an appendix attached to it, which he
8 outlines several of the enforcement measures
9 to which I refer.

10 I also would point out to you that
11 although I personally cannot verify this,
12 the statement is often made, and believed
13 that New York State has the most vigorous
14 anti-tax enforcement of any state in the
15 United States.

16 SENATOR GOLDEN: They will come up
17 right behind you and they will agree with
18 you, we used to have Sheriffs that used to
19 go into all of these different locations and
20 seize these cigarettes, they are not doing
21 that anymore, so that's one less
22 authoritative branch that's going in and
23 making these seizures.

24 They will be able to testify, they will

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1 also be able to testify that there is more
2 money coming out of these Reservations than
3 the \$95 million that you believe are coming
4 out that was put into your budget.

5 Then we had, I believe, Mr. Rosenthal
6 put up a figure of about \$1.6 billion.

9 has been given and it is that number with
10 the assumption of full compliance, and full
11 compliance does not appear to be a
12 reasonable assumption that the Governor has
13 to act on.

14 Now, you can throw out the number \$750
15 million, anyone can throw out a number, but
16 it seems to me it's incumbent on other
17 people who put up numbers to have some
18 support for it.

19 We have some support for the number
20 \$225 million.

21 SENATOR GOLDEN: The industry seems
22 to have some empirical data as to the number
23 of cartons that are coming into the State of
24 New York.

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1 MR. KIERNAN: One can ascertain the
2 number of cartons that comes into the State
3 legally.

4 But what is done is there is also by
5 interpolation, they take numbers of, I think
6 it goes back to some point in the '90s, I
7 have seen an analysis, I can't quote it, but
8 they simply say if the tax that currently
9 exists was imposed on the number -- the

10 revenues generated X number of years ago,
11 then the revenue would be this today.

12 That also is assuming full compliance,
13 and it doesn't have any netting effect and
14 it's not a very good analysis, in our view.

15 SENATOR GOLDEN: That's what the
16 problem is, nobody seems to like your
17 analysis, nobody seems to like anybody's
18 analysis that is going forward here.

19 But I do know that we do have a \$4
20 billion drop dead date of December 15th here
21 for the State of New York, or we become much
22 like California in starting to issue IOUs.

23 That grows to \$18 billion by 2012.

24 The City of New York has a \$2 billion

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1 deficit which also continues to grow.

2 But this is okay, that others don't
3 have to pay their taxes and it's okay for
4 the debt in the State of New York to be
5 passed on to the taxpayers.

6 They are already indebted with their
7 credit cards, they are already indebted
8 trying to pay for their mortgages, they are
9 already indebted trying to pay for their car
10 loans, but now we are telling them we are
11 going to get more debt here in the City and

12 State of New York, but there is some money
13 out there with the Sovereign Nations and we
14 are not going to worry about it, because
15 there could be some problems, it might cost
16 us \$2 million a day to collect that.

17 And we won't be able to collect that
18 because it's going to cost us more money to
19 collect it than we are honestly going to
20 make.

21 But we can't really put a dollar figure
22 on how much we are going to make because the
23 numbers are all over the place from \$250
24 million to \$95 million which is realistic,

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1 to a \$1.6 billion which is said to be
2 unrealistic, so I still say \$750 million
3 number is realistic, and I believe the
4 People of the State of New York deserve it
5 from the State of New York to go out and to
6 collect those taxes and to stop passing that
7 debt down to the taxpayer here in the City
8 and State of New York.

9 Do we have a problem with that?

10 MR. KIERNAN: I think --

11 SENATOR JOHNSON: Excuse me, could we
12 have some order, here?

13 SENATOR GOLDEN: Thank you, Mr.
14 Chairman.

15 MR. KIERNAN: Senator, there is no
16 question about that the State faces an
17 unprecedented severe revenue crisis.

18 However, I think there is a very, very
19 serious risk as to whether the immediate
20 enforcement of the cigarette and fuel
21 taxation laws against Native American
22 Reservations will produce any sort of net
23 benefit that will address the serious
24 revenue crisis that we have.

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1 Now that's a fair question.

2 SENATOR GOLDEN: And you gave my a
3 fair answer, and guess what, we have a drop
4 dead date of December 15th here to pay our
5 bills.

6 So let's have a drop dead date of
7 spring where you are going to collect the
8 money, and if I look at this, correct me if
9 I'm wrong with the parity, not only do we
10 set parity, the tribe sets the parity, the
11 money goes back into the communities around
12 the Seneca Nation and around the other
13 Sovereign Nations.

14 I mean there seems to be a win/win here

15 for our Tribal Nations across the State of
16 New York, again, at the cost of the
17 taxpayer.

18 MR. KIERNAN: I disagree with that.
19 I think the win would be equally shared,
20 there would be a win for the State, a rather
21 large win for the State, but that's --

22 SENATOR GOLDEN: Then why can't we
23 seem to get to that negotiated dead end?

24 Like my colleague best pointed out, why

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1 can't we have an agreement between our
2 Nations to do that?

3 Let's have a drop dead date here, and
4 courts may make that decision very shortly,
5 but let's have a drop dead date of this
6 becoming law, and if they don't come into
7 agreement, we collect it?

8 MR. KIERNAN: I'm not sure that would
9 be the best negotiating technique, but it
10 may be one that's worth considering,
11 Senator.

12 SENATOR GOLDEN: I have to tell you,
13 I believe our Sovereign Nations get
14 education, they get healthcare, they get
15 Social Security.

18 State deserve more.

19 There is education, there is
20 healthcare, there is Social Security, there
21 is public assistance and even stimulus going
22 in to our Sovereign Nations.

23 Is it too much to ask our Sovereign
24 Nations to collect tax on non-tribal

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1 members?

2 Is that too much to ask? I ask you,
3 sir?

4 MR. KIERNAN: No. It's not too much
5 to ask.

6 SENATOR GOLDEN: Is it too much to
7 ask the Governor of the State of New York to
8 enforce the law?

9 MR. KIERNAN: Of course not, Senator,
10 but the Governor needs to enforce the law in
11 a way that makes the enforcement meaningful.

12 And he needs to do it in a way that's
13 in the best interests of the State, and that
14 is a decision he's weighing.

15 SENATOR GOLDEN: Well, in closing I
16 guess I was a little bit more charged than
17 my colleague, I apologize.

18 But, you know, the people of this great

19 State, they really deserve more.

20 19.5 million people and the debt of
21 this State and the debt of this City it's
22 just unbelievable that it could be as high
23 as it is.

24 And that we cannot actually get agreed

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1 upon contracts with our Sovereign Nations
2 over 20 years here in this great State tells
3 me that we are going to have a very
4 difficult time doing it when the courts come
5 in and tell us to do it, or whether you have
6 a drop dead date of the spring.

7 But I would strongly say and urge to
8 you, sir, that if there is no drop dead
9 date, or if the court comes back and does
10 say enforce those laws, that we do, in fact,
11 do exactly that.

12 We go out there without fear and we go
13 in to this great state and we tell them that
14 we are a law abiding State, and that's why
15 we broke away from England, England demanded
16 taxes from us, we fought them and we became
17 our own nation because England gave us and
18 took the wrong taxes and too much out of
19 this nation.

20 We became a great nation based on a

21 great Constitution and that Constitution
22 gives us the right to be able to be fair to
23 all of its taxpayers across the State and
24 across the nation.

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1 We owe fairness to those 19.5 million
2 people, and I would ask the Governor of the
3 State of New York to step up and do the
4 right thing, enforce the law if, in fact,
5 you cannot get an agreement by this spring,
6 if, in fact, the courts do not do that.

7 SENATOR JOHNSON: Thank you, Senator
8 Golden.

9 I know Senator Maziarz, short quick
10 questions, then we are going to take a five
11 minute break and then the Seneca Nation we
12 will permit the testimony.

13 We will allow a quick break so people
14 can stretch their legs, the stenographer is
15 doing a terrific job, so non-committee
16 members, short questions, please.

17 SENATOR MAZIARZ: Thank you very
18 much, Mr. Chairman, for your courtesies.

19 I am not going to ask a question, but I
20 do think that the record has to be at least
21 a little fairly balanced here.

22 I just want to say for the record that
23 I totally, totally disagree and disassociate
24 myself with the comments of my colleague,

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1 Senator Golden.

2 I do not know the background of
3 everyone sitting up at this table, I
4 probably would say that I am the only one
5 who has grown up and lived and currently
6 lives next to a Native American Reservation.

7 And I can tell you and the Chairman
8 asked you a question, Mr. Kiernan, about
9 State services on the Reservation.

10 When I was a kid we all went to public
11 school, they went to the Indian school; and
12 they were not equal, I can tell you that.

13 The roads on the Res were always the
14 last to be paved, always the last to be
15 taken care of, healthcare was almost
16 nonexistent.

17 Now, in your statement, Mr. Kiernan,
18 you talked about the Oneida Nation and the
19 Oneida you sort of introduced the gasoline
20 into this discussion, too, so I feel I can
21 introduce something else.

22 I think it's just a little bit
23 disingenuous for the Oneidas to say we are

24 going to negotiate tax parity for cigarettes

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1 and gasoline sales and not mention gaming
2 revenue.

3 Because if you talk to the Oneidas
4 about gaming revenue, they would say no,
5 hands off, no way, no how.

6 The Senecas on the other hand have
7 contributed hundreds of millions of dollars
8 to the State of New York, to local
9 governments in western New York from gaming
10 revenue.

11 For the record, that should be noted.

12 And you talked about a -- you talked
13 about money being held in reserve as if
14 there was some dispute of that.

15 I think, and I watch this pretty
16 closely in western New York, hundreds of
17 millions have been paid out by the Seneca
18 Nation, I think if there is anything being
19 held in reserve it may be because there is a
20 dispute between the City of Buffalo and the
21 county of Erie as to how to split that money
22 up.

23 I think the Senecas have actually put
24 it in escrow to allow those two entities to

1 resolve their dispute.

2 So, I just think for the record that
3 should be made clear.

4 Again, thank you very much for your
5 courtesies, and I could go on for a long
6 time, but I won't, and thank you.

7 I think the Governor, the Governor, the
8 Governor should try to negotiate this
9 dispute at all costs because in the end
10 violence, particularly in western New York,
11 will be horrible, will be horrible.

12 People will be seriously hurt, people
13 may be killed, and it's just not worth it.

14 Thank you.

15 SENATOR JOHNSON: Thank you very
16 much, Senator Maziarz.

17 SENATOR GOLDEN: Obviously my name
18 was mentioned here so I am going to come
19 back with a nice little retort here.

20 Just plainly stating that the facts are
21 the facts, taxes should be paid, the People
22 of the State of New York deserve more, and
23 Senator Maziarz is a good colleague, good
24 friend, can make any comments that he wishes

1 to defend the great nation, we want to work
2 with the great Sovereign Nations but we want
3 the Sovereign Nations to work with the
4 taxpayers across this great state.

5 Thank you.

6 SENATOR JOHNSON: Senator Griffo.

7 SENATOR GRIFFO: Thank you, Senator.

8 I appreciate that because it's been so
9 long I want to make sure my memory is right.

10 Counsel, despite court action, can you
11 enforce the legislation of 2008 that was
12 signed by the Governor, yes or no?

13 Can you enforce it despite the court
14 enjoining you?

15 MR. KIERNAN: We could issue the
16 regulations and the coupons and therefore,
17 perhaps, the injunction will be lifted.

18 SENATOR GRIFFO: Are you currently,
19 are you or any member of the executive
20 branch negotiating with any of the Nations?

21 MR. KIERNAN: Yes.

22 SENATOR GRIFFO: You said that the
23 Tax and Finance Department has a detailed
24 financial analysis and that's how you

1 determined that number of potential economic
2 impact, correct?

3 MR. KIERNAN: That's how it
4 determined it, yes.

5 SENATOR GRIFFO: You did say on the
6 other hand, though, that you can't site as
7 gospel the statistics that you are receiving
8 from law enforcement, correct?

9 MR. KIERNAN: Well, those are
10 estimates.

11 SENATOR GRIFFO: So don't you feel,
12 and I know we are all concerned about the
13 health and safety of the residents of the
14 state, don't you feel that if the one agency
15 of the executive branch could come up with a
16 detailed statement, that any other agencies
17 associated with it, whether it be public
18 safety, DCIS, the State Police should also
19 be providing that type of information so
20 that you can make a true and accurate
21 analysis and evaluation?

22 MR. KIERNAN: Well, Senator, I'm
23 going to -- I'm not trying to be coy, but
24 I'm not an economist, I don't know if what

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1 you suggest can be done, I certainly think a
2 consensus could be arrived at.

3 There is a lot of data, but there also
4 have to be a lot of assumptions made.

5 SENATOR GRIFFO: But we have those
6 type of planning documents in place from
7 CMO, for economic -- for natural disasters,
8 for potential threats with the Division of
9 Public Safety and Homeland Security.

10 So I think I guess my point is I'm
11 hearing two different things here.

12 In one sense you are saying yes, we
13 have a specific number, and the other we
14 can't give you gospel.

15 I think it's important when you are
16 describing the complex nature of everything
17 that's taking place.

18 MR. KIERNAN: Fair enough.

19 SENATOR GRIFFO: Thank you, Chairman.

20 SENATOR JOHNSON: Thank you, Senator.

21 We are going to take a, no joke, five
22 minutes, real five minute break, stretch
23 legs, take a break, then I am going to
24 invite J.V. Seneca, Co-Chair of the Seneca

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1 Nation of Indians to give testimony.

2 (At this point in the proceedings
3 there was a recess, after which the

4 deposition continued as follows:)

5 SENATOR JOHNSON: I don't have a

6 gavel to bang, I will ask members of the

7 audience to have a seat, to take a seat.

8 At this time I invite Jason Seneca and

9 -- Councilor, Tribal Councilor and Rob

10 Quarter, counsel to the Seneca Nation before

11 us.

12 I ask you gentlemen, are your other

13 three members going to be testifying, those

14 at the table, are they going to testify as

15 well, or you?

16 MR. SENECA: No, these are fellow

17 counselors from the Seneca Nation counsel, I

18 am one of 16.

19 We have Tim Simmerson here, Brenda John

20 and Linda Doxnayer from our Tribal Council,

21 I asked them to come up and sit with us.

22 SENATOR JOHNSON: Will they be

23 testifying?

24 MR. SENECA: I'll be giving the

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1 testimony. We can all answer questions if

2 you have anything that needs to be asked.

3 J A S O N S E N E C A

4 R O B P O R T E R

5 T I M S I M M E R S O N

6 B R E N D A J O H N

7 And

8 L I N D A D O X N A Y E R

9 Called as a witness, having been first
10 duly sworn by the Counsel to the Committee,
11 was examined and testified as follows:

12 SENATOR JOHNSON: Mr. Seneca, is that
13 the appropriate, honorable or Councilor,
14 what is the best way to address you?

15 MR. SENECA: Call me J.C.

16 SENATOR JOHNSON: I want to thank you
17 very much for coming today.

18 MR. SENECA: Thank you for the
19 opportunity.

20 SENATOR JOHNSON: I truly appreciate
21 your patience through the three previously
22 witnesses.

23 I am going to open the floor for you,
24 Mr. Porter, or anybody else to provide

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1 testimony and then we will proceed from
2 there.

3 So thank you again, and the floor is
4 yours.

5 MR. SENECA: Thank you. I appreciate
6 once again the opportunity and, it's an

7 honor for me to come here to be able to
8 testify on behalf of the Seneca Nation here
9 before your committee today.

10 I also would like to thank my fellow
11 counselors here that have traveled here to
12 New York to join me up here at the table to
13 sit with us to answer any questions that the
14 Senators may have at that level.

15 I also would like to thank the Seneca
16 people for being here, for traveling across
17 the State, I know it was a long trip and
18 certainly your commitment and travel is
19 appreciated by us here testifying on behalf
20 of the Nation.

21 Certainly if there is only a handful of
22 us here today we represent nearly 7,800
23 Senecas here today in this room and also
24 future Senecas and future generations that

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1 will come after us.

2 Certainly there has been some, should I
3 say, spirited dialogue this morning,
4 certainly some things I could understand,
5 and mostly a lot of things I didn't agree
6 with.

7 So I stepped out of the room a couple
8 of times, certainly, listening to what was

9 going on, and I commend our people here
10 traveling from not only Seneca Nation but
11 other Indian Nations here and in Rome for
12 not getting too spirited.

13 Certainly I compliment them on their
14 control because certainly I've been in many
15 heated meetings on territory where they say
16 their peace, so I think they should be
17 commended for that, and I think if they do
18 want to speak out, they are used to that and
19 should be awarded the opportunity for their
20 voice to be heard, certainly here today, and
21 I will not condemn them from speaking out.

22 So if they have something to say, I
23 welcome it.

24 There is a lot of talk about the issue

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1 in regards to collecting taxes on Indian
2 Nations here in New York, and I just want to
3 give you a brief -- before I do my
4 statement, just a brief note here in regards
5 to really what is the law that is out there.

6 Back in 1999 the New York Association
7 of Convenience Stores filed suit against
8 Commissioner Urbach at the time and in that
9 case Judge Lang in July of 1999 in a

10 decision then held, "Notably Indian tribes
11 have immunity from and cannot be sued to
12 accomplish tax collection. This immunity
13 extends to tribal retailers."

14 Judge Lang's decision was affirmed by
15 the New York Appellate Division in year
16 2000.

17 In July of 2001 a leave to appeal was
18 denied by the New York Court of Appeals, and
19 then further in December of 2001 the United
20 States Supreme Court denied a Writ of
21 Certiorari, therefore Judge Lang's 1999
22 decision regarding the immunity from State
23 tax collection is the law.

24 So I have if you have any questions on

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1 why you can't collect the tax, certainly
2 within your own court system has defined
3 those reasons why.

4 I want to thank everybody who had a
5 part for putting this testimony together and
6 once again I am honored on behalf of the
7 Seneca Nation to be able to provide you with
8 this information here today.

9 Good afternoon, Mr. Chairman and
10 members of the Committee.

11 I am here today to share with you the

12 perspective of the Seneca Nation of Indians
13 on the question before this committee.

14 Which is why doesn't New York State
15 collect taxes on commerce taking place on
16 Indian land in the State.

17 The answer to that question put simply
18 is that your government has no authority to
19 assess taxes in our territory.

20 That the United States has promised the
21 Seneca Nation that your taxes would not
22 apply in our territory and, perhaps most
23 importantly, that you cannot force the
24 Seneca Nation and the Seneca People to be

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1 the State's tax collectors.

2 I believe that members of this
3 committee and the State legislature as a
4 whole have not been presented with all of
5 the facts surrounding the Nation's treaty
6 rights, legal history and economic impact on
7 the State.

8 And so I would like to share with you
9 additional information pertaining to the
10 question before you.

11 The Seneca people have lived in what is
12 now western New York for nearly 1,000 years.

13 We are a historic member of the 6
14 Nations Confederacy of the Shoshone and
15 since 1848 we have governed ourselves as an
16 independent Constitutional Republic.

17 In 1794 the Seneca Nation and the other
18 Six Nations entered into a lasting treaty of
19 peace and protection with the United States
20 at Canandaigua, the Canandaigua Treaty was a
21 treaty of peace and it contained promises to
22 the Seneca Nation and the other Six Nations
23 unlike any other Indian treaty.

24 It not only provides that the United

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1 States will recognize title to our lands,
2 but also provides that we will be recognized
3 in the free use and enjoyment of those
4 lands.

5 This means that our lands belong to the
6 Seneca Nation and the Seneca people and that
7 no other government has the right to
8 interfere in how we use those lands.

9 It is for this reason that New York
10 State has no authority over us, our lands or
11 the commerce taking place on our lands.

12 This promise was once again made to us
13 in 1842.

14 The Buffalo Creek Treaty of 1842 was

15 entered into after the State and its land
16 speculators failed to steal our remaining
17 lands from us.

18 To tax those lands and to have us
19 physically removed to lands west of the
20 Mississippi River.

21 The Buffalo Creek Treaty provides that
22 the United States will protect such of the
23 lands of the Seneca Indians within the State
24 of New York as may, from time to time,

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1 remain in their possession from all taxes
2 and assessments for roads, highways or any
3 other purpose until such lands shall have
4 been sold and conveyed by said Indians.

5 What this means in the clearest of
6 terms is that New York State has no
7 authority to tax us, our lands or anything
8 else, or anyone in our territories today.

9 We have always interpreted our treaty
10 rights this way, and we will fight to uphold
11 these rights now and forever.

12 You may wish to refer to state and
13 federal court decisions that suggest the
14 State has a right to impose as taxes within
15 our lands.

16 But it is a fundamental principle of
17 international law that every sovereign
18 nation has the right to interpret its
19 treaties with other Nations as it sees fit.

20 Your court cases are meaningless to us
21 and do not bind our conduct.

22 We interpret our treaties with the
23 United States as the words clearly state, as
24 we understand them and within the context of

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1 history.

2 That history is clear. For over 200
3 years New York State has illegally tried to
4 steal our lands, assert jurisdiction over
5 what lands we have left and to impose taxes
6 on us in our activities.

7 For about 25 years now the State has
8 been trying to collect excise taxes on
9 tobacco and motor fuel sold in our
10 territories.

11 For the reasons I have just described,
12 these actions violate our treaties with the
13 United States and are unlawful under Nation
14 and Federal Law.

15 And yet, perhaps, due to ignorance of
16 these rights, or simple greed, State
17 officials have continued this crusade

18 against us.

19 In many ways the State has created its
20 own problem. It has imposed higher and
21 higher taxes on various products, especially
22 cigarettes.

23 Apparently to your surprise and dismay
24 the higher taxes have created new markets

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1 for surrounding states, Canadian provinces
2 and Indian territories.

3 Your policies have driven consumers to
4 the new markets tremendously and indirectly,
5 including the internet.

6 Our nation and our people have already
7 been tax immunity, but we are not foolish,
8 and if circumstances arise that give us an
9 opportunity to improve our long suffering
10 economy, we are going to take it.

11 Our tobacco and motor fuel trade has
12 grown considerably over the years.

13 It has provided much needed revenue for
14 our nation, our people and our non-Native
15 employees.

16 We estimate that over 1,000 jobs are
17 tied to our tobacco economy. With our
18 gaming enterprises the Seneca Nation

19 employees over 6,300 people every day and
20 injects \$1.1 billion into the western New
21 York economy.

22 For this reason I am sure you can
23 understand why the Nation, our people have
24 so vigorously resisted the efforts to tax

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1 commerce in our territory.

2 Not only do we have the treaty rights
3 to State tax immunity, but your economic
4 well-being is tied to it.

5 Recent state Governors have understood
6 this and have wisely adopted what is called
7 the forbearance policy to recognize our
8 treaty immunity from State taxation.

9 They have not all accepted this policy
10 easily.

11 But we appreciate that Governors Cuomo,
12 Pataki, Spitzer and Paterson have chosen to
13 base our relationship on diplomacy and
14 respect rather than unilateralism and
15 conflict.

16 Four different New York State
17 Governor's have pursued a wise course in
18 dealing with the Seneca Nation and all of
19 the Indian Nations in the State on taxation
20 issues.

21 Despite this bold effort, the State
22 legislature has never followed the
23 Governor's lead and has actually acted in
24 contrary fashion, choosing instead to

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1 embrace a policy of confrontation and
2 disrespect.

3 An important matter for you to consider
4 is whether the State legislature should once
5 and for all recognize our federally
6 protected treaty rights and work to
7 establish a lasting peace.

8 In 2006 the nation's counsel enacted
9 our import/export law. This law established
10 strict controls on the flow of tobacco
11 products into and out of the nation's
12 territory.

13 Authorized stamping agents must affix
14 the nation's own encrypted and coded stamp
15 to every pack of cigarettes sold in our
16 territory.

17 The Seneca Nation has acquired the
18 latest stamp and tracking technology that
19 exceeds the systems in place in New York
20 State.

21 The nation thus has the ability to

22 track all tobacco packages with a fool-proof
23 stamp and electronic infrastructure that can
24 tell us the complete origin of each product

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1 sold on our territories.

2 The nation receives an administrative
3 fee of \$.75 per pack which is used
4 specifically for health and education
5 programs.

6 Once the cigarettes are stamped they
7 can then be sold to Nation licensed
8 retailers who are also subject to important
9 restrictions on sales.

10 Sales must be consistent with a minimum
11 pricing structure which governs the sale of
12 all a brands within the Nation's
13 territories.

14 Sales to minors are prohibited and
15 sales cannot exceed 49 cartons per
16 transaction, comporting to the federal
17 Cigarette Contraband Trafficking Act which
18 sets 50 cartons as the allowable limit on
19 the amount of unstamped cigarettes that an
20 individual may possess.

21 In addition, export shipments to
22 non-federally recognized tribes are
23 prohibited.

24

The import/export law is enforced by

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1 the Nation's Import/Export Commission.

2 Since its creation, the Commission has
3 been involved in several different
4 enforcement actions taken that resulted in
5 imposition of significant fines and
6 consequences for those involved.

7 These enforcement efforts are in accord
8 in our Nation with such agencies as U.S.
9 Bureau of Tobacco, Alcohol and Firearms and
10 U.S. Postal Service, local law enforcement
11 and even the State ATF.

12 Recently the Commission was involved in
13 a sting operation with federal and state
14 agencies to help expose the cigarette
15 diversion efforts of State stamping agents.

16 The Nation's role was favorably cited
17 by State officials handling the case to
18 cancel the company's State license.

19 The nation has worked most closely with
20 a federal BATFE because the United States,
21 as our treaty partner, and we believe that
22 this is the most natural alliance in our
23 joint effort to regulate tobacco products.

24 We are proud of our efforts to date

1 that we have been favorably recognized by
2 the United States Government as a result.

3 Seneca Nation believes that tobacco
4 products must be comprehensively regulated
5 by all responsible governments, we support
6 any and all coordination efforts with all
7 governments that is directed towards that
8 important goal.

9 Our critics have told you that there
10 are hundreds of millions of dollars, maybe
11 even \$1 billion that the State loses because
12 of our treaty protected tax free Indian
13 commerce.

14 This assessment is untrue and
15 misleading. And the continued efforts to
16 promote this lie by our critics is
17 scapegoating and worse.

18 You should not be misled by their
19 deception.

20 To our knowledge the State Tax
21 Department has never commissioned and
22 publicly reported any economic analysis of
23 the State's cigarette taxation efforts that
24 supports a \$1 billion tax loss to the State

1 from Indian territory sales.

2 This number was created out of thin air
3 by the State Convenience Store Association.

4 Because we believe that data and
5 reasoned analysis and not lies and
6 half-truths should form the basis of sound
7 public policy, we have commissioned our own
8 economic studies of the State cigarette
9 taxation policies and are glad to share them
10 with you.

11 In a study conducted by Harvard
12 economist Jonathan Taylor, he concluded that
13 the nation's tobacco based economy actually
14 generates net economic benefits to the state
15 rather than net losses.

16 Even though the nation's tobacco trade
17 is not subject to state taxation, the ripple
18 effects of the nation's trade spill into the
19 State and western New York regional economy
20 as a nation government and nation citizens
21 spend that tobacco profits in off territory
22 economy.

23 Moreover, given that the sizable
24 percentage of the nation's tobacco trade

1 derives from the internet based national
2 market, significant revenues are infused
3 into the State economy from out-of-state
4 customers.

5 Jonathan Taylor concludes that the
6 nation's tobacco economy generated \$195
7 million in State gross domestic product in
8 2005.

9 In other words, for every \$1 of gross
10 profits that are accrued through the Seneca
11 Nation tobacco economy, New York State
12 gained \$1.67.

13 In addition to this direct benefit to
14 the State economy, the State also benefits
15 from the payments it receives from the major
16 tobacco companies pursuant to the Master
17 Settlement Agreement.

18 Despite the fact the State's share of
19 the MSA funds include cigarettes sold on
20 Seneca Nation lands, the Nation receives
21 none of these funds.

22 For some years now Philip Morris, the
23 largest U.S. cigarette manufacturer, has
24 been seeking a downward adjustment of the

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1 monies paid to New York under the MSA on the
2 theory that the State has not been

3 diligently enforcing its laws relating to
4 Indian cigarette tax collection.

5 The State Office of the Attorney
6 General has consistently defended the
7 forbearance policy as consistent with
8 diligent State enforcement.

9 However, were the State to alter its
10 enforcement position and commence new
11 efforts at the Indian tax collection, the
12 Attorney General estimates that the state
13 could loose between \$800 million and \$1
14 billion in annual MSA payments.

15 Changing the State's enforcement
16 position away from forbearance jeopardizes
17 these important state revenues.

18 From these studies we have been able to
19 answer the important question of where do
20 the Nation's tobacco revenues go?

21 They go right to help our people, but
22 eventually through our hands and into the
23 hands of our employees, vendors and
24 merchants who sustain western New York

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1 regional economy.

2 Lastly, we believe that the answer --
3 another important question before you is

4 where is the State's tax money going?

5 Jonathan Taylor looked at the effect of
6 state cigarette taxes on cross-border demand
7 for cigarettes and reached these
8 assessments.

9 One, New York State and New York City
10 cigarette taxes are so high that they have
11 produced powerful incentives for citizens to
12 cross state borders to purchase cigarettes.

13 The high cigarette taxes have
14 intensified cross-border interstate trade
15 and advertising campaigns.

16 Cross-border effects are most
17 pronounced for New Jersey, Pennsylvania,
18 Connecticut and Vermont, but also for South
19 Carolina where the cigarette tax is only 7
20 cents per pack.

21 The State likely loses \$500 million in
22 tax revenue as a result of its citizens
23 purchasing cigarettes in Pennsylvania alone.

24 On the basis of these assessments,

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1 Taylor draws three important conclusions.

2 First, the Seneca Nation's
3 comprehensive regulation and minimum pricing
4 scheme has produced net economic gains to
5 the State and western New York regional

6 economy.

7 Second, the declines in cigarette
8 consumption by New York's citizens are most
9 likely illusory in light of cross-border
10 interstate cigarette sales that induce
11 millions of dollars of cigarette tax loss.

12 And third, any effort by the State to
13 promote tax or price parity between the
14 Seneca Nation cigarette sales and State
15 cigarette sales would not cure the State's
16 cross-border cigarette tax revenue problem
17 and would only push positive economic
18 benefits to other states.

19 It is true that you have significant
20 problems with your own citizens not paying
21 your taxes, but it is not the result of our
22 economic activity.

23 We should not be used as your scapegoat
24 for a problem that has been created by the

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1 State's own open borders with other states.

2 In conclusion, it has been our goal
3 today to share with you important
4 information about the nation, our struggle
5 to restore economic vitality to our homeland
6 and western New York region, as well as how

7 to regulate the sale of tobacco products to
8 achieve commonly shared policy goals as we
9 look forward to tomorrow, I believe that the
10 fundamental truth of history, law and
11 economics are undeniable and must be
12 accepted by you if we are to have a positive
13 working relationship in the future.

14 These truths are that the Nation's
15 treaties preclude the application of State
16 taxes in our territories, that the nation
17 and the Seneca people will never allow the
18 State to tax our commerce, that the Nation's
19 cigarette trade generates millions in net
20 economic benefit to the State and western
21 New York region, and that while the State
22 may have a problem with lost cigarette tax
23 revenue, it has little to do with the Nation
24 and more to do with your own citizens buying

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1 cigarettes in other states.

2 Mr. Chairman, thank you for the
3 opportunity to present this information to
4 your Committee.

5 If you and other members of the
6 Committee have any questions, we will be
7 glad to answer them.

8 SENATOR JOHNSON: Thank you very

9 much, Mr. Seneca.

10 I am going to allow Senator Golden to
11 make a statement.

12 Senator Golden.

13 SENATOR GOLDEN: I want to thank the
14 Chairman for allowing me to make the
15 statement.

16 Obviously the co-chair of the Seneca
17 Nation will be allowed to respond to it if
18 need be, but there is going to be everybody
19 here questioning and answers as we move on.

20 We are not by any measure looking to
21 create an atmosphere that would cause any
22 type of destruction or upsetment, we are
23 just trying to create a fairness here in the
24 City of New York.

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1 And I know that you as a Sovereign
2 Nation have lived under your rules and laws
3 that were created hundreds of years ago.

4 And that's why we have had many
5 treaties over the years, to work and to be
6 able to work within those Nations.

7 Those sin taxes that you spoke of were
8 created to stop people from doing certain
9 things.

10 And those sin taxes have driven people
11 over the border, to the internet and, yes,
12 to the Sovereign Nations as well.

13 And if you take a look just the City of
14 New York, where we had in 2002 raised the
15 price of cigarettes by 1,700 percent, we had
16 40 million cartons sold, they will be able
17 to testify that they are selling 11 million
18 cartons; what happened to 29 million cartons
19 of cigarettes?

20 Does everybody believe that those 29
21 million cartons of cigarettes disappeared
22 because people stopped smoking?

23 I don't think so, and when you take a
24 look across the country where the graduation

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1 you increase taxes drops by 1.5 percent
2 across other states, that precipitous drop,
3 29 million cartons and if you take the \$46
4 tax stamp, we are over \$1 billion, that's
5 just in the City of New York.

6 That's not including the 25 million
7 cartons that are missing across the State.

8 So there are definite problems here in
9 this State, and the problems within our
10 households and our homes across this great
11 State, the debt that's being brought upon

12 them, all we are asking is for fairness.

13 I'm not talking about gaming, gaming
14 everybody seems to have an agreement with.

15 It's the cigarette sales that we have
16 to come up with and have some type of
17 agreement amongst the Nations, and if you
18 agree that most of this is going across
19 border, you should have no problem in
20 allowing State regulators to be part of the
21 Seneca Nation and other Nations to monitor
22 as we agree to some type of agreement over
23 the next several months if the courts don't
24 come to one sooner.

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1 So what I'm trying to get at here is
2 there is a rule of law in this nation, and
3 that's what this land is based on.

4 Either there is the rule of law or
5 there isn't a rule of law.

6 We are not looking to go to war with
7 anybody, we want fairness, you want
8 fairness.

9 That is an awful lot of money that's
10 out there that cannot be accounted for and
11 you know that some of that and a large
12 majority of that is going to the Indian

13 Nations.

14 Let's get together, let's find a way
15 that we can work together so that those
16 dollars that are on those Indian
17 Reservations are equally shared with the
18 taxpayers, especially when it comes to those
19 that are non-tribal members that are
20 purchasing 49 cartons of cigarettes.

21 That's all we are asking, is fairness.

22 We can get there, I'm asking you, Mr.
23 Chairman of the Seneca Nation, to work with
24 this State, to work with this Governor and

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1 to come up with a date certain that we can
2 have this agreement in place with all of our
3 Nations here in the City of New York.

4 Very, very simple request and
5 hopefully, God willing, the smart people in
6 this room will make that happen.

7 Thank you, Mr. Chairman.

8 SENATOR JOHNSON: Thank you Senator
9 Golden.

10 I don't know if you wanted to respond.

11 MR. SENECA: Well, you know certainly
12 I respect your comments, but however I think
13 agreements have already been made.

14 I related to it in my testimony, the

15 Treaty of 1842 specifically states that the
16 State has no authority to tax us no matter
17 what it is for any purpose whatsoever.

18 And so I think if you are looking for
19 an agreement on taxation, it's already
20 there.

21 SENATOR GOLDEN: I thought the State
22 said that they were talking to you only last
23 night and over the past several months in
24 coming up with an agreement.

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1 So I guess the State has not been
2 talking to you about coming up with an
3 agreement on paying taxes on cigarettes?

4 MR. SENECA: They are not talking
5 with us.

6 SENATOR GOLDEN: They are not talking
7 to you, well that's good to know that at
8 least nobody is talking.

9 That means that those taxes probably
10 will never get collected and that's
11 unfortunate, because that's the -- we need
12 to get those taxes collected, the people of
13 this great State have too much debt you and
14 us should be able to pick up and be
15 responsible enough to be able to share

16 across this great State, it's 19.5 million
17 people when it comes to taxes, that's all
18 I'm asking, Mr. Chairman.

19 Thank you for this time.

20 SENATOR JOHNSON: Thank you very
21 much, Senator Golden.

22 MR. SENECA: Mr. Chairman thank you
23 for the opportunity, certainly and we met
24 last week in Albany we certainly had a frank

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1 discussion in regards to this issue.

2 I just want to make it clear to the
3 rest of your Committee and Senators present
4 that the Seneca Nation will never be tax
5 collectors for the State, and as far as we
6 are concerned, we look to the legislature
7 and in this Committee to recommend to the
8 legislature as a whole to honor your
9 commitments and your agreements of the past
10 and stand by those of the Treaty of 1842 in
11 regards to taxation within our territory.

12 That's what we ask for, honor our
13 treaties and those agreements.

14 SENATOR JOHNSON: Thank you, Mr.
15 Seneca.

16 I'm going to ask you a series of
17 questions because I think it's important

18 just for the record to indicate the Senate
19 reviewing it, just seeing a broad spectrum
20 of relationships between the Nations and the
21 State of New York, and certainly I
22 appreciate our frank discussion that we did
23 have last week, and one of the things that I
24 suggested and I have already spoken to the

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1 Democratic Conference I believe it's very
2 important for the State Senate to have at
3 the very least at the subcommittee level a
4 standing committee involving Native American
5 fairness, because obviously it goes beyond a
6 cigarette tax issue, there are a lot of
7 issues, as the Governor indicated, and I
8 have a problem with the Governor not having
9 selected a Deputy Secretary for Native
10 American affairs.

11 I think it's important in the
12 relationship to have a point person, not to
13 say in fact Mr. Rose isn't doing an
14 excellent job, at a Cabinet level position.

15 That being said, I hope these questions
16 don't seem inane, but I think it's important
17 for the record just to set it forth.

18 My understanding from your testimony is

19 that there are probably about 7,800 members
20 of the Seneca Nation that reside in the
21 State of New York, is that correct?

22 MR. SENECA: Yes, our tribal roles
23 are about around 7,800. Not all the
24 members, as I indicated, are within the

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1 Nation.

2 SENATOR JOHNSON: 7,800 within the
3 State, what boundary of the State of New
4 York?

5 MR. SENECA: More or less.

6 SENATOR JOHNSON: Are they counted?
7 Are members of your nation counted when the
8 U.S. census is taken every 10 years?

9 MR. SENECA: They are going through
10 that process now and actually a lady from
11 the Mohawk Nation is working on it and so an
12 attempt is being made to identify members.

13 Whether everybody is counted or not, I
14 would doubt that.

15 SENATOR JOHNSON: But there is an
16 attempt made to try?

17 MR. SENECA: I think so. When census
18 does it, what is it, every 10 years they do
19 that, attempts are made to get a number of
20 Indian people, I guess across the country.

21 SENATOR JOHNSON: Are members of your
22 nation registered to vote in federal, state
23 and county elections?

24 MR. SENECA: Not really. Some are,

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1 some aren't, it depends on their personal
2 preference if they want to be registered to
3 do that.

4 SENATOR JOHNSON: Talking about
5 taxation, do members of the nation pay
6 federal income taxes?

7 MR. SENECA: Yes.

8 SENATOR JOHNSON: State income tax?

9 MR. SENECA: No.

10 SENATOR JOHNSON: With respect to
11 real estate taxes, do Nation members pay
12 real State taxes on lands, on Reservation
13 lands?

14 MR. SENECA: No.

15 SENATOR JOHNSON: What about a
16 situation if a member of the Seneca Nation
17 owns land outside of the Reservation, to
18 they pay real estate tax?

19 MR. SENECA: Yes.

20 SENATOR JOHNSON: Does the Nation
21 itself own smoke shops, or are they owned by

22 individuals who are members of the Nation?

23 MR. SENECA: Yeah, the nation owns
24 smoke shops its own self and sells gasoline,

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1 but certainly we have a private sector that
2 is probably unlike any other Nation in this
3 country, so we have a wide-ranging -- very
4 large private sector business entity.

5 SENATOR JOHNSON: It's the private
6 sector members of the Nation, they would
7 own, an individual who is a member of the
8 nation could own or does own a smoke shop,
9 correct?

10 MR. SENECA: Yes.

11 SENATOR JOHNSON: Casino gambling,
12 the casino I believe it's in the Niagara
13 area.

14 MR. SENECA: We have three casinos,
15 one in Niagara Falls, Salamanca, New York
16 and Allegheny territory.

17 SENATOR JOHNSON: Owned by the Nation
18 or private members of the nation who are
19 members of the Nation?

20 MR. SENECA: Owned by the Nation,
21 only the Nation can own a Class 3 casino, or
22 any game.

23 SENATOR JOHNSON: Are all three Class

24 3 gaming?

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1 MR. SENECA: We have two Class 2
2 gaming facilities, Bingo halls and like that
3 and three casinos.

4 SENATOR JOHNSON: Unrelated to
5 cigarette taxes, to retailers with members
6 of the Nation or the Nation itself, do they
7 collect Sales and Use Taxes on sales of
8 goods to non-Native Americans?

9 MR. SENECA: No.

10 SENATOR JOHNSON: On Reservation
11 land, or if I own -- if I am a member of the
12 Nation and I own a piece of property, does
13 the nation impose a real estate tax or a
14 fee?

15 MR. SENECA: No. There is no taxes
16 at all in our territories.

17 SENATOR JOHNSON: No taxes.

18 MR. SENECA: For anything.

19 SENATOR JOHNSON: Any types of fees
20 for licenses?

21 MR. SENECA: Yeah, we have license
22 fees. If someone goes into business, there
23 is -- a certain dollar amount is required
24 for them to apply for a license.

1 SENATOR JOHNSON: How much did the
2 nation generate in licensing fees in 2008?

3 MR. SENECA: Senator, you are asking
4 a lot of very specific kind of fact
5 questions, I could direct you to one of the
6 exhibits in our testimony is a very
7 comprehensive economic assessment, it
8 doesn't get down to how much a fishing
9 license might cost a non-Native, but does
10 provide some of this aggregate information
11 about how the nation government functions,
12 how it sustains itself and you might find
13 that helpful as you go through your
14 questions.

15 SENATOR JOHNSON: Mr. Seneca, would
16 that be Exhibit F, entitled Seneca Nation,
17 side impact on your state in western New
18 York?

19 MR. SENECA: Yes.

20 SENATOR JOHNSON: I will go back to
21 that.

22 I know there was some testimony and a
23 little bit of passion from down that way
24 when we were talking about casino gaming, I

1 just want to get an understanding.

2 There is currently a Compact between
3 the State of New York and the Senecas with
4 respect to payments related to background
5 checks and Racing and Wagering Board
6 employees working in the Casinos, is that
7 correct?

8 MR. SENECA: Yes.

9 SENATOR JOHNSON: There was testimony
10 indicating there is a dispute right now,
11 there is an ongoing dispute involving those
12 payments.

13 Can you maybe expand upon or maybe
14 clarify what the dispute is involving?

15 MR. PORTER: I think you are relating
16 to the issue associated with State Police
17 reimbursements.

18 You have to keep in mind there is a lot
19 of things, it depends on how you define
20 dispute.

21 The Nation and the State are subject to
22 this Compact and on a daily basis there are
23 interpretations between the State and the
24 Nation regulators for which you might call

1 it a dispute.

2 So the issue of State Police
3 reimbursements is in a process in which the
4 nation has asserted an interest of
5 questioning the basis for those
6 reimbursement requests.

7 But it is simply one of many really
8 within the framework of this very complex
9 Compact with which we have periodic
10 disagreements with the state.

11 SENATOR JOHNSON: I use a shorthand
12 word dispute, so I appreciate the
13 clarification.

14 But my understanding is if there are
15 differences of opinions with respect to
16 those payments, it goes -- there is an
17 arbitration clause?

18 MR. PORTER: There is a procedure
19 under the Compact by which the Nation and
20 the State in the last resort can take the
21 dispute to arbitration within which it can
22 be resolved.

23 SENATOR JOHNSON: Have you ever done
24 that?

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1 MR. PORTER: It's never happened.

2 SENATOR JOHNSON: My understanding

3 there is a number, a figure thrown out of
4 \$40 million.

5 Mr. Kiernan testified that there is \$40
6 million currently held in escrow or set
7 aside because there are these issues that
8 are being resolved, is that accurate?

9 MR. PORTER: I don't know the exact
10 amount, that's the ballpark.

11 SENATOR JOHNSON: What is that \$40
12 million, what does that ballpark figure
13 represent? How many years' worth of
14 payments?

15 MR. PORTER: Again, I don't know the
16 exact number, I think it's been an ongoing
17 dispute between the Nation and the State, so
18 as long as we have had a Compact.

19 SENATOR JOHNSON: Have any payments
20 ever been made by the Nation to the State?

21 MR. PORTER: No.

22 SENATOR JOHNSON: I missed the part,
23 when was the Compact entered into between
24 the State and the Nation?

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1 MR. PORTER: 2002.

2 SENATOR JOHNSON: So no payments have
3 been made since the entry of this Compact in

4 2002.

5 MR. PORTER: Correct. Just let me
6 rephrase the question or refine it.

7 As it relates to State Police
8 reimbursement the Nation has been making
9 regular quarterly payments with respect to
10 the State Racing and Wagering, as we do with
11 the county law enforcement and the other
12 governments, so we have a very positive
13 working relationship with the State Racing
14 and Wagering, and I think the general view
15 is that this is a service that is required
16 under the Compact and the Nation has been
17 making.

18 Again, we audit these requests no
19 differently than any other government would
20 audit a request from a vendor, and that's
21 what our regulators do, and at the end of
22 the day we have substantially worked very
23 closely with Racing and Wagering in
24 addressing those issues.

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1 SENATOR JOHNSON: What's a yearly
2 payment made to the Racing and Wagering, if
3 you can give me an estimate?

4 MR. PORTER: I don't know that
5 offhand.

6 SENATOR JOHNSON: I will look in
7 here. If it's not in there, it would be
8 great.

9 MR. PORTER: Racing and Wagering
10 would have that.

11 SENATOR JOHNSON: Let me turn the
12 attention to maybe the treaty and I guess,
13 Mr. Seneca, I don't want to -- I was jotting
14 down notes during your testimony, if I say
15 this misquoting you, I apologize.

16 I think I you said during the testimony
17 that the court cases are meaningless.

18 Am I accurate to say that that's the
19 word you used to describe the decisions, the
20 Supreme Court case, Attea case and other
21 cases?

22 MR. SENECA: Yeah, many of the cases
23 that have been heard before courts, whether
24 it be state or federal, have never addressed

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1 the treaty issues.

2 So therefore that equation was never
3 incorporated into any decision, really, in
4 regards to that.

5 SENATOR JOHNSON: My understanding
6 through your very thorough and thank you for

7 this, this is what we talked about last
8 week, when you said information, the treaty
9 established, I am referring to the 1842
10 Treaty of Buffalo Creek, because that's, I
11 think, if you want to you can put that up on
12 the board, that's what you are referring to
13 the taxation issue.

14 My understanding is that with respect
15 to the Supreme Court case you refer to the
16 Attea case.

17 MR. SENECA: Yes.

18 SENATOR JOHNSON: My understanding is
19 that there was an effort by the Seneca
20 Nation to submit or you did submit an amicus
21 brief in that decision or in that case
22 making the point that your nation is not
23 subject to the decision or subject to the
24 State's position based on the treaty, is

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1 that correct?

2 MR. PORTER: My recollection of the
3 case is that the Nation did file a friend of
4 the court brief, it was not a party, did not
5 assert before the court those rights as a
6 party, that in a footnote in that decision
7 the court reserved decision and did not
8 opine or in any way take a position with

9 respect to the Nation's treaty claims.

10 I think reference to the notion of the
11 decision being meaningless or not helpful
12 would be rooted in the notion that how can
13 one government of the State or the United
14 States take a treaty interpretation and
15 expect it to bind the other party to a
16 treaty, especially a state government which
17 is a subdivision of the treaty partner to
18 the United States.

19 The only way to, perhaps, make any
20 logic of this for your benefit would be your
21 willingness as a state government, state
22 official to participate in a lawsuit in our
23 courts.

24 And perhaps we would be able to amend

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1 our rules and open it up so that your
2 government could come into our court system
3 to seek an interpretation of that treaty.

4 And so to the extent that that's
5 something uncomfortable or something you
6 don't think appropriate, that's where we
7 stand in terms of we each have different
8 interpretations, perhaps, of that treaty,
9 and that's in the specter of international

10 law what you have to talk through.

11 SENATOR JOHNSON: Mr. Porter, let me
12 ask you, if you don't mind, I can focus for
13 a second, let's assume that a Native
14 American, a member of the Seneca Nation
15 marries a non-Nation member and children,
16 they have children, then there is a break up
17 or dissolution of that marriage.

18 Can the Seneca Nation member go to a
19 Seneca court and seek relief, either divorce
20 or child custody or alimony, and does the
21 Seneca court have jurisdiction over the
22 non-Seneca Nation member?

23 MR. PORTER: Yes.

24 SENATOR JOHNSON: So there are

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1 situations where non-Native Americans become
2 subject to the jurisdiction -- jurisdiction
3 of the tribal courts, correct?

4 MR. PORTER: Yes, and these are not
5 controversial issues, frankly, even as it
6 relates to the laws that would govern you in
7 terms of federal laws or State laws.

8 That there is a long line of
9 acknowledgment of the inherent authority of
10 Indian Nations and tribal courts and
11 individuals, non-natives who marry into

12 tribes who live in our territories by virtue
13 of their own personal conduct, subject
14 themselves to the jurisdiction of our courts
15 and our government.

16 We are not forcing anyone to do this,
17 although Seneca men are somewhat
18 irresistible, perhaps, that's what you're
19 getting at, but for the most part these are
20 personal choices that are acknowledged under
21 our laws and are the subject of our
22 jurisdiction.

23 SENATOR JOHNSON: With respect to the
24 Supreme Court decision of 1994, just so -- I

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1 want the record to reflect it accurately and
2 I'm not saying you are right or wrong, just
3 let the record reflect the footnote 11 which
4 was referred to says, and I quote, amicus
5 the Seneca Nation argues that New York
6 cigarette tax regulations violate treaties
7 between it and the United States insofar as
8 the regulations allow New York to tax any
9 transactions occurring on Seneca tribal
10 lands, see brief for Seneca Nations of
11 Indians and amicus 18-26, but see brief for
12 United States amicus curiae 21-24, we do not

13 address this contention which differs
14 markedly from the Respondent's position and
15 which was not addressed by the Court of
16 Appeals, and they cite see United States
17 Parcel Service, Inc., v. Mitchell and it
18 gives the case citation.

19 I don't know, Mr. Porter, were you
20 involved in this? You did not represent the
21 Seneca Nation, that's a no, right? You are
22 shaking your head?

23 MR. PORTER: No.

24 SENATOR JOHNSON: Do you know what

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1 the United States' position was in their
2 brief with respect to disagreeing with the
3 Seneca Nation's position that they are not
4 subject to the New York's jurisdiction?

5 MR. PORTER: I don't.

6 SENATOR JOHNSON: Maybe it seems like
7 an easy question to ask, and you have
8 indicated testimony to us that you have
9 never, according to on Page 8 of your
10 testimony to read a quote, "The Seneca
11 Nation has never sought to litigate our
12 treaty rights in the courts and so the court
13 cases you rely on fail to address the
14 uniqueness of our situation."

15 Maybe my question is why not? In the
16 sense that why not attempt a legal decision
17 or determination, as other Nations either
18 have sought or were sought against them, why
19 not put before a court and have a court of
20 law determine whether or not the Treaty of
21 1842 stands for the proposition that you put
22 forth?

23 MR. SENECA: Perhaps because we
24 really don't want to trust the court to rule

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1 in our favor.

2 Certainly courts have not been friendly
3 to many of the issues that face Indian
4 people across this country, and so I think
5 that's probably a reason.

6 Also is that certainly we determine
7 what our treaties say and what they say, and
8 that's our determination, not a court's
9 benefit to rule on what they believe the
10 treaty would say.

11 SENATOR JOHNSON: I appreciate your
12 point of view, but it seems like the Cayuga
13 Indian Nation sued the Seneca -- sorry, the
14 Cayuga county sheriff and the Seneca county
15 sheriff with respect to this particular

16 issue, and, in fact, correct me if I'm
17 wrong, but the Seneca Nation did submit in
18 that case an amicus curiae brief as well, is
19 that correct?

20 MR. PORTER: Yes, there is a
21 significant difference. I'm not sure if
22 you're a lawyer or not, but there is a
23 pretty tremendous difference between
24 participating in litigation as a party and

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1 offering helpful information and legal
2 analysis to the court as a friend of the
3 court.

4 So the Nation has found in its
5 interests, the Council has authorized
6 participation as a friend of the court to
7 provide information for its benefit as it
8 resolves the disputes.

9 We are not a party, nor subject to the
10 jurisdiction of the court in that regard.

11 SENATOR JOHNSON: With respect to and
12 similarly with respect to that decision as
13 well as the Erbot decision, certainly those,
14 in those two decisions the courts have ruled
15 in favor of positions taken by respective
16 Nations.

17 And so while I certainly respect your

18 viewpoint that there is concern about
19 whether or not you would be treated fairly,
20 clearly these decisions show that courts
21 have been fair when it comes to this
22 particular issue.

23 So it would seem to me that it would
24 put probably to bed once and for all the

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1 question of whether or not New York State
2 can impose and collect sales tax on
3 cigarette sales to non-Native Americans.

4 MR. PORTER: Senator, just to bring
5 back your questioning to what you had raised
6 at the beginning, which is the Compact with
7 the Nation and the State, you will note in
8 that Compact that there is no concession of
9 jurisdiction to the courts of either
10 government, and there is a reason for that,
11 I think the notion that the Nation would
12 trust the State and the State's courts to
13 resolve a dispute is perhaps just as
14 unlikely as the State trusts the Nation's
15 courts to resolve this dispute.

16 So there was an example of parties
17 coming together to work together to create
18 jobs and opportunity in western New York on

19 which we agreed to have arbitration in the
20 event the worst case scenario of which we
21 need a decision making party to decide that
22 dispute.

23 Because we are dealing with treaty law
24 here, we are dealing with treaties for which

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1 you are not even party, you are simply
2 obligated under law, your law, to adhere to
3 those treaties.

4 We need to go to the United Nations to
5 achieve the proper degree of involvement in
6 our internal disputes, if that is the
7 direction that you are going in.

8 We would gladly invoke that as well, as
9 we have with the President of the United
10 States.

11 SENATOR JOHNSON: Mr. Porter, I'm
12 just curious about something, has the Seneca
13 treaty, not necessarily Article 9, but has
14 this treaty ever been interpreted by any
15 court, whether it's a Seneca Nation court,
16 whether it's a court, a federal court or a
17 State of New York court, has it ever been on
18 any particular provision?

19 MR. PORTER: Not so much litigation.
20 I believe there is one case out there

21 involving an individual, but that there have
22 been a series of state interpretations over
23 the years from actually your predecessors,
24 150 years ago, we have attached that in our

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1 testimony as well, in terms of the historic
2 position of the state government from time
3 to time of interpreting the treaty.

4 And there is also most recently the
5 interpretation from U.S. Representative
6 Eric Massa, who has also provided
7 interpretation of that treaty that is
8 consistent with the way in which we are
9 acknowledging it.

10 His position in looking at, I guess,
11 the word protect is being interpreted as
12 will not assess or not impose, to protect
13 the lands of the Seneca Indians within the
14 State of New York from time to time remain
15 in possession, protect it from all taxes and
16 assessments for roads, highways and any
17 other purpose.

18 I'm just curious, how is it interpreted
19 that the State of New York can impose
20 cigarette taxes on the sale to non-Native
21 Americans?

22 Because that would fall into the
23 categorical prohibition that you are trying
24 to tax us for any other purpose, that

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1 purpose being the taxation of non-natives
2 who do business with us on our lands.

3 The language refers to taxes on lands,
4 all taxes on roads, highways, or any other
5 purpose.

6 And what your government has sought to
7 do over the years is to tax especially the
8 commerce between our nation and our
9 non-Native customers on our lands.

10 So we interpret that to be what was
11 intended at the time, the categorical and
12 broad sweeping assertion that the State of
13 New York would never have any authority to
14 assess its taxes in our territory.

15 And not only that, the United States
16 will actually help protect us from you in
17 terms of doing that.

18 SENATOR JOHNSON: Is there
19 legislative, any type of legislative history
20 in the United States Senate that supports
21 this position? Not Representative Massa?

22 MR. PORTER: Keep in mind there were
23 no State taxes in 1842 when this occurred,

24 and the dispute that was occurring related

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1 to the specific actions of the state at the
2 time in which they were seeking to tax our
3 lands, and so the language is spun out of a
4 specific dispute that occurred.

5 But the cure, if you will, was sweeping
6 in terms of then and forever there be no
7 taxation.

8 SENATOR JOHNSON: Well, it's vague.
9 I would take the position that's vague in
10 the sense that from all, from all tax
11 assessments for roads, highways or any other
12 purpose, certainly the any other purpose can
13 really apply to any other purpose related to
14 roads or highways and not commerce.

15 I mean one could take that position.

16 What I'm asking is in terms of
17 legislative histories, trying to interpret a
18 dispute, I'm trying to see if a particular
19 Senator on the floor of the United States
20 Senate in a debate on this particular treaty
21 take the position that this relates to taxes
22 for commerce, you know, not to a cigarette
23 tax, but any other type of tax for commerce
24 on Indian lands.

1 MR. PORTER: I don't know offhand. I
2 mean if this is something that you want more
3 work done on it, I'm sure Roger will be able
4 to pull it up for you.

5 SENATOR JOHNSON: I certainly want
6 to, based on Page 7 of your testimony, the
7 Buffalo Creek Treaty was entered after a
8 failed effort by the State and its land
9 speculators, this is your testimony, to
10 steal our remaining lands, to tax those
11 lands and have us physically removed to the
12 lands west of the Mississippi River.

13 Based on that description it would seem
14 to me the purpose, the intent of this treaty
15 is simply related to taxation on the land,
16 and anything related directly to the real
17 estate, the mud, the dirt, and not
18 necessarily the commerce.

19 And that's why I understand that you're
20 making the catch-all or any other purpose,
21 I'm wondering is there anything other than
22 your belief that says any other purpose.

23 MR. PORTER: There are two things, if
24 your interpretation is correct, there would

1 be no reason to put the words any other
2 purpose in the treaty.

3 And the second thing is everything
4 occurs in the context of history and in
5 realizing, as we have talked with you in the
6 past, that your understanding of these
7 issues is in its initial phase.

8 The Treaty of 1842 came about after a
9 concerted deliberate effort by the State
10 working with the United States at the time
11 to wipe us out and to eliminate us, take our
12 lands and move us to Kansas.

13 So the treaty of 1838, the treaty of
14 1826, the treaty of 1794 with which we
15 established that peace was a 50 year period
16 of perpetual conflict and hostility from the
17 State towards the Nation.

18 And so it's not surprising that the
19 treaty commissioners on behalf of the United
20 States wanted a sweeping and broad
21 admonishment to your predecessors to leave
22 the Senecas alone.

23 And that's why I think the language is
24 worded the way it is.

1 SENATOR JOHNSON: Look, I am trying
2 to learn and I think that's the purpose of
3 this committee and this hearing, from that
4 statement I'm trying to see if there is
5 anything to back that up, meaning that there
6 was testimony in the Senate in a hearing
7 like this where the Commissioner said look,
8 we are trying to do a sweeping statement and
9 we believe all taxes should be all taxes.

10 Because we are in 2009 and there have
11 been certain positions taken, trying to
12 figure out where we go.

13 So I'm trying to get as much
14 information as I can in trying to do in a
15 nonconfrontational manner.

16 With that said I'm going to turn it
17 over to Senator Winner who will ask some
18 questions, then Senator Nozziolo, and
19 Senator Maziarz.

20 Thank you very much for your testimony.

21 SENATOR WINNER: Thank you, Mr.
22 Chairman.

23 Mr. Seneca, I can really appreciate
24 from hearing from you the zeal and the

1 obviously the commitment that you have with
2 regard to enforcing your interpretation as

3 relates to the treaty.

4 No one is doubting the fervent belief
5 that you have in your interpretation and
6 your insistence on the principles that we
7 uphold that.

8 However, there are some questions that
9 we have as it relates to the State action
10 that has been taken over the last number of
11 years, and I think that as you listen to
12 some other testimony here today, you have
13 seen that there are different
14 interpretations as to what the authority the
15 State of New York has as it relates to this
16 whole issue of collecting taxes on the
17 sales, particularly of tobacco products to
18 non-Indian residents of Reservation -- or
19 not Reservation residents.

20 Under those circumstances from the
21 Governor's counsel to the Department of
22 Taxation of finance those are the people
23 that obviously we interact with on a regular
24 basis, and they have entirely different

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1 interpretation as to the validity of your
2 interpretation of the treaty as it relates
3 to the actions that we take.

4 So we are not -- I'm not here to
5 discount in any way, shape or form the zeal
6 under which you are protecting your
7 interpretation here, but I do want to have
8 some further dialogue as it relates to what
9 actions we are taking and what actions we
10 can take and what actions are being
11 contemplated going into the future.

12 So as such, I do want to specifically
13 talk about right now the chapter of the laws
14 of 2008 as it relates to the tax stamping
15 requirements on the tax stamping
16 requirements that the Nozziolo legislation
17 2008 imposes upon those businesses that
18 would then sell the tobacco products to you
19 and to others.

20 Now, are you taking the position that
21 you believe that that effort under that
22 statute violates this treaty, and if so,
23 how, due to the fact that's not occurring on
24 your lands, this is a tax that is being

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1 imposed or collected on the operation of the
2 tax stampers outside of the territorial
3 jurisdiction of your smoke shops and other
4 enterprises?

5 MR. PORTER: The legislation that you

6 speak of, which has since been enjoined, is
7 an indirect effort to impose the same taxes
8 that the State is unable to do so on the
9 purchasers of those tobacco products.

10 And so as a result of its impact on the
11 Nation, it's retailers, the people that we
12 do business with, it has the same
13 consequence in terms of its ability to --
14 there is no question as the State has done
15 in the past, that you have the capacity for
16 a pure embargo as the result of the tobacco
17 products being cut off.

18 And so efforts to refine that process
19 through moving the -- a pinching, if you
20 will, upstream still has the same
21 consequence on our economy.

22 That's your choice in terms of how you
23 address that.

24 But our view is that it still

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1 interferes with the right of our people to
2 receive tobacco products, as would be any
3 other product without tax.

4 Simply because you put it on someone
5 else doesn't mean it isn't going to result
6 in tax on to the purchaser which is the

7 Indian.

8 SENATOR WINNER: I don't think that
9 was my specific question, my specific
10 question is you believe that it violates the
11 treaty?

12 MR. PORTER: Yes.

13 SENATOR WINNER: Now, what about the
14 fact the federal government imposes a tax at
15 the time that that product leaves the
16 manufacturer's bonded warehouse and there is
17 a tax imposed upon it at that stage, do you
18 believe that the federal tax that is being
19 imposed violates the treaty?

20 MR. PORTER: We have no provision in
21 our treaties that prohibits or protects the
22 Nation from any charges or fees or taxes
23 that the United States may impose on its
24 citizens or its companies.

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1 And so it is a different legal
2 question.

3 SENATOR WINNER: Okay Now, you have
4 indicated, and I think correctly, so that
5 one of the reasons for a lot of the dropoff
6 in our sales in the State of New York is due
7 to cross-border commerce and the fact -- I
8 mean I am a resident of the City of Elmira

9 and I live on the Pennsylvania border and I
10 know very, very well of all the people that
11 go across into Pennsylvania to purchase
12 their cigarettes.

13 That being said, that is an argument
14 that we certainly have created or a problem
15 that we have created on our own, as you have
16 also pointed out through the heavy increase
17 in the amount of taxes that we impose upon
18 cigarettes and the noncompetitive nature of
19 the sales across the border.

20 That being said, have you provided to
21 us, and I apologize if you have and I
22 haven't picked up on it, because you did
23 testify that you have extraordinary
24 technology with regard to tracking sales and

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1 the like.

2 Have you provided to us data as it
3 relates to the amount of cigarettes that you
4 do sell in New York?

5 MR. PORTER: Well, yes, in the
6 economic study there is a couple of years of
7 data, but it's not a secret, really, just
8 ask your Tax Department, because all of the
9 tobacco products come through State licensed

10 dealers and they know who the purchasers
11 are.

12 So, it's not a secret really at all
13 about what the volume is, it's actually
14 helpful data because I think what we have
15 tried to provide you is enough information
16 to realize you have a tax problem, it's just
17 not us.

18 That the volume that everyone on the
19 other side is speaking to is not accounted
20 for in the same way that it is for us,
21 because you know who's buying the cigarettes
22 because they are going through state
23 dealers, you have that data.

24 SENATOR WINNER: Have you reviewed

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1 chart 5 that was provided to us from Deputy
2 Commissioner Comiskey?

3 MR. PORTER: No, we just heard about
4 it for the first time today.

5 SENATOR WINNER: Would you be kind
6 enough to have you review the data that was
7 provided by the Department of Taxation and
8 Finance as it relates to the specific sales
9 by Seneca Nation and others as far as what
10 they are -- what they contend are your sales
11 of tobacco products in New York?

12 MR. PORTER: Senator, what are you
13 going to do with the answer?

14 Is this something rooted in --

15 SENATOR WINNER: Obviously if you're
16 indicating to us as policy makers in New
17 York that we are missing the boat here as
18 far as making a determination as to where
19 these cartons of cigarettes that are
20 disappearing, it is clear to us that if, in
21 fact, there is a sinking hole here where
22 these are disappearing, that it would be
23 helpful to me to know where they are.

24 MR. PORTER: Sure, we will look at

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1 that.

2 SENATOR WINNER: If your receipt in
3 sales are overstated or understated by a
4 significant amount, I think then that might
5 be reflected in the other remaining sales
6 that are being attributed, and there may be
7 problems with our Tax and Finance people as
8 far as the data that they are utilizing, is
9 that fair enough?

10 MR. PORTER: Yes.

11 SENATOR JOHNSON: Senator Nozziolo.

12 SENATOR NOZZIOLO: Thank you very

13 much for the panel, your testimony, J.C., I
14 appreciate your directness and your approach
15 to this, and I do have a number of
16 questions.

17 Could you explain the structure of the
18 Nation and it's sales of tobacco products?

19 You mentioned a two tiered system or a
20 two component system, one where the Nation
21 owns the retail, retail and wholesale
22 establishments, another you called a private
23 sector sales force or business force.

24 Could you elaborate on that for us?

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1 MR. SENECA: Certainly the Nation has
2 three they call them one stops, they are
3 convenience store gas station retail sales
4 for cigarettes, groceries, things like that.

5 And then also we have a private sector
6 where individuals -- actually only
7 businesses on territory and sell tobacco
8 products, grocery items, gasoline at some,
9 some are just tobacco, grocery item stores.

10 So it's -- there is other types of
11 businesses we have, we have some other types
12 of businesses, mechanics, oil change, tires,
13 stuff like that.

14 SENATOR NOZZIOLO: Are all of the

15 businesses licensed by the Nation in some
16 form or another?

17 MR. SENECA: Yes.

18 SENATOR NOZZIOLO: Do revenues or a
19 portion of the revenues go in any type of
20 proportionate distribution to the rest of
21 the Nation?

22 MR. SENECA: Well, certainly the fees
23 that are charged go back to the Nations for
24 operations and to provide services for the

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1 people.

2 SENATOR NOZZIOLO: But those fees do.
3 Are those fees based on a percentage of
4 sales?

5 MR. SENECA: No.

6 SENATOR NOZZIOLO: Fixed fee for
7 everyone?

8 MR. SENECA: Right.

9 SENATOR NOZZIOLO: But the revenue
10 itself is not going to the Nation, it's
11 going to the individual business owner?

12 MR. SENECA: Yes.

13 SENATOR NOZZIOLO: You see, that's
14 where I have some trouble in trying to
15 understand the fairness of this issue.

16 And you mentioned confrontation and
17 disrespect, I think -- please know that we
18 are not, at least from my standpoint, we are
19 not trying to be confrontational and
20 certainly not trying to be disrespectful, we
21 have a difference of opinion and that
22 difference is an opinion I have versus an
23 opinion that you may have, and that opinion
24 is -- both opinions are protected by the

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1 United States Government and the country we
2 live in.

3 So I don't want this to be a
4 confrontational discussion. I don't believe
5 it has been, I don't believe that we have
6 tried to be confrontational in our efforts
7 to establish policies from our perspective,
8 for our constituents' perspective appear to
9 be fair.

10 You have a right to disagree with those
11 perspectives, but I think what we are trying
12 to give and get is an understanding and as
13 both Senators Johnson and Winner discuss
14 this right that you believe you have under
15 the 1842 Buffalo Creek Treaty, the issue
16 becomes where does that end?

17 You're saying it does not end at the

18 Reservation where the -- you believe that
19 the Seneca Nation is protected from any
20 commercial enterprise on the Reservation.

21 You believe further, as I understand
22 it, that treaty protects or insulates any
23 transaction that takes place on the
24 Reservation between the Seneca Nation or one

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1 of its licensees and on non-Indian which
2 gets a little further from what Senator
3 Johnson and Winner were trying to isolate in
4 terms of the intention of that treaty.

5 So we are moving away from just simply
6 commerce among the Nation to commerce
7 between the Nation and other not members of
8 the Nation.

9 My question is you've taken another
10 step in Senator Winner's question to you, we
11 are not seeing taxation on the Nation or
12 even to the nation in terms of direct
13 taxation, but rather taxation to a
14 distributor of a product that the Nation is
15 selling to nonmembers of the Nation.

16 That seems further and further apart
17 from the original intention of the 1842
18 Buffalo Creek Treaty.

19 Again, my question to you then is how
20 far does this go?

21 Does it go to all the internet no
22 matter where that internet purchaser is
23 from?

24 Does it go to -- so the State is

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1 prohibited from taxing that sale, and what
2 other commodities, what's next?
3 Automobiles? Other luxury items?

4 Is that the position of the Nation now?

5 MR. SENECA: I think so. I think we
6 have an economy, that we believe that we
7 have the right and the opportunity to take
8 advantage of certain things, and if we can
9 sell automobiles, if we can several
10 different items on our territory and make
11 money on it and create an economy for our
12 people and something that they can build and
13 support their families on, then that's what
14 we will do.

15 I think if there is opportunity we are
16 going to do that.

17 SENATOR NOZZIOLO: J.C., if I may
18 call you that, I respect that a great deal,
19 that's the free enterprise system, and I
20 certainly don't have any argument with that.

21 However understand that with each
22 different variation of this transaction you
23 are on thinner and thinner legal ice, and
24 that ice, which may be very deep and thick

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1 for issues certainly among the Seneca Nation
2 members or other Indian Nation members
3 protected by certain treaties within the
4 Reservation that's one thing, but as you're
5 branching out and are engaging in commerce
6 farther and farther away with other
7 nonmembers of the Nation, we think that
8 there is a reasonable interpretation that
9 ice gets thinner and thinner, and that, in
10 effect, would be a taxable transaction as
11 you get further away from the original
12 intention of that legislation.

13 I'm not arguing with your point, I'm
14 just saying that we have a point, too.

15 My next question gets to the economic
16 study.

17 You talk about it, you discuss it with
18 some pride.

19 It's not accurate unless it takes into
20 account the numbers of non-Native American
21 jobs that were lost, the non-Native

22 Americans businesses that were closed, the
23 tax revenue that was lost from those
24 businesses, the true economic model would

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1 have to take also into consideration the
2 fact that the unlevel playing field of
3 Indian business transactions as it moves
4 across the spectrum has given an advantage,
5 some would say an unfair advantage, many
6 would say an unfair advantage over those who
7 are paying taxes.

8 So I think your analysis, unless it has
9 those other businesses that were closed, the
10 taxation revenue that wasn't achieved and
11 the jobs that were lost, is faulty.

12 MR. SENECA: I disagree with you,
13 Senator. I think being involved in
14 government for the last 20, 25 years and
15 being in business myself and living and
16 growing up with our neighbors off the
17 Reservation in that region and probably for
18 many of our communities where businesses are
19 throughout this State, we, I think,
20 intensified the ability for businesses
21 around our territories to prosper, to do
22 business, to create new economies because of
23 the traffic flow, the people that come in to

24 do business with us on our territory.

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1 SENATOR NOZZIOLO: And you have done
2 that in areas, like the casinos and the --

3 MR. SENECA: Without the casinos just
4 this territory in the little town where I
5 grew up in Irving, just south of Buffalo
6 about 30 miles or so, I remember there was
7 nothing there, when business started back in
8 the early '80s on our territory things
9 started happening off the Reservation.

10 And next thing you know, there was a
11 Burger King there, there is a lot of stores
12 and things were popping up and, you know,
13 the convenience stores that were in the gas
14 business back then, and the convenience
15 store business, they are still there today
16 and there are a couple of more.

17 And so these things we have given
18 incentives and things to businesses around
19 our area to prosper, we do business and
20 spend our money in these businesses off the
21 territory and the people that come to do
22 business with us, they save money, really,
23 they don't pay the tax, but what do they do
24 with that money that they save once they

1 come and purchase a carton of cigarettes or
2 gallon of gas?

3 They go back into New York State and
4 spend it again. In a roundabout way you are
5 getting your tax money somewhere, so those
6 are the things that need to be recognized
7 and understood.

8 SENATOR NOZZIOLO: My experience,
9 J.C., is that's not the case in every corner
10 of the State that has been confronted with
11 the establishment of Native American
12 businesses.

13 Lastly, I would like to ask you about
14 the issue of violence.

15 You heard the Governor's counsel talk
16 about an analysis done by the New York State
17 Police relative to potential threats of
18 violence.

19 You don't seem like a violent person at
20 all. I would hope that the Nation would not
21 condone violence, would not promote violence
22 and would do all it could to ostracize those
23 who would.

24 Do you have a comment about that?

1 MR. SENECA: Well, you don't know me
2 very well, do you?

3 You know, I think when we talk
4 violence, I think violence is precipitated,
5 certainly it's an inflammatory word, and I
6 think standing here and listening today
7 there was a lot of violence directed at
8 Indian people and what we do.

9 And I think every day as Indian people
10 we fight and we struggle against propaganda,
11 against innuendo, being attacked at every
12 angle, whether it's by the New York State
13 legislature, whether it's by a Committee,
14 whether it's by individuals, organizations,
15 the courts, the State and federal
16 governments.

17 Indian people struggle every day to
18 fight for what we have, and we are going to
19 continue to fight for that.

20 And when violence occurs and things
21 that have happened in the past, it was
22 precipitated on the State's behalf.

23 The Seneca Nation people weren't armed,
24 we didn't have guns, we didn't have clubs,

1 we didn't invade anybody's territory.

2 When 1,000 state troopers invaded our
3 territory back in 1992 what would you do if
4 somebody invaded d your neighborhood and
5 threatened your livelihood and your family
6 and your women and your children and your
7 elders?

8 You would fight back, wouldn't you?
9 That's what our people did. If that's
10 violence to you, I look at it defending our
11 people and our nation. And certainly our
12 people will step forward and defend our
13 nation at any cost at any time to defend
14 what we have so that we protect those
15 rights.

16 Not for us just today that live here in
17 this world in 2009, but our future
18 generations.

19 We come here and defend these treaties
20 that certainly haven't had the review of a
21 committee or a court to rule on what they
22 mean.

23 We learn about these things from our
24 ancestors, from our fathers, our mothers,

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1 our grandparents, tell us about this is the
2 way it's supposed to be, these are the

3 things to believe in. This is what it
4 means.

5 That's what we fight for and we will
6 continue to fight for that.

7 If that's violent, I'm sorry, that's
8 the way it is. And that's all I can say as
9 straightforward as that.

10 SENATOR NOZZIOLO: It's very
11 disappointing.

12 MR. SENECA: I don't condone violence
13 and certainly we shouldn't do that.

14 SENATOR NOZZIOLO: It's very
15 disappointing that it took you the entire
16 answer to say you don't condone violence.

17 MR. SENECA: I don't.

18 SENATOR NOZZIOLO: I think we are a
19 nation of laws, I don't mean to be
20 discussing the question of how many
21 sacrifices there have been made to defend
22 the Constitution and the laws that we have
23 and the way of life that we have, the
24 democracy that we have.

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1 MR. SENECA: What is that democracy
2 based upon? The United States was based on
3 the Six Nations Confederacy, the original

4 people, that's what was based on, the United
5 States.

6 SENATOR NOZZIOLO: Then you more than
7 anyone else should appreciate the fact that
8 we are a nation of laws.

9 MR. SENECA: And when we stepped
10 forward to help this country when it was
11 being born back in those days, we got
12 stepped all over.

13 We got lied to, we got misled, our land
14 was taken from us, our people were killed.

15 You know, you go into the State Capitol
16 here, you know what you see? Champlain
17 killing the first Indian in the Governor's
18 office.

19 Should we put up our first white guy
20 killed?

21 What would you feel like if that was up
22 on the ceiling every time I go into the
23 Governor's office I have to know it's up on
24 the ceiling.

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1 First Indian killed. And now you tell
2 me about violence.

3 SENATOR NOZZIOLO: Two wrongs don't
4 make a right.

5 Two wrongs don't make a right, and we

6 --

7 THE AUDIENCE: Then don't throw the
8 first stone.

9 SENATOR NOZZIOLO: This was not about
10 confrontation and disrespect, it was about

11 --

12 SENATOR JOHNSON: Please, please.

13 SENATOR NOZZIOLO: This was not about
14 confrontation and disrespect, it was about
15 discussing mutual disagreements and trying
16 to understand through this discussion where
17 we can find common ground, and where there
18 is an ability to make laws fair for
19 everyone.

20 Thank you for your discussion.

21 MR. SENECA: Thank you, and let me
22 make it clear that certainly the law
23 enforcement of western New York and the
24 local State Police, the Sheriffs, the FBI,

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1 the ATF, we have sat down at the table and
2 talked with them, they are concerned about a
3 lot of things that go on within our
4 territory and our relationships.

5 You know what, if you even tried to
6 invade our territory, I think they would

7 maybe stand by us.

8 SENATOR JOHNSON: Thank you Senator

9 Nozziolo.

10 Senator Maziarz.

11 SENATOR MAZIARZ: Thank you very

12 much, Mr. Chairman.

13 Mr. Seneca, you mentioned -- I believe

14 you mentioned in your opening statement that

15 the Seneca Nation has 6,300 employees, were

16 you talking about total or were you just

17 talking about in the gaming side?

18 MR. SENECA: That's total that we

19 employee in western New York as an entity.

20 SENATOR MAZIARZ: I would suspect

21 that probably makes you if not the largest,

22 maybe the second or third largest private

23 sector employer in all of western New York.

24 MR. SENECA: I believe Business First

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1 said we were the fifth largest employer in

2 western New York.

3 SENATOR MAZIARZ: How many of those

4 6,300 employees are non-Native Americans?

5 Do you have any idea?

6 MR. PORTER: Senator, the numbers

7 break down roughly about 1,300 jobs from the

8 Nation government that are primarily Seneca

9 people, we have casino enterprises that are
10 predominantly non-natives and that we
11 actually in terms of that number is somewhat
12 conservative because it somewhat undercounts
13 the private sector since we don't track that
14 data as accurately, but it's a significant
15 number of non-natives in terms of direct
16 employment plus the vendors and all the
17 others that derive economic benefit.

18 SENATOR MAZIARZ: Mr. Porter, under
19 that same thing for Mr. Seneca, whoever
20 wants to answer the question, those
21 employees that you employ in western New
22 York, they all have a health insurance
23 benefit package associated with their
24 employment, don't they?

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1 MR. PORTER: They have.

2 SENATOR MAZIARZ: And pension?

3 MR. PORTER: They have considerable
4 benefits, not just their salaries, but
5 associated benefits of healthcare and the
6 like and, of course, they live in taxable
7 communities, they pay property taxes and our
8 economic studies bear out the taxable
9 benefit to the state associated with our

10 nontaxable economic activity.

11 SENATOR MAZIARZ: Thank you. I just
12 want to very briefly, the Chairman sort of
13 examined this in great detail about the
14 payments made to the state from the gaming
15 operation, according to the Compact that was
16 negotiated in 2002 and started on December
17 31st of 2003, and this figure of \$40
18 million, which I think was a guesstimate on
19 the part of Governor's counsel or somebody
20 who testified to that.

21 I think it's fair to say, Mr. Porter,
22 that that is really a very minor amount of
23 money, considering the hundreds of millions
24 that have been paid without any dispute;

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1 would you agree with that characterization?

2 MR. PORTER: I would agree with that,
3 Senator, and keep in mind, it's just
4 something that we are in disagreement over.

5 I mean I realize that's a lot of money,
6 but in the grand scheme of the \$750 million
7 that the enterprise has generated last year,
8 the State's over \$100 million direct payment
9 from our slot drop, this is a lot of money
10 and it's an example of how the Nation and
11 State have worked together to create

12 opportunity and jobs in western New York.

13 SENATOR MAZIARZ: I believe, and
14 again, Mr. Chairman, living right there, I'm
15 very familiar with this and I think that
16 some of that delay in payment is not always,
17 but more often, Mr. Chairman, the fault of
18 the State not getting the proper information
19 and again, I'm not sure if this \$40 million
20 is a part of it, but there is a very public
21 dispute going on between local governments,
22 the City of Buffalo and the County of Erie
23 as to how the split is going to be made.

24 I'm not sure that \$40 million is a part

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1 of that, but I know right now I think that
2 in an unusual case the Senecas want to make
3 a payment, they just don't know how to split
4 the profits up.

5 But there have been hundreds of
6 millions of dollars paid to the City of
7 Niagara Falls, to the County of Niagara, to
8 the Niagara Falls School District in the
9 Seneca Nation.

10 I just want to be fair to everybody who
11 -- particularly the press that's in the room
12 -- that maybe are not from western New York

13 that don't realize that, so I just wanted to
14 get that on the record.

15 MR. PORTER: Senator, just to really
16 follow-up on a prior point that was made
17 about this economic issue, I hope it's clear
18 that there is a lot that we could disagree
19 over with respect to interpretations of the
20 law, of policy and history, but the one
21 thing I don't think and what we have tried
22 to provide you in that very extensive
23 material is our common agreement that we are
24 about providing opportunity, providing jobs,

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1 providing some hope for western New York,
2 and the State indirectly as a whole.

3 But as you know, the Seneca Nation is
4 not going anywhere, we have been in our
5 territory for 1,000 years, we are going to
6 be there for another 1,000.

7 Yet, when thousands of non-natives
8 leave western New York every year to go
9 elsewhere, it hurts us, it hurts our
10 neighborhoods, it hurts our communities it
11 hurts our businesses it hurts everything.

12 And this is not something that is
13 unknown to you in terms of, in effect, of
14 abating taxes for economic development

15 purposes.

16 The AMD facility in Albany got \$1
17 million a job in tax credits, in abatements,
18 and the State of New York created 5,000 jobs
19 in our casinos for basically nothing,
20 because we did it ourselves.

21 So that kind of economic opportunity,
22 if you want to kill the next Monaco that
23 exists within your borders, we are not going
24 to let it happen, but that's basically what

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1 you have in front of you.

2 Is a unique historic opportunity that
3 for most of our history we were unable to do
4 anything with because we didn't have any
5 money.

6 And now that we have started to grow,
7 the benefit is extending to everybody.

8 And that's something that we would like
9 to invite you to continue working with us
10 on, as we work towards tomorrow.

11 SENATOR JOHNSON: Thank you, Senator
12 Maziarz, for that.

13 SENATOR ADAMS: Thank you. I must
14 apologize, I had to step out because I had
15 another hearing on a round table down the

16 hall, and I wanted to come and hear you
17 testify because I think at the heart of this
18 issue in order to have mutual discussion,
19 you have to have mutual respect.

20 And someone testified earlier due to
21 the tax issue, I quote, "It was a major
22 injustice."

23 We can't rewrite history, the major
24 injustice was not your failure to pay taxes,

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1 the major injustice is what has happened to
2 the indigenous people of this country,
3 that's the major injustice.

4 You have the right to defend your land,
5 you have the right to defend your families,
6 you have the right to defend your people,
7 and the only way we are going to resolve
8 this issue is when this country deserves and
9 respects your right.

10 I admire you. Fight for your land,
11 protect your families.

12 MR. SENECA: Thank you, Senator, for
13 those comments. I really appreciate that.
14 I'm a true believer in that if you give
15 respect out, that's what you'll get back.

16 SENATOR JOHNSON: Thank you, Senator
17 Adams.

18 There are no further questions, I want
19 to thank you Mr. Seneca and Mr. Porter for
20 participating and for providing some very
21 important words of thought with respect to
22 this issue.

23 I truly appreciate the members of your
24 nation who joined us today, who clearly have

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1 very strong positions on this issue, and it
2 helps us to take into account how this
3 committee is going to formulate its report.

4 So I thank you very much for
5 participating in this hearing today.

6 MR. SENECA: Thank you, Senator
7 Johnson, Mr. Chairman.

8 I think, once again, I would like to
9 thank the Committee and the legislature for
10 allowing us the opportunity to come forward
11 and discuss these issues with you.

12 As we talked last week in Albany, I
13 think there are many issues we can work on
14 together, I think we really need to
15 establish a dialogue and develop a
16 communication vehicle, whatever it may be,
17 certainly we have two paths that are in
18 front of us.

19 SENATOR JOHNSON: I agree with that,
20 and it is just beginning, I believe very
21 strongly, the Senate should establish a
22 standing subcommittee with respect to deal
23 specifically about Native American issues,
24 clearly Senator Maziarz and his insight into

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1 the issue, as well as others.

2 There is a lot more to the dialog than
3 simply cigarette taxes, there is obviously
4 -- and more than just gaming -- there are
5 healthcare issues, there are education
6 issues that have to be addressed and
7 clearly, as you indicated, you have been
8 here on this land, on your land for the long
9 run, and so we look forward to working with
10 you going forward, and obviously a dialogue
11 is important, so I thank you again for
12 participating today, and I appreciate your
13 time.

14 MR. SENECA: We look forward to
15 talking to you next time.

16 SENATOR JOHNSON: Absolutely. Thank
17 you very much.

18 I am now going to invite David Dresser,
19 David Dresser, Super Seneca County, John
20 Companie, Madison County Attorney, Honorable

21 Peter Same, Supervisor, Town of Seneca
22 Falls.

23 D A V I D D R E S S E R
24 S. J O H N C O M P A N I E

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1 P E T E R S A M E
2 Called as witnesses, having been first
3 duly sworn by the Counsel to the Committee,
4 were examined and testified as follows:
5 SENATOR JOHNSON: We will give it a
6 moment for everybody to clear out.
7 Just to clarify, this is the first time
8 I'm meeting you three gentlemen, so if I
9 could just so I have it all set.
10 Supervisor Dresser, I will pass along
11 to you first.
12 MR. DRESSER: I would yield to Mr.
13 Companie, if it's all right.
14 SENATOR JOHNSON: That's fine. Mr.
15 Companie, I pass it on to you.
16 MR. COMPANIE: Thank you, Senator,
17 Honorable members of the Committee and thank
18 you for the privilege of testifying today.
19 I am the County Attorney for Madison
20 County, a position I have held for over 22
21 years, I was previously supervisor

22 representing the State of New York of
23 Oneida, I've been Chief Civil Counsel for
24 the County again for over 22 years and I

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1 have been involved with Indian affairs
2 during that entire period.

3 Currently I serve as the Chair of the
4 National Association of Counties, County and
5 Tribal Government Relations subcommittee.

6 I am also a member of the New York
7 State Association of Counties, Native
8 American Committee and locally as the City
9 Attorney for the City of Cheryl.

10 In my prepared remarks I would like to
11 go over the following. As New York faces a
12 crisis of historic proportions I could not
13 agree more with Senator Johnson that,
14 "Literally we cannot afford to look the
15 other way," nor should the State.

16 Our taxpayers and small businesses
17 continue to struggle with tax burdens and be
18 punished when they come up short.

19 The front page of the Syracuse Post
20 Standard on August 31 declared in large bold
21 print, "Tax man plays hardball with
22 delinquent businesses," and continues, "New
23 York State is now more aggressive in seizing

24 properties and holding auctions to recover

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1 unpaid taxes."

2 The article related the seizure of a 30
3 year business with no prior history of
4 default owing \$61,000 in sales tax and
5 reported in the last two years the State has
6 more than doubled the number of businesses
7 it has seized for unpaid taxes increasing
8 annual collections from about \$6 million to
9 \$14.5 million.

10 Senators, as we have seen today, this
11 is a pittance compared to the taxes that go
12 unremitted from sales by Indians to
13 non-Indians.

14 According to the State's expert
15 economist in opposition to the Oneida's
16 opposition to take land in trust, Professor
17 Greg Gerald of the University of Rochester,
18 lost sales and excise taxes on such sales in
19 Madison and Oneida are on the order of \$449
20 million per year, and I understand there is
21 quite a bit of dispute over the numbers you
22 will find attached to my statement, Exhibit
23 16 from that report, the information was
24 from the Tax Department simply multiplied by

1 the then applicable rates, which by the way
2 were \$1.50 a pack, not the increased amount
3 that they are presently.

4 In my county, Madison County we have a
5 local real property tax levy of \$28 million.

6 Each \$280,000 of tax collected is 1
7 percent less our citizens pay in real
8 property taxes.

9 Consequently our citizens in the \$5 or
10 \$6 million that we would otherwise be
11 collecting, our citizens face 25 percent
12 higher real property taxes today.

13 Imagine what our fiscal position
14 locally and State wide would be had these
15 billions been collected State wide over the
16 15 years since the Attea case.

17 Now, as Mr. Comiskey said in Syracuse a
18 couple of months ago in late August, I think
19 there is a general sense in government that
20 we are short billions, we are losing
21 billions, that we ought to be going after
22 the money.

23 He then further stated when taxes go
24 unpaid two things happen, the pool of honest

1 taxpayers gets squeezed, and as we are
2 seeing, we lose essential services, classes
3 get overcrowded, public safety suffers, our
4 roads suffer.

5 And I couldn't agree more, this is
6 preferable certainly to the announced \$50
7 per vendor fee for collecting taxes, for the
8 deep and painful cuts that I know you are
9 now facing to meet the deficits we have
10 talked about.

11 But if we do not do something like
12 issue these coupons, not only will our
13 citizens suffer, but they are going to vote
14 with their feet, and I think those of you
15 who saw today's New York Post on the second
16 page saw the headline, tax revenue escape
17 from New York, \$1.5 million in the years
18 2005-2006 and the lost tax cost for just
19 2006-7 it was \$2.5 billion.

20 Now, credit must be given to the State,
21 the last two administrations for help in the
22 land claims and other matters, but in this
23 area I think much more could be done.

24 What's happening now is local

1 government is spending time and money, and
2 Mr. Dresser will detail that shortly, in
3 tying to take up the State's task, and while
4 we all prefer and we certainly prefer, I've
5 been involved for over 20 years in
6 negotiations to resolve it, in fact years of
7 diplomatic efforts, respectful attempts at
8 rational persuasion have failed.

9 Moreover, what we can and do respect
10 the right of tribes to sell tax free to
11 their resident members, simply put the sales
12 tax on sales to non-Indians belongs to the
13 State. The State needs to collect it.

14 To collect this revenue is not only
15 right, but fair, and I want to just take a
16 minute to talk about my particular
17 circumstance in central New York.

18 The Oneida Indian Nation versus in this
19 context the County of Madison.

20 Oneidas have established a chain of 12
21 Save On convenience stores on properties
22 throughout the county, the northerly part of
23 the county and part of Oneida County. 75
24 percent are located in my county, they are

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1 along the busiest arteries in leaving
2 communities, they are not part of a greater

3 tribal holding, but they are typically
4 isolated parcels in key commercial
5 intersections.

6 As a result of their acquisition of
7 existing businesses and other businesses
8 going out of business by the inability to
9 compete, the percentage of convenience
10 stores collecting and remitting taxes in
11 northerly Madison County has decreased from
12 94 percent to 46 percent, potential
13 competitors have largely abducted the market
14 with firms as large and powerful as Walmart
15 refusing to enter and face the unfair
16 competitive advantage.

17 As a result, the Oneidas have achieved
18 a near monopoly in gas and convenience, sell
19 gas at approximately the same price, or
20 marginally less.

21 Now we have heard today and we have
22 heard previously proposals of tax parity or
23 price parity.

24 This is not the solution. First of

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1 all, it entrenches that monopoly, secondly
2 it deprives the State and local government
3 with revenues desperately needed to maintain

4 services and infrastructure and allows
5 unfair competition to prevail as non-Indian
6 businesses.

7 Moreover, given the legal authority
8 given collection it is simply unnecessary.

9 In turning to the Oneida, it's not
10 necessary for them either, according to
11 professor Gerald's report, which I urge that
12 you get, and I can send it to you because it
13 also details issues with respect to the
14 impact of casino gaming and jobs creation in
15 a far more detailed manner, according to
16 professor Gerald's report the Oneida Nation
17 nets \$115 million per year with approximate,
18 that's nets, \$115 million with approximately
19 1,000 enrolled members and reportedly only
20 approximately 400 in central New York.

21 Now, they contributed according to
22 their own figures \$17 million to their
23 government programs and services, and have
24 488 working in government.

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1 That's almost -- it's a 1 to 2 ratio,
2 one employee for every 2 residents.

3 In contrast Madison County has 71,000,
4 we spend about 8 percent of that and we have
5 nearly 1 employee for every 100 residents.

6 Moreover, their enterprise value
7 contained in the Gerald report is \$2.15
8 billion, \$2.2 million for Oneida nation
9 member, \$6.3 million per household.

10 Quite simply our citizens have a far
11 greater need for those revenues, revenues
12 the U.S. Supreme Court long ago concluded we
13 could require collected and remitted on.

14 Businesses have a right to compete on
15 an even playing field, and then just simply
16 to conclude, I think this State needs an
17 action plan, you need to promulgate the
18 regulations and issue the coupons, you need
19 to terminate the forbearance policy, you
20 need to direct the administrative law
21 enforcement to enforce collection and
22 remission of taxes and you need to provide
23 funding and direct assistance to the
24 counties to support the local district

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1 attorneys and law enforcement agencies, like
2 in Seneca and Cayuga Counties in that
3 enforcement.

4 And that concludes my formal remarks.

5 There is one other thing when it's
6 question time I would like to address the

7 issue of sovereignty, generally.

8 MR. DRESSER: Good afternoon,
9 Senators. You and the audience will be
10 pleased to know we have refined our remarks,
11 Mr. Same and I, to three minutes.

12 SENATOR JOHNSON: Thank you.

13 MR. DRESSER: My name is David
14 Dresser, I am Chairman of the Indian Affairs
15 Committee of the Seneca County Board of
16 Supervisors.

17 Seneca County and Cayuga County just to
18 the east of us have been directly and
19 adversely and severely affected by the
20 failure of New York Governors to enforce the
21 laws requiring the collection of taxes on
22 cigarettes sold by Indian enterprises to
23 non-Indians.

24 We therefore greatly appreciate the

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1 decision of this Committee to look into this
2 unauthorized and inexcusable forbearance
3 policy.

4 Since October 2003 the Cayuga Indian
5 Nation has operated a gas station and
6 convenience store in each of our counties
7 and sold gas and cigarettes without
8 collecting State sales and excise taxes.

9 This has put competing businesses out
10 of business and severely reduces the profit
11 margins of others.

12 It has also greatly reduced the sales
13 tax revenue of counties and deprive the
14 State of significant sales and excise tax
15 revenue.

16 Seneca County has been at the forefront
17 of efforts to collect these taxes. In May
18 2006 it filed an Article 78 lawsuit against
19 the Commissioner of Taxation and Finance for
20 failure to collect the county's sales taxes
21 from Indian owned businesses.

22 But the trial court ruled that the
23 county did not have standing to sue the
24 State, and on appeal the Third Department

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1 concluded explaining that the Petitioner had
2 no proprietary interest in a fund of money
3 that had not been collected.

4 In November 2008 the Sheriffs of Seneca
5 and Cayuga Counties confiscated a total of
6 17,600 cartons of unstamped cigarettes from
7 the two convenience stores.

8 And Supreme Court Justice Kenneth
9 Fisher ruled in their favor.

10 On appeal the Fourth Department
11 reversed his decision claiming the stores
12 were on a "Qualified Reservation."

13 The case now goes to the Court of
14 Appeals.

15 Section 471(e) of the tax code provides
16 for members to be issued tax exemption,
17 tribal members to be issued tax exemption
18 coupons, so even on qualified Reservations
19 sales and excise taxes will be paid by the
20 non-Indian customers.

21 Successive Governors for questionable
22 reasons have simply not directed or allowed
23 the Department of Taxation and Finance to
24 print and issue these coupons.

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1 One excuse given is that the Governor
2 is negotiating settlements with the tribes.

3 But laws are to be enforced, not
4 negotiated.

5 Another is fear of tribal violence,
6 which means the Governor is being
7 intimidated.

8 Seneca County urges this Committee to
9 find a means to compel Governor Paterson to
10 order the printing and issuing of these tax
11 exemption coupons, last December he signed

12 into law legislation prohibiting
13 manufacturers from selling cigarettes to
14 stamping agents who had not certified that
15 they would not sell untaxed cigarettes, and
16 he's not enforcing this law.

17 The Governor must be held accountable.

18 Thank you for your efforts.

19 SENATOR JOHNSON: Thank you. Mr.
20 Same.

21 MR. SAME: Thank you, Senator, and
22 the counsel for hearing testimony, we really
23 appreciate the opportunity to come before
24 you and speak.

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1 We are just a small county, two
2 counties in upstate New York, that are being
3 faced with what is being discussed today.

4 The Cayuga Indian Nation operates a
5 convenience here in Seneca Falls and Cayuga
6 County since the year 2003. Failure to
7 collect taxes on gas and cigarettes in these
8 establishments has had a devastating impact
9 on my town and county.

10 Three competing businesses have gone
11 out of business and have suffered severe or
12 have suffered severe reductions in profit

13 margins because of the lower prices charged
14 by the untaxed gasoline and cigarettes that
15 are being sold at trading establishments.

16 When its untaxed cigarettes were
17 received by the Sheriff in 2008 sales of
18 cigarettes at competing stores skyrocketed.
19 One store saw weekly cigarette sales
20 increase from less than \$1,000 before the
21 raid, to over \$14,000 after the raid.

22 In Cayuga County Village of Union
23 Springs, the single competitor of Lakeside
24 Trading Store saw weekly cigarette sales

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1 jump from \$234 per week to after the raid of
2 \$5,361.

3 In addition to the loss suffered by
4 individual businesses, there is a loss of
5 tax revenue coming from the counties and
6 States.

7 In 2006 the Yale economist, Byron Airs
8 estimated that the annual tax loss to the
9 counties and State from the operation of one
10 Indian enterprise in Seneca Falls at about
11 \$300,000 to \$400,000, that was before the
12 State raised the excise tax to \$2.75.

13 Brian O'Connor, another economist
14 retained by the New York State Association

15 of Convenience Stores, estimates the State
16 is forfeiting over \$1 billion a year in
17 uncollected actions.

18 Cayuga County stands to loose more than
19 tax revenue with the enormous profits the
20 Cayugas are making from the sale of untaxed
21 gasoline and cigarettes, the tribes are
22 buying up property with plans to place it in
23 federal trust which would take it off the
24 county, town, village and school tax roles.

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1 Although the current trust application
2 involved with the Cayugas is only for 129
3 acres, the tribe now owns more than 900
4 acres, and clearly intends to purchase more.

5 The upper limit would be the 64,000
6 acres that are part of their former Cayuga
7 reservation.

8 If all the land were taken into trust,
9 the tax base of the town of Seneca Falls
10 would decrease by 53 percent, the tax base
11 of our school district would decrease by 51
12 percent.

13 The effect of allowing the Cayugas to
14 continue to sell gasoline and cigarettes to
15 non-Indians without payment of sales and

16 excise taxes will be disastrous for my own
17 town and the county, not to mention the
18 State of New York.

19 The tribe would continue to cherry pick
20 choice locations and pay inflated prices for
21 properties and do a checkerboarding effect
22 through our communities.

23 The loss of our sales tax is bad
24 enough, the loss of our land is permanent.

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1 Therefore I urge you, the Committee, to
2 find a solution to the problem, the sale of
3 -- untaxed sale of gasoline and cigarettes.

4 The future of our county is at stake.

5 Thank you.

6 SENATOR JOHNSON: Thank you
7 supervisor.

8 SENATOR NOZZIOLO: Thank you, one
9 question, gentlemen, thank you for being
10 here.

11 Your views, as you heard discussed by
12 Governor Paterson's counsel today on price
13 parity, what are your thoughts on that
14 issue?

15 Oneida County has rejected it, has it
16 been discussed in Seneca or Madison
17 Counties?

18 MR. DRESSER: Yes, it has, Senator,
19 and I refer back to a letter that our county
20 sent to Governor Pataki when he proposed
21 such a system, and I will read the first
22 paragraph, at least.

23 "As you know, we had objected to the
24 price parity provision whereby the Nation

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1 would keep monies collected in lieu of
2 taxes.

3 "We have objected in part because every
4 sales tax dollar not collected by a county
5 is a dollar that must be raised by property
6 taxation.

7 "We also do not know how such an
8 agreement would be administered or enforced
9 in a competitive economic environment.

10 "In three separate resolutions
11 previously forwarded to your office, our
12 county has urged the collection of taxes by
13 Indian enterprises to non-Native Americans
14 has been authorized by the U.S. Supreme
15 Court and has been overwhelmingly called for
16 by our state Assembly and Senate."

17 MR. COMPANIE: Senator, Madison
18 County has not been in favor of parity

19 through three administrations, we believe,
20 as I said in my comments, that it
21 institutionalizes an advantage to the
22 Oneidas.

23 The current variation that talks about
24 there being established some sort of a fund

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1 from which we can then apply to have some
2 economic projects assuming someone approves
3 them is really not particularly workable,
4 nor are the numbers particularly impressive.

5 I think Mr. Kiernan talked about being
6 able to leverage \$38 million when, in fact,
7 the State is giving up in just in our two
8 little counties \$49 million per year, the
9 economics don't make sense.

10 SENATOR NOZZIOLO: Thank you very
11 much.

12 SENATOR JOHNSON: Senator Maziarz.

13 SENATOR MAZIARZ: Thank you very much
14 for being here today. As you can see on
15 this Committee there is some disagreement on
16 this particular issue, but let me tell you
17 one thing, you have a very forceful and good
18 advocate in Senator Nozziolo because there
19 is never a minute when he and I are in the
20 same room that this issue does not come up.

21 Thank you.

22 SENATOR JOHNSON: Thank you, Senator.

23 Gentlemen, thank you very much for your

24 testimony.

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1 Assemblyman Michael Benjamin. Senator

2 Benjamin.

3 M I C H A E L B E N J A M I N,

4 called as a witness, having been first duly

5 sworn by the Counsel to the Committee, was

6 examined and testified as follows:

7 SENATOR JOHNSON: Good afternoon,

8 Assemblyman.

9 How are you today?

10 ASSEMBLYMAN BENJAMIN: I am good,

11 thank you.

12 Thank you for the opportunity to

13 address you today. Again I would like to

14 thank Senator Craig Johnson and the other

15 Senators for holding today's hearing.

16 Yesterday I was amused to read that the

17 Seneca Nation of Indians had already

18 allocated half a million dollars to defeat

19 State senators like yourself who dare to

20 stand up for New Yorkers against bootleggers

21 and racketeers.

22 Leaders of a foreign nation want to
23 interfere with New York elections so they
24 may continue to sell duty free cigarettes.

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1 It reads like a plot of a Woody Allen or
2 Coen Brothers movie.

3 As an assemblyman from the Bronx, I
4 have witnessed the negative impact that the
5 forbearance policy by our State Department
6 of Taxation and Finance has had on the
7 budget process and in communities in the
8 Bronx.

9 Each year millions of dollars are
10 written off and as a consequence tuition
11 assistance to each locality and other
12 critical state assistance is reduced.

13 Because of Department of Taxation and
14 Finance's failure to obtain these taxes our
15 ability to help smokers quit and produce a
16 balanced budget have been greatly weakened.

17 It is time we bring together both sides
18 to achieve a future mutual agreement or for
19 creating a 21st Century Compact for New York
20 State and our Native American tribal
21 governments.

22 In response to a The New York Times
23 investigation last year, I wrote legislation

24 that would rescind the State recognition of

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1 the Poospatuck Indians as an official tribe.

2 The Poospatuck Nation, represented by
3 fewer than 200, are not yet recognized by
4 the Bureau of Indian Affairs and appears to
5 be nothing more than a criminal enterprise.

6 The Times report detailed how the 52
7 acre Poospatuck Indian Reservation is
8 largely responsible for supplying a
9 substantial amount of illegally sold
10 cigarettes through a sophisticated bootleg
11 distribution network here in New York City.

12 Reportedly members of the tribe have
13 set up various locations on the Reservation,
14 sometimes amounting to little more than
15 signs on sheds or trees to support the
16 illegal activities.

17 According to the AP, cigarettes sold on
18 the Reservation are often priced at half
19 what they would be in New York City.

20 In 1996, 400,000 cartons of cigarettes
21 were delivered to the Poospatucks.

22 According to the State Tax Department, last
23 year they had increased that to 11.3 million
24 cartons.

1 Last year New York City sued eight
2 smoke shops on Reservation accusing them of
3 cheating the State and City of hundreds of
4 millions of dollars of tax revenue by
5 structuring and concealing bulk sales,
6 assisting in the packing of vans destined
7 for New York City and even making their own
8 bulk deliveries off the Reservation.

9 In addition to New York's efforts, U.S.
10 Attorney for Eastern District of New York
11 has aggressively pursued Poospatuck
12 traffickers by prosecuting their ringleader,
13 Rodney Morrison.

14 A jury later found Mr. Morrison, owner
15 of the Peace Pipe Smoke Shop, of selling
16 millions of contraband cigarettes without
17 the required tax stamps.

18 Since the Poospatuck Reservation seems
19 to be little more than a haven for illegal
20 bootlegging operation, my measure would
21 disrupt an extensive cigarette bootlegging
22 industry in New York City and effective shut
23 down a criminal cartel that constantly
24 breaks law to make a profit off New York

1 smokers.

2 In addition to that measure, I'm
3 introducing a resolution calling upon
4 Governor Paterson to authorize the New York
5 State Department of Taxation and Finance to
6 execute tax warrants for the recovery of
7 taxes owed on goods sold on reservations by
8 tribal retailers to non-tribal consumers.

9 So resolution includes references to
10 the legislation that Governor Paterson
11 signed and on December 15, 2008 which was
12 overwhelmingly passed by the New York State
13 Senate and Assembly to require any stamping
14 agent in New York to submit a certification
15 under penalty of perjury to the State and to
16 its suppliers indicating that it will not
17 resell unstamped product in violation of the
18 terms of the State tax laws.

19 I have undertaken these measures
20 because recent increase in excise taxation
21 rates on cigarettes in New York will
22 continue to increase the sale of untaxed and
23 unstamped cigarettes.

24 Additional losses of revenue due to the

1 continued flouting of New York State Law by
2 tribal retailers will only add to our
3 growing budget deficit for the current
4 fiscal and out years.

5 The policy of forbearance by the State
6 Department of Taxation and Finance must end.

7 Recent estimates have found that newer
8 than 20,000 Native Americans live on
9 Reservations in New York, yet in 2007 these
10 Reservations sold more than 30 million
11 cartons with a retail value of \$2 billion.

12 These figures represent nearly
13 one-third of all cigarettes sold in New York
14 State.

15 The excise tax loss is well over \$800
16 million.

17 This revenue could have cut the State's
18 2008 fiscal deficit by half. In addition to
19 these figures, law enforcement authorities
20 say Native Americans operate 5 of the top 10
21 websites selling cheap cigarettes.

22 The problem of tax free cigarettes will
23 continue to negatively impact our state
24 unless we take action.

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1 I applaud the City of New York and law
2 enforcement officials for their efforts to

3 shut down bootleg operations based on tribal
4 lands.

5 While law enforcement does their part,
6 it's time our government take immediate
7 action to recover the taxes owed.

8 We cannot be paralyzed by fear of a
9 repeat of the unlawful actions taken by some
10 Senecas in 1997 when they temporarily shut
11 down New York State Thruway with their
12 protest.

13 While State authorities must take care
14 to avoid violate confrontations, the
15 Governor must engage the government Governor
16 must engage in smart, purposeful
17 negotiations, but in negotiations with
18 tribal leaders, our legislature must to
19 remove criminal tribes through legislative
20 means.

21 As elected official, it is our
22 responsibility to protect all of the
23 residents of New York New York State.

24 If you continue to practice forbearance

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1 we will fail to live up to our oath of
2 office and legislative responsibilities.

3 I want to commend in committee and it's

4 Chairman for taking up this thorny issue and
5 not succumbing to threats of political
6 intimidation.

7 In these perilous fiscal economic
8 times, failure to act no longer is an
9 option.

10 I look forward to working with you, my
11 fellow senators, in getting this issue
12 accomplished.

13 And last I want to say that mural that
14 was mentioned that's in the Governor's
15 Office, it should be permanently removed.
16 It's a relic of dishonorable past.

17 Thank you.

18 SENATOR JOHNSON: Thank you very much
19 I appreciate your leadership in the assembly
20 on this particular issue, anybody have any
21 questions.

22 Thank you very much, Senator I
23 appreciate your testimony today.

24 I call Eric Proshansky to testify.

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1 E R I C P R O S H A N S K Y,
2 called as a witness, having been first duly
3 sworn by the Counsel to the Committee, was
4 examined and testified as follows:

5 SENATOR JOHNSON: Mr. Proshansky, the

6 floor is yours.

7 MR. PROSHANSKY: Chairman Johnson and
8 members of the Senate Investigations
9 Committee, thank you very much for inviting
10 me to testify here today.

11 My name is Eric Proshansky, I'm an
12 Assistant Corporation Counsel in the office
13 of Michael Cardozo, Corporation Counsel of
14 the City of New York.

15 And again, I appreciate the opportunity
16 to testify concerning the State's
17 non-collection of taxes on cigarettes sold
18 to non-Native Americans on Indian
19 Reservations.

20 You may well ask why a lawyer for New
21 York City, which has no Indian Reservations
22 within its boundaries, has anything to say
23 on this subject.

24 My response would be that as a result

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1 of the State's policies the City has been
2 flooded with untaxed bootleg cigarettes, and
3 the City has been forced to undertake steps
4 to repair the effects of the State's
5 nonenforcement on the City's financial and
6 public health.

7 The City has been required to turn to
8 the federal courts by bringing lawsuits
9 under the federal racketeering statute and
10 the Federal Contraband Cigarette Trafficking
11 Act against state licensed stamping agents
12 and Native American cigarette sellers on the
13 Poospatuck Reservation, as well as against
14 internet sellers.

15 During the five years of litigation
16 that we have conducted thus far the City has
17 become quite knowledgeable about the effects
18 of the State's failure to enforce its
19 existing laws.

20 One result of the City's litigation,
21 however, is a series of extensive, very well
22 reasoned decisions in which the United
23 States District Court for the Eastern
24 District of New York has held that the

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1 present State Law supports an injunction
2 against further sales of untaxed cigarettes
3 by Native Americans to the public.

4 Most important, two federal judges have
5 ruled that sales of untaxed cigarettes by
6 Native Americans to the public violate
7 existing State Law and Federal Law and that
8 violation of the law occurs whether or not

9 the State chooses to enforce its law.

10 Let me offer you some examples of the
11 consequences of the State's practices over
12 the last few years.

13 With the acquiescence of the State
14 certain cigarette wholesalers deliver
15 unlimited quantities of untaxed cigarettes
16 to stores located on the Indian
17 Reservations.

18 In the City's lawsuit against those
19 wholesalers, we discovered that in 2007
20 alone, two wholesalers delivered to the
21 Poospatuck Reservation on Long Island
22 10,300,000 cartons of cigarettes.

23 If the cartons delivered to the
24 Poospatuck Reservation had actually been

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1 personally consumed on the Reservation, as
2 they must be in order to be legitimately
3 exempt from taxes under the United States
4 Supreme Court precedent, every man, woman
5 and child on the Reservation would have had
6 to smoke 900 packs a day.

7 Those deliveries amounted to a tax loss
8 of \$155 million per year in 2007 alone.

9 Now, there have been a lot of numbers

10 thrown around today. That is simply one
11 year, one Reservation, \$155 million, and
12 these are figures that were proven in court.

13 They are reliable because the numbers
14 come from the wholesalers themselves.

15 For the present year, September 2008 to
16 2009 the same two wholesalers sold 5 million
17 cartons to the Poospatuck Reservation,
18 amounting to a tax loss to the state only of
19 \$137 million. Again, one year, one
20 Reservation.

21 And again, these figures come from the
22 wholesalers' sworn filings with the state.

23 Neither of these numbers include the
24 City's tax losses, so that if we assume that

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1 these cigarettes were bootlegged into the
2 City where they replaced sales in the City,
3 in addition to the \$155 million loss in 2007
4 there would be another \$155 million loss to
5 the City and in 2008-2009 something on the
6 order of \$100 million.

7 The City also learned that by
8 permitting the Poospatuck Reservation to be
9 loaded up with millions of cartons of
10 unstamped cigarettes, the State has
11 essentially allowed the construction of a

12 huge duty free zone to which bootleggers
13 flock, buying van loads of cigarettes,
14 cartons of unstamped cigarettes that are
15 then brought back into the City to supply
16 City stores and City street sellers with
17 bootlegged unstamped cigarettes.

18 One bootlegger in our case testified to
19 her five or six year career driving out from
20 the Bronx to the Poospatuck Reservation at
21 least five days a week, loading her van up
22 with 900 to 1,200 cartons of Newport
23 cigarettes, and reselling the Newport
24 cigarettes to street sellers or stores in

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1 the City the same day.

2 If she sold these Newports early in the
3 day, she made a second trip back to the
4 Reservation.

5 Another bootlegger with a three or four
6 year career that Poospatuck Reservation
7 sellers made his business even easier by
8 driving three or four van loads of
9 cigarettes into the City every weekend to
10 his storage site.

11 Now, in the City's case against the
12 wholesalers, when the City challenged the

13 wholesaler's right to flood the Poospatuck
14 Reservation with unstamped cigarettes that
15 the wholesalers know are bootlegged back
16 into the City, incredibly to us the
17 wholesalers' argument to the court is that
18 they have the State's permission to deliver
19 as many cigarettes to the Reservation as
20 they wish to; that was their defense.

21 When the City goes to the Lorillard
22 Tobacco Company and challenges their right
23 to supply these wholesalers with Newport
24 cigarettes that Lorillard knows are then

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1 bootlegged back into the City, Lorillard
2 tells the City to go complain to the State
3 if we don't like the situation.

4 But the tax loss to the city and the
5 State is only one affect of the State's
6 failure to enforce the law.

7 As part of our case we asked the New
8 York City Department of Health to conduct a
9 study on the health effects of bootlegged
10 cigarettes.

11 It's well-established in the publish
12 health literature that maintaining high
13 cigarette prices causes people to cut down
14 and quit smoking entirely.

15 Doctor Thomas Freedom, who was then the
16 City's Health Commissioner and now is the
17 Director of the United States Centers for
18 Disease Control, testified in the Rodney
19 Morrison case that but for the availability
20 of cheap cigarettes in the amount
21 transported into the City by one trafficker,
22 the one I referred to earlier, 1,300 fewer
23 people per year would quit smoking.
24 That is the availability of the cheap

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1 cigarettes brought in by one bootlegger kept
2 1,300 people who normally would have quit
3 from quitting.

4 And of those 1,300 people, that's per
5 year, 450 of them will die prematurely from
6 smoking related illnesses.

7 So those deaths, annual deaths would
8 appear to be a result of the State's policy
9 of non-enforcement.

10 If tax loss and an injury to the public
11 health are not of sufficient concern, maybe
12 promoting crime is.

13 The Poospatuck Reservation is located
14 in Suffolk County. Arrest records that were
15 provided to the City by the Suffolk County

16 Police Department and by the Suffolk County
17 District Attorney's office show that
18 hundreds of people with New York City
19 addresses are arrested every year for
20 transporting what amounts to thousands of
21 cartons of unstamped cigarettes from the
22 Poospatuck Reservation back into the City.

23 The New York City Police Department
24 provided us with arrest records showing us

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1 that the same individuals are arrested 8, 9,
2 10 and 12 times, both for transporting
3 cigarettes from the Reservation into the
4 City and for selling those cigarettes on the
5 City streets.

6 If the legislature wishes to take
7 action now, its timing is excellent because
8 the problem could become much worse without
9 action by you.

10 There will be, very shortly, I believe,
11 in February of next year a case argued in
12 the New York Court of Appeals in which the
13 principal argument will be that you, the
14 legislature, have repealed Tax Law 471 when
15 you passed tax law 471(e), so that in the
16 absence of any coupons now there is no tax
17 on Reservation cigarette sales.

18 That's the issue in that case. That
19 position is based on what in the City's
20 opinion and in the opinion of two federal
21 judges is a very massive distortion of the
22 legislative history that's been foisted on
23 the state courts.

24 Unless it was the legislature's intent

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1 in 2006 to repeal the existing Tax Law 471,
2 and the City believes that the evidence in
3 the legislative history is that was not the
4 intent, but was, in fact, ordering the taxes
5 be collected forthwith, then the legislature
6 must do something now to respond to the
7 utter distortions of the legislative history
8 that are going to be argued to the Court of
9 Appeals by those who support the continued
10 course of taxing.

11 The simple fact is a fundamental cause
12 of the current problem is the State's
13 failure to implement the coupon system.

14 As a result of which, New York State
15 has become really the Nation's supplier of
16 unstamped cigarettes by means of internet
17 sales.

18 So the State injures not only its own

19 citizens, but the rest of the country as
20 well.

21 If the failure of the State of New York
22 to enforce the laws with respect to
23 Reservation sales is directly responsible
24 for the loss of billions of dollars that

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1 rightfully should have gone into the public
2 treasury at a time when you were asked to
3 close what I'm now hearing is a \$4 billion
4 budget deficit, it hardly seems like good
5 public policy to leave so much lawful tax
6 money in the hands of bootleggers.

7 State policy also promotes the same
8 type of criminal activity that characterizes
9 the illegal drug trade and it's destructive
10 of the public health by undermining
11 effective high cigarette prices on smoking
12 cessation.

13 Thank you very much for the opportunity
14 to testify here.

15 SENATOR JOHNSON: Thank you very
16 much, Mr. Proshansky.

17 Senator Winner.

18 SENATOR WINNER: A couple of fast
19 questions.

20 You heard testimony earlier from Steve

21 Rosenthal with regard to City of New York's
22 effort or lack thereof with regard to
23 prosecuting some of the individuals that you
24 are talking about that have been arrested

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1 numerous times for violations of the
2 transporting and selling untaxed cigarettes
3 and the like.

4 Do you have any comment as to why the
5 City of New York chooses to at the one hand
6 complain about the loss of revenue and on
7 the other hand not do anything about it
8 through the criminal justice system?

9 MR. PROSHANSKY: Well, my
10 understanding is, and looking at the
11 criminal records, criminal prosecution by
12 the way is done in the State Courts it's not
13 done by the City, but there are loads and
14 loads of individuals who are being
15 prosecuted.

16 But I would say that the problem, just
17 like the drug problem, it's not playing back
18 mole and trying to prosecute every little
19 street seller who is selling 5 or 10 cartons
20 of cigarettes; that's not an efficient way
21 to approach the problem.

22 The efficient way to cut off the supply
23 and the supply is coming from the
24 Reservation.

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1 The State Tax people and Deputy
2 Comiskey who testified here this morning,
3 those folks are out all the time arresting
4 people and those people are being prosecuted
5 all the time; it's a very inefficient way to
6 proceed. If you take away the supply there
7 is nobody driving those cigarettes on the
8 highways and into the City.

9 SENATOR WINNER: One other question,
10 just quickly, Mr. Rosenthal also testified
11 that in his judgment there are a number of
12 licensed establishments through the City of
13 New York that are selling openly and
14 notoriously untaxed cigarettes.

15 Does the City of New York have any role
16 through its Tax Department with regard to
17 going in and enforcing the statutes as it
18 relates to the sale of those untaxed
19 cigarettes?

20 MR. PROSHANSKY: Yes, they do, and
21 they take up that role.

22 I would debate whether the sales of
23 cigarettes are open and notorious. There is

24 known what is under the counter. The City

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1 Finance Department has a cadre of inspectors
2 that are constantly going into stores and
3 looking to see that stamped cigarettes are
4 being sold.

5 SENATOR WINNER: Do you keep data
6 with regard to your enforcement efforts?

7 MR. PROSHANSKY: Yes, the Department
8 of Finance does.

9 SENATOR WINNER: Would you provide
10 that to the committee?

11 MR. PROSHANSKY: We would.

12 SENATOR WINNER: Thank you very much.

13 SENATOR JOHNSON: Mr. Proshansky,
14 just a couple of quick questions, you
15 brought up the Rodney Morrison case.

16 Can the City actually seek a
17 restitution award for the tax revenue in the
18 Rodney Morrison case?

19 MR. PROSHANSKY: We are, yes. Rodney
20 Morrison is a Defendant in our civil case
21 and we are seeking civil damages in that
22 case that will be equivalent to the tax loss
23 to the city.

24 SENATOR JOHNSON: Is the state

1 participating with you in that civil case?

2 MR. PROSHANSKY: No.

3 SENATOR JOHNSON: Do you know why the
4 State is not participating with you in that
5 case?

6 MR. PROSHANSKY: No.

7 SENATOR JOHNSON: Is the State aware
8 you are seeking a restitution award in that
9 case?

10 MR. PROSHANSKY: I'm certain they
11 must be.

12 SENATOR JOHNSON: How much are you
13 seeking, by the way?

14 MR. PROSHANSKY: Well, we would have
15 to determine in the course of discovery what
16 his sales are, but it's many tens of
17 millions of dollars.

18 SENATOR JOHNSON: I read the decision
19 on the train ride in and one of the things
20 that struck me was that one of the shops, I
21 guess it's the Monique Smoke Shop, the
22 testimony evidence indicated that the smoke
23 shop also obtained unknown amounts of
24 cigarettes from, among other sources, an

1 entity on the Seneca Reservation.

2 MR. PROSHANSKY: That's correct.

3 SENATOR JOHNSON: The Senecas
4 testified that through their efforts and
5 collectively with the City and the State,
6 that they worked together to shut that down,
7 so to speak.

8 Is that accurate? Was it a cooperative
9 effort between and among the parties?

10 MR. PROSHANSKY: My understanding,
11 the City has not yet worked with the Seneca,
12 my understanding about that particular sale
13 was that it was made over the internet.

14 SENATOR JOHNSON: Okay, so the
15 Monique Smoke Shop made the purchase via the
16 internet?

17 MR. PROSHANSKY: Yes, and the Seneca
18 would not have known it was going to another
19 Reservation.

20 SENATOR JOHNSON: Okay, great. Thank
21 you very much.

22 MR. PROSHANSKY: Thank you.

23 SENATOR JOHNSON: We call now Jose
24 Louis Morillo. I am going to ask I know the

1 hour is -- he left.

2 We do have his written testimony. Jim
3 Ransom, chief of the St. Regis Mohawk Tribe.
4 Welcome. Thank you for coming today and
5 thank you for sticking around. Thank you
6 for your patience.

7 J I M R A N S O M

8 Called as a witness, having been first
9 duly sworn by the Notary Public, was
10 examined and testified as follows:

11 MR. RANSOM: I am one of the few
12 tribal Chiefs with the Mohawk Tribe, we have
13 13,000 tribal members, we are the largest
14 tribe in the State and geographically we are
15 located on the Canadian border, so we are
16 also the most remote tribe in the State.

17 I want to thank you for the opportunity
18 to present today, I think it's important to
19 the resolution of the issues that we be
20 engaged in this dialogue.

21 Much has been said recently of Governor
22 Paterson's letter to the United States
23 Attorneys. In response I will say that any
24 time someone attempts to infringe on our

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1 rights, we will defend ourselves.

2 All one has to do is review the events

3 that occurred early this summer in regards
4 to the port of entry to Canada that goes
5 through Mohawk territory.

6 There was no meaningful consultation by
7 the government of Canada in that situation
8 and there was no attempt to accommodate the
9 rights and interests of the Mohawk people.

10 That action was met with strong civil
11 disobedience because of the failure to
12 consider our rights. Rights that are
13 enshrined in the Canadian Constitution, in
14 Canadian's Charter of Rights.

15 I bring this up because New York should
16 expect no less.

17 If our rights are given fair
18 consideration, and meaningful consultation
19 occurs in a government to government basis,
20 then a peaceful resolution of State concerns
21 can be found.

22 In regards to the cigarette tax issue,
23 much has been said of the need for the
24 collection of cigarette taxes on sales made

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1 to non-natives on our Reservations and
2 territories.

3 In our situation, in particular the

4 imposition of a State tax on cigarette sales
5 within our Reservation will harm the State
6 economy, not help it.

7 We regulate and restrict the sale of
8 tobacco within our community. We stamp and
9 require that all tobacco retailers pay a
10 tribal tobacco fee, we prohibit internet
11 sales, we license businesses that sell
12 cigarettes retail and they employ over 400
13 local residents, most of whom would be out
14 of work if it weren't for these jobs.

15 We take the revenue collected from
16 sales on the Reservation and we use it to
17 fund essential governmental services.

18 A study that we did in 2003 indicated
19 that very modest tax increases in Mohawk
20 Territory at that time would cost the State
21 economy \$13 to \$20 million in lost gross
22 domestic product over subsequent years.

23 In addition, the poll of northern New
24 York voters that year showed that 60 percent

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1 of voters supported Governor Paterson's
2 position at the time the new tax regulations
3 were unconstitutional and violated Indian
4 sovereignty.

5 So the State's own constituents agree

6 with the tribes and Nations in the State.

7 The efforts underway are really about
8 catering to special interest groups. New
9 York State taxes are currently the highest
10 by a wide margin in history, this has
11 created prohibition like incentives for tax
12 evasion across state boundaries, to say
13 nothing of the tribes in the state.

14 A February 2003 report titled, and I
15 quote, "Cigarette taxes black markets and
16 crime, lessons from the 50 year losing
17 battle," bolsters our position that the
18 state's high cigarette taxes are the
19 problem, not us.

20 Quoting from that report which was
21 published by the Cato Institute, and I
22 quote, "The failure of New York's policy
23 makers to consider the broader effects of
24 high cigarette tax has been a mistake

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1 repeated across the country in a stampede to
2 maximize tax revenue from demonized
3 product."

4 History shows you need to lower your
5 cigarette taxes in terms of going forward,
6 in recent months Governor Paterson has made

7 several public statements that indicate a
8 willingness to respect tribal sovereignty
9 and seek a negotiated solution with us.

10 He even made a bold statement in this
11 year's state of the state address pledging
12 to work with us to forge a government to
13 government relationship.

14 We welcome this change in the State's
15 position.

16 A peaceful solution can be found, but
17 only if we work together on a government to
18 government basis.

19 This is what the Governor and this
20 Committee has in mind, there is hope that
21 our relationship can change in positive and
22 lasting ways that benefit us all.

23 Thank you.

24 SENATOR JOHNSON: Thank you.

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1 SENATOR WINNER: Thank you, Chief.

2 Just one fast question, the Senecas
3 have indicated very strongly they base most
4 of their opposition to the State's effort to
5 collect sales tax and/or cigarette excise
6 taxes on their particular treaty.

7 Are you making any kind of similar
8 assertion on behalf of the Mohawks, that

9 there is a treaty that prevents the State of
10 New York from imposing these taxes?

11 MR. RANSOM: I am not, I am basing it
12 on the sovereignty of our community.

13 We have the right to
14 self-determination, we have the right to
15 commerce, we have the right to trade, we are
16 a recognized sovereign within the U.S.
17 Constitution and we conduct ourselves as
18 such.

19 SENATOR WINNER: Thank you very much.

20 SENATOR JOHNSON: Thank you. Thank
21 you very much for participating today, I
22 appreciate your patience and have a safe
23 trip back.

24 Thank you. Russell Scaindra, Robin

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1 Vitale American Cancer Society, and Michael
2 Seilback from the American Lung Association
3 of New York.

4 R U S S E L L S C I A N D R A

5 R O B I N V I T A L E

6 M I C H A E L S E I L B A C K

7 Having been first duly sworn by the
8 Counsel to the Committee, was examined and
9 testified as follows:

10 SENATOR JOHNSON: Thank you. As you
11 know, the hour is growing.

12 MR. SCIANDRA: We will be brief.

13 SENATOR JOHNSON: We have your
14 written testimony.

15 MR. SCIANDRA: Thank you for holding
16 this hearing on one of the biggest health
17 problems facing New York today, rampant
18 civil tax evasion, and we wanted to come
19 today because we thought it was important to
20 make the point that this issue was not only
21 about money, it's about public health.

22 We have to remember cigarettes kill
23 25,000 New Yorkers a year, treating
24 cigarette caused disease causes \$8 billion a

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1 year in New York, of which more than \$5
2 billion is paid by Medicaid.

3 So the health effects of cigarette tax
4 evasion and the cost to New York State's
5 budget and local budgets from tax evasion is
6 not only on the revenue side, it's also on
7 the outgoing side.

8 More than 500 peer reviewed studies and
9 experience in State after State show that
10 higher taxes are one of the most effective
11 ways to reduce smoking among both children

12 and adults.

13 Every 10 percent increase in the price
14 of cigarettes reduces youth smoking by about
15 7 percent, and overall consumption by 4
16 percent.

17 And we estimate based on those models
18 that if the tax were collected, 100,000 New
19 Yorkers would quit smoking. We think that's
20 a very conservative estimate.

21 It's based on a survey of smokers in
22 New York State done by the State Health
23 Department that asked them about their
24 purchasing behavior.

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1 That survey and a study based on it
2 done by the Health Department, concluded
3 that more than 200 million tax free packs
4 are purchased on Indian Reservations.

5 And I will point out that Mr. Comiskey
6 said 250 million packs are going to the
7 Reservations, so we are pretty close.

8 We estimate that lost revenue since the
9 last tax increase in June of 2008 is now
10 over \$830 million.

11 And again, we base that on the numbers
12 we developed. I was surprised to hear that

13 the estimates from the Tax Department are so
14 low.

15 I mean they have told us that there is
16 25 million untaxed cartons being sold, at
17 \$27.50 a carton that's \$687.5 million in
18 taxes, not counting sales taxes and New York
19 City tax that you are losing out on.

20 So if one quarter of those cigarettes
21 are, in fact, going out-of-state and
22 therefore not subject to New York State
23 taxes, you end up with \$500 million a year
24 that you're losing in revenue, and so we

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1 think our conclusion actually is pretty
2 solid.

3 MS. VITALE: In the interests of
4 brevity I will concur with everything my
5 colleague from the American Cancer Society
6 has just said.

7 I do send apologies from Dr. William
8 Borden, who was supposed to be testifying
9 with us, but ironically he is a preventive
10 cardiologist and he had to leave for a
11 patient's appointment where he is offering
12 some tobacco counseling.

13 So with that I will just reiterate that
14 the American Heart Association does stand

15 and support this effort to implement this
16 tax enforcement and emphasizes that 25,000
17 New Yorkers die from tobacco related disease
18 annually, and the State accrues more than \$8
19 billion in medical costs each year related
20 to tobacco use we obviously want to make
21 sure that every tool is utilized in the
22 effort to prevent these mortalities from
23 happening, and we truly believe in order to
24 do that we must finally enforce this tax

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1 evasion issue.

2 As the tobacco related, tobacco is the
3 number one related cause of death from heart
4 disease and stroke, and as a result we
5 believe firmly that lives depend on your
6 actions today.

7 So thank you very much for your
8 attention.

9 SENATOR JOHNSON: Thank you.

10 MR. SEILBACK: Today is the first
11 briefing that I have actually been given
12 from the administration on the current
13 status of the negotiations with the various
14 tribes.

15 This process has been going on way too

16 long. You heard the health effects and the
17 reason why we are here today we are just
18 urging you to continue your pressure,
19 certainly the three of you and your
20 colleagues so that we can finally get a
21 resolution to this, because the public, the
22 health of the public and of your
23 constituents depends on it.
24 Thank you.

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1 SENATOR JOHNSON: Thank you. Thank
2 you very much.

3 SENATOR WINNER: Thank you for your
4 patience.

5 SENATOR JOHNSON: Thank you for your
6 testimony. Please get home safe.

7 Next on the list, James Calvin, Kevin
8 Beyer, Sandy Pope, Russell LaCoste, Jack
9 Rugen, James Wood.

10 J A M E S C A L V I N

11 K E V I N B E Y E R

12 S A N D Y P O P E

13 R U S S E L L L A C O S T E

14 J A C K R U B I N

15 J A M E S W O O D

16 Called as witnesses, having been first
17 duly sworn by the Counsel to the Committee,

18 were examined and testified as follows:

19 MR. RUGEN: Jack Rugen, I am
20 representing the United Franchise Owners of
21 Long Island and New York.

22 MR. WOOD: James Wood, I have my own
23 company and on my copy I have highlighted --
24 I made these copies and they didn't have

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1 them all highlighted, so you can see the key
2 points.

3 SENATOR JOHNSON: Gentlemen, thank
4 you very much.

5 As the hour is late and we do have your
6 written testimony, I ask you to try to do
7 your best to summarize.

8 Please note that we do take into
9 account the full testimony, your full
10 written testimony will be incorporated into
11 our deliberation, thank you.

12 MR. RUGEN: I am here representing
13 7-Eleven franchisees operating over 300
14 stores in the five boroughs of New York
15 City, Nassau and Suffolk counties of Long
16 Island and upstate counties of Orange,
17 Putnam, Rockland and Westchester.

18 Cigarette sales in our stores have

19 plummeted. On a personal note, in 1989 I
20 franchised my store, my cigarette sales at
21 the time were below the market average,
22 through hard work and business cunning I
23 lifted those sales to 35 percent above the
24 7-Eleven market average.

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1 Since the introduction of exorbitant
2 federal and State excise taxes on cigarettes
3 and tobacco, those sales have fallen
4 dramatically, and today those sales are
5 again below the market average.

6 In fact, there are three 7-Elevens in
7 Shirley whose cigarette sales are
8 practically nonexistent. One of the key
9 drivers of this dramatic downward spiral is
10 the close proximity of the Poospatuck Tribe
11 Reservation to these and my store.

12 When I questioned many of my customers
13 whom I have known for 20 years, why they are
14 not buying cigarettes from me, I get
15 explanations like I've been getting them at
16 the Indian Reservation in Mastic, or I am
17 buying them online at the Indian
18 Reservations.

19 Some even have been so bold to exclaim,
20 "Why should I buy them from you when I can

21 buy them on the Reservation for half your
22 price?"

23 I looked at this particular customer
24 with wonder and say gee, you don't look like

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1 a Native American.

2 The customer was arrogant enough as to
3 reply, "They don't enforce that."

4 I have even been told that neighbors
5 band together and purchase some 200 to 300
6 worth of cigarettes at the time at the
7 Poospatuck smoke shop.

8 I respect the God given right of Native
9 American sovereignty, but sovereignty is
10 complicated, there is a perplexing
11 uncertainty as to what it is exactly or
12 where it can be found or who possesses it
13 and who does not.

14 But certainly sovereignty does not
15 sanction non-sovereign, non-Native Americans
16 to enjoy the indigenous sovereignty granted
17 to Native American Indians.

18 It is time to enforce the legislation
19 already on the books.

20 It is time to take punitive actions
21 against those who would evade taxes and

22 shift the burden on law abiding tax paying
23 retailers.
24 It is time to level the playing field.

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1 Thank you for your attention to this
2 important issue, and your commitment to the
3 people and the cigarette retailers of the
4 City of New York.

5 SENATOR JOHNSON: Thank you. Mr.
6 Wood.

7 MR. WOOD: I just had a question for
8 you first. Do any of you own a business?

9 SENATOR WINNER: I run a law
10 business.

11 MR. WOOD: Let me ask you this, what
12 would you do if your government came in to
13 you, beat you up, ripped down your business,
14 burned your business, burned your house and
15 took you off your property? What kind of
16 government is that?

17 Do you think it's like communism, and
18 wait, I'm not done yet, then they put your
19 business, your business so they got their
20 stores running instead of yours.

21 SENATOR JOHNSON: Mr. Wood, can we
22 get your testimony?

23 MR. WOOD: I know, I was just asking

24 that question because it was just something

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1 I saw last night. I was saying would that
2 happen in New York State?

3 MR. ADLER: I think the thrust of
4 this is it's the panel that asks the
5 questions and it's the witnesses that
6 hopefully provide the panel with facts and
7 information.

8 If you could respect that it would
9 really help the process.

10 Thank you, sir.

11 MR. WOOD: I just wanted to do that
12 because I was going on the sovereignty
13 issue, they don't understand the word
14 sovereignty, but this is just the beginning,
15 but I was going to start with this, but I
16 saw this video last night and I saw that
17 happened and I didn't think that could ever
18 happen this the United States, but it did,
19 it happened on the Anendogua Indian
20 Reservation. The State Police and the
21 Sheriff's Department and the fire department
22 stayed off the land, said we can't go on, we
23 have no have permission to go on, and I saw
24 these videos of these businesses being

1 burned down and the owners beat up and they
2 start their own stores there.

3 It's like the Seneca Nation, they are
4 good people, they got individual stores and
5 they have business stores and they try to do
6 everything they can that's right, but I will
7 get back to my presentation, but I just
8 wanted to make that noted that it did happen
9 on March 2nd, 1998 and Channel 5 news in
10 Syracuse has it.

11 First thing I was going to talk about
12 is sovereignty. I know I am visually
13 impaired, not as bad as the Governor, so I
14 am going to skip over a loss of stuff to
15 make this quick, but basically in the U.S.
16 Constitution which we go under, not
17 treaties, but in Section 2, Section 8 and
18 Section 6 and Section 10 deal with the
19 Indians.

20 And commerce in Section 8 is only
21 supposed to be dealt with the United States
22 Government, not New York State.

23 And Section 10 says we are not even
24 supposed to do Compacts with them or even

1 write a letter.

2 So that's the first part. The second
3 part is Governor Pataki in a speech in 1997
4 where he said let me make my message to all
5 Indian Nations clear, it is your land, we
6 respect your sovereignty, and if a
7 legislature acts as I am requesting, you
8 have the right to sell tax free gasoline and
9 cigarettes from no interference from New
10 York State.

11 That's what he said in Erie County, but
12 the thing is, like everybody is talking
13 about selling to non-natives, they don't
14 think about Canada selling to New York State
15 residents and so on.

16 The next thing is in the 1950s
17 cigarettes were \$1.40 a carton and the New
18 York State tax was 3 cents a pack. Now the
19 tax is 2 to 3 times the base price of the
20 cigarettes.

21 You know, there is something wrong with
22 that picture, there is too much tax we know
23 in this New York State, but we can remedy
24 this.

1 The next thing you guys are talking
2 about smuggling and all that, but Philip
3 Morris has agreed to pay over \$1 billion for
4 smuggling offenses in Europe and has been
5 linked to the drug trade in Columbia, yet --
6 offenses in Europe has been linked to the
7 drug trade -- their right to tobacco
8 legislation in U.S. there are laws --
9 basically I can't read that.

10 What's happening is Philip Morris is
11 being charged for racketeering and drug
12 smuggling, using drug money to buy their
13 cigarettes, I have that in the references in
14 the back of the notes which I am giving you,
15 but yet Philip Morris is still in business
16 and they are talking billions of dollars,
17 yet here in the United States we let people
18 make their laws with the legislators, it's
19 because of the money, it's not right.

20 And then the Attea case is another
21 landmark against Indian Nations, all the
22 Attea was they were saying the BIA limited
23 partnerships they had a federal traders
24 license, didn't oversee the New York State

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1 license and New York City says no, it
2 didn't, that's what happened in court and

3 you have a copy of that in there.

4 Now, also New York State allows anyone
5 in the state to possess 2 cartons, up to 2
6 cartons of cigarettes untaxed, it's in this
7 right here, this CG 15, right here it says,
8 "A New York State resident can have up to 2
9 cartons," that's like 40 million of untaxed
10 cigarettes.

11 The other thing I've got in here is to
12 stop the smuggling that you are doing in New
13 York City.

14 If you go -- I don't know if any of you
15 have been to an Indian store on the
16 Reservation, but most cigarettes are \$45 to
17 \$50 a carton for cigarettes, but yet in
18 North Carolina they are only like \$35 a
19 carton on the shelves.

20 A person can take a van from New York
21 City, go down to North Carolina, by 17 cases
22 of cigarettes, bring it back here and make
23 \$20,000.

24 Now they are talking about 60 percent

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1 of the stores are Arab owned, now and they
2 figure there is terrorism, Tobacco Alcohol
3 and Firearms, apples ATF has done a survey

4 on that.

5 If 1,000 people from the community do
6 that, that's like \$20 million a week, \$1
7 billion a year in unpaid taxes on those
8 cigarettes, and it's funding the terrorists.

9 The way to do it is parity, but not
10 parity with the Indians, parity with the
11 lower tax states.

12 If you do parity with the lower taxed
13 States, all of a sudden people from New York
14 to Pennsylvania and New Jersey and Canada
15 and wherever to buy cigarettes, those people
16 from those states would come here and buy
17 their cigarettes, I missed that part, that's
18 what I have to say.

19 SENATOR JOHNSON: Thank you very
20 much, Mr. Wood, we appreciate your time.

21 I'm going to call the last four
22 witnesses together, so if James Simermeyer
23 and David Jacobs, Douglas Anderson and Jed
24 Morey, I'm going to start with Mr. Morey's

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1 testimony.

2 J A M E S S I M E R M E Y E R

3 J E D M O R E Y

4 D O U G A N D E R S O N

5 D A V I D J A C O B S

6 Called as witnesses, having been first
7 duly sworn by the Counsel to the Committee,
8 were examined and testified as follows:

9 MR. SIMERMEYER: James Simermeyer,
10 attorney for the Poospatuck Indians.

11 MR. MOREY: Jed Morey, Long Island
12 Press.

13 MR. ANDERSON: Doug Anderson,
14 Ambassador to the UN.

15 MR. JACOBS: David Jacobs, from the
16 Convenience Stores Association.

17 SENATOR JOHNSON: Mr. Morey, I'm
18 going to start with you.

19 MR. MOREY: Thank you, I will be
20 brief.

21 I offer this testimony to the committee
22 today as somebody who has done a lot of
23 reporting on this issue and gathered a lot
24 of exposure by traveling to native

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1 territories and looking at a lot of cases
2 and thereby reporting.

3 New York State is in dire financial
4 straits and its politicians, in my opinion,
5 are seeking refuge through taxation to cover
6 up their own negligence.

7 They claim that the sale of cigarettes
8 to non-Natives from the Reservation is
9 unjustly enriching Native Americans and is
10 contrary to established law in New York.

11 Of course none of this was a real issue
12 until our government ran out of money.

13 So while the State is struggling to
14 maintain solvency, several Reservations are
15 gaining economic momentum, and essentially
16 you tolerate them so long as they are poor.

17 But now that the tables have turned,
18 your true colors are showing.

19 When billions of dollars from the
20 landmark tobacco settlements were disbursed
21 among the 46 states enjoined in the lawsuit,
22 New York did what it does best, it took the
23 funds in one shot, wrapped them up in fancy
24 Wall Street financial instruments, and

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1 bonded out our future.

2 To make up for further budget
3 shortfalls the State hiked taxes on
4 cigarettes and artificially inflated the
5 price of tobacco, thereby creating a
6 disparity in pricing and calling it off the
7 Reservation and causing a rift between
8 retailers and the tribes, as you have heard

9 today.

10 New York continued to maintain its
11 pattern of reckless spending and found
12 itself on the wrong side of this recession.

13 Long before the cigarette industry was
14 booming on Reservations, Indian Nations sold
15 cigarettes as a means of basic survival.
16 Now they are being persecuted for
17 succeeding.

18 Unfortunately the very unsympathetic
19 view cigarettes hold in our society casts a
20 dark cloud over the critical issue of
21 taxation and jurisdiction and places in
22 doubt the immutable right of
23 self-determination these tribes enjoy.

24 Instead of working with tribal leaders

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1 the government inquiries about the
2 possibility of obtaining Federal Law
3 enforcement support against these Nations
4 and crafts unilateral policies that directly
5 affect tribal lands, but without tribal
6 consent these unilateral policies are
7 unenforceable and exist in a vacuum, no
8 different than attempting to legislate
9 activities within France or Canada.

10 Mr. Benjamin who testified today
11 actually introduced, as he said, legislation
12 to abolish the Poospatuck Reservation,
13 writing that it seems to be nothing more
14 than a criminal enterprise.

15 Mr. Benjamin would exile a people whom
16 Judge Masomoto in her October 8th decision
17 of this year, which nobody else referenced,
18 found to have, "Met it's burden of
19 establishing by a preponderance of the
20 evidence that they are recognized as
21 belonging to a sovereign nation."

22 What Mr. Benjamin and this panel don't
23 understand is that the very nature of
24 sovereignty, by definition, holds that no

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1 legislative decision, judicial decision or
2 executive decision outside Reservation land
3 has any bearing on activity conducted on
4 Reservation territory.

5 The Supreme Court of the United States
6 of America has repeatedly ruled that Indian
7 Nations are Sovereign Nations recognized by
8 but not governed by the Constitution of the
9 United States.

10 But in the end this is not about taxes,
11 bootlegging or the black market, this is an

12 issue of sovereignty and you are out of your
13 jurisdiction, you are out of your league,
14 and you are out of your mind if you think
15 that these Nations, if you think that these
16 Nations and its leaders would give up their
17 rights with respect to this.

18 So before you examine the operations of
19 the long house, I suggest you turn your
20 attention to cleaning up your own.

21 SENATOR JOHNSON: Thank you, Mr.
22 Morey.

23 Mr. Simermeyer.

24 MR. SIMERMEYER: Yes, thank you. I

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1 represent the Poospatuck Reservation Indians
2 and I have been involved with these cases
3 for perhaps five years now.

4 The unfortunate thing is as you see the
5 testimony today and you see statements made
6 testimony, so much of this stuff is based
7 upon newspaper articles or rumors or
8 statements that people say and there are no
9 facts, no facts presented.

10 For instance, as mentioned by the prior
11 speaker, Judge Masomoto recently after an
12 exhaustive hearing, evaluated the claim of

13 the Poospatuck Indians as to whether they
14 should be immune from being sued in federal
15 court, and they had to prove their pedigree
16 they went all the way back to the 1600s and
17 they showed that they are the same people,
18 same place that were there at that time as
19 they are today. This has not been
20 mentioned, this has been ignored by some
21 people actually having the nerve to promote
22 a Bill to try to remove these people from
23 existence. Outrageous. Unbelievable that
24 somebody would actually do this without any

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1 knowledge or any effort to make themselves
2 knowledgeable about these people.

3 And secondly, the City promotes a case
4 and they piled on everyone they could
5 possibly pile on against this tribe.

6 It's the smallest tribe in New York,
7 and the poorest tribe in New York. What
8 happened was you had a private case by
9 millionaire Katsamidis from Gristede's who
10 started the case, the City ran in behind
11 them, then the City encouraged they
12 encouraged Suffolk County to commence the
13 same exact case, this whole tribe has five
14 federal lawsuits against them prompted by

15 Blumberg and his crowd, five lawsuits.

16 Now, anyone else would crumble under
17 that amount of stuff, why wasn't this tribe
18 crumbling? They have nowhere to go.

19 This is the tribe that belongs there,
20 this is their land, it is their land, it
21 will remain to be their land so all these
22 lawsuits will not have effect on them for
23 two reasons, first of all because the State
24 has no standing, they come, the City has no

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1 understanding, they are asking the State to
2 collect taxes, the State couldn't do it, so
3 they commence an action, they commenced
4 several actions and they found as many as
5 they possibly could to commence actions
6 against this tribe. Everyone sat back and
7 didn't say a word.

8 Negotiations, this tribe has not been
9 invited to the table to negotiate with the
10 Governor, there has been no attempt,
11 although there has been letters from the
12 tribe to the Governor's office requesting
13 some sort of sit down in order to negotiate
14 these things.

15 There was criminal activity on the

16 Reservation, how did this criminal get
17 removed from the actions of the tribe?

18 The tribe commenced the action. They
19 commenced the action in federal court.

20 10 years ago they wrote a letter to the
21 federal prosecutor's office and said we have
22 a problem here, help us resolve this
23 problem.

24 Not until somebody was murdered did the

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1 federal government step forward and come
2 after this person. And who are the key
3 witnesses to this? Tribal members who were
4 also abused by this action.

5 So when you talk about criminal ring
6 leaders and activity, you should know what
7 you talk about before you make the
8 statements.

9 This tribe has taken it upon itself to
10 govern itself, its people and to control
11 what's going on.

12 Even on its Reservation they are taking
13 major courses, they have thrown Philip
14 Morris off the Reservation for selling
15 cigarettes, and they have attempted to make
16 every effort they possibly can to provide
17 for their people.

18 They have a taxation on cigarettes that
19 are sold that goes directly to the benefit
20 and welfare of their community, to senior
21 citizens, children, education, health and
22 welfare.

23 And also the shops have moved the
24 population of the Reservation from

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1 unemployment to employment.

2 And the community as well has benefited
3 from the activities of this tribe.

4 So not only do you hear statements that
5 are inaccurate and just rumors basically,
6 but things based on a newspaper article have
7 been the starting point for litigation, the
8 starting point for presenting a bill to have
9 this tribe removed from the State of New
10 York.

11 Amazing. I would just like that the --
12 that this committee deal with this tribe in
13 all fairness as it would the other tribes
14 and anyone else that comes before it with
15 these issues, and give this tribe an
16 opportunity to sit down and talk to you and
17 understand this tribe, learn about this
18 tribe and perhaps negotiate with this tribe

19 in good faith.

20 There has been a lot of talk about good
21 faith and fairness. Well, this is something
22 that really calls for attention, too.

23 Thank you.

24 SENATOR JOHNSON: Thank you very

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1 much.

2 Mr. Jacobs.

3 MR. JACOBS: Thank you, Mr. Chairman.

4 I am David Jacobs representing the
5 Store Owners of the Akwesasne operating on
6 -- the Reservation is located along the
7 U.S.-Canadian border in Franklin County New
8 York.

9 Our elected government and state
10 leaders, Mohawk Tribal Council, has been in
11 existence for over 200 years and is a
12 federally recognized tribe.

13 I am here today on behalf of the
14 Akwesasne Convenience Store Association to
15 voice our opposition to New York's attempt
16 to collect taxes generated by the sale of
17 cigarettes to non-natives on Indian
18 Reservations.

19 Our concern regarding the sales tax
20 issue center around two specific themes,

21 governmental jurisdiction and the economic
22 future of our Reservation community.

23 First, any attempt by the State to
24 collect taxes is a direct violation of our

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1 sovereignty as American Indians.

2 United States Government recognizes a
3 limited sovereignty for all Indian tribes,
4 but even with those limitations, the tribes
5 are given equal status to that of states.

6 Aside from criminal and civil law
7 enforcement, New York State does not have
8 jurisdiction over Mohawk territory.

9 Legally, only the federal government
10 can supersede the jurisdiction of the Mohawk
11 government. Morally, no government should.

12 New York State must respect the
13 government to government relationship that
14 it's obligated to maintain with the Mohawk
15 Government, as well as the governments of
16 other neighboring states.

17 What would be the reaction of
18 government officials and business people in
19 Vermont, New Jersey, Pennsylvania be if New
20 York was to insist other states collect New
21 York State taxes based on percentage of

22 sales made to New Yorkers?

23 Such an idea is preposterous and
24 unthinkable. But you consider similar

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1 behavior towards Indian Nations acceptable.

2 Thus, if our tribal council and members
3 of the Mohawk tribe do not wish to have
4 states collecting taxes on our Reservation,
5 and they don't, they won't, New York has no
6 authority to impose it.

7 For more than two centuries the United
8 States and individual states have chipped
9 away at the sovereign rights of territories
10 of American Indians.

11 Unscrupulous politicians conducted
12 nefarious deals with naive and trusting
13 Indian leaders which resulted in a virtual
14 theft of millions and millions of acres of
15 land.

16 Along with this loss of territory came
17 a loss of power, strength for American
18 Indian people.

19 On the Reservation is poverty, disease
20 and death. Some native leaders sought to
21 take advantage of the circumstances that
22 this had created by forcing Indian Nations
23 to sign treaties surrendering sovereign

24 rights.

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1 Some tribes had few other choices but
2 to acquiesce to foreign authorities and
3 taxation, however the Six Nations of the
4 Iroquois Confederacy did not.

5 The Iroquois Nations were never
6 conquered. The treaties signed were born of
7 piece, friendship and cooperation.

8 A trust, albeit uneasy, was
9 established, but that trust has been
10 violated time and time again by the mixed
11 messages and two-faced attitudes coming out
12 of non-Native governments.

13 Historically, New York State has
14 emphasized its desire to stimulate economic
15 development on Indian Reservations by making
16 Indian economic development a top priority.

17 This approach was designed to help the
18 Mohawks and other Indian stem the tide of
19 rampant unemployment and widespread poverty.

20 Likewise, the United States Government
21 continually talks about self-determination
22 and economic self-sufficiency for Indian
23 people.

24 We as Indian people would like nothing

1 more than one day to be sufficient,
2 self-sufficient because there can never be
3 true sovereignty without economic
4 independence.

5 While New York and the federal
6 government pledge more assistance for
7 economic development on tribal lands, they
8 also call for taxation and measures which
9 will destroy our economies and leave more of
10 our people without jobs.

11 A recent unemployment figure from the
12 Mohawk Reservation according to the New York
13 Bureau of Indian Affairs is three times that
14 of the national average, and that figure is
15 not unusual for Reservations throughout the
16 United States, some are even greater.

17 Labor Department officials in New York
18 can't even imagine figures that high for the
19 non-Native work force, but Mohawk people
20 live that nightmare every day.

21 It is safe to assume that many of these
22 unemployed people have no other alternative
23 but public assistance to support their
24 families.

1 If the State's welfare system is
2 already overburdened, what will happen when
3 more unemployed Mohawks who have lost their
4 jobs after business closed because of your
5 taxes seek financial support from the State?

6 What will that cost the taxpayers each
7 year?

8 How is that fair compared to the
9 alleged amounts of lost revenues from
10 cigarette taxes?

11 We receive mixed messages; become
12 independent, but not too independent.

13 Be successful, but not too successful.
14 Earn money, but not too much money.

15 But to our people the real message is
16 all too clear, we must stand firm and assert
17 our sovereignty now or we will live with the
18 consequences for many years to come.

19 We do not wish to alienate New York
20 State, but we do expect the State to respect
21 our authority and treat us in the same honor
22 given to other governments.

23 As Felix Cohen, a man considered to be
24 the father of federal Indian law has said,

1 there are many circumstances which apply to
2 American Indians that can also be applied to
3 other groups throughout history.

4 Allow me to quote Mr. Cohen, "The
5 American Indian plays much the same role in
6 our American society that the Jews played in
7 Germany. Like the miner's canary, the
8 Indian marks the shift from fresh air to
9 poison gas in our political atmosphere, and
10 our treatment of the American Indian even
11 more the treatment of other minorities marks
12 the rise and fall of our democratic faith."

13 Gentlemen, do not lessen our faith in
14 your brand of democracy.

15 Thank you.

16 SENATOR JOHNSON: Thank you sir.

17 MR. ANDERSON: Before I speak, I
18 would like to address some issues.

19 First of all, before I state my
20 statements, I would like to pass this letter
21 over to you people, if somebody could pick
22 it up and take it.

23 Second is I know you people had a lot
24 of issues about price parity and talking

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1 about that from the State level from the
2 local government, Paterson and everybody,

3 that's a violation of the antitrust laws,
4 that's federal offenses.

5 The other thing, too, is that you speak
6 about the sovereignty. Our sovereignty is
7 based on one condition and that is if --
8 that you have the ability to write passports
9 that are accepted by member states to the
10 United Nations, you're truly a sovereign
11 nation, we don't. The Shoshanna people have
12 a passport, we are truly sovereign, and I
13 want to read my letter.

14 The Senate Standing Committee on
15 Investigation in Government Operations, Mr.
16 Greg M. Johnson, Chairman, legislative
17 office Albany, New York.

18 Reference, non-Native Americans not
19 taxed with dealing with the Iroquois people.

20 Senate Committee, now I thank you. We
21 thank the Senate Standing Committee, the
22 Borough of Manhattan Community College, the
23 citizens of the United States and the
24 Unkechauga, the real people of mother earth.

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1 We are the Unkechauga, one of the Six
2 Nations of the Iroquois Confederacy of
3 Turtle Island, a/k/a North America.

4 Canada and the United States are
5 representative governments. The cardinal
6 principle of a representative government is
7 non-taxation without representation.

8 Remember the Boston tea party, 1773?
9 Canada and the United States could not make
10 laws without all parties the Unkechauga, the
11 real people of mother earth and the Iroquois
12 people.

13 Senator Whipple, 1889 and former
14 Congress, the Iroquois people owned the
15 northeastern part of the United States, the
16 Iroquois people own all Crown land in Canada
17 and the United States of turtle island,
18 a/k/a North America.

19 1914 -- 1924 I mean, Canada and United
20 States grant the citizenship to the Indians.
21 The Hopi and the Iroquois deannounce
22 citizenship in 1925.

23 1957 international law, the court ruled
24 treaty provisions may not be given as the

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1 U.S. domestic law if it conflicts with the
2 Constitution.

3 Read versus Colber, 1957. All the
4 Unkechauga people that have treaties with
5 Canada and the United States have conflicts

6 with the U.S. Constitution, Article 6,
7 Section 2.

8 Canada's Constitution Act of 1932
9 Section 35 of that document which describes
10 itself as the supreme law of the land, both
11 recognize and affirms existing aboriginal
12 treaties, the United Nations Charter is
13 binding in the United States under article
14 6, Section 2 of the U.S. Constitution,
15 treaties, in which the United Nations
16 Charter is one, are considered the supreme
17 law.

18 Canada and the United States lack
19 jurisdiction and authority to bring their
20 laws into the sovereign lands of the
21 Iroquois people.

22 Therefore Canada and the United States,
23 in particular New York State, must pay tax
24 with interest and penalties.

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1 If you are located within the
2 northeastern part of the United States or
3 Crown land on our Unkechauga, the real
4 people of mother earth, or the indigenous
5 people, then you are part of the Iroquois
6 people.

7 Non-Native Americans not taxed,
8 citizens of the United States voted yes to
9 pass laws in 1912, 1913 and 1914.

10 1912 the United States sold war bonds
11 to support World War I, the Iroquois people
12 purchased those war bonds. The Iroquois
13 people performed a government function.

14 1913 the United States collected
15 federal taxes to support the security of the
16 nation.

17 1914 the United States Treasury said if
18 you are a citizen of the United States and
19 in dealing with the Iroquois people, there
20 will be no taxes, 663323, therefore the
21 standing committee on investigation and
22 government operations of New York, you do
23 not have jurisdiction or authority to
24 collect taxes from non-Native Americans

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1 dealing with the Iroquois people.

2 I await your response. Ambassador
3 Douglas S. Anderson, Ambassador to the U.S.
4 All these letters, all these papers will be
5 sent to the UN, to the EUs, the European
6 Union and to the Organization of American
7 Historians States.

8 SENATOR JOHNSON: Thank you. Thank

9 you very much. I appreciate your time. I
10 just have a couple of questions, and they
11 are for Mr. Simermeyer.

12 Are the Poospatucks recognized by the
13 Federal Bureau of Indian affairs?

14 MR. SIMERMEYER: No, they never
15 applied for that.

16 There was a hearing before Judge
17 Masomoto to have sovereign immunity applied
18 to the tribe so they can't be sued in
19 federal court.

20 So there is a federal common law
21 standard of doing that called the Montoya
22 standard which we had a hearing on and the
23 tribe, through a preponderance of evidence,
24 met that standard so they could not be sued

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1 in that case in federal court.

2 SENATOR JOHNSON: So what's the
3 position that the tribe takes with respect
4 to the facts that were elicited in the
5 verdict that was rendered in the criminal
6 trial of Mr. Morrison before Judge Patucci?

7 MR. SIMERMEYER: It's interesting,
8 that's a criminal trial for him
9 specifically.

10 The reason why if you look at it and
11 read the details of the case, you will see
12 that the tribal members were the ones who
13 started the prosecution to remove him from
14 the job because of his activities.

15 So it's not something as if -- calling
16 him a ringleader, that's absurd, if you look
17 at the facts the people that were abused and
18 injured by Morrison's activity were tribal
19 members, I was part of a letter that went to
20 the federal government 7 to 10 years ago
21 asking them to do something about Morrison,
22 and until someone was murdered, nothing was
23 done.

24 SENATOR JOHNSON: What's the position

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1 the tribe takes with respect to the facts
2 elicited and the decision that was rendered
3 by Judge Amon in August 2009, the case City
4 of New York versus Golden Feather Smoke, et
5 al.

6 MR. SIMERMEYER: Clearly she took a
7 position that's anti -- it goes against the
8 Cayuga decision, she said state court got it
9 wrong, I got it right, once they review it
10 they will get it right.

11 Basically she was saying that 471

12 applies, not 471(e), in spite of the fact a
13 week before her decision the Cayuga decision
14 from the Fourth Department came out and she
15 ignored it.

16 Her ruling was they got it wrong, so of
17 course we had to appeal that, it's being
18 appealed now at the Second Circuit, and that
19 case, perhaps will then be certified to the
20 Court of Appeals to determine whether or not
21 471(e) applies or not and whether Cayuga got
22 it wrong.

23 SENATOR JOHNSON: She interpreted it,
24 the Cayuga decision, she evaluated Cayuga?

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1 I'm not following what you're saying.

2 MR. SIMERMEYER: Basically she said
3 that.

4 SENATOR JOHNSON: She said the Fourth
5 Department was wrong and the Court of
6 Appeals --

7 MR. SIMERMEYER: 4 to 1 decision,
8 they got it wrong and she's right.

9 We are appealing it, according to the
10 Second Circuit it's their priority to send
11 it, if they want they can send it the to
12 Court of Appeals and ask the Court of

13 Appeals to certificate whether or not she
14 got it wrong or they are right.

15 SENATOR JOHNSON: I am a little
16 confused about something, sovereign immunity
17 before a Judge Masomoto, why wasn't the
18 sovereign immunity issue adjudicated before
19 Judge Amon?

20 MR. SIMERMEYER: You have to see the
21 history. It was cases piled up against this
22 tribe, first Katsamidis is the owner of
23 Gristede's supermarket, wanted to be a
24 politician, commenced a case against them

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1 and Judge Amon ruled whether or not the
2 tribe could be sued will determine whether
3 or not you are entitled to sovereign
4 immunity.

5 So what she did there was she said they
6 had to have a hearing based on that, after
7 about a year of discovery, the case was sent
8 to the Judge Masomoto who at that time was a
9 magistrate to have a hearing.

10 So the hearing was conducted, a
11 decision was determined that the tribe, in
12 fact, is entitled to sovereign immunity
13 based in federal comity law.

14 SENATOR JOHNSON: And just one final

15 -- two final questions, one, do the
16 Poospatuck purchase cigarettes from stores
17 in the Seneca Nation?

18 MR. SIMERMEYER: That I'm not sure
19 of.

20 I know the purchases -- the information
21 that the City obtained and the reason why
22 they had so much information was because
23 they purchased all through licensed
24 wholesalers, New York State licensed

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1 wholesalers.

2 The information was readily available.
3 I know there are no internet sales on the
4 Reservation.

5 SENATOR JOHNSON: A final question to
6 clarify, you represented one of the parties,
7 one of the sued Defendants in that, in this
8 case, in the Golden Feather Smoke case, you
9 didn't represent the Nation or the tribe?

10 MR. SIMERMEYER: The Nation wasn't
11 sued, it was individual shops. But I
12 represented all of the Indians who were sued
13 in the action.

14 SENATOR JOHNSON: Okay, great.

15 MR. SIMERMEYER: All the ones who

16 were blood right members and had a license
17 and authority to operate pursuant to the
18 tribal rules and regulations.

19 SENATOR JOHNSON: Thank you very
20 much, gentlemen.

21 Thank you very much for your testimony
22 today. I appreciate your testimony and your
23 patience and please get home safe.

24 Thank you. As of right now this

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1 concludes today's hearing with respect to
2 taxation of cigarette sales, Native American
3 cigarette sales.

4 I know there were some individuals who
5 left. What I'm going to do for right now is
6 determine if any of them do want to have an
7 opportunity to come before the Committee, I
8 have been informed that the Senate will be
9 in session at least on the 10th for an
10 extraordinary session, I may, I may, and I
11 stress may, reconvene if there is interest.

12 If not we certainly have a lot of
13 written testimony from witnesses who had --
14 we will simply reach out to them to see if
15 the written testimony is enough.

16 With that I appreciate everybody's time
17 and patience and attendance today.

18 I specifically want to thank the
19 Borough of Manhattan Community College for
20 hosting us.

21 I want to thank my staff for assistance
22 in this process, I thank you all and good
23 day and I appreciate your time.

24