

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  
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Richard Harris Terrace  
Borough of Manhattan  
Community College  
199 Chambers Street  
New York, N.Y.

October 27, 2009  
Tuesday  
10:30

- PRESIDING: Senator Craig M. Johnson  
Chair
- Senator George H. Winner
- Senator Michael Nozziolo
- Senator Jeffrey Klein
- Senator Martin Golden
- Senator Joseph A. Griffo
- Senator Ruben Diaz
- Senator Eric Adams
- Senator George D. Maziarz

Also Present: Roger Adler  
Counsel

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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,

28

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

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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

33

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.



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                   cents 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



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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



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.



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,



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

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 Shinnecoeks, 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.

16 How about public assistance?

17 SENATOR JOHNSON: Excuse me, excuse  
18 me, hold on, Senator.

19 I'm trying to -- I would appreciate the  
20 members of the audience not to call out, not  
21 to speak out.

22 We have a hearing process, Senators and  
23 the witnesses are speaking, we understand  
24 and I understand the tensions that this

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1 hearing arises, we have an understanding,  
2 the Senator has permission to ask the  
3 questions and we want to solicit the  
4 answers.

5 Obviously representatives will be  
6 testifying shortly, the Senecas,  
7 representatives from the Nation are going to  
8 come testify next, but, please, no calling  
9 out; it serves no purpose.

10 Senator Golden.

11 SENATOR GOLDEN: Thank you, Mr.  
12 Chairman.

13 Again, we want to work with our  
14 Sovereign Nations, we have been trying to  
15 work with our Sovereign Nations for a long  
16 time.

17 Too long, and the taxpayers across this

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.



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

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



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.



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



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

10

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.

19

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,

24

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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

6

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 trying 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

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 concurred 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

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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

303

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, buy 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