

# The Burger Court Opinion Writing Database

## *United States v. Antelope*

430 U.S. 641 (1977)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



No. 75 -661

United States v. Antelope

To: Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Burger  
 Mr. Justice Black  
 Mr. Justice Douglas  
 Mr. Justice Harlan

From: The Chief Justice

Circulated: APR 11 1977

Recirculated: \_\_\_\_\_

Mr. Chief Justice Burger delivered the opinion of the Court.

The question presented by our grant of certiorari is whether, under the circumstances of this case, federal criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.

(1)

On the night of February 18, 1974, respondents, enrolled Coeur d'Alene Indians, broke into the home of Emma Johnson, an 81-year old non-Indian, in Worley, Idaho; they robbed and killed Mrs. Johnson. Because the crimes were committed by enrolled Indians within the boundaries of the Coeur d'Alene Indian Reservation, respondents were subject to federal jurisdiction under the Major Crimes Act. 18 U.S.C. § 1153.<sup>1/</sup> They were, accordingly, indicted by a federal grand jury<sup>2/</sup> on charges of burglary, robbery and murder. Respondent William Davison was convicted of second-degree murder only. Respondents Gabriel Francis Antelope and Leonard Davison

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

April 14, 1977

MEMORANDUM TO THE CONFERENCE:

Re: 75-661 United States v. Antelope

Enclosed is the first print draft of the opinion. Further reflection suggests to me that I should omit the tangential references to the death penalty potential. Notes 5, 10, and 13 have been modified by excisions, and a small addition is added to Note 9 for emphasis. There is no substantive change from the typed copy circulated on April 11.

Regards,

WRB

Justice Stewart  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens

1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 75-661

APR 14 1977

United States, Petitioner,  
 v.  
 Gabriel Francis Antelope  
 et al.

On Writ of Certiorari to the United  
 States Court of Appeals for the  
 Ninth Circuit.

[April —, 1977]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by our grant of certiorari is whether, under the circumstances of this case, federal criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.

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On the night of February 18, 1974, respondents, enrolled Coeur d'Alene Indians, broke into the home of Emma Johnson, an 81-year-old non-Indian, in Worley, Idaho; they robbed and killed Mrs. Johnson. Because the crimes were committed by enrolled Indians within the boundaries of the Coeur d'Alene Indian Reservation, respondents were subject to federal jurisdiction under the Major Crimes Act. 18 U. S. C. § 1153.<sup>1</sup>

<sup>1</sup> Title 18 U. S. C. 1153 provides in pertinent part:

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 14, 1977

RE: No. 76-661 United States v. Antelope

Dear Chief:

I agree.

Sincerely,

*Bill*

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

April 13, 1977

Re: No. 75-661, United States v. Antelope

Dear Chief,

I am glad to join your opinion for the Court  
in this case.

Sincerely yours,

P.S.  
/

The Chief Justice

Copies to the Conference

✓ ✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 14, 1977

Re: No. 75-661 - United States v. Antelope

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 15, 1977

Re: No: 75-661, United States v. Antelope

Dear Chief:

Please join me.

Sincerely,

  
T. M.

The Chief Justice

cc: The Conference



✓ ✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 14, 1977

Re: No. 75-661 - United States v. Antelope

Dear Chief:

Please join me.

Sincerely,

*H.A.B.*

The Chief Justice

cc: The Conference

✓✓

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 12, 1977

No. 75-661 United States v. Antelope

Dear Chief:

Please join me.

I do have two or three minor suggestions that I have noted on the enclosed copy of your opinion.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

April 14, 1977

No. 75-661 United States v. Antelope

Dear Chief:

I would be happy to have you add the footnote suggested in Bill Rehnquist's letter of April 13.

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Justice Rehnquist

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 13, 1977

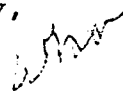
Re: No. 75-661 - United States v. Antelope

Dear Chief:

A propos our discussion of your circulating opinion in the above entitled case this afternoon, I offer the following language as a substitute for present footnote 9. I think in light of difficult and undecided questions as to the extent of the jurisdiction of Indian tribal courts and the like, it is important to cite cases such as those included in the proposed substitute footnote, not to make anything out of them in this case, but simply to show that they remain good law and that the language which you necessarily use in your opinion about Indian "sovereignty" is not to be taken with complete literalness.

Since Lewis indicated in his join letter to you that he was also suggesting minor changes, I am taking the liberty of sending a copy of this letter to him.

Sincerely,



The Chief Justice

Copy to: Mr. Justice Powell

4/13/77

Proposed addition to Antelope, footnote 9

    / Congress has provided for federal jurisdiction over the crime of murder on the reservation, much as on other federal enclaves, 18 U.S.C. § 1111, 1153. But as our opinions have recognized that Indian reservations differ in certain respects from other federal enclaves, the statute has been construed as not encompassing crimes on the reservation by non-Indians against non-Indians. United States v. McBratney, 104 U.S. 621 (1881); see Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930); Williams v. Lee, 358 U.S. 217, 219-220 (1959); McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 171 (1973). The statute does not single out Indian defendants; non-Indian defendants are also covered if the victim was a member of the tribe.

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 15, 1977

Re: No. 75-661 - United States v. Antelope

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 12, 1977

Re: 75-661 - United States v. Antelope

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference