

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DONALD L. CARCIERI, :

4 GOVERNOR OF RHODE ISLAND, :

5 ET AL., :

6 Petitioners :

7 v. : No. 07-526

8 DIRK KEMPTHORNE, SECRETARY :

9 OF THE INTERIOR, ET AL. :

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11 Washington, D.C.

12 Monday, November 3, 2008

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 1:00 p.m.

17 APPEARANCES:

18 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
19 the Petitioners.

20 DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the Respondents.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-526, *Carcieri v. Kempthorne*.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONERS

MR. OLSON: Mr. Chief Justice, and may it please the Court:

Congress squarely addressed and unambiguously answered the first question in this case when it enacted the Indian Reorganization Act of 1934. It authorized the Secretary to take land in trust for Indians, and it declared, as used in this Act, Indians were "members of any recognized Indian tribe now under Federal jurisdiction." The word "now" had the same meaning in 1934 as it does every morning in this Court when the Marshal announces that "The Court is now sitting."

When Congress said "now under Federal jurisdiction," it did not mean "then under Federal jurisdiction," but that is what the Government contends. In fact, the word "then" is the antonym for "now." "Now" must be given its ordinary meaning, which the Government concedes on -- in its brief, is the date,

1 effective date of the statute.

2 In this statute, the term "now" and synonyms
3 are used repeatedly throughout the Indian Reorganization
4 Act. The word "now" appears five times in the same
5 sense throughout the Act. The word "hereafter" is also
6 used. The word -- the term "now" or "hereafter" is used
7 three times; "heretofore" is used three times. I
8 mention these things because the Congress that read and
9 enacted the statute had a keen sense of the temporal
10 nature of the terms used in the Act.

11 JUSTICE BREYER: What about a poster that
12 says "Give blood now."

13 MR. OLSON: Pardon me, Justice Breyer? I
14 didn't hear you.

15 JUSTICE BREYER: They put up a poster that
16 says "Give blood now."

17 MR. OLSON: Well, it is --

18 JUSTICE BREYER: It doesn't mean when it was
19 printed.

20 MR. OLSON: Of course, of course, Justice
21 Breyer. There are many contexts in which one could
22 conceivably, but the context would tell you. In fact,
23 the Government's -- one of the Government's examples is
24 the use of the word "now" in a will. Of course,
25 everyone knows the will speaks as of the date of the

1 passage of the individual. There's another reference in
2 the statute where the Government refers to that, and the
3 statute itself has a very clear, different meaning.

4 My reference to the statute and the use of
5 the word "now" in this statute is very, very clear. The
6 legislation -- the statute refers to legislation "now
7 pending." That had to mean 1934. It refers to
8 boundaries "now existing or hereafter established." It
9 refers to positions and Indian tribes "now or hereafter
10 created." It refers to lawsuits "now pending or
11 hereafter filed." It refers to tribes "now under
12 Federal jurisdiction." All of those uses of the word
13 "now" are consistent. If the Government was correct,
14 the word "now" would have no meaning in that statute.

15 I think it was interesting, if one takes the
16 question presented as articulated by the Government, it
17 says, "Whether the Indian Reorganization Act authorizes
18 the Interior Secretary to take into trust on behalf of
19 an Indian tribe that was not recognized" -- "a not
20 recognized Indian tribe under Federal jurisdiction on
21 June 18th, 1934," if you take that word "not" and strike
22 it out of the question presented, you get the statute.

23 So, what the Government is asking for is the
24 exact opposite of what the statute clearly requires.
25 And all one has to do is look at the question presenting

1 -- presented as --

2 CHIEF JUSTICE ROBERTS: What about -- what
3 about the additional definition in section 19 of
4 "tribe," which is not limited the way the first sentence
5 is?

6 MR. OLSON: But it says, Chief Justice
7 Roberts, it says "Indian tribe." And the word "Indian,"
8 in that very section, at the very beginning of the
9 section, says "the term 'Indian' as used in this Act,"
10 blah, blah, blah. So then, later in that same section,
11 it refers to "Indian tribe."

12 It's important to juxtapose section 5, which
13 is codified as 465, and section 19, which is codified as
14 479, to look at the statute. The first part of section
15 5 authorizes the Secretary to take land for Indians.
16 Now, the way the Government addresses that in the
17 Government's brief, they took the word "tribe" at the --
18 towards the end of Section 465 and said the statute
19 authorizes taking land for tribes. It actually says
20 taking land for Indians, and then in the latter part of
21 section 5, it says "title" -- "When property is taken
22 for Indians, title may be vested in an individual Indian
23 or in a tribe." Then when you get to section 19,
24 Congress very carefully said, "As used in this Act, the
25 term 'Indian' shall mean" what we've been talking about

1 here today, and that's an adjective that describes
2 "tribe" later in the sentence.

3 There's two things that the Government does
4 in their brief which I find very interesting. First of
5 all, the Government says the use of the word "Indian"
6 doesn't necessarily mean Indians.

7 But Title I, section 1, of the United States
8 Code, the first sentence in the United States Code,
9 says: "The word 'singular'" -- "The word 'singular'
10 shall include the plural, and the plural shall include
11 the word 'singular.'"

12 So the United States is disregarding that
13 maxim. Of course, the context can always indicate
14 something different. But the Government asks you to
15 ignore the singular or plural. And then the other thing
16 that the Government does is to ask you to understand
17 that the word "Indian" means something when it's a noun
18 and something else when it's an adjective, violating
19 another primary construct -- construction, statutory
20 construction.

21 JUSTICE ALITO: Doesn't it have to be
22 correct because in -- in section 19 it says that the
23 term "Indian" means, among other things, all other
24 persons of one-half or more Indian blood. Now, the use
25 of "Indian" there can't be limited. It would be

1 circular if that definition applied to the use of that
2 adjective there.

3 MR. OLSON: The -- the -- yes. I understand
4 that, Justice Alito, and -- and no statute, if you -- if
5 you come along 70 years later, is it not possible to
6 find something like that. But the fact is that the only
7 consistent way to look at that term throughout the
8 statute -- and I would say, first of all, it's the
9 language of the statute. It's the context of the words
10 in the statute where the word "Indian" has to mean
11 certain things.

12 It has to have some limitation. Otherwise,
13 the Secretary can do anything, and -- and Congress
14 certainly didn't intend that. It's not just the text of
15 the statute. It's the purpose for the statute, which
16 was to protect and remediate Indians and Indian tribes
17 that have been harmed by the allotment policy.

18 JUSTICE KENNEDY: What sort of -- excuse me.
19 What sort of tribes were not under Federal jurisdiction?

20 MR. OLSON: Well, the use of the word
21 "tribe" in that question is -- is causing me a problem
22 momentarily.

23 JUSTICE KENNEDY: Pardon me. What -- what
24 -- yes, what members of tribes were not under Federal
25 jurisdiction?

1 MR. OLSON: Well, there were all sorts of
2 Indians who were not under Federal jurisdiction. What
3 -- there is a -- there is a document that the Government
4 produced in 19 -- in just this summer. There are four
5 documents I urge the Court to look at that the
6 Government suddenly discovered after 10 years of
7 litigation and produced in August of this summer, all of
8 which are Interior Department documents which support
9 our position in this case, Justice Kennedy.

10 What -- the fact is that there were many
11 Indians throughout the United States that were not
12 recognized -- recognized as a part of tribes. They
13 weren't groups of individuals with whom the United
14 States had made treaties. The United States had various
15 different relationships with groups of Indians,
16 including tribes.

17 JUSTICE KENNEDY: Were there, then -- were
18 there persons of Indian descent who were not under
19 Federal jurisdiction?

20 MR. OLSON: Yes. And --

21 JUSTICE KENNEDY: What -- what kind of
22 persons would those be, persons without a tribal
23 affiliation?

24 MR. OLSON: Yes. In fact, many -- many of
25 the Indians throughout the United States were not

1 connected or -- or tied up into a formal tribe. The
2 purpose for the Indian Allotment Act was to take a --
3 land out of reservations and out of the possession of
4 Indian tribes and distribute that to -- to Indians in
5 fee simple so that they could sell it to someone else.
6 Congress decided, the United States decided, in the '30s
7 that that policy had been -- ill-served the Indians and
8 ill-served the United States. So the Indian
9 Reorganization Act was intended to address and remediate
10 that.

11 At the same time the United States was
12 concerned and the Congress was concerned that there had
13 to be some limit. If there were Indians that had not
14 been adversely affected by the Allotment Act, they were
15 not intended to be, generally speaking, covered by the
16 Indian Reorganization Act.

17 So what I mean -- I was saying in response
18 to Justice Alito's question -- it's not just the text of
19 the statute. It's the purpose for the statute, which
20 was to provide some benefits and some limitations on the
21 damage done by the allotment policy. So it was natural,
22 when it was necessary to come up with some restriction
23 on who would be the potential beneficiaries of the
24 statute, to look at the tribes that were under Federal
25 jurisdiction in 1934 who had been harmed in some

1 fashion.

2 CHIEF JUSTICE ROBERTS: My understanding --
3 maybe I've got this wrong, but there was not then, as
4 there is now, a list of tribes that are recognized and
5 under Federal jurisdiction. So how -- how do you tell
6 in 1934 who is under Federal jurisdiction?

7 MR. OLSON: Well, what the Interior
8 Department did was, in compliance with the statute --
9 was to set about and create a list. There was a list
10 created in 1936, as I understand it, Chief Justice
11 Roberts. There was subsequent legislation that has even
12 a List Act.

13 But the -- what --

14 CHIEF JUSTICE ROBERTS: But I guess the
15 point is that, given the weight that you are placing on
16 the word "now," you would think there was some clear way
17 to say who was recognized before then and who was
18 recognized after that. And I -- I just don't know what
19 the test of recognition was in 1934.

20 But if they were drawing -- if Congress were
21 drawing a sharp line, presumably, it would be based on a
22 sharp distinction; and, yet, as I understand it, there
23 is no real sharp distinction.

24 MR. OLSON: Well, there was a relatively
25 sharp distinction. That is to say, it was Indians that

1 had treaties with the United States, or tribes that had
2 treaties with the United States, or had been recognized
3 in some fashion by the United States Government in terms
4 of a relationship between the Government of the United
5 States and the Indian tribes.

6 Now, the Federal Register and Federal
7 records in 1934 were not what they are today, and that's
8 the reason why, when these words were used, the Interior
9 Department set about to look through the history of the
10 Interior Department and to come up with a list of tribes
11 that would have been covered, would have been embraced,
12 by that term now recognized in 1934.

13 JUSTICE GINSBURG: But we're told that that
14 -- that effort was ridden -- ridden with mistakes. So
15 could you have, under your definition, a tribe that is
16 recognized relatively recently, whether it is about 16,
17 but that was, in fact, a tribe in 1934; that is, the --
18 although it wasn't formally recognized until later, it
19 was, in fact, a tribe in 1934?

20 MR. OLSON: Yes. Yes, Justice Ginsburg. In
21 fact, to the extent that it's necessary to go back and
22 -- and it happened on a few occasions subsequent to 1934
23 that historical records were reviewed, relationships
24 between the tribe and the Federal Government were
25 reviewed. In fact, in the Government's brief, the

1 Government talks about three tribes for which land was
2 taken into trust that didn't fit the definition of now
3 recognized -- tribes recognized in 1934.

4 We went back and looked at two of those
5 three tribes where -- in fact did have treaties with the
6 United States and would have been included. The other
7 would have probably been included and could be included
8 just exactly the way you suggested in your question.

9 The other point that I think is very
10 important to emphasize is that 15 times since the
11 enactment of this statute Congress has acted
12 specifically to apply the Indian Reorganization Act to
13 an Indian tribe that had not been covered in 1934,
14 evidencing some congressional understanding that it --
15 it took an act of Congress to bring a particular tribe
16 under the Act. There is these --

17 JUSTICE SCALIA: Of course, I suppose if the
18 phrase "now under the jurisdiction of the United States"
19 did not have any clear meaning when the statute was
20 enacted, it -- it wouldn't have any clear meaning for
21 the future, either. So you don't -- you don't solve
22 that problem by reading "now" to mean "then," right?

23 MR. OLSON: Well, what -- what -- I think I
24 understand your question. What the Government wants to
25 do is just take the word "now" out of the statute

1 altogether.

2 JUSTICE SCALIA: Yes. I'm saying it doesn't
3 help if you do what the Government suggests. That
4 doesn't give any clearer content to the meaning of being
5 under Federal jurisdiction. It is still going to have
6 to be worked out somehow. The question is whether you
7 work it out and apply it as of the time of the statute
8 or work it out and apply it time by time.

9 MR. OLSON: The only way the statute makes
10 sense is to construe "now" to mean 19 --

11 CHIEF JUSTICE ROBERTS: No. No. No.
12 That's not true, because now you have a very clear
13 system. You are recognized if you are on the list. If
14 you don't -- you know, maybe you shouldn't be on the
15 list; maybe you should be. But you are recognized if
16 you are on the list. That wasn't the case in 1934.

17 MR. OLSON: Chief Justice Roberts, what --
18 it was intended -- members of Congress had to think the
19 word "now" meant something. In fact, there is a
20 colloquy between Senator Wheeler and Commissioner --
21 Bureau of Indian Affairs Commissioner Collier that is
22 referred to in the briefs where Senator Wheeler was
23 saying: Well, there are some -- some groups out in --
24 in California that are no more Indian than you or I.
25 What are we going to do about that?

1 And Commissioner Collier, who is the author
2 of the Act, says: We will stick the words "now under
3 Federal jurisdiction in there." And then he explains
4 exactly what was meant by that: That would -- that it
5 would cover tribes that existed in -- in 19 -- that
6 would -- he says that would limit the Act to Indians now
7 -- and he is speaking at the time the statute was being
8 debated -- under Federal jurisdiction.

9 Those documents that the Government suddenly
10 discovered in August of this year, which were lodged
11 with this Court in the latter part of August of this
12 year, include a 1936 -- circular letter by Commissioner
13 Collier to all of the superintendents throughout the
14 United States. This is the author of the statute
15 speaking in 1936, and he says "all persons of Indian
16 descent who are members of any recognized tribe that was
17 under Federal jurisdiction at the date of the Act."

18 Now your point, Chief Justice Roberts, is
19 that maybe it was unclear at the exact moment of -- of
20 enactment which 198, or whatever number it might have
21 been, tribes were under that, but that's the sort of
22 information that can be discerned by looking at the
23 history and the records so that a finite group could be
24 identified. It isn't perfect, as Justice Ginsburg's
25 question suggests, but it is a verifiable method of

1 limiting what Congress obviously intended to limit --

2 JUSTICE STEVENS: Mr. Olson, can I ask you a
3 kind of a -- maybe it's too obvious -- preliminary
4 question? Is there a definition of the term "Indian
5 tribe" in the statute?

6 MR. OLSON: No. Not in -- it says "Indian
7 tribe" --

8 JUSTICE STEVENS: Section 19 defines the
9 term "Indian," but there is no definition of what an
10 Indian tribe is.

11 MR. OLSON: It refers, in the second-to-last
12 sentence of section 19 or 479, "The term 'tribe'
13 wherever used in this Act shall be construed to refer to
14 any Indian tribe." That's -- that --

15 JUSTICE STEVENS: See that -- that word
16 isn't limited by time or date, is it?

17 MR. OLSON: Well, the word "Indian" is, if
18 you accept the word --

19 JUSTICE STEVENS: Well, but the word
20 "Indian" -- it says the word "Indian," in the last
21 sentence, "'adult Indian' wherever used in this Act
22 shall be construed to refer to Indians who have attained
23 the age of 21 years."

24 MR. OLSON: Well, that just simply, I
25 submit, defines the word "adult."

1 JUSTICE SCALIA: Where -- where were you
2 reading from? I --

3 MR. OLSON: We were reading from section
4 479, which is at page 15a of the Carcieri brief.

5 JUSTICE STEVENS: I'm looking at the
6 Government brief. That's --

7 MR. OLSON: Yes. Yes. Now, the Government,
8 I think, has the codified version of it as well as there
9 are some changes --

10 JUSTICE SCALIA: That's what's causing me
11 confusion there. You're talking about -- I wish we
12 would just use the statutory numbers, but do what you
13 like.

14 MR. OLSON: Well, I'm happy to do it either
15 way. The -- the brief -- when we put it in -- in the
16 appendix to our blue brief, we did that.

17 JUSTICE SCALIA: Thank you.

18 MR. OLSON: And I think -- but nonetheless,
19 Justice Scalia, for the purposes of this, it is quite
20 clear that if you were a member of Congress in 1934
21 reading this statute and seeing the words "now or
22 hereafter" meaning now or sometime afterwards and seeing
23 the words "now pending," "now recognized," "now
24 existing," and so forth, you would think that the word
25 "now" meant 1934. In fact, when this Court in 1978 was

1 construing the statute --

2 JUSTICE STEVENS: Mr. Olson, am I not
3 correct that the membership in the tribe is just one
4 category of persons who are included in the broader
5 definition of the term "Indian"?

6 MR. OLSON: There are three categories,
7 Justice Stevens.

8 JUSTICE STEVENS: And one of the them is
9 members of the tribe.

10 MR. OLSON: Yes.

11 JUSTICE STEVENS: Another is one who --
12 Indians who have attained the age of 21 years. The
13 other other is -- let's see. "The term 'tribe' wherever
14 used in this Act shall be construed to refer to any
15 Indian tribe, organized band, pueblo, or the Indians
16 residing on one reservation." Now, that reference to
17 the term "tribe," as opposed to "Indian," doesn't have
18 any limit on the time.

19 MR. OLSON: Well, if you take the word
20 "Indian" out, but the word -- the phrase is "Indian
21 tribe." And Congress specifically said the word
22 "Indian" wherever -- now that's where the Government
23 says the word used as a noun doesn't mean the same as
24 the word used as an adjective. That doesn't make any
25 sense.

1 But Congress was clearly talking about --
2 when it made three categories at the beginning of that
3 sentence, Justice Stevens, it made three categories
4 basically to cover the tribes that were recognized and
5 then under jurisdiction in 1934, and that's -- the
6 author of the statute said that in 1936. He said that
7 in an exchange with Senator Collier. In fact, the two
8 other Justice Department -- Interior Department
9 documents that were reproduced were documents from the
10 Solicitor of the Interior Department to the Indian
11 Affairs person saying the same thing in 1978, the same
12 thing in 1980, and the same thing in 1994. And when
13 this Court construed the statute in -- in an indirect
14 way with respect to the Choctaw Tribe in 1978, in the
15 case of U.S. versus John, the Court said members of any
16 recognized bracket, in 1934, "tribe now under Federal
17 jurisdiction."

18 JUSTICE BREYER: Do you think -- do you
19 think the meaning of that -- the words specifically that
20 were added were "now under Federal jurisdiction." The
21 word "recognized" was already in the statute. So, it
22 looks like the "now" applies to "under Federal
23 jurisdiction."

24 Now, my law clerks, in doing research on
25 this, came up with a number of instances where the tribe

1 wasn't recognized until 1976. I think that was true of
2 something called the Stillaguamish Tribe.

3 MR. OLSON: Yes.

4 JUSTICE BREYER: And it's recognized in
5 1976, but then they go back and they say, well, was it
6 under Federal jurisdiction in 1934? And that seems a
7 rather loose term that includes the fact that you are
8 under Federal jurisdiction if, for example, the Federal
9 Government has a treaty with you that requires the
10 Federal Government to do something. Suppose that's the
11 right reading of this. Then should we send this back?

12 MR. OLSON: No. The meaning is quite clear.
13 In fact, Justice Breyer --

14 JUSTICE BREYER: Well, I'm saying I'm
15 agreeing with you on the meaning. The meaning is "now,"
16 but it's "now under Federal jurisdiction." So, there
17 would be a question. This tribe wasn't --

18 MR. OLSON: There's no question that this
19 tribe would not qualify --

20 JUSTICE BREYER: No.

21 MR. OLSON: -- and there's no contention
22 that it would. No matter how you define that and the --
23 the --

24 JUSTICE KENNEDY: They wouldn't qualify for
25 two reasons -- A, they weren't recognized; and B, they

1 weren't, in 1934, under Federal jurisdiction? Or
2 either?

3 MR. OLSON: Both, Justice Kennedy. They
4 weren't either.

5 JUSTICE KENNEDY: Because I suppose that
6 what the Government wants us to do is put in two commas:
7 The Indian as used in section -- a person of Indian
8 descent, comma, who are members of any recognized Indian
9 tribes, comma, now under Federal jurisdiction. That
10 still might not help if they weren't under Federal
11 jurisdiction in 1934.

12 MR. OLSON: That's correct. It does not
13 help --

14 JUSTICE KENNEDY: Even if they were
15 recognized later?

16 MR. OLSON: They can be recognized later,
17 Justice Kennedy. In fact, Congress specifically did
18 that 15 times between -- for the first time, it was
19 1936, and the last time it was 1994.

20 JUSTICE KENNEDY: You don't agree that
21 "recognized later" complies with this statute in your
22 case.

23 MR. OLSON: No, because here's what Congress
24 said: In each one of those 15 cases, Congress said --
25 the statute, including section 5 and 19, which is what

1 we are talking about here, "shall hereafter apply,"
2 "shall hereafter apply," "shall be hereby extended,"
3 "hereby," "hereby extended." So, Congress, on 15
4 occasions, decided that it was necessary to --

5 JUSTICE STEVENS: Mr. Olson, let me just
6 make sure I get this off my chest, and then I'll be
7 quiet. The first sentence in section 19 defines the
8 term "Indian." And that's the section you're talking
9 about?

10 JUSTICE SCALIA: What section are we talking
11 about -- 19? Or are we talking about some other number?

12 JUSTICE STEVENS: -- in this Act. The
13 second refers to -- the second sentence refers to
14 Eskimos. The third sentence defines the term "tribe,"
15 the term "tribe" -- and in that definition there is no
16 reference to time.

17 MR. OLSON: No, but it says the word
18 "Indian."

19 JUSTICE STEVENS: No. I'm talking about the
20 third -- the first sentence defines the term "Indian";
21 the third sentence defines the term "tribe."

22 MR. OLSON: May I read this, Justice
23 Stevens?

24 JUSTICE STEVENS: Yes.

25 MR. OLSON: "The term 'tribe' wherever used

1 in this Act shall be construed to refer to any Indian
2 tribe."

3 JUSTICE STEVENS: Right.

4 MR. OLSON: So, the word --

5 JUSTICE STEVENS: "Organized band, pueblo,
6 or the Indians residing on one reservation."

7 MR. OLSON: I submit that, for purposes of
8 construction of the statute and using the word
9 consistently, the word "Indian" modifies tribe, the word
10 "Indian" as defined, that's consistent with the purpose,
11 that's consistent with the legislative history. It's
12 consistent with the construction --

13 JUSTICE STEVENS: The word "Indian" does not
14 modify the word "tribe" as used in the third sentence.
15 That's my point.

16 MR. OLSON: Well, I think you and I must be
17 reading a different thing because the sentence that --
18 the sentence that defines the word "Indian" says "the
19 term 'Indian' as used" --

20 JUSTICE STEVENS: I'm saying for purposes of
21 getting the meaning of the word "tribe," just look at
22 the sentence defining that term, and that doesn't refer
23 to any time limit.

24 MR. OLSON: But it does include the word
25 "Indian," which does have a temporal limitation. If it

1 was "brown cow" and the word "brown" was defined, you
2 would look to the word "brown" to determine what a brown
3 --

4 JUSTICE STEVENS: It doesn't limit it to
5 Indian tribe. It says, shall include "any Indian tribe,
6 organized band, pueblo, or the Indians residing on a
7 reservation."

8 MR. OLSON: Well, I think that the
9 construction of the statute, including the way this
10 Court read it in 1978, the history, the purpose that it
11 was intended to accomplish, the use of those words
12 throughout the statute which are consistent, all
13 supports the proposition that it had meant Indian tribes
14 recognized and under Federal jurisdiction.

15 JUSTICE SCALIA: I assume that you think
16 "Indian" modifies "organized band" and "pueblo" as well.

17 MR. OLSON: Yes. And if I may, Mr. Chief
18 Justice, reserve the remainder of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Ms. Maynard.

21 ORAL ARGUMENT OF DEANNE E. MAYNARD

22 ON BEHALF OF THE RESPONDENTS

23 MS. MAYNARD: Mr. Chief Justice, and may
24 it please the Court:

25 The text of the Indian Reorganization Act

1 supports the Secretary's action here for three
2 independent reasons. First, section 5 authorizes the
3 Secretary to take land into trust for any Indian tribe,
4 and the Narragansett tribe is a tribe as that term is
5 separately defined in the Act. Second, even if one
6 looks to the definition of "Indian" in section 19, the
7 best reading of "now" in the first definitional example
8 is at the time that the Act is applied.

9 CHIEF JUSTICE ROBERTS: So -- so the statute
10 reads the same whether "now" is in there or not? You
11 read it as saying any recognized Indian tribe under
12 Federal jurisdiction.

13 MS. MAYNARD: Yes, Your Honor. And I think
14 that if you look at the legislative colloquy, it -- it
15 only makes sense, the addition of "now under Federal
16 jurisdiction," if what they meant by that was to use it
17 at the time the Act is invoked. Senator Wheeler's
18 concern, as Mr. Olson explained, was that there were
19 Indians in California who were then --

20 CHIEF JUSTICE ROBERTS: So you're saying the
21 only way that makes sense is to read it as if it weren't
22 there.

23 MS. MAYNARD: Ironically, Your Honor, I
24 think the Congress added the term "now under Federal
25 jurisdiction" to the Act, yes, to make clear that it --

1 it was a contemporaneous application of the term.
2 Senator Wheeler was concerned about Indians who were
3 already under Federal jurisdiction, and he said sooner
4 or later they must have come out from under the Act.

5 JUSTICE BREYER: I'm not sure he was,
6 because when I looked through that whole thing it seemed
7 to me what they were worried about -- Senator Thomas was
8 worried about remnants of tribes, and they were talking
9 about an example of the Catawba Indians in South
10 Carolina, and they had a discussion about that; and then
11 it seemed everybody on the committee agreed that these
12 Catawba Indians should not be included if they were only
13 one quarter Indian. They should be included if they
14 were half Indian. And that meant that they had to fall
15 within the other phrase, not the phrase that we are
16 talking about.

17 So then they say how do we get this result?
18 I mean, because they are a tribe. Because they are
19 certainly a tribe and they are recognized, the Catawbas.
20 And then the answer to that was -- what's his name --
21 the Collier -- Collier. Collier says: I'll tell you
22 how: We add the words "now under Federal jurisdiction."
23 And he thought what he was doing was ruling out the
24 Catawbas and only allowing the half Indians to come in.

25 Now, ironically, later on, in the '40s I

1 think, the government decides that the Catawba tribe is
2 in fact under Federal jurisdiction in 1934 because a
3 treaty exists.

4 Anyway, that's how I read it and the
5 California Indians were quite secondary to what they
6 were talking about. They didn't -- they didn't know
7 whether they were under a tribe or not a tribe or
8 anything.

9 MS. MAYNARD: Well, the colloquy is
10 certainly not clear, Justice Breyer. I'll grant you
11 that. But I do think the best reading --

12 JUSTICE BREYER: I thought it was fairly
13 clear.

14 MS. MAYNARD: I -- I think the best reading
15 of it is that Commissioner Collier is addressing Senator
16 Wheeler's concern, not the earlier concern about the
17 Catawbas, because he says "Senator Wheeler" -- "Senator
18 Wheeler, will this not address your concern?"

19 JUSTICE BREYER: Yes, but they -- I mean,
20 Senator Wheeler was worried about the Catawbas. Then
21 Wheeler decides, okay, the half-Indian Catawbas fall in,
22 but the quarter-Indian Catawbas don't.

23 MS. MAYNARD: My memory of it --

24 JUSTICE BREYER: I'll go back to it.

25 MS. MAYNARD: My memory is that it was a

1 different Senator who was concerned about the Catawbas.

2 JUSTICE SCALIA: Where -- where was this
3 interesting conversation? Was it even on the floor of
4 the Congress? It couldn't have been, because one of the
5 members wasn't a Congressman, right?

6 MS. MAYNARD: Well, I think it was at a
7 hearing, Your Honor.

8 JUSTICE SCALIA: It was at a hearing, oh.

9 JUSTICE BREYER: You learn a lot at
10 hearings, actually.

11 MS. MAYNARD: But if I could, going back to
12 the text, Justice Scalia, the text of the Act
13 independently support the Secretary's reading for three
14 reasons, the third being that even if one reads "now" in
15 the first definitional -- in the first definition to
16 mean unambiguously June 18, 1934, the definition by its
17 terms is expressly inclusive, setting forth the category
18 of people that the Secretary must include but not
19 limiting the Secretary to --

20 JUSTICE SCALIA: He can include anybody
21 else? He can include, for example, people who are only
22 one quarter-Indian blood, even though, you know, they
23 went to the trouble of defining it as 50 percent Indian
24 blood?

25 MS. MAYNARD: I think that would be a

1 more --

2 JUSTICE SCALIA: Very strange statute, just
3 leaving it up to him to do whatever he wants.

4 MS. MAYNARD: I think the proper way of
5 reading, as this Court said, definitions that start with
6 "shall include" is that they are illustrative examples
7 of a general group.

8 JUSTICE SCALIA: So -- so there is no
9 limitations. It includes this and it also includes
10 whatever else he wants. Is that it?

11 MS. MAYNARD: No, Your Honor; I think an
12 illustrative example of a general class, it would be
13 persons listed like the listed person. You example of
14 the quarter blood would be more difficult, perhaps. But
15 here what the Secretary has done is include within the
16 meaning of "Indians" persons who are every bit as much
17 an Indian as those who were members of recognized tribes
18 under Federal jurisdiction in 1934.

19 JUSTICE SCALIA: That's -- that's a very
20 strange reading of "shall include" when you're dealing
21 with a word that does not itself have any solid content.
22 When you're dealing with a word that's pretty much
23 self-defining, yes, you can say "shall include this,"
24 because what in addition is included is -- is pretty
25 clear.

1 But these words have virtually no -- no
2 content; and if you say "shall include" means, you know,
3 it has this, I'm still left with well, what else does it
4 have? I can't believe that the statute was meant to be
5 that expansive, to let the Secretary buy land for
6 whomever he wanted.

7 MS. MAYNARD: Well, it doesn't do that, Your
8 Honor. I think both -- both the definitions of -- of
9 "tribe," for example as Justice Stevens points out,
10 "tribe" is a separately defined term; and I don't think
11 you can work the statute in the plain text way that
12 Mr. Olson suggests. You can't take the word "Indian"
13 everywhere it appears in the statute and plug in the
14 definition of "Indian." And that's proven by looking at
15 the definition of "Indian" itself, which uses the
16 adjective "Indian" to define the term "Indian" four
17 times. So you can't take --

18 JUSTICE STEVENS: Ms. Maynard, would you
19 clarify one other thing for me? The sentence in
20 question with the word "now" in it and so forth, does
21 that have the meaning that it includes descendants who
22 are less than a half-blood, quarter-blood, eighth-blood
23 and so forth?

24 MS. MAYNARD: Yes, Your Honor. I think the
25 straightforward reading of that would be any descendant

1 who meet the terms of that provision would be included.

2 JUSTICE STEVENS: So that is an expansive
3 definition of the term "Indian," right?

4 MS. MAYNARD: The descendants. Yes, we
5 interpret that to be descendants who were living on the
6 reservation on June 1, 1934, but they wouldn't even have
7 to be members of tribes, and there would be no blood
8 quantum requirement.

9 CHIEF JUSTICE ROBERTS: Oh, so you're
10 applying now, when you're talking about who is of Indian
11 descent --

12 MS. MAYNARD: No, Your Honor.

13 CHIEF JUSTICE ROBERTS: -- Indian descent of
14 those in 1934, but not when it's determining -- in other
15 words, you say the Indian descent as of when?

16 MS. MAYNARD: Descendants who were on June
17 1st, 1934. That's not using -- that's not applying the
18 definition of the word "now." That's in fact using a
19 very different phrase, the second phrase, where Congress
20 used a date when it meant a date in 1934 --

21 CHIEF JUSTICE ROBERTS: Oh, I see.

22 MS. MAYNARD: -- rather than the definition
23 now. In fact, if you look at the verbs in the
24 definitional phrase, all of them are "are," "are,"
25 "are": "Are members of recognized Indian tribes," "are

1 half-bloods," "are descendants," except when they're
2 talking about June 1st, 1934: "Who were on June 1,
3 1934, residing on a reservation."

4 And I think the best reading of "now" in
5 context -- and Mr. Olson has pointed you to several
6 places in the text where they use "now" in very
7 different clauses: "now pending," "now or hereafter" --
8 and -- but in two places in the Act, and that's why I do
9 think it's important to look at the Act itself, Justice
10 Scalia, because this hasn't been codified into positive
11 law. In two places in the Act, section 14 and section
12 18, Congress used the phrase "at the time of passage of
13 this Act."

14 So it knew how to use that phrase. It
15 didn't use that phrase in "now." And in fact when those
16 --

17 CHIEF JUSTICE ROBERTS: What do you do about
18 United States v. John? There the Court in describing an
19 Indian, Indian descent, went out of their way to include
20 in brackets the phrase "any recognized in 1934 tribe now
21 under Federal jurisdiction"?

22 MS. MAYNARD: Well, that's obviously dicta
23 in the context of the decision, but I think in fact the
24 addition of the brackets shows that it's ambiguous. If
25 it were so clear, they wouldn't have needed to add the

1 phrase.

2 CHIEF JUSTICE ROBERTS: Well, but it -- it
3 may have shown it's ambiguous, but it shows how -- shows
4 how we resolved the ambiguity.

5 MS. MAYNARD: Well, the Court wasn't
6 resolving the meaning of the first definition in John,
7 so I don't think the Court was resolving anything. But
8 I do think if it had been so clear, the Court wouldn't
9 have needed to add the phrase. The --

10 JUSTICE SCALIA: It's pretty clear what the
11 Court thought it meant, though, isn't it? Whether it's
12 dictum or not, it's pretty clear that the Court thought
13 it clearly enough meant that, that they were willing to
14 say bracket -- you know.

15 MS. MAYNARD: It's certainly not a holding,
16 Justice Scalia --

17 JUSTICE SCALIA: I agree.

18 MS. MAYNARD: -- that the text unambiguously
19 forecloses any other reading.

20 JUSTICE SCALIA: I agree.

21 JUSTICE BREYER: What do I do about --

22 JUSTICE SCALIA: It suggests that it's not
23 very ambiguous, I think.

24 JUSTICE BREYER: What do I do about the fact
25 -- I was looking this up -- Collier and Felix Cohn, the

1 world's authority on Indian law, both write at the time:
2 this means under Federal jurisdiction in 1934; and they
3 write it and they rewrite it and they rewrite it. They
4 say nothing to the contrary.

5 I mean, they are the ones who did it, so I
6 have to admit I'm pretty much moved by the fact that
7 they thought that's what it meant.

8 MS. MAYNARD: Well, apart from the Collier
9 memo, which I would like to address, the Secretary when
10 administering this Act has uniformly, since the
11 beginning, applied the definition that applies today.

12 JUSTICE BREYER: I could only find one
13 instance, which is that Biloxi tribe, where the --
14 something, you know, the ones in Louisiana -- aside from
15 that instance, I have not found one other instance that
16 is inconsistent with the words "now under Federal
17 jurisdiction" meaning Federal jurisdiction in 1934.

18 MS. MAYNARD: I don't know --

19 JUSTICE BREYER: If you want to list them,
20 I'll look them up.

21 MS. MAYNARD: I don't know that the
22 Secretary has ever undertaken to make such a list.
23 There was no list at the time. And the Act was a
24 forward-looking act in its view of organized tribes and
25 by its nature assumed that there would be no tribes.

1 But in the 1930s and 1940s, the Solicitor's opinions
2 that we cite and discuss in our brief apply the question
3 of whether a group is a tribe who can organize under
4 section 16 or can have land taken into trust for them
5 under section 5.

6 JUSTICE BREYER: I believe that's organized
7 or recognized, because what they did in several cases, I
8 found, like the one, the Stillaquamish or whatever, they
9 said, yes, we recognize them now. They weren't
10 recognized in 1934, but they were under Federal
11 jurisdiction in 1934 because there were treaties that
12 applied between the Federal Government and the Indians
13 which gave these Indians rights then. And that -- that
14 seems consistent with what -- what Collier and the
15 others say.

16 MS. MAYNARD: My understanding is that the
17 Secretary interprets "recognized" and "under Federal
18 jurisdiction" to not have much difference with respect
19 to tribes. I think the "under Federal jurisdiction,"
20 the Court of Appeals suggested this might have more
21 content when you're talking about individuals, and that
22 makes more sense --

23 JUSTICE KENNEDY: That, seems to me, not to
24 help you, because if they are the same, then that would
25 apply to both.

1 Justice Breyer was suggesting, as I had
2 earlier, that maybe you can make a distinction between
3 those were under Federal jurisdiction then and
4 recognized tribes now.

5 MS. MAYNARD: And possibly you could. I
6 don't know that that would help the Narragansett Tribe
7 here. But the Secretary has always looked at whether --
8 whether a tribe could reorganize or have land taken into
9 trust for them under section 16 and section 5, to which
10 the same definitional -- definitions apply as to whether
11 or not the tribe was a tribe at the time the Secretary
12 was applying that decision.

13 CHIEF JUSTICE ROBERTS: This is -- we are
14 talking about an extraordinary assertion of power. The
15 Secretary gets to take land and give it a whole
16 different jurisdictional status apart from State law and
17 all -- wouldn't you normally regard these types of
18 definitions in a restrictive way to limit that power
19 instead of saying whenever he wants to recognize it,
20 then he gets the authority to say this is no longer
21 under Rhode Island jurisdiction; it's now under my
22 jurisdiction?

23 MS. MAYNARD: Well, there is -- there is a
24 competing presumption there that I think is -- Chief
25 Justice Roberts, which is that Indian statutes are

1 interpreted to the benefit of the Indian. And this was
2 supposed to be a new deal for the Indians --

3 CHIEF JUSTICE ROBERTS: Well, how do we know
4 which one of them benefits the Indian? I mean, have the
5 Indians benefited from Federal jurisdiction in the last
6 50 years?

7 MS. MAYNARD: Well, the Indians are the ones
8 who made the request to have the land taken into trust.
9 And I assume they know -- that they believe it's in
10 their interest to have the land taken into trust.

11 CHIEF JUSTICE ROBERTS: What are the plans
12 the Indians have of doing with the land once it's
13 determined to be Indian land subject to trust of the
14 Federal Government?

15 MS. MAYNARD: The administrative record
16 reveals that HUD loaned the -- or granted the tribe
17 money to build housing.

18 CHIEF JUSTICE ROBERTS: Yes, of course, the
19 use of that land would not be limited to housing, right?
20 They could engage in other activities that Indian tribes
21 can engage in, correct?

22 MS. MAYNARD: According to the
23 administrative record, there are some HUD restrictions
24 on the land. If what you're concerned with is the
25 specter of gaming, our interpretation of the Indian

1 Gaming Regulatory Act is that the tribe could not
2 unilaterally decide to game on this property were it
3 taken into trust.

4 But as to your point, the -- with respect to
5 the clarity of these definitions, the terms "Indian
6 tribe," "organized band," "Pueblo," they had been
7 interpreted by this Court in 1934 several times. In --

8 JUSTICE KENNEDY: The Chief Justice's
9 question, and I was going to put the same question to
10 Mr. Olson, is whether or not there is -- is some canon
11 of construction, some principle of Federalism which
12 makes us be very cautious before we take land out of the
13 jurisdiction of the State. It sounds to me plausible.
14 Is there any authority for the proposition I just
15 stated? Have we said that in cases or --

16 MS. MAYNARD: Well, you've said --

17 JUSTICE KENNEDY: Or have we said the
18 opposite, that there is no --

19 MS. MAYNARD: Here I think it's very clear
20 that the purpose of section 5 was to allow the Secretary
21 to take land into trust for Indians. And then --

22 JUSTICE KENNEDY: But is there any
23 overriding principles about which we must be most
24 cautious before we interpret the statute as depriving
25 the State of the ownership and jurisdiction of this

1 land? Is there anything in the cases either way on that
2 point?

3 MS. MAYNARD: I don't know -- I don't know
4 standing here and, Petitioners haven't cited anything
5 for that principle in their brief, although they suggest
6 -- of that. There is a competing principle that Indian
7 sovereignty is not lightly to be set aside.

8 One important point I think is that the
9 purpose of this statute -- that the Secretary's
10 interpretation makes more sense. The -- the purpose of
11 this statute was a forward-looking one. It was to
12 revitalize and reorganization rights.

13 CHIEF JUSTICE ROBERTS: Of course, your
14 friend on the other side says the exact opposite. It
15 was backward-looking. They had had the allotment
16 policy, which they decided was not a good idea, and yet,
17 that had resulted in Indian land being turned over to in
18 fee simple, and this is a way to compensate for the
19 discredited allotment policy.

20 So, if you weren't recognized in 1934, you
21 were not penalized by the allotment policy, so you
22 didn't need the benefit. I think that backward-looking
23 perspective seems to make perfect sense.

24 MS. MAYNARD: Well, the historians brief, I
25 think, makes a good case that that's not the right view

1 of history. But the text also debunks that view. The
2 half-blood definition is in no way limited to whether or
3 not you were an Indian who was a member of a tribe who
4 was allotted.

5 The inclusion of Pueblos also makes clear
6 that that was not the purpose of the Act, because
7 Pueblos never had their lands allotted. This was a new
8 deal legislation for Indians to let them revitalize. It
9 was the beginning of what now has consistently been,
10 with the exception of the 1950s, the -- you know,
11 Congress has set about to allow the Indians to govern
12 themselves. The acquisition of land is extremely
13 important to the ability to do that, to revive
14 economically, to have self-governance.

15 The line that Petitioners pose would create
16 an entirely arbitrary result.

17 JUSTICE GINSBURG: As you read the statute,
18 Ms. Maynard, the words "now under Federal jurisdiction"
19 could be deleted and the statute would mean the same
20 thing that you're urging.

21 So what do the words "now under Federal
22 jurisdiction" add?

23 MS. MAYNARD: Well, I think, as I was saying
24 earlier, I think the colloquy was -- reveals that what
25 they were trying to do was make the statute fluid so

1 that it would apply at the time of application
2 contemporaneous move with the times. As I said earlier,
3 I don't think there is much distinction between
4 recognition and under Federal jurisdiction when one is
5 speaking about tribes, but perhaps --

6 JUSTICE SOUTER: Well, there may -- there
7 may not be, but let me on that score, take you back to
8 an answer that Mr. Olson gave.

9 Assume for the moment, for the sake of the
10 question, that we were to read this the way Justice
11 Kennedy and Justice Breyer suggested, and that is to
12 draw a distinction between the reference -- the now
13 reference between recognition and jurisdiction and say
14 that the now refers to jurisdiction and it refers to the
15 time of passage. If that is the way we read it, should
16 we remand this case to the circuit? Mr. Olson said no.
17 There is no claim that, in fact, the tribe was, in fact,
18 under jurisdiction at the time of passage. What is your
19 answer?

20 MS. MAYNARD: I'm not certain enough to say,
21 Justice Souter. I'm not sure it was litigated on
22 that -- on that premise.

23 JUSTICE SOUTER: Well, tell us what you want
24 us to do.

25 MS. MAYNARD: I mean, you know, if the Court

1 is going to take that view of the statute, then I
2 suppose a remand is preferable to let it be worked out.
3 But the Secretary's preface.

4 JUSTICE SOUTER: In any case, you are not
5 here to represent that, in fact, we may assume that
6 there was no jurisdiction over the tribe at the time of
7 the passage?

8 MS. MAYNARD: You know, I just don't know
9 that it's ever been looked into from that perspective,
10 especially if one draws the difference --

11 JUSTICE SOUTER: Well, if it hasn't -- if it
12 hasn't, then you're not in the position to make the
13 representation that Mr. Olson -- I think Mr. Olson's
14 answer suggested would be a correct one.

15 MS. MAYNARD: I believe that the Secretary's
16 interpretation from the beginning, as I suggested
17 before, has -- has understood recognition and under
18 Federal jurisdiction at least with respect to tribes to
19 be one and the same. And the -- the -- if the Court
20 were to draw a distinction and, you know -- from the
21 beginning of the 1930s and '40s the opinions show that
22 what the Secretary looked at was at the fact at the time
23 as in 1964 there were published regulations interpreting
24 Indians and tribe not limited by --

25 JUSTICE SOUTER: I'm sorry. Are we in a

1 position to -- to draw or accept that conclusion here?
2 I mean, that -- that wasn't worked out. Shouldn't we
3 remand and have that specifically addressed and
4 specifically address the question of jurisdiction?

5 MS. MAYNARD: Which wasn't worked out?

6 JUSTICE SOUTER: Well, you were -- you were
7 saying that the -- that a distinction simply had not
8 been drawn at the BIA level, I guess, between
9 jurisdiction and recognition. And I don't think -- I
10 don't think we are in a position to say, yes, that's so
11 or, no, that isn't so. So that would seem to me to
12 argue for a remand in and of itself.

13 MS. MAYNARD: Well, I think there --

14 JUSTICE SOUTER: Would you agree?

15 MS. MAYNARD: Well, if the Court limits its
16 view to the one definitional example in the IRA, then
17 perhaps a remand is certainly preferable to a reversal.
18 But there is no need to remand, because there are two
19 separate reasons. For the Petitioner's to prevail here,
20 the text has to unambiguously foreclose the possibility
21 --

22 JUSTICE BREYER: I wouldn't know that that's
23 so, because the -- the question I ask myself on that is:
24 Were I in Congress, is this the kind of thing I would
25 have delegated to the Secretary to decide.

1 And it's very hard for me to think that
2 Congress wanted to delegate the power to the Secretary
3 to decide whether "now" happens to mean 1934 or "now"
4 means any time in the future. Well, I mean that's
5 something Congress would decide: They meant by "now"
6 1934, or they meant by "now" any old time it's applied.

7 Now -- now, you could argue that both ways,
8 but why would you want to delegate? What human being
9 would want to say: The meaning of the word "now" is
10 something I'm leaving to the Secretary?

11 MS. MAYNARD: Even if you think, Justice
12 Breyer, that "now" unambiguously means June 18, 1934,
13 there are two other --

14 JUSTICE BREYER: I'm not -- I'm not saying
15 it unambiguously means it. That's not what I'm saying.
16 I'm saying it's totally ambiguous, but what the
17 Secretary has to say about it is enlightening only
18 insofar as the Secretary knows more about it than I.
19 That's fine. But not insofar as it delegates power to
20 the Secretary to make up his own mind.

21 MS. MAYNARD: Well, I think that one -- if
22 one can't tell from the text in Chevron and other
23 principles, that you allow the Secretary, in light of
24 his understanding of the purposes of the statute, the
25 plight of the Indians, contemporaneous things, to decide

1 what the statute means. But there are two other
2 provisions in the statute that, apart from that, the
3 other side, for them to prevail, the statute has to
4 unambiguously foreclose the taking of land in trust for
5 tribes, setting apart the example of "Indian." And the
6 definition of "tribe" is, as Justice Stevens pointed
7 out, it's separately defined. That --

8 JUSTICE STEVENS: Can I ask you a question?
9 It seems to me that the limited definition of "the
10 tribe" really is quite irrelevant to this -- to this
11 case. The term "Indian" is defined to include two
12 classes of persons: One who are members of a certain
13 category of tribes and others who have more than half
14 Indian blood. It seems to me that -- and then you get
15 to the definition of "tribe" that comes later.

16 It seems to me that when you're talking
17 about the definition of "tribe," the statute would have
18 exactly the same meaning if, instead of it limiting by
19 time from 1934, it said tribes located west of the
20 Mississippi. If they just limited it to that, that
21 wouldn't have limited the definition of "Indian." I
22 mean the definition of "tribe."

23 It would have made the category of -- of
24 persons of Indian descent or eligible to be treated as
25 Indians and whose eligibility is determined by tribal

1 membership, limited but the -- not to include all
2 tribes. So you can limit it, as I say, to tribes west
3 of the Mississippi.

4 But then when you get down to defining the
5 term "tribe," there is no such definition. So that I
6 just think the fight about what "now" means is totally
7 irrelevant to the meaning of the definition of "tribe."

8 MS. MAYNARD: I agree. I agree
9 wholeheartedly, and I think there might have been
10 reasons that the Court of Appeals concluded they might
11 have wanted to limit the definition of any of the
12 benefits the Act allows individuals, but not limit the
13 Act's coverage of tribes.

14 JUSTICE SCALIA: I'm interested -- I'm
15 interested in the Secretary's conclusion that recognized
16 "tribe" and "tribe now under Federal jurisdiction" are
17 one and the same; that the words are used redundantly.

18 Does he know the rule that we usually don't
19 -- I guess he doesn't because he interprets "now" to
20 mean nothing. Does he understand that we usually do not
21 interpret words to have no meaning? Why would they say
22 both if they both mean the same thing?

23 MS. MAYNARD: Well, I think maybe I didn't
24 --

25 JUSTICE SCALIA: "Recognized tribe under

1 Federal jurisdiction," that, to me, means two different
2 requirements.

3 MS. MAYNARD: I think it can capture tribes
4 that were previously recognized but that either disband
5 or become -- become not -- not vibrant. But in terms of
6 currently recognized tribes, tribes that the Secretary
7 today recognizes as tribes that have always been tribes
8 -- and that's all we are talking about here: Tribes
9 that were tribes before European contact, have had a
10 cohesive political entity since that time. And that's
11 what the Narragansetts are.

12 JUSTICE BREYER: I have difficulty with the
13 "tribe" thing. I think it's a very difficult case. I
14 have a hard time. But the difficulty with the word
15 "tribe" is that either that tribe has some people in it
16 who are Indians, or it doesn't, right? That has to be
17 true.

18 Now, if it has some people in it who are
19 Indians, i.e., a person who falls within the definition
20 of "Indian," then, of course, the Secretary can take
21 land for that because the whole thing is for the purpose
22 of giving land to Indians. But let's imagine a
23 tribe that has no Indians in it within the definition of
24 the Act. You are saying that this Act would give to the
25 Secretary the power to take land for an entity that has

1 no members within the Act. Now, that is pretty hard for
2 me to accept.

3 MS. MAYNARD: Two points, Justice Breyer.
4 There is nothing in the definitional section that
5 requires the drafting of "Indian" on to the definition
6 of "tribe."

7 JUSTICE BREYER: Well, there is one thing.
8 It says it's for the purpose. We -- we give the
9 Secretary the power to take land for a tribe for the
10 purpose of giving land to Indians.

11 MS. MAYNARD: But in --

12 JUSTICE BREYER: And now we have assumed a
13 tribe that has no such members because "Indian" has a
14 special definition.

15 MS. MAYNARD: But later on in Section 5 it
16 says we can take land in trust on behalf of an Indian
17 tribe or an individual Indian for whom the land is
18 required.

19 JUSTICE SCALIA: I don't -- I don't
20 understand how you say that -- that the term "tribe" has
21 no limitation to Indians. "The term 'tribe,' whenever
22 used in this Act, shall be construed to refer to any
23 Indian tribe, organized band or Pueblo, or the Indians
24 residing on one reservation."

25 MS. MAYNARD: Well, we have to graft on to

1 the last clause where -- Indians residing on a
2 reservation. But it can't graft on to "Indian tribe,"
3 Justice Scalia, because "Indian tribe" is used to define
4 "Indian," as well. And the whole thing is circular, and
5 it --

6 JUSTICE SCALIA: Well, it's -- I mean
7 circular definitions are nothing unusual in the
8 legislation that Congress comes up with.

9 MS. MAYNARD: But it -- that may be so but
10 it doesn't unambiguously foreclose the Secretary's
11 interpretation here. And that must mean they must show
12 that it unambiguously forecloses --

13 JUSTICE SCALIA: What meaning -- what
14 meaning do you think the sentence has when it says:
15 "The term 'tribe' shall be construed to refer to any
16 Indian tribe, organized band, Pueblo, or the Indians
17 residing on one reservation"?

18 MS. MAYNARD: This Court had interpreted --

19 JUSTICE SCALIA: How can you interpret that
20 not to be limited to Indian tribes?

21 MS. MAYNARD: In Montoya this Court had
22 interpreted in an earlier statute the term "Indian
23 tribe" and "organized band" to mean a distinctly Indian
24 community that shared political, ethnic, and cultural
25 attributes.

1 CHIEF JUSTICE ROBERTS: An Indian -- an
2 Indian community. Now, if we are looking for a
3 definition of "Indian," we go back to the first
4 sentence.

5 MS. MAYNARD: But the definition of "Indian"
6 uses the adjective "Indian" to define it four times,
7 Mr. Chief Justice. That can't be clear. You can't take
8 their -- their plain-text argument where you just take
9 the word anywhere.

10 CHIEF JUSTICE ROBERTS: Well, if it does it
11 four times, you ought to give effect to it at least
12 once. It says "Indian tribes now under Federal
13 jurisdiction." It seems to me that that is the key
14 restriction, and that it's not taken away by that last
15 sentence, which again reiterates that it's "Indian
16 tribe." And then in the last clause to which you refer,
17 it's still "Indians residing on one reservation."

18 MS. MAYNARD: Well, the --

19 CHIEF JUSTICE ROBERTS: It's a defined term.

20 MS. MAYNARD: Yes, and I grant you that it
21 may graft on to the last clause. But it doesn't graft
22 on to "Indian tribe, organized band, or Pueblos."

23 JUSTICE STEVENS: It just describes the
24 subcategory of Indian tribes who -- for whom members can
25 qualify even though they don't have half blood. That's

1 the point. It picks up people who are less than half
2 blood if they are members of of those tribes.

3 MS. MAYNARD: Well -- but if you look
4 broadly at the Act, Justice Stevens, there are
5 provisions that are meant to address tribe issues and
6 tribal issues. And -- and I think that the purpose of
7 the Act -- it makes more sense to read "tribe" as -- as
8 not limited by the date and the provisions that apply to
9 "tribe," which is how the Secretary has always read it.

10 JUSTICE BREYER: Then Collier, himself,
11 would have been wrong. Because Collier in this great
12 famous colloquy says, when he adds these four words, he
13 says to the Committee: That would limit the Act to the
14 Indians -- the Act would be limited to the Indians now
15 under Federal jurisdiction except that other Indians of
16 more than one-half Indian blood would get help.

17 So what he is thinking in his mind is if you
18 have any kind of entity or a person who is more than
19 one-half Indian blood, fine. The Secretary can act.
20 But suppose we have an entity that has only people who
21 have less than one-half Indian blood. Then they are out
22 of luck unless they are now under Federal jurisdiction.

23 MS. MAYNARD: As we -- I discussed earlier,
24 I don't agree with your reading of the colloquy. I do
25 think it's ambiguous. I think, at a minimum, the

1 statute doesn't foreclose the secretary's interpretation
2 of the provisions. And "Indian" used in Section 1
3 clearly is not the "Indian" defined in Section 19.
4 Because in Section 1 they talk about Indians who have
5 entered into treaties. And that would have included
6 both Indians who were and were not under section --
7 under -- would meet the definition of "Indian" in
8 Section 19; nor would plugging that definition into
9 Section 1 make very much sense.

10 The -- if I could, just before time runs out
11 -- if the Court gets to the second question, as we think
12 you should, the -- the Settlement Act clearly does not
13 repeal the Secretary's authority to take land into
14 trust.

15 And if the Court has any questions about
16 that, it addresses jurisdiction in Rhode Island
17 expressly and limits Rhode Island's jurisdiction to the
18 settlement land. It contemplates that the Secretary may
19 some day take land into trust on behalf of the tribe.
20 Other acts, similar acts, do expressly address that
21 question. Unlike the Rhode Island Act, they have
22 similar extinguishment premises, and, yet, they -- they
23 went on. I just -- the Rhode Island extinguishment
24 provisions just don't have the meaning that -- that
25 Petitioners say.

1 CHIEF JUSTICE ROBERTS: Of course if we just
2 -- I'm sorry to jump back to the other provision, but if
3 we disagree with your interpretation and Congress thinks
4 we are wrong they can pass another one of these 15, 16
5 provisions that they have that says this tribe is -- is
6 recognized now.

7 MS. MAYNARD: They could. If I could make
8 one point in response to that? Congress has already
9 acted on the presumption that the Secretary's reading is
10 correct. In ILCA section 2019 there is an exception --
11 it's in the back of our brief on page 30 -- IGRA; sorry,
12 IGRA -- page 35a that lands taken into trust as part of
13 an initial reservation of any tribe acknowledged by the
14 Secretary under the Federal acknowledgment process.

15 In other words, Congress understands the
16 Secretary to have the authority to take land in a trust
17 for tribes that have been duly recognized under the
18 Secretary's acknowledgment process.

19 CHIEF JUSTICE ROBERTS: Well -- I'm sorry to
20 keep you there longer than you may want to be.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: Why -- why else --
23 why would Congress then enact these 15 or 16 separate
24 provisions if they think the -- if in this provision
25 they think it's not necessary?

1 MS. MAYNARD: In the ones of which I'm aware
2 I think just to make it clear beyond doubt that Section
3 465 applies to bribes. Often the ones that I know of
4 just have a list of statutes and say these are -- now
5 apply to the -- to the tribe. In -- in other acts
6 Congress has acted; in fact it's amended section 16 of
7 the IRA in 1994. And there has been decades -- since
8 1964 the Secretary has interpreted section 16 to apply
9 to any recognized Indian tribe; and Congress amended it
10 to add authority -- (f) and (g) -- instruct the
11 Secretary to treat all recognized tribes the same.

12 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
13 Mr. Olson, you have four minutes remaining.

14 REBUTTAL ARGUMENT OF THEODORE B. OLSON
15 ON BEHALF OF THE PETITIONERS

16 MR. OLSON: Thank you, Mr. Chief Justice.

17 Let me start with Justice Kennedy's
18 question, and I think one other justice asked about
19 other canon of construction, specifically with respect
20 to sovereignty of States. This Court said in Vermont
21 Agency in 2000 if Congress is to alter the
22 constitutional balance between States and the Federal
23 government, it must make its intention to do so
24 unmistakably clear; and Justice Kennedy, I think you
25 asked that question in the context of the relationship

1 between States and Indian tribes, and I would refer the
2 Court to Seminole Tribe, in which the Court said the
3 Congress must unequivocally express its intent to
4 abrogate States' immunity.

5 As the Chief Justice was pointing out, this
6 is a very broad grant of authority, if it is what the
7 government says it is. The Secretary can take property
8 from the State, particularly a small State like Rhode
9 Island, but it would be the same anywhere, and strip the
10 State of jurisdiction and give jurisdiction to a dual
11 sovereign operating within that State. We submit that
12 the legislative history, the legislative language, the
13 legislative purpose, the contemporary construction of
14 the statute by the author of this statute, and
15 everything stands for the proposition that there was
16 some limitation intended here. I think the Government
17 overlooks the fact and it somewhat misstates it by
18 saying land may be taken for tribes. I've heard that
19 several times not just in the brief but during oral
20 argument.

21 Section 5 which is the grant of authority
22 says the Secretary is authorized to take land for the
23 purposes of providing land for Indians and then section
24 19 defines the term Indians.

25 Now it may -- once it decides that it may

1 take title it may take land for Indians, it can then
2 vest the title in -- as it says at the end of section
3 5 -- in individual Indians, individual Indians or
4 tribes. But it takes lands for Indians; they have to be
5 Indians or land cannot be taken.

6 The other canons of construction, besides
7 the ones that must recognize State sovereignty, is that
8 words must be given their ordinary meaning absent a
9 contrary context. Words are not to be considered to be
10 superfluous. There are several instances of efforts to
11 repeal by implication in the Government's brief; and I
12 could go on and on. There are several violations of
13 various canons of construction.

14 The colloquy is clear when it's put in
15 context. It's exactly what I think you were getting at,
16 Justice Breyer. There is a difference between you know,
17 Indians under jurisdiction, which is what
18 Mr. Commissioner Collier meant, and Indians that may
19 have had some connection with the Federal Government.
20 That whole colloquy is explained quite clearly in the --
21 in the document the Government discovered in August; and
22 it's dated 1980; it's a memorandum by the assistant
23 solicitor, and I explains -- it explains the context.

24 Section -- the tribe was not -- this
25 particular tribe I submit -- and we would describe this,

1 this question came up in a couple of the questions, was
2 this tribe under Federal jurisdiction and should the
3 case be remanded. I know of nothing that suggests that
4 it was under Federal jurisdiction. I invite the Court
5 to look at page 7 of our brief. The tribe was under
6 State jurisdiction, under State control and there is a
7 reference to that in an explanation in the joint
8 appendix at pages 21a and 23a. I don't have time to
9 elaborate on that, but that is answered there.

10 U.S. versus --

11 JUSTICE GINSBURG: How did it get to be
12 recognized? I thought the recognition reflects that
13 it's had a history going way, way back?

14 MR. OLSON: It had -- the -- the group of
15 Indians called the Narragansetts, yes, have history that
16 does go way back; but the are relationship with the
17 Federal Government was what was being considered where
18 -- the Indian Reorganization Act is -- and that
19 relationship did not exist at that time. U.S. v John,
20 the bracketed phrase doesn't mean that that phrase was
21 unambiguous. The Court clearly understood that it meant
22 1934, the same as Commissioner Collier meant, and the
23 same as the statute indicated. It doesn't show that it
24 was ambiguous. The Court was speaking in 1978, so it
25 was quite natural -- instead of using the word "now" to

1 put in bracket 1934; and it was necessary to get to that
2 question of Indian blood which the Court finally got to
3 in U.S. v John to -- because otherwise we wouldn't have
4 needed to get to that question, if it had been otherwise
5 answered as -- with respect to the meaning of section
6 19.

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
8 The case is submitted.

9 (Whereupon, at 2:02 p.m., the case in the
10 above-entitled matter was submitted.)

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