

ORIGINAL

LIBRARY

SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

DELAWARE TRIBAL BUSINESS COMMITTEE)	No. 75-1301
et al.,)	
ABSENTEE DELAWARE TRIBE OF OKLAHOMA)	No. 75-1335
BUSINESS COMMITTEE, et al.,)	
and)	and
THOMAS S. KLEPPE, SECRETARY OF THE)	No. 75-1495
INTERIOR, et al.,)	
)	
Appellants,)	
v.)	
)	
WANDA JUNE WEEKS, et al.,)	
)	
Appellees.)	

Washington, D.C.
November 10, 1976

1976 NOV 18 AM 9 24

RECEIVED
SUPREME COURT U.S.
MARSHAL'S OFFICE

Pages 1 thru 76

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

----- :
: DELAWARE TRIBAL BUSINESS COMMITTEE, :
: et al., :
: :

Appellants, :
: :

v. :
: :

No. 75-1301 :
: :

WANDA JUNE WEEKS, et al., :
: :

Appellees. :
: :

----- :
: ABSENTEE DELAWARE TRIBE OF OKLAHOMA :
: BUSINESS COMMITTEE, et al., :
: :

Appellants, :
: :

v. :
: :

No. 75-1335 :
: :

WANDA JUNE WEEKS, et al., :
: :

Appellees. :
: :

----- and ----- :
: :

THOMAS S. KLEPPE, SECRETARY OF THE :
: INTERIOR, et al., :
: :

Appellants, :
: :

v. :
: :

No. 75-1495 :
: :

WANDA JUNE WEEKS, et al., :
: :

Appellees. :
: :
: ----- :
: :

Washington, D. C.,

Wednesday, November 10, 1976.

The above-entitled matters came on for consolidated
argument at 10:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice
 HARRY A. BLACKMUN, Associate Justice
 LEWIS F. POWELL, JR., Associate Justice
 WILLIAM H. REHNQUIST, Associate Justice
 JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GEORGE B. CHRISTENSEN, ESQ., Winston & Strawn, Suite
 5000, One First National Plaza, Chicago, Illinois
 60603; on behalf of the Appellants.

A. RAYMOND RANDOLPH, JR., ESQ., Deputy Solicitor
 General, Department of Justice, Washington, D.C.
 20530; on behalf of the Appellants.

DELMER L. STAGNER, ESQ., Spradling, Stagner, Alpern
 & Friot, Suite 700, Continental Savings Building,
 101 Park Avenue, Oklahoma City, Oklahoma 73102;
 on behalf of the Appellees.

BERNARD J. ROTHBAUM, JR., ESQ., Tomerlin, High,
 Patton & Rothbaum, 323 Fidelity Plaza, Oklahoma
 City, Oklahoma 73102; on behalf of the Appellants.

- - -

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
George B. Christensen, Esq., for the Appellants	3
A. Raymond Randolph, Jr., Esq., for the Appellants	10
Delmer L. Stagner, Esq., for the Appellees	35
<u>REBUTTAL ARGUMENT OF:</u>	
Bernard J. Rothbaum, Jr., Esq., for the Appellants	68

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in 75-1301, Delaware Tribal Business Committee against Weeks, and the related cases.

Mr. Christensen, you may proceed whenever you're ready.

ORAL ARGUMENT OF GEORGE B. CHRISTENSEN, ESQ.,

ON BEHALF OF THE APPELLANTS

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

You will recall that this case poses the question of whether a three-judge federal court may hold unconstitutional a distribution statute passed by Congress distributing an Indian Claims Commission award, ten percent to two federally recognized tribes, the balance to the members of the tribe per capita, thereby excluding American citizens who have Delaware blood in them, but whose ancestors renounced the tribe and became solely United States citizens some 110 years ago.

The court enjoined distribution of the fund under the statute to last until either Congress amended the statute or passed an entirely new one.

Now, the award was based upon a violation by the United States in 1856 and 1857 of an 1854 Treaty under which some of the land, then occupied by the Delawares in Kansas,

were to be sold at public sale with the proceeds held in trust by the United States for the benefit of the Delaware people.

I will get to that in the argument, but that it was for the Delaware people is extremely clear.

As a matter of fact, they were sold at private sale, and in this case it was found, or the Indian Claims Commission found the sale produced something in the neighborhood of \$1.4 million less than a public sale would be, and that's the foundation of the award which, with interest today, I am informed, amounts to something like \$13.7 or \$13.4 million.

After the 1854 Treaty and the sale of the lands, in 1866, in the rush of white settlers into Kansas, the United States decided to remove the Delawares into Indian territory, and it promised to take, to sell their lands and then take the proceeds and buy them a place to live in Indian territory. It had to make a deal with the Cherokees to get them in there, because, at that time, the United States was crowding more Indians into the Indian territory and giving away or letting them occupy land, more Indians than there was land.

But that Treaty -- and this is crucial to this case -- of 1866 by which the Delawares were compelled to move into Indian territory, contained an important exception. And that was: If a Delaware could prove that he had adopted civilized ways, that he had supported himself for five years, he was given the option of renouncing the tribe and becoming

solely an American citizen. And under those circumstances he could stay in Kansas on land that already had been allotted to him or the equivalent of it.

Some 21 adults chose to exercise that option in 1867, they with their children remained there and in a few years their children also became American citizens.

Now, that process was one of renunciation of the tribe completely. Tribal affiliation, all interest in tribal funds, except they got a pro rata share as it then existed. And so they have been American citizens ever since.

At that time the Delaware tribe was actually in two branches. The main group was in Kansas. There was a smaller group that had wandered off down amongst the southern Indians that were expected to rejoin the main tribe, but they never did, and they are located in western Oklahoma.

So you have today two federally recognized tribes before you: the Delaware Tribe of Indians, which I have the honor to represent; and the Absentee Tribe of Western Oklahoma.

QUESTION: And where are your clients located?

MR. CHRISTENSEN: They're located in Oklahoma also.

QUESTION: They're in Oklahoma, also.

MR. CHRISTENSEN: Yes. In an area roughly in the Bartlesville area, and the others are -- the Absentee Tribe is further west.

QUESTION: Your group is called in the briefs the

Cherokee Delawares?

MR. CHRISTENSEN: Correct.

QUESTION: All right.

MR. CHRISTENSEN: That's correct.

Now, that name Cherokee, Your Honor, it's a classification used by the plaintiff Weeks in this case. She set up classes and subclasses of Delawares. And she denominated my people Cherokee Delawares, because they lived with the Cherokees and they had certain rights as Cherokees.

But the undisturbed finding of fact below is that they constantly had maintained tribal identity during this long span from 1867 or thereabouts to the time of the trial of this action.

QUESTION: May I ask you one more question? I take it that your group, or the group you represent, came about separately after the 1854 Treaty. Do I have my chronology right?

MR. CHRISTENSEN: No, not quite, Your Honor. The group I represent came about before Columbus landed here. They were the Delaware Tribe of Indians that originally started out somewhere in New Jersey and, step by step, as you will find it traced in the briefs and in the history -- there's a long --

QUESTION: No, I know that, even the Last of the Mohicans tells us this.

MR. CHRISTENSEN: Yes.

QUESTION: My question was directed at their going to Oklahoma and whether it was that journey that came after the 1854 Treaty.

MR. CHRISTENSEN: Yes.

QUESTION: That's the one.

MR. CHRISTENSEN: Yes. I misunderstood your question. I beg your pardon.

QUESTION: All right.

QUESTION: It came after the 1866 Treaty, didn't it?

MR. CHRISTENSEN: Yes. Yes.

QUESTION: Yes.

MR. CHRISTENSEN: They moved, I think, in 1867, actually.

QUESTION: Right after the Treaty of 1866.

MR. CHRISTENSEN: It was after the 1866 Treaty.

QUESTION: Yes.

QUESTION: Mr. Christensen, you said there were two groups in 1866. Was there not a third, the Munsees?

MR. CHRISTENSEN: Yes, but they are not party to this litigation.

QUESTION: No, but they are relevant when we're trying to figure out what Congress was doing with the distribution of funds, I would think.

MR. CHRISTENSEN: Yes, there were. The Munsees, as I understand it, had started with the tribe, they had moved up

into New York and then they began to live with the Stockbreeders.

I was born and raised in Oshkosh, Wisconsin, and right across Lake Winnebago from me were the Stockbreeders. Not until I got in this case did I discover they were really Delawares.

But the Munsees have been in Canada or Wisconsin for many, many years; just how long I can't tell you, Mr. Justice Stevens.

Now, this brings us to the appellees, the so-called Kansas Delawares. Now, that again is a litigation classification. The Kansas Delawares are solely American citizens, there never has been a group of Indian citizens holding Indian citizenship known as the Kansas Delawares. Never in the past, and not today. This is purely a litigation device.

The ancestors of these people left the tribe in 1866 or 1867, exercising their option so to do, and they are no more --

QUESTION: The ancestors are the 21 adults that you told us about earlier?

MR. CHRISTENSEN: Yes, Mr. Justice Brennan.

They are no more Delaware, political Delawares than I am a political Dane, because my grandfather left Denmark about this same time that they made this move and came over here and renounced Danish citizenship and took up American

citizenship.

Now, it's relatively easy in my case, with an ocean between us, to decide that I have no political rights as a Dane. But, of course, here we have these people of Delaware, some Delaware blood, who are living amongst all the rest of us, and fairly near in some instances the political Delaware Tribes, one of which I have the honor to represent.

QUESTION: Did they live together in any recognizable group?

MR. CHRISTENSEN: No. No, they do not. They live all over the country.

QUESTION: There's some 900 of them now?

MR. CHRISTENSEN: And I understand a lot of them went out into California during the days of the Dust Bowl. They do not live together as a group. There is no group of Kansas Delawares. It is just a classification put together, as you would put a class of bond holders or of citizens in an ordinary class action case.

QUESTION: But it is true, is it not, Mr. Christensen, that their ancestors, the 41 original Kansas Delawares, are within the group that was wronged by the government's breach of the Treaty?

MR. CHRISTENSEN: Their ancestors were in the group when a wrong was done to the tribal property, to the tribal right.

QUESTION: They were a member of the Tribe at that time?

MR. CHRISTENSEN: Yes. Yes.

QUESTION: You say the Kansas Delawares are kind of like a classification of American Danes?

MR. CHRISTENSEN: I beg pardon?

QUESTION: Are you saying that the Kansas Delaware classification is kind of like a classification of American Danes?

MR. CHRISTENSEN: Correct. Correct.

QUESTION: That's a question from someone with Swedish ancestry, I might say.

[Laughter.]

MR. CHRISTENSEN: Well, this brings me -- my time is up, if it please the Court.

We stand for this case being nonjusticiable, we think it's a better, cleaner way than going into this question of rationality.

Thank you very much.

MR. CHIEF JUSTICE BURGER: All right, Mr. Christensen. Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

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

Suppose this question were asked: Does the due process clause of the Fifth Amendment bar Congress from distributing tribal property only to the Tribe and its members?

We think, and we think the Court will agree, the question seems to answer itself. Yet, in our view, that's the very question presented by this case. In fact, the question may be somewhat similar -- simpler, as I'll expand upon later; the question may well be: Does the due process clause of the Fifth Amendment prohibit Congress from giving tribal property to the Tribe?

I say tribal property, because that is what we're dealing with here. That's what the more than \$13 million that Mr. Christensen referred to, which is now gathering interest in the United States Treasury, represents, it's tribal property. No individual certainly has any vested rights in that property. This money was appropriated by Congress to satisfy a judgment of the Indian Claims Commission. The money was appropriated in 1969, that's when it became tribal property.

The award of the Indian Claims Commission was to the Absentee Delaware Tribe as plaintiffs, and the Cherokee Delaware Tribe, or the Delaware Tribe of Indians, which is their more formal title.

As representatives of the Delaware Tribe, the modern representatives of the Delaware Tribe, and the basis, as Mr. Christensen pointed out, it's not a wrong that was done to

an individual Delaware or a group of individual Delawares. The basis for the award was a wrong that was done to the Delaware Tribe more than 100 years ago, when the United States breached its Treaty commitment in 1854, and failed to sell the land at public auction and sold it instead at private sale.

So we're dealing with tribal property.

Now, what is Congress's duty when it has tribal property? Congress's duty is to determine what is the best use of that tribal property for the Delaware Indians. It's not only its duty, it's its power, its authority, its right.

The 1854 Treaty, in fact, charged Congress with that responsibility for all money that was generated by the land sales. Now, Congress's judgment, that is, its judgment about how best this tribal property should be used, is reflected in the statute that the district court struck down in this case, the statute that distributed money to the Absentee Delaware Tribe and the Cherokee Delaware Tribe.

QUESTION: Mr. Randolph, could I interrupt you? During the period between 1954 and 1966 -- during the period after the wrong was committed --

MR. RANDOLPH: Eighteen -- oh, I'm sorry.

QUESTION: 1854 and 1866. After the wrong was committed, but before the Kansas Delawares, you know, became citizens.

MR. RANDOLPH: Yes.

QUESTION: They were members of the Tribe -- were they not?

MR. RANDOLPH: May I make one clarification? There is confusion, I think, perhaps in this discussion and certainly in the opinion of the Court. When we talk about Kansas Delawares --

QUESTION: Well, the Indians who are now known as the Kansas Delawares.

MR. RANDOLPH: The Kansas Delawares are not members of that Tribe, their ancestors were.

QUESTION: Well, but --

MR. RANDOLPH: Yes.

QUESTION: What would you like to call them? That's the name that has been given to them for purposes of this case.

MR. RANDOLPH: The non-Delaware Indians.

QUESTION: All right, the non-Delaware Indians were then Delaware Indians and members of the Tribe, is that correct?

MR. RANDOLPH: Yes.

QUESTION: And at that time a wrong had been done to the Tribe; is that correct?

MR. RANDOLPH: Yes.

QUESTION: And they had an intangible interest in the

difference between what they actually got and what they should have gotten. They had, in effect, a cause of action, didn't they?

QUESTION: Not as --

MR. RANDOLPH: No. Certainly no.

QUESTION: The Tribe did, didn't it?

MR. RANDOLPH: The Tribe had a claim, certainly.

QUESTION: Right. And when they elected to become citizens, did they not -- were they not then entitled to a pro rata share of the tribal assets?

MR. RANDOLPH: They were entitled, to use the precise terms of the Treaty, to a pro rata share of the tribal assets then held in trust in the United States Treasury.

QUESTION: In the United States Treasury, or held in trust by the United States?

MR. RANDOLPH: By the United States.

QUESTION: Well, do you think the claim arising out of the breach of the Treaty was something the United States held in trust for these people?

MR. RANDOLPH: No. They held it in trust for the Delaware Tribe, if there was anything that was held in trust.

QUESTION: No, but at the time --

QUESTION: For the Tribe, while they were still members of it.

MR. RANDOLPH: Well, I don't know how one holds it,

how --

QUESTION: Had the wrong been known -- let me put it this way: had the wrong been known in 1866, would they have shared in the proceeds of the recovery?

MR. RANDOLPH: By "they" you mean the ancestors of the people that --

QUESTION: Yes. Yes.

MR. RANDOLPH: One never knows, first of all, I think that's rather speculative; who knows what would have happened between 1857, when the money was realized, and 1866? For all we know, the Secretary of the Interior could have decided that there was a good project, since the Delaware Indians had so much money at that time; in which case they would not have shared it. I think that's somewhat speculative.

There is a "but for" relationship, I agree. But for the fact of the United States violation, it would appear that the ancestors of the plaintiffs in this case probably would have received more money, I agree.

There's another "but for" in this case.

QUESTION: Do you think it's just probably? Is there anything to indicate that they would have received less than their allocated share of the tribal assets at the time they severed?

MR. RANDOLPH: Well, that would depend on what the tribal assets were, and I'm saying they could have been

depleted in the intervening years, given the large sum that would have been in that treasury at that time.

But, there's another "but for" in this case. it's not just simply that, and I'll get to it. The other "but for" is: but for the fact that they resigned from the Tribe, they would be sharing in the Tribe's assets today, under the distribution statute.

But, let me continue. As I said, Congress's judgment about how best the tribal assets, which came into existence in 1969, could be used is reflected in this statute.

QUESTION: Well, didn't the tribal assets come into -- wasn't there a tribal asset when they just had an intangible cause of action? Wasn't that a tribal asset?

MR. RANDOLPH: That was one, yes.

QUESTION: So the tribal asset did not come into existence then at the time that this --

MR. RANDOLPH: The \$9.7 million was nowhere to be found until 1969, when that appropriation --

QUESTION: No, but that represents the tangible -- that represents the present value of the cause of action, doesn't it?

MR. RANDOLPH: The present value of the cause of action held by the Delaware Tribe, yes.

QUESTION: Correct.

QUESTION: It was due, though.

MR. RANDOLPH: To the Delaware Tribe.

QUESTION: How long was that money due, since the last hundred years?

MR. RANDOLPH: That's right, to the Delaware Tribe. And that this -- which simply emphasizes my point, that this was tribal money.

QUESTION: Well, when you say -- we say cause of action, Mr. Randolph, do you mean that the Delawares at the time that the 1866 or 1867, that the Tribe could have sued the United States?

MR. RANDOLPH: No, they could not have sued.

QUESTION: It took an enabling act of Congress, didn't it?

MR. RANDOLPH: The Indian Claims Commission Act, in order to allow them to sue 100 years later.

QUESTION: Yes.

QUESTION: So it really wasn't a chosen action?

MR. RANDOLPH: Well, it existed somewhere in space, I suppose, until Congress acted, and I think it was that and nothing more.

QUESTION: Well, it was a claim that could not have been asserted anywhere.

MR. RANDOLPH: Unless Congress --

QUESTION: Except an appeal to the --

MR. RANDOLPH: Certainly, they could not have --

QUESTION: Because the Indians couldn't go to court back then.

MR. RANDOLPH: That's right.

QUESTION: Because if they could have, they could have put a restrictive covenant in, couldn't they?

MR. RANDOLPH: Well, the question that is -- the one thing I think that there's no dispute about is this tribal money. And Congress has made a judgment about what should be done with it.

If the judgment were in error, if the judgment reflected in that statute, about what to do with the Delaware Tribe's money, was in error --

QUESTION: Mr. Randolph, let me interrupt again, because it's really quite important to my understanding of the case. The government had sovereign immunity before the procedure for asserting Indian claims was provided for. Does that mean, in your judgment, that there was no tribal asset, simply because there was no remedy?

MR. RANDOLPH: I think the -- with all due respect, I think the question is irrelevant to the case. The funds that we're talking about came into existence in 1969. If you -- if one --

QUESTION: I wish you would answer the question, even though you think it's irrelevant.

MR. RANDOLPH: One can say there was a tribal asset

in one sense and one sense only. That there was the possibility that some time in the future Congress might pass a law that would --

QUESTION: That would remove the, waive sovereign immunity; right.

MR. RANDOLPH: -- remove sovereign immunity and allow the Tribe to bring a suit for something that was done to it a hundred years ago.

QUESTION: But you would agree that the existence of sovereign immunity would not be inconsistent with the notion that there was a tribal claim, and therefore a tribal asset?

MR. RANDOLPH: I think that tribal asset for a hundred years was worth about zero. As far as what it was worth. I don't know what one would have paid in 1866 for that, but it would not have been very much, in light of the history of the --

QUESTION: Well, the fair market value wouldn't have been very high, but it was an asset.

MR. RANDOLPH: Well, --

QUESTION: You do agree to that?

MR. RANDOLPH: In some sense of the word -- in the sense that you're using it, yes, Your Honor.

But I don't think that's important. The important thing is that the tribal -- we were dealing with tribal property. And Congress has directed how the tribal property

should be used. The tribal property of the Delaware Tribe.

If Congress's judgment was in error, if, in fact, that's a misuse of tribal property, one would expect the Delaware Indian to complain, you're misusing the tribal property, the Delaware Tribe's representatives, the two Tribes before the Court.

No Delaware Indian has registered such a complaint, no Delaware Indian Tribe has registered such a complaint. The complaining parties, as Mr. Christensen pointed out, who designate themselves the Kansas Delawares, are not members of the Delaware Tribe or the Absentee Delaware Tribe. So far as the complaint appears, they are not members of any Indian Tribe. In fact, they are not a tribal entity at all. They are not an organized group.

They are simply a class, and they are class for one reason only, because of the Federal Rules of Civil Procedure. And they have but one thing in common. The one thing they have in common is simply this: they each have an ancestor who resigned from the Delaware Tribe in 1866, and agreed never again to participate in the Tribe's Councils or share in its property. And that's the common thing that binds the class together.

Now, in our view it's difficult to understand how failing to give -- Congress's failure to give -- individual non-tribal Delaware Indians a portion of the Delaware tribal

fund means that Congress has properly -- improperly decided how the tribal funds should be best used.

The basis for going further and saying the Constitution was violated is, we think, all the more difficult to understand, in view of the Court's repeated holdings over the years that Congress's plenary authority to decide what should be done with tribal property, that the political branches of the government are charged with this responsibility, that the Judiciary must defer to their judgment, and that, as the Court recently held, in Morton vs. Mancari, legislation dealing with Indians is constitutional if it fulfills Congress's special obligation to the Indians. And I stress that last phrase: to the Indians.

In regard to the Kansas Delawares, Congress has no special obligation to them as Indians, none whatsoever. And that point, I think, is not in dispute.

I think it's fair to say that appellees really do not meet our arguments on this score, and, as a matter of fact, they don't even cite the Morton vs. Mancari opinion in their brief. What they invite the Court to do is to follow a different path, the path that's marked out by decisions that do not deal with Indian Tribes or Indians at all.

Their argument is simply this: that it is absolutely irrational, there's no rational distinction between them and the Indian beneficiaries of the distribution statute.

This means that the statute violates due process and, more precisely, the equal protection principles that are embodied in the due process clause.

Now, by a rational distinction, I would suppose that one means a distinction that's not based on the flip of a coin or on whimsy, but on reasoning. If that is the test, and I think it is, then this statute certainly meets that test.

Let me give the Court the rational basis. It's quite simple.

In distributing tribal funds resulting from a 1969 appropriation by Congress, the statute simply excludes those whose ancestors relinquished any interest in tribal property a century ago.

That's the rational basis. At least that's one.

Now, it's derived from Article IX of the 1866 Treaty, which we were discussing a few moments ago. And that says that after the appellees' ancestors resigned, they were not to share in tribal property. Moreover, the same provision, the same Article IX of that same Treaty says that in addition to 80 acres in fee, which these ancestors would get, they are entitled to a pro rata share of the tribe's funds, then held in trust by the United States. Then held in trust by the United States.

The district court interpreted this provision to say that, well, it doesn't mean what it appears to mean; what it

means is that the ancestors would be entitled to share in a future award. And the court said further: the reason we interpret it that way is because we have to interpret statutes in favor of the Indians.

Well, we agree with the last proposition, but we think an interpretation in favor of the Indians is not in favor of the Delawares, but in favor of the Tribes that are before the Court.

I would like to say that the one point that the Delaware Indians constantly make, and make quite effectively through their brief, is the proposition that Mr. Justice Stevens alluded to. It's simply this: but for the breach in 1854, my ancestor probably would have gotten more money when he left the Tribe in 1867. Whether the individual, or Kansas Delawares would have been benefitted, one never knows. If my great-grandfather had more money in 1866, I don't know whether I would be better off today.

But the fact is, the "but for" relationship is the one point that the Kansas Delawares press.

If Congress had made a judgment to include them in the distribution on the basis of that reasoning, I think Congress would have acted rationally. I think that would have been within Congress's discretion.

I also think, and the point I'm making to the Court is that, it was likewise rational, derived from reasoning, for

Congress not to include them on the basis of another "but for" reasoning. But for the fact that your ancestors left the Tribe, you would have been members of the Delaware Tribe and entitled to tribal money when it was appropriated in 1969.

QUESTION: Mr. Randolph, your argument, of course, is based on the face of the statute, and you presume a rational basis for the congressional decision. Do you disagree with their analysis of the legislative history, that the real purpose of not including the catch-all phrase with this second distribution, the statute was to include the Munsees rather than the Kansas Delawares?

MR. RANDOLPH: I wouldn't frame it that way. Certainly the Munsees were -- I would put it in a class. The real purpose was to exclude a class of people who would share in the award because and only because their ancestors were members of the Tribe in 1854. That, of course, included the Munsees.

But the problems that Congress realized, that applied to the Munsees, applies -- I think applies well to the Kansas Delawares.

Let me explain.

First of all, this question about how many Kansas Delawares there really are. We don't know. This class has not been closed yet, as far as I'm aware. It's still open.

QUESTION: They say -- and let me just be sure if this

-- if this is factually wrong, you straighten me out -- they say that the problem with the third category, with the earlier distribution pursuant to the claim 337, was that the Munsees were hard to identify, and they were delaying the distribution, one thing and another.

MR. RANDOLPH: That's right.

QUESTION: But that the Kansas Delawares in fact are an easily identifiable group and there isn't the same problem with respect to them. Is that correct?

MR. RANDOLPH: Well, I'd like to respond -- yes, I think that's basically their argument.

Let me respond to that.

I'll have to use some citations. Take a look at -- I would like the Court to take a look at the Appendix, page 9 of the Appendix, the complaint of the Kansas Delawares.

Now, one would suppose that if the Kansas Delawares were easily identifiable, that they would know how many Kansas Delawares there are. At least be close to it.

The complaint, paragraph 9 on page 9, states:

"There are approximately ... 300 members of the sub-class Kansas Delawares..."

Now I'd like to refer the Court to the opinion --

QUESTION: "There are approximately 250 living members" -- is what what you said it was?

MR. RANDOLPH: No. "300 members of the sub-class

Kansas Delawares".

QUESTION: "300 members of the sub-class Kansas Delawares".

MR. RANDOLPH: Now I'd like to refer the Court to page, I think it's 38 of the opinion of the district court in the blue jurisdictional statement.

QUESTION: Page 38?

MR. RANDOLPH: Yes. Footnote 36.

QUESTION: Page 38, --

MR. RANDOLPH: Oh, I'm sorry, 39, page 39, footnote 36.

QUESTION: That's 39a?

MR. RANDOLPH: 39a, footnote 36.

QUESTION: Footnote 36.

MR. RANDOLPH: By now the number of Kansas Delawares has risen from 300 to 678 that were reported to the court; doubled.

And now I'd like to refer the Court back to the Appendix that was filed, to page 28 of the Appendix. The very last two lines of page 28, which is a filing by the Kansas Delawares, defining the class. Now the class has risen, or fallen, I don't know the chronology here -- to "approximately one thousand members of the Delaware class."

QUESTION: Where is that?

MR. RANDOLPH: It's the last line on page 28 of the

buff-colored Appendix.

QUESTION: Couldn't that be that the evidence didn't back it up? I assume that this is the evidence the judge is talking about, not the complaint.

MR. RANDOLPH: The judge is talking about what has been reported to him by the Kansas Delawares. And every allegation I am talking about is an allegation by the Kansas Delawares; and they have 300, 678, 1,000. I don't think that the Kansas Delawares are easily identifiable, because if they were we would have known long ago how many Kansas Delawares there were.

I think the same kinds of problems, at least I think the Court can take that into account in crediting Congress's judgment. This is the same sort of thing that caused the problem with the Munsees, except the Munsees, there were 1500 Munsees. Here the allegation is there are at least a thousand Kansas Delawares. One never knows.

In fact, I'd like to point out one further thing before I --

QUESTION: Well, Mr. Randolph, I want to be sure I haven't lost the thread of your answer to my question.

You say there is in fact difficulty in identifying the Kansas Delawares?

MR. RANDOLPH: Absolutely.

QUESTION: Is there evidence in the legislative

history that Congress was concerned about the problem of identifying Kansas Delawares as opposed to identifying Munsees?

MR. RANDOLPH: No, and I think that proves my point. They are so difficult to identify, Congress didn't even know they existed. And they never made themselves known before Congress. They certainly --

QUESTION: They did share in the earlier award, didn't they?

MR. RANDOLPH: Yes. They shared in the earlier award. But there's no indication and no reference to this particular group singled out. They shared in the other award because there was a catch-all.

QUESTION: So you would say there is no legislative history indicating a deliberate decision by Congress to exclude Kansas Delawares?

MR. RANDOLPH: No, I think the legislative history is precisely that. Congress intended to -- because Congress intended to include those and only those it specified. That has the effect of excluding the Kansas Delawares, and Congress so intended.

As a matter of fact, that's the very reason they are suing in this case.

QUESTION: And you say the rational basis is that there was another consideration to that.

MR. RANDOLPH: Yes. While I think there is a

rational basis -- there are a number of rational bases. One is the one I just mentioned, which is that the people that are excluded are people whose ancestors gave up any right to tribal property. It's as simple as that.

There's another rational basis.

QUESTION: For a consideration.

MR. RANDOLPH: For a consideration.

QUESTION: Assuming one was needed.

MR. RANDOLPH: Yes. There's no allegation, I might add, that the 1866 Treaty has been breached by Congress, because they didn't pay a certain amount to the Kansas Delawares. There's another rational basis, too.

I mentioned earlier in the argument that the question here may be, in fact, whether the due process clause prevents Congress from distributing tribal property to the Tribe. This statute is, in effect, in form, a distribution not to individuals directly, it's a distribution between two Tribes. If one takes a look at the statute, which is set forth -- it's 1294(a), and it's set forth in a number of places, but since I have the jurisdictional statement out, it's page 96a and 97a of the jurisdictional statement.

And one notices that the form of the award and the form of the apportionment is to the Absentee Delaware Tribe of Western Oklahoma, and to the -- and also to the Cherokee Delawares, or the Delaware Tribe, as they are referred to.

The fact of the matter is that after giving the money, this is the way the form of the award reads, after giving the money to the Tribe, that Congress directed how the Tribe was to use 90 percent of that money, which is, of course, a normal function of Congress and the Executive Branch in regulating the affairs of a ward, which a Tribe technically is, and still is.

QUESTION: Well, Mr. Randolph, Congress can conclude that members of the Tribe are Indians, but if you are not a member of the Tribe, what makes you an Indian?

MR. RANDOLPH: Well, that's a very difficult question, Mr. Justice Marshall. One can take the definition, for example, in the Indian Reorganization Act, which defines what an Indian is for the purposes of that Act. The Kansas Delawares would not fit within it. You have to be a member of a recognized Tribe, No. 1, or possess more than one-half Indian blood and be recognized as an Indian in the community in which you live. I don't think there's any evidence whatsoever that any of the people representing this class come within that definition of an Indian.

There's common-law definitions in some State cases, I understand, that say an Indian is a person who claims to be an Indian, who possesses a high degree of Indian blood and who acts in the customary tribal ways, and so on and so forth.

For our purposes, I think the important question is

not whether in some abstract sense the Kansas Delawares are Indians, but whether, in a federal context, they are. And the answer to that is clearly no, they are not Indians because Congress owes no special obligation to them, they are not in any kind of trust status with the United States. There is no ward-guardian relationship between them.

As a matter of fact, the question came up whether their counsel's contract for representing them had to be approved by the Secretary of Interior. If they were Indians, it had to. And the answer was no, it doesn't have to be. And they so argued, as a matter of fact, that it didn't have to be.

QUESTION: Mr. Randolph, has Congress ever recognized in any official way the Kansas Delawares since 1866?

MR. RANDOLPH: No. There is precedent -- the question came up, a question quite similar to this, in 1906, where there was another distribution to the Cherokee Delaware Tribe, and in that distribution, the distribution was made to the Delaware Tribe of Indians. The question came up, does that include the Kansas Delawares? In 1906, the answer that was decided upon by the Secretary of Interior and the Comptroller of the Currency -- and we've got this set out in our brief -- is no, the Kansas Delawares are people that are descended from those who renounced their tribal membership in 1866, and they are certainly not entitled to this portion of

this award of \$150,000. Even though, I might add, that some of the wrongs that the \$150,000 was to compensate for were wrongs that occurred prior to 1866.

QUESTION: Mr. Randolph, can I ask you one other question, to be sure I have your position right? Assume arguendo, and I know you don't accept this, but that the ancestors of the Kansas Delawares were members of the class that was wronged by the United States when it breached the Treaty in 1854. Assume further that the Indian Claims Commission intended the award to benefit all of the descendants of the class of all of the members who were wronged.

I take your position to be, nevertheless Congress, in appropriating the money to satisfy the judgment, could exclude people not members of Tribes.

MR. RANDOLPH: Yes. May I explain why?

QUESTION: So that -- I mean, your position, your legal position doesn't really rest on the equities at all.

MR. RANDOLPH: Well, I --

QUESTION: What I'm really saying is that if one thinks it's somehow unfair to treat these people, you say that's completely irrelevant, really, as a matter of legal analysis.

MR. RANDOLPH: That's right.

QUESTION: Yes.

MR. RANDOLPH: May I just expand upon that for one

second?

The fairness of it is not the constitutional test, certainly, Mr. Justice. The constitutional test is rationality. I know sometimes the Court uses the word "reasonable", but I take it, by "reasonable" they don't mean "fair" in the Court's eyes, because that would mean fairly subjective judgments.

The question is whether the distinction in this case is a distinction that's derived from reasoning, not based on a flip of the coin. And I think it's absolutely certain that it is.

QUESTION: Well, fairness may be irrelevant or it may not, but I think your position would mean even if there had been a judgment by something like the Court of Claims for the entire class, but no money to pay it, Congress could rationally decide to pay only some of the participants in the judgment and not others.

MR. RANDOLPH: And the others would have, in their possession, an unsatisfied judgment of the Court of Claims, which Congress has absolutely no obligation to fulfill, and the Court has so held. There's a footnote in our brief giving the cases. Glidden v. Zdanok is one of them.

QUESTION: Well, if Congress decides to appropriate public moneys, supposing this weren't an Indian case at all, is it held to any rational basis standard? What if it just decides that every tenth person in the country shall get \$100?

MR. RANDOLPH: Well, I think that's a question that, as I view it, is open to the Court. I mean, I can think of other hypotheticals. Congress, I suppose, could apportion money and give it only to people that are white.

QUESTION: Well, that would raise a different question than a purely random --

MR. RANDOLPH: If it were purely random, then it would be, I suppose it could do it; I don't know.

QUESTION: I take it what you're saying is that whatever the test, if some test is to be applied, it's the lowest tier test that is to be applied?

MR. RANDOLPH: The Court has said for 200 years, or 100 years, however many years they've been deciding Indian cases, that what is best for the Indians is a judgment that's left to Congress. And the only Indian -- because of the special relationship with Indians, who are the Indians that Congress has a special relationship with in this case? Kansas Delawares? No.

The plaintiffs, or the defendants in this case, the Tribes? Yes. And Congress made that judgment. How did it make it? It decided to distribute the money to the Indians it had a special relationship with. And I think that's rational.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Randolph.

Mr. Stagner.

ORAL ARGUMENT OF DELMER L. STAGNER, ESQ.,

ON BEHALF OF THE APPELLEES

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

First of all, I would like to advise the Court I am a little hard of hearing, and should I not understand the question, I hope you will understand.

We have filed in this case, in Case No. 75-1495, which was the appeal of the Secretary, a motion to dismiss, in which we cited certain authorities that we're sure the Court will consider those authorities along with the others in our brief in the consideration of this case. We simply did not burden the brief with a repeating of those same arguments. It was suggested that we had not responded to Morton vs. Mancari, and our response to that case, and our basis for saying that it is not applicable to this case is included in that motion to dismiss.

I think it's important, if the Court please, to understand that we're here before the Court at this time in two capacities. The Kansas Delawares are not only the descendants of the adult Kansas Delawares who remained in Kansas when the Tribe was moved to the Indian territory in 1867. There were 48 minor children of those adults.

And Article IX of the Treaty of 1866 treated the

rights of those minor children quite differently than it did the rights of the adults. And the present class of Kansas Delawares are the present descendants of those minor Kansas Delawares, that is, who were minors in 1866, the same as they are the descendants of the adults, just one generation less remote.

But this has some serious differences in terms of their legal standing before this Court, and in their claim to share in the proceeds of this judgment.

It has been presented to the Court in the arguments that we are here representing expatriates, persons who have resigned. The fact is the minors never resigned from the Tribe, and those are our ancestors.

QUESTION: Well, they weren't around then, were they?

MR. STAGNER: Yes, sir.

QUESTION: The grandchildren?

MR. STAGNER: The minors were alive, they were listed on the roll. If the Court will note --

QUESTION: As of what date are you speaking?

MR. STAGNER: 1866.

In 1866, Article IX of the Treaty provided that the adults could resign, but the minor children of those adults were not required to resign, but were granted the option until they reached the age of 21, to elect whether or not to resign. They were allowed, of course, to remain in Kansas with their

parents.

QUESTION: I want to be sure. The children you are speaking of are children of the 21 adults?

QUESTION: Yes.

MR. STAGNER: Yes, sir. And they were shown on the registry.

QUESTION: They weren't orphans, --

QUESTION: No.

MR. STAGNER: No, sir.

We have in this case --

QUESTION: Mr. Stagner, I understood you to use the term "grandchildren" when you first spoke.

MR. STAGNER: No, I'm sorry, --

QUESTION: Children.

MR. STAGNER: Yes. I may have misspoken, but I mean the children.

QUESTION: Yes. There were no grandchildren probably at that time.

MR. STAGNER: That's right.

QUESTION: Yes.

MR. STAGNER: As a matter of fact, Wanda June Weeks, who is the plaintiff in this case, is the grand-daughter of a man who is on that roll of 1866. Her grandfather appears on that roll as a minor, and therefore we're just talking about two generations.

The question was raised about the enormity of the problem of trying to trace back, but this is suggesting to this Court that in order for the Kansas Delawares to be entitled to share, that it would be necessary to be a catch-all phrase, so that you may get into a question of --

QUESTION: When did any ancestor of Mrs. Weeks attend a tribal meeting?

MR. STAGNER: Mrs. Weeks, herself, as the record shows, attended the tribal meetings.

QUESTION: When?

MR. STAGNER: The dates I would -- it was in eighteen -- I mean nineteen sixty- --

QUESTION: Yes, when the money was coming up.

MR. STAGNER: Sir?

QUESTION: When the money was coming up.

[Laughter.]

MR. STAGNER: Well, let me address myself to that point.

QUESTION: Well, did she attend any -- any of her ancestors attend prior to the 1960's?

MR. STAGNER: Well, sir, that's hard to answer, because of the history, which I would like to relate to you, to explain the answer, --

QUESTION: But is there any --

MR. STAGNER: -- that there has been no tribal

meeting.

QUESTION: Is there anything in the record to show anything that any ancestor of Mrs. Weeks did in a tribal manner before the 1960's?

MR. STAGNER: No, sir.

QUESTION: So she wasn't a member of the Tribe until 1960.

MR. STAGNER: Well, our contention is, sir, that in 1960 there was no Tribe.

But, now, if the question related to Mrs. Weeks, let me relate the question to the Kansas Delaware class, which is, after all, she is here in a representative capacity of the whole class.

In fact, the last chief of the Delawares was in 1894, when the last chief died. The record shows that in 1895, they elected a Business Committee. That Business Committee was elected by the Cherokee Delawares, who were residing with the Cherokee Nation. And its only function through the years, from that date to this date, is to present claims against the United States.

The testimony is clear, the testimony in this record and in the Indian Claims Commission is of the Chairman of the Business Committee of the group that calls itself the Delaware Tribe of Indians. And that Chairman is a man named Joe Bartles, and he was Chairman for 32 years, I believe it was.

He's the man who brought the action in the Indian Claims Commission on behalf of the Tribe, signed the employment contract for the attorney, and he was, interestingly, a Kansas Delaware.

The reason for that was that his mother had been one of the 21 adults that remained in Kansas. After the Tribe had moved down here, his mother, being the daughter of the Chief of the Tribe, married an Oklahoma man, moved to Oklahoma. And --

QUESTION: Are you going to end up by saying nobody is entitled to this money?

MR. STAGNER: I'm sorry, I didn't understand?

QUESTION: Are you going to end up by saying that nobody is entitled to this money?

MR. STAGNER: No, sir. No, sir. I'm saying that, as the representatives of the Kansas Delaware minors, we stand on the same footing as members of the historical Tribe who owns this cause of action.

And I think it might be appropriate to address that question that was raised as to the ownership of the cause of action that existed in 1866.

QUESTION: Before you proceed to that, Mr. Stagner, could you state what were the legal rights of the minor children of these 21 people who left the Tribe in 1866 or soon thereafter?

MR. STAGNER: Be glad to.

Article IX provided --

QUESTION: You said they are quite different from their parents, and you relied on the difference, and just -- I would be interested in what their legal status was.

MR. STAGNER: All right, sir.

Article IX provided that the minors could remain with their parents in Kansas. They could continue to receive their annuities.

QUESTION: Right. And they all in fact did remain with their parents?

MR. STAGNER: Yes, sir.

QUESTION: Didn't they?

MR. STAGNER: Yes, sir.

And they could continue to receive their annuities. They were granted an option until they reached -- when they reached 21, to elect, at that time, whether or not to resign from the Tribe. And if they elected to resign from the Tribe at that time, they would be entitled to a patent for the allotment which they held, and would then have been entitled to their pro rata share of the trust fund, the same as their parents had been given in 1866.

But the historical event that has been left out of the presentation is that the very next year, after that Treaty of 1866, the Delaware Tribe made an agreement with the Cherokee

Nation, whereby they were moving to Oklahoma Territory under a paragraph of a prior Treaty between the United States and the Cherokee Nation, whereby it would have been necessary for them to abandon their tribal existence.

The Delawares elected to move east of the 96-degree longitude, and under the Treaty provisions that were applicable to that move, as this Court has found in cases that have been before you before -- I want to mention that in a moment; I'm reminding myself not to forget it.

The Delawares moved east of the 96-degree longitude, not as a tribe at all, and this Court has so found. The Cherokee Delawares have been before this Court before, twice. They were here in a capacity as Cherokees, seeking from this Court their share of the Cherokee assets. They were successful.

And in the trial of that case, these same people claimed not to be Delawares, they claimed to be Cherokees, and they were right, because the agreement which they had entered into and under which they moved was an agreement under which the tribal existence, the political body of the Delaware Tribe, went out of existence. And it had to, for them to be able to move where they did.

And in that case this Court specifically found that they did move under that condition, that section of the Treaty, and that since the year 1867, Justice Marshall, it is

our contention from that day there has been no tribe. There has been a group that is calling itself a tribe, but it is our contention that that group does not, in any sense, rise to the dignity of a tribe. They are an identifiable group of people, of which our people were a part, until this --

QUESTION: Well, where is the tribe that's entitled to this money?

MR. STAGNER: Sir?

QUESTION: Where is the tribe that's entitled to this money?

MR. STAGNER: Where is the tribe entitled to the money?

QUESTION: As I understand you as of now, nobody is a tribe.

MR. STAGNER: Well, Congress, in the Indian Claims Commission actions, is always faced with this kind of a situation. As you, the Court, will know, the Indian Claims Commission Act allows actions to be brought not just by tribes, it can be brought by tribes, bands, and other identifiable groups.

Now the other identifiable groups are there obviously because there are many, many people who are current representatives of historic tribes that no longer exist as political bodies. That's what happened in this case.

These two groups filed these actions in the Indian

Claims Commission as representatives of the historical tribe. It is the historical tribe who owns the cause of action. Who now own the judgment.

I quote from Turtle Mountain Band of Chippewa Indians vs. United States, a Court of Claims case, reported at 490 Fed 2d 935, in which they cite the earlier case of McGhee vs. United States, and say that "the ancestral group 'owns' the claim, and the present-day Indian groups are before the Commission only on behalf of the ancestral entity."

Now, where you have that situation, and there is no present modern-day tribe that is representative of that historical group, Congress then has elected, as they have in many of these union distribution Acts, to distribute the money on a descendancy basis.

QUESTION: Mr. Stagner, --

QUESTION: If this is the right time, getting back to your claim, you are pointing out to us that your claim derives not from the 21 adults who left the Tribe in 1866, but, rather, from their children, their minor children; isn't that what you told us?

MR. STAGNER: That's one of the -- no, we claim that we're entitled to it as --

QUESTION: That you -- your indication was, as I understood it, that your claim was a little stronger if we think of them as descendants of the minor children of the 21

who left the Tribe in 1866.

MR. STAGNER: Stronger under due process, yes, sir, under just compensation.

QUESTION: Yes, well, that's what this -- the basis of the court's opinion was due process, as I understand.

And you told us that the children were -- remained with their families, with their adult parents, in Kansas, and they were given the right under the Treaty, when they reached the age of majority, 21, to decide whether or not they wanted to return to the Tribe.

MR. STAGNER: Yes, sir.

QUESTION: Now, what in fact did they do? Did any single one of them return to the Tribe?

MR. STAGNER: No, sir, I'm sorry, I didn't continue telling you that historical background for the minors.

QUESTION: No, you didn't, because we interrupted you. I interrupted you.

MR. STAGNER: Because, in 1867, the next year, the Tribe made its contract with the Cherokee Nation, and left, and under the terms of that Treaty, no one could be added to that registry for moving to the Cherokee Nation after thirty days.

The minors simply had no option to return to the Tribe. The Tribe went out of existence. The individual Delawares went to the Cherokee Nation. There was no Tribe

from which they could resign.

Therefore, the Congress, recognizing that status that they were in, in 1874, appropriated funds to pay them for their pro rata part of the Delaware national fund as it then existed.

Also to grant them their patents to their allotments, the same as if they had been an adult in 1866. And in --

QUESTION: What was that, 80 acres?

MR. STAGNER: Yes, 80 acres.

QUESTION: Unh-hunh.

MR. STAGNER: And --

QUESTION: In Kansas?

MR. STAGNER: In Kansas.

All of them had had an 80-acre allotment.

QUESTION: All the adults had?

MR. STAGNER: All of them.

In 1860 there had been an allotment of all the lands in Kansas -- that is, there had been an allotment of 80 acres to each of the members in Kansas, and the other lands were surplus.

Now, those who moved to the Cherokee Nation, their allotments were sold.

QUESTION: Right.

MR. STAGNER: And they, in turn, bought a life estate in the 160 acres in the Cherokee Nation.

But, substantially, all of them had been treated alike, so far as the real property is concerned.

The minor Delawares got their share of the Delaware general fund just like their parents did, but at a later time.

But so did the Cherokee Delawares. The general fund was totally expended by 1893. There was an appropriation that paid to the Cherokee Delawares the balance of the general fund. So they all are on the same footing, so far as having been given their part of the general fund.

As to the citizenship problem, it's asserted by the Absentees in this case that the Appropriation Act of 1874, which conferred United States citizenship on the minor Delawares, had the effect of terminating their Indian membership.

We say that that is contrary to many holdings of this Court. They rely upon the case of Elk vs. Wilkins, which did not in any sense hold that. This Court, in a number of cases, -- I believe that there are six of them -- have held that there is no incompatibility between the United States citizenship and membership in an Indian Tribe; and in the case of Winston vs. Amos, you specifically held that the conferring of United States citizenship does not terminate Indian citizenship.

So that the basis for their saying that the minors' membership in the Tribe just simply is contrary to the holdings of this Court.

In 1875, then, Your Honor, the next year after the Appropriation Act and the granting of citizenship, there was an Act passed that now appears at 43 U.S. Section 189, which was dealing with the historical problem then of the government trying to encourage the Indians to leave the reservations, and the history of this has been discussed in several lower court cases, that what the government wanted to do was to get the Indians to resign and assimilate. That was the public policy.

And in keeping with that public policy, they passed this Act, and the last paragraph of that Act, referring to Indians who had theretofore resigned from their Tribe, or abandoned their tribal relationship, or shall hereafter abandon their relationship, Congress said that they shall be entitled to -- or he shall be entitled to his distributive share of all annuities, tribal funds, lands and other property, the same as though he had maintained his tribal relations; and any transfer, alienation or encumbrance of any interest he may hold or claim by reason of his former tribal relations shall be void.

Now, it was just a year before that that they had granted citizenship to these minors.

Now, we do not contend, of course, that that being an Act of Congress that that could not be repealed. It has not been. And they are -- the appellants in this case are

contending that impliedly the challenged statute here repealed that section.

Because they have come to you with the argument, as it did to the trial court, asserting that these funds are tribal funds and that they are the Tribe.

We say that the adjudicated cases say that they are tribal funds, but only of the historical Tribe, and that Congress, in dealing with those tribal funds, then, of the historical Tribe, may decide how to utilize those funds as they appropriate money to pay an Indian Claims Commission judgment.

And you have varying kinds of circumstances that Congress has to deal with. Such as the Navajoes, where they are a homogenous unit, they can channel the funds through the tribal unit and the members get the benefits of it. But where, as here, you have no tribal entity through which the people that are entitled to the benefits of it can get the benefit of it, they go on a descendency basis. And there are many of these statutes that are descendency statutes. And they are asking this Court to read that statute as not being a descendency statute but as being a distribution of these funds to the Tribe and, through the Tribe, to the members, and that the membership is to be determined in accordance with the Act.

We think that's a misreading of Congress' intention.

We know that it's not the intent of Congress as reflected by the legislative history. As a matter of fact, the legislative history that's before this Court shows that at the time Congress was considering this Act, the question was asked of the representative of the Indian group: Well, if we adopt this Act in the form that it's now in, will this include everybody who was with the Tribe in 1854?

Congress was assured that it would.

The problem, as you indicated, was that there were Munsee Indians who were on neither of these rolls, and that with the catch-all there the argument would be made that they were entitled to share.

The simple answer to the problem at that time, which we offer to you simply as a mistake or an oversight, was that they did not include the third roll, that is, the Article IX roll, in setting up eligibility. They do not have to have a catch-all phrase.

Contrary to the arguments made in the briefs, the trial court did not say that Congress has to have a catch-all phrase, although many, many of the Indian Acts do. All it needed to do was to have added the registry of those persons whose rights were preserved under Article IX of the Treaty of 1856. You have 68 known persons. It is true that our complaint said three hundred. Those three hundred were the ones who had actually proved this ancestry and had been paid

under the prior docket. Their names were a matter of record.

And, as in any class, you never know the names of all of the classes when you file your lawsuit. And, as investigation has shown, as the trial court asked us to investigate and make reports, we did. And we have given the names and addresses of that many, and that's most of them.

QUESTION: Mr. Stagner, if you prevail, what percentage of the total award will your clients receive? Roughly.

MR. STAGNER: Roughly, sir, about five percent.

QUESTION: About five percent.

MR. STAGNER: Yes, sir.

QUESTION: And their shares would be diminished by that amount, then?

MR. STAGNER: Yes, sir. Just about. That is, if we prevail on this appeal. This Court knows there is another appeal before you that is a question of over-inclusion. ✓

QUESTION: I understand that.

MR. STAGNER: But, assuming that it's distributed to all these classes, we'll have five percent.

I'd like to address my attention to one other statement made by counsel, and that is, that this Court would believe from the statement made that the group that's calling itself the Cherokee Delaware class is a homogeneous class that has been having tribal meetings. In fact, there are, as the

record shows here, 7500 of them scattered over 25 States of the Nation, they have no reservation, there has never been a constitution that was adopted by this group until after this lawsuit was filed.

Now, they are before you today saying, "We're here as a federally recognized tribe." They are. At least they have been recognized, after this lawsuit was tried. And the constitution which they adopted was after this lawsuit was tried. And this is pretty much a self-serving effort to try to get themselves in a position, being able to come to you, to be a federally recognized tribe.

We say that at the time of the action before the Indian Claims Commission, at the time of the adoption of this statute, they had no such standing at all.

There was a Business Committee, period. And that Business Committee's job was to pursue this lawsuit, and that's all that's been involved. The by-laws that are affecting that, or giving the power to that Business Committee is in the record. And the record shows that that is all that this group has done.

Now, that is an important thing for this group to have done. Our clients were attending the meetings of that very group, and we were a part of it. And they thought we were a part of it, and we thought we were a part of it, Justice Marshall. We were attending just like everyone else

was. And it wasn't until after this legislation was passed that it was discovered --

QUESTION: If I had a drop of Indian blood, I would have been attending it, too.

MR. STAGNER: Yes, sir.

[Laughter.]

MR. STAGNER: It wasn't until after it was discovered that there had been an accident in leaving them out that there ever was any question about them being able to attend.

The omission, as we think we have made clear from the record and through our briefs, was an inadvertent one, in the effort to try to exclude the Munsees.

And we're before you on the constitutional question of whether or not, when you have a group of lineal descendants, all standing on equal footing in regard to the wrong that was committed in 1854, the Congress may arbitrarily omit from the distribution to those lineal descendants of a portion of that award.

QUESTION: Mr. Stagner, let me interrupt again, to be sure I have something straight.

The reason for the exclusion of the Munsees --- is this correct -- was that they had separated themselves from the Tribe prior to 1854?

MR. STANGER: Prior to 1818.

QUESTION: Prior to 1818. So they certainly -- they were not even arguably a part of the Tribe in 1854 and 1866?

MR. STAGNER: No, sir.

Now, one little problem, and like all statements, they are over-simplifications, is that in 1854 there were about 200 Christian Munsees that were living in Kansas on the Kansas Reservation. They were the real problem, the knotty problem. But the Treaty of 1866 had dealt with those Christian Munsees. They were required to pay to the Tribe so much per acre for the lands which they occupied. They were not there as a part of the Delaware Tribe. They were there separate and apart, and they had no share in any of the Delaware lands. As a matter of fact, they had to pay to get their share. And --

QUESTION: So that they lived in Kansas, but were not part of the Tribe?

MR. STAGNER: That's right. And that is why, you see, that in drafting the statute, that they were a little afraid to use the catch-all phrase, because you would still have the question of whether or not it included the Christian Munsees.

QUESTION: I see.

MR. STAGNER: So someone got the bright idea, well, let's just strike out the catch-all altogether, without

remembering that if you do that you eliminate these 300 people that were already recognized as members of the Tribe for the previous award, and were paid. And the question raised as to the administrative inconvenience of including them, they have already --- 300 of them have already proved their claims. And no question ever raised anywhere that they were not members of the Tribe. They were paid in the original payment, for a wrong prior to this one, as a matter of fact.

They had successfully proved their lineal ancestry to the Tribe as of 1818, and now they are saying, Well, that was a mistake, too, I guess.

But one point I think that I need to touch on is the difference in the status of the adult Kansas Delawares, as that affects the legal question that this Court must deal with.

As I indicated, we are here asserting that there has been an arbitrary classification, by error, but, nevertheless, been resolved, an arbitrary classification by mistake, and we were left out.

And that, in violation of the equal protection of the Fifth Amendment.

We also have based our claim to share in this distribution upon the fact that in 1866 the shares of the 21 adults, all being the ancestors of our clients, became individualized interests. Once they left the Tribe, as in many,

many cases this Court has held that once that individual leaves the Tribe and receives certain assets, those are individualized, and they are protected by the Fifth Amendment from any taking, without just compensation.

There is a line of cases, Jones vs. Meehan, which has a landmark case, in which this Court has held that interest of Indians in the tribal assets, once individualized, become a property right that's protected by the Fifth Amendment against taking without paying just compensation.

So we have asserted that as a further basis for the fact that this statute is unconstitutional, because it does not take that into account and allow those persons to share.

Admittedly, that raises the question as to whether or not the payment of this money would be a taking of that right. But we did not get from the trial court a distribution, a right to have this money distributed to us. All the trial court said was that the descendency statute, as framed, arbitrarily excluded us. It will be up to Congress in framing a new one to determine whether or not we will be entitled to share on the basis of just compensation or whatever basis it may decide.

QUESTION: Well, could Congress then say that since nobody can agree, we just won't give anybody anything?

MR. STAGNER: I think Congress would have that power. We do not assert, Your Honor, that --

QUESTION: You don't mind that happening, do you?

MR. STAGNER: -- we're in any position to require the Congress to appropriate moneys to us.

As to the case that I've just referred to -- the legal basis I've just referred to, of just compensation, that perhaps might be a claim that could be sustained; but certainly as to this class, on the basis of equal protection, we don't say that we can force the Congress to appropriate the money.

We don't even say --

QUESTION: Mr. Stagner, in connection with your comment of a moment ago, the relief awarded you by the district court here wasn't to require inclusion of your clients, but it was to enjoin the expenditure of the moneys generally, wasn't it?

MR. STAGNER: Yes, sir. And in that case what they did -- the trial court determined that if you are going to distribute this money on a descendancy basis to individuals, then you cannot discriminate. Considering the purpose of the legislation. And the purpose of this legislation, of course, being that which is shown in the legislative history of the Indian Claims Commission Act, to be to compensate the present generation of the Indians who were wronged by the historic treaty breaches.

QUESTION: But isn't the distribution to Tribes

rather than to individuals?

MR. STAGNER: No, sir.

QUESTION: I thought the government's argument was this is all money being given to Tribes.

MR. STAGNER: That's what the government contends, sir. And I --

QUESTION: But you say it's going to be given to thousands of individuals?

MR. STAGNER: Sir?

QUESTION: It's going to be given to several hundred or seven or eight thousand individuals?

MR. STAGNER: Yes, sir.

Let me explain that a little. This is a basic difference in our approach, in this, that has caused a lot of the difficulty. But, of course, this Court is going to look at what the Congress did, not what I say or what Mr. Randolph said. And when you look at the statute, you see that what the statute does is say that there shall be a roll made up of lineal descendants and this money, 90 percent of this money shall be paid to those persons on that roll. None of that going to any tribal entity at all.

It's a direct descendancy, lineal descendancy distribution.

The other ten percent, however, was to be set back for tribal use, and a part of that was -- a pro rata part of

that was to go to the Absentee group. It was, at that time, an organized entity. But the Cherokee group who now stands before you and says, "We're a Tribe", in 1972 couldn't say that. They weren't. And therefore the Congress, in Section 1294(b), as to the ten percent, or their pro rata part of the ten percent that would be shared by the Cherokee Delawares, said that the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the Tribe until the Tribe is organized, a legal entity, which, in the judgment of the Secretary, adequately protects the interest of its members.

Now, we say that Congress was recognizing at that time that there was no federally recognized Tribe that even that money was going to. That Congress recognized, just as we do -- or as we contend in this case -- that here was a group saying they were the Tribe, but were not in fact.

One little thing just occurred to me as I -- I left out in my argument in recitation of the membership question. Mr. Joe Bartles, who brought this lawsuit, as I say, was Chairman of the Committee that brought this lawsuit, was a Kansas Delaware. He retired in 1952, after the suit had been filed. And at the time of his retirement, this group, meeting in Council as the Delaware Tribe of Indians, adopted a resolution recognizing Mr. Bartles and all of his descendants and naming several other Kansas Delaware families, saying that

we recognize that you are members of the group, you are members of the Tribe, you're entitled to your share in all the lands.

We were not only for thirty years attending their meetings, we chaired the meetings, that we had actually two men on the Council that were Kansas Delawares, of Kansas Delaware origin.

And Mr. Bartles died. The subsequent Tribal Chairman became -- they came then out of the Cherokee group, rather than out of the Kansas group. And even they didn't disclaim us.

And I think it's important to note that nothing in the 337 docket legislative history excluded us, we were accepted for that purpose. The original recommended bill for the distribution of this very fund that was offered by the Indians also included us. They, clear up to that time, were recognizing that we were part of the group.

QUESTION: Mr. Stagner, may I interrupt again, because you say Joe Bartles, who is a member of your group, was a leader in the prosecution of this lawsuit. Now, by that, do you mean the suit attacking the statute, or do you mean the prosecution of Claim 72 and 298?

MR. STAGNER: 72 and 298.

QUESTION: So you're talking about the creation of the claim, not the lawsuit attacking the statute, then?

MR. STAGNER: That's right. That's right.

QUESTION: Was he also involved in the prosecution of the claim 337?

MR. STAGNER: Yes, sir.

QUESTION: I see.

MR. STAGNER: I say that, and I don't want to be wrong on it. Before the Indian Claims Commission, as I recall, the Absentees had filed one claim, the Cherokee Delawares had filed numerous claims, and they were consolidated into various ways, and they all participated together in those actions.

And to say that the Kansas Delawares actually filed 337, I don't recall. But they were included in and involved in, participated in the determination of that action.

And I just don't have the recollection of which group actually filed it. But they were all treated together by the Indian Claims Commission as applying to both of these groups.

Now, the group here that is trying to exclude us have offered you rationals which they say would support the statute, had the accident not been made and they had been dropped out.

Now, it's pretty obvious that this is a rational that's never been considered by Congress. This is a rational that's proffered by these parties for the self-serving purpose of defeating this lawsuit, of course. And we have tried to

answer those proffered rationals, one by one, in our briefs.

But one of the things that bothers us is the suggestion made by the government that we are asking this Court to do something that is very, very unusual, and is going to cause the government a lot of troubles, a lot of administrative inconvenience -- that phrase, I know, is not new to this Court.

But the administrative inconvenience involved here is that they would simply have to look at, in the case of Wanda Weeks, two birth certificates. They have looked at it and approved it.

It's a bugaboo for them to say that this is going to be a big ethnological problem to the Secretary of the Interior. And to consider this case in comparison of recent cases the Court has had, I believe it was the Lucas case, where you were dealing with the question of exclusion and presumptions and so forth, had the Act put the duty on us to prove our ancestry back to the Tribe of 1854, and we had said that that's putting a duty on us that has not been put on the other groups in the class, that would bring us within the Lucas case.

But the Lucas case, you were very careful to distinguish it from those situations where it was a rebuttable presumption on one hand, or an irrebuttable presumption on the other. We have here an absolute exclusion. There is no way

that this Court can read this statute to include us, save an abortive effort that happened at that time, as the record shows, once this accident happened and was discovered, it was of some concern to the Indians that were involved. And the record shows it was. And the Chairman of the Business Committee came to Washington to try to get it amended, to include us.

And to solve the problem, an arrangement was made for an administrative construction by construing the 1906 roll as being an open roll, like the 1940 roll was, to just administratively construe to add the words "or be entitled to be on such roll". Then, if that had been so construed to allow the Kansas Delawares to show that they were entitled to be on that roll for purposes of this distribution, it solved the problem.

And that's where it stood until they denied the claims. Someone in the Bureau then denied the claims, after Congress, relying upon that, didn't amend the Act. Then, of course, they had to go through the administrative procedure and finally wind up before this Court.

But the question that Your Honor raised, that I think is answered by the history that's shown by the record in this case is the contemporary construction that was given to the Treaty of 1866, because the very first paragraph of that Treaty relates to a claim which this Tribe had, because

they had had some lands taken for railroad purposes, for which they had never been compensated.

In 1860 the -- some of their lands were taken for railroad right-of-way purposes, given to the railroad by a Treaty between the Delawares and the government. The railroad refused to pay for it. The government refused to pay for it. The Delawares had no way of collecting it. As a matter of fact, a lawsuit was filed against the railroad.

The Court held the railroad was not a party. You don't have any suit against the railroad. The only way you can get paid is to be paid by the government.

Well, that had not been paid in 1866 when the government says to the Delawares: We want you to move to Oklahoma Territory.

And they said: What about our railroad money? We'd like to have that determined.

And you'll note the very first paragraph of the Treaty of 1866 deals with that claim, in which the United States guaranteed the Delawares that they would receive the funds that were due to them. And that was not even an existing claim against the government, it was an existing claim against a third party.

Article IX, then, which reserved the rights to share in the assets, did not speak to a share in the Article I money; but, in fact, we proved in this action, that when that money

was appropriated in 1892, I believe it was, the residing Kansas Delawares got their share.

Now, the reason for that was --

QUESTION: That's the railroad claim you're still talking about?

MR. STAGNER: Yes, sir.

QUESTION: Okay.

MR. STAGNER: And that was an inchoate claim, an abstract claim out there, where it was understood, from the four corners of Article IX, by everybody that if you will resign, or elect to resign, then you will get your share of the assets. And it included all of the assets in which they then had an interest.

We believe that we have presented to this Court a clear showing not only inequity but a showing of a legal right to, in support of the unconstitutionality because of the invidious discrimination.

The government in its brief has said that the answer to this case is that Congress should determine what should happen to this money. We agree. The relief given us by the trial court was just that.

We asked the trial court, going in in a class action, as you would, to determine if we're entitled to share and set up the machinery to allow us to participate. The trial court denied us that relief. The trial court chucked this

back to Congress, so that if the Congress feels it was in error, that they can correct it. And at that time, of course, the Congress will consider what this Court has said about the status of these parties and their legal claim to share in the proceeds of this judgment.

And there are many historical precedents, contrary to what's indicated by the brief of the appellants, for this Court involving itself in the protection of Indian rights. Just because they are Indians does not mean they are not United States citizens, with all the rights of the Fifth Amendment. And this Court has historically protected those rights, where they became individualized.

QUESTION: Are these people Indians?

MR. STAGNER: Yes, sir.

QUESTION: Did the record show that?

MR. STAGNER: Yes, sir.

QUESTION: Is there a finding?

MR. STAGNER: Yes, sir. The --

QUESTION: There was a finding that they were Indians?

MR. STAGNER: Yes, sir. I think the finding is that they are Indians in the same sense the Cherokee Delawares are. Because the Cherokee Delawares --

QUESTION: It was a specific finding on that?

MR. STAGNER: I believe -- I believe there is, sir.

It is not disputed in the case that we are the same blood as they are, historically.

The only question there is you're dealing with: What is an Indian in relation to a political entity? And there is a serious question in this case as to whether or not there even is a political entity or could be under this Court's holding in Baker vs. Carr.

In Baker vs. Carr, you said Congress cannot just call a group an Indian Tribe, and then deal with them under the plenary power, without the courts having the right to inquire as to your actions.

QUESTION: I missed that in the Baker v. Carr case.

MR. STAGNER: And we think that if you apply that in this case, that there is a serious question whether even the Cherokee Delawares are a Tribe. No court, of course, has defined what an Indian Tribe is.

In Montoya vs. United States, it is.

But it becomes a little distortion here because they now say we are a federally recognized Tribe, without considering the chronology of that event. That happened after the lawsuit was tried. The court was asked to approve it, the trial court did not determine that that was not a matter that was relevant to the case.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stagner.

Mr. Rothbaum.

REBUTTAL ARGUMENT OF BERNARD J. ROTHBAUM, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

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

This Court is not the proper forum in which to re-try all the factual issues which were tried below. There is the unanimous finding of the court below in regard to the Delaware Tribe of Oklahoma. It reads, quote, "The Kansas Delawares deny that such tribal identity has been maintained by the Cherokee Delawares. We are unable to agree, and find that the Cherokee Delawares have maintained group identity, having Chiefs and Business Committees continuously until the present time."

We litigated that issue below, with a unanimous finding on the point.

That's at page 16 of the Jurisdictional Statement.

In regard to the Absentee Delaware Tribe of Western Oklahoma, who I have the honor to represent, the finding is the Absentee Delaware Tribe of Western Oklahoma has maintained group identity, having Chiefs and a Tribal Council up to the present time. That's at page 12 of our Jurisdictional Statement, page 1218 of 406 Fed Supp.

Now, in regard to the time of recognition of the Tribes, the Cherokee Delawares or, their proper name, the

Delaware Tribe of Oklahoma, has been a federally recognized Tribe since 1962. The documents that were referred to by Mr. Stagner do not deal with federal recognition. That's discussed ably in the brief of Mr. Christensen, and particularly his Reply Brief.

The Absentee Delaware Tribe of Western Oklahoma has been a federally recognized Tribe since 1957, has many tribal functions. They are all in the record, in answers to interrogatories, requests for admissions. If the Court feels it important, we could easily prepare a post-argument memorandum on it.

Now, in regard to the proposed administrative construction of the statute. Dewart Barnes, Associate Solicitor at Interior, did write a letter proposing that the roll be considered open. That would not have included Kansas Delawares, because they were not eligible to be on that 1906 roll. The Comptroller General so held in 1904. This same exact identical question came up.

Wrongs committed against the Delaware Tribe, who should get the money, particularly should those who resigned in Kansas get that money?

The question went to the Attorney General. The Attorney General wrote a long opinion, and then he said, But I'm going to submit it for final decision to the Comptroller General. The Comptroller General wrote a long decision, approv-

ing exclusion of the Kansas Delawares for the reason that in Article IX of the 1866 Treaty, they had expatriated themselves from the Tribe.

Now, in regard to the minors, we do not argue that Elk vs. Wilkins holds that you can't be the member of an Indian Tribe and a member of the United States at the same time. And if that's the impression that was drawn from our brief, we're sorry.

QUESTION: Mr. Rothbaum, I just lost a point. You say the Attorney General wrote a long opinion saying that the Kansas Delawares were excluded because they had been expatriated. In connection with which claim was that opinion?

MR. ROTHBAUM: In connection with a series of claims which were -- it was the Comptroller General's opinion which was finally conclusive, Mr. Justice Stevens. We have reproduced both the Attorney General's opinion and the Comptroller General's opinion in pertinent part in our briefs.

There was a series of claims filed in the Court of Claims, under a special jurisdictional act in 1901, or 1902, I won't swear to the date right at the moment. The government agreed to settle the claims for a set amount of money. The question then became: To whom is this money to be paid? Is it to be -- and the Comptroller General ruled it is to be paid only to --

QUESTION: But just so I have it, these are claims other than 337, 72 or 298?

MR. ROTHBAUM: Yes, Your Honor.

QUESTION: I see.

MR. ROTHBAUM: But they do include the -- the claims did include a claim prior to -- claims prior to 1866.

QUESTION: But were they not included in the distribution on claim 337?

MR. ROTHBAUM: They were. We --

QUESTION: Is that consistent with the other Attorney General's opinion?

MR. ROTHBAUM: It is inconsistent. The two tribal entities opposed before Congress the use of a catch-all clause. We think it was a mistake. We think that --

QUESTION: Did they rely on the Attorney General's opinion in opposing the distribution?

MR. ROTHBAUM: I cannot state that for a fact.

QUESTION: But the Attorney General's opinion came before the distribution statute related to claim 337?

MR. ROTHBAUM: Yes.

QUESTION: I see.

MR. ROTHBAUM: Both the Attorney General's opinion and the Comptroller General's opinion are 1904.

QUESTION: I see.

MR. ROTHBAUM: Half a century prior to this time.

It is true that there is a catch-all clause in 337. We think that was a mistake. And we think the history of it --

QUESTION: Well, if you prevail, your side prevails, can Congress make the same mistake? Tomorrow?

MR. ROTHBAUM: Can Congress make the same mistake?

QUESTION: Do the same thing it did with 337?

MR. ROTHBAUM: Yes.

QUESTION: Amend the statute and bring in --

MR. ROTHBAUM: Yes. We think it would be wrong, but Congress could do it.

QUESTION: Could do it.

MR. ROTHBAUM: We have no vested right until it is paid out under this Court's holding in Gem and similar cases. We think it would be wrong.

But I do want to mention the question of the legislative history which was before Congress.

Now, it is true that the Munsee problem was a substantial problem. It is true that the Munsees had separated themselves from the Delaware Tribe in 1818, but that the Bureau of Indian Affairs kept trying to bring them in. But the attorney who represented the Tribes, before Congress, pointed out to the Congress expressly -- and this is in the record, it's in the testimony -- that under a holding of the Court of Claims, Minnesota Chippewa Tribe, which is reported in 415 Fed 2d, the Indian Claims Commission Act, says the

Court of Claims, requires that awards be made not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today, close quote.

It is perfectly true that Congress has, on many occasions, used descendancy statutes, where the Tribes are no longer existent or no longer viable or no longer functioning today, or where on Tribe has become assimilated into another. Those are not the facts of this case, found unanimously below.

QUESTION: Well, your opponent told us that they made the award here to individuals rather than to the Tribes. Is he wrong in that?

MR. ROTHBAUM: Your Honor, these - the award in 72 and 298 is clearly a tribal award. Ten percent of each sum goes -- in regard to the Absentee Delaware Tribe -- to the Absentee Delaware Tribe as presently constituted.

QUESTION: What about the other 90 percent?

MR. ROTHBAUM: The other 90 percent is paid out per capita to those who are on or eligible to be on the 1904 roll, base census roll of the Absentee Delaware Tribe of Western Oklahoma.

QUESTION: Paid directly to individual descendants, right?

MR. ROTHBAUM: It is paid -- it is not paid directly

to individual descendants, no, Your Honor, it is paid to those who --

QUESTION: Well, individual persons.

MR. ROTHBAUM: -- are on or eligible to be on the Tribe's roll as of 1940.

QUESTION: Is that consistent with the Court of Claims decision you just described?

MR. ROTHBAUM: Yes, sir. Because it is one thing to say that a modern roll, such as the 1940 base census roll prepared by the Bureau of Indian Affairs, which has the same function as the census prepared every decade by the Bureau of the Census, is to be used as a method for locating names and addresses.

It's something else again to say we're going to trace ethnologically by blood every one from 1818 forward.

QUESTION: The reason being you -- then you know you have the right people.

MR. ROTHBAUM: Well, then we know we have --

QUESTION: Is that, then, just to be sure I give you a chance to answer this thought that's troubling me, as I understood the argument earlier, the rationale of Congress had to be they wanted the money to go to the Tribes rather than to individuals. How does the actual distribution square with that argument?

MR. ROTHBAUM: I'm sorry, I didn't get the last part?

QUESTION: How does the actual distribution to identified individuals square with the argument that the real policy Congress was concerned with was giving money to Tribes rather than to individuals?

Or maybe I misunderstood the argument.

MR. ROTHBAUM: I'm sorry, but I don't quite follow, Mr. Justice. The distribution is ten percent to the Tribe, to each of the Tribes, --

QUESTION: I understand that, but the 90 percent I am asking.

MR. ROTHBAUM: The 90 percent goes to those who are on or eligible to be on the 1940 roll prepared by the Bureau of Indian Affairs census, as a method of determining names and addresses. We're not talking about people who were on or eligible to be on a roll of 1854, or something like that. This is simply a method of determining names and addresses.

And we have in the record, from the Bureau of Indian Affairs, the manner in which the base census roll was constructed and so forth and so on.

I see my time has expired. I thank the Court. I think that the matter here is -- there is a clear rational basis for the decision Congress made. It had two choices before it, and chose one.

Thank you.

QUESTION: Mr. Rothbaum, --

MR. ROTHBAUM: Yes, Mr. Justice Rehnquist.

QUESTION: -- I had been under the impression that the office of Comptroller General was created by the Act of 1920. You've cited an opinion of the Comptroller General from 1904. Is that the same --

MR. ROTHBAUM: I beg your pardon. Comptroller of the Currency. A slip of the tongue; I'm sorry.

QUESTION: All right.

MR. ROTHBAUM: The predecessor to the Comptroller General.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:35 o'clock, a.m., the case in the above-entitled matter was submitted.]

-- --