In the

Supreme Court of the United States

SMITH JOHN AND HARRY JOHN SMITH,

APPELLANTS

V.

MISSISSIPPI; AND
UNITED STATES,

PETITIONER

V.

SMITH JOHN AND HARRY SMITH JOHN

c.4

No. 77-575

No. 77-836

Washington, D. C.
April 19, 1978

Pages 1 thru 54

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Official Reporters
Washington, D. C.
546-6666

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IN THE SUPREME COURT OF THE UNITED STATES

SMITH JOHN AND HARRY JOHN SMITH, Appellants	:	
v.	:	No. 77-575
MISSISSIPPI; and UNITED STATES, Petitioner	:	
v.	:	No. 77-836
SMITH JOHN AND HARRY SMITH JOHN	:	

Washington, D. C.

Wednesday, April 19, 1978

The above-entitled matter came on for argument at 10:44 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:

H. BARTOW FARR, III, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.
For Petitioner in No. 77-836

Continued ...

RICHARD B. COLLINS, ESQ., Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302
For Smith John and Harry Smith John (the latter being moot)

CARL F. ANDRE, ESQ., P.O. Box 22831, Jackson, Mississippi 39205
For Appellee in No. 77-575, Mississippi

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-575, Smith John and Harry Smith John versus Mississippi and No. 77-836, United States versus Smith John and Harry Smith John.

Mr. Farr, you may proceed whenever you are ready.

ORAL ARGUMENT OF H. BARTOW FARR, III, ESQ.,

ON BEHALF OF PETITIONER IN NO. 77-836

MR. FARR: Thank you, Mr. Chief Justice.

May it please the Court:

These consolidated cases from the Supreme Court of Mississippi and the Court of Appeals for the Fifth Circuit present a common central issue and that is whether land purchased by the United States and held in trust for the Mississippi Band of Choctaw Indians and declared a Reservation by the Secretary of the Interior pursuant to the Indian Reorganization Act, constitutes Indian Country within the definition found in 18 USC 1151.

The state case also presents a dependent issue, whether if these lands are Indian Country, the Federal Courts have exclusive jurisdiction over crimes involving Indians as they traditionally do, or whether the history of the Mississippi Choctaws in some way compels a departure from the generally-accepted rule.

Now, I would like to emphasize briefly at the outset

that what we were talking about in terms of federal jurisdiction here is not a plenary sovereign jurisdiction excluding all state jurisdiction. It is simply the limited preemptive authority over matters involving Indians that is common in Indian Country.

For reasons that I shall discuss, we believe that the Choctaw Lands are Indian Country and thus are subject insofar as crimes involving Indians are concerned, solely to jurisdiction of the federal court.

QUESTION: You are saying that your position with respect to this Reservation is different than your position with respect to the Navajo Reservation, for example?

MR. FARR: No, I am saying that our position with respect to this Reservation is the same but it is no broader than that, so when we talk about exclusive jurisdiction we are not suggesting, for instance, the state does not have jurisdiction over crimes solely involving non-Indians as it does under the McBratney rule or that it would not have sovereign jurisdiction over its citizens if they go off the Reservation.

QUESTION: But on every piece of this Reservation -- how many pieces are there?

MR. FARR: There are tracts in seven different counties.

QUESTION: Well, how many pieces, separate pieces are there, do you know?

MR. FARR: Well, I am not sure what you mean by

"separate pieces."

QUESTION: Well, how many non-contiguous tracts are there in the Reservation?

MR. FARR: Well, I am not sure what the answer to that is.

QUESTION: There are at least seven.

MR. FARR: There are several basic areas.

QUESTION: There are at least seven.

MR. FARR: That is correct.

QUESTION: And probably more.

MR. FARR: There are more than seven basic areas which are not contiguous but there are at least seven basic areas, as I understand it, that comprise the Reservation.

QUESTION: And you assert that each one of those must be treated as a Reservation.

MR. FARR: Those collectively --

QUESTION: Or individually, then.

MR. FARR: As parts of a Reservation, that is correct.

QUESTION: Mr. Farr, would your position be affected at all as to whether the victim of the crime is an Indian or a non-Indian?

MR. FARR: Not on this particular issue, no.

QUESTION: All right.

MR. FARR: That does, perhaps, have a relevance to another issue which I will mention in a moment.

These cases arise out of a single incident that occurred on the Choctaw Land. In October, 1975 a Federal Grand Jury indicted Respondent John, who is a full-blooded Mississippi Choctaw Indian, for assault with intent to kill one Artis Jenkins under 18 USC 1153, which as the Court is familiar with, is the Major Crimes Act.

The indictment stated that the offense occurred on and within the Choctaw Indian Reservation and on land within the Indian Country under the jurisdiction of the United States.

At trial the Government requested instruction not only on the offense charge, but also on the assault with a dangerous weapon with intent to do bodily harm while the Defendant relying on Keeble versus the United States, 412 U.S., asked for an instruction on the lesser included offence of simple assault as defined in 18 USC 113 E.

The instructions were given. Respondent was acquitted of the Major Crimes but convicted of simple assault and sentenced to 90 days in prison and a $300 fine.

After posttrial motions, Respondent appealed his conviction to the Fifth Circuit, arguing that although Keeble requires the giving of instruction on the lesser-included offense, the District Court lacked jurisdiction to enter a judgment of conviction on that offense.

And this is in response to Mr. Justice Stevens. We have suggested that if the Court accepts our position on these

lands as Indian Country, that it remand the case to the Fifth Circuit to consider that issue but that it is possible that the race of the victim may be a factor in determining that jurisdictional question but the record simply does not show whether the victim was an Indian or not and Respondent does not urge that here.

In any event, the Fifth Circuit did not reach the issue but asked the Department of Justice to file a brief discussing whether the crime occurred in Indian Country at all and the Department of Justice took the position in its brief, the position with which Respondent agreed, that the crime did occur in Indian Country, but the Fifth Circuit disagreed for reasons that I will discuss shortly and reversed the convictions.

Meanwhile, after the federal prosecution was completed, state authorities also contained an indictment against John for exactly the same offense, charging aggravated assault under the Mississippi statutes. He moved to dismiss the indictment on grounds that the federal courts had exclusive jurisdiction. The motion was denied and he was convicted and sentenced to two years' imprisonment.

The Mississippi Supreme Court, in a decision that was actually rendered before the Court of Appeals for the Fifth Circuit decision, held that these lands were not Indian country and thus that the state had exclusive jurisdiction. It therefore, affirmed the conviction.

Now, turning first to the provisions of Section 1151, the statute defining Indian Country which is found at page 40A of the Appendix to our Petition for Certiorari, we submit that contrary to the conclusions reached by the Court Below, these lands, held in trust for the Choctaws, fit very comfortably within the definition of Indian Country found there.

To begin with, 1151A includes within Indian Country all lands within the limits of any Indian Reservation under the jurisdiction of the United States. And this Court for over 60 years has recognized that such Reservation lands, even if they are not original Indian lands, are Indian country so long, as the Court said in Donnelly, "They are lawfully set apart as an Indian Reservation."

Now, here the Secretary of the Interior --

QUESTION: That is from judicial decision and not from an expressed language of Congress, right?

MR. FARR: The language that I just quoted in Donnelly was prior to the definition.

QUESTION: Well, you say it has been recognized for over 60 years, the exclusivity of federal jurisdiction over Indian Country but that is by reason of judicial decision and not by reason of a Congressional statute making it so, am I --

MR. FARR: Justice Rehnquist, I think the Court has recognized that the federal courts have jurisdiction -- leaving aside exclusive jurisdiction for a moment -- over Reservations

for much longer than 60 years. The point that I was raising here is that for a certain time it was recognized that only the original Indian lands comprised an Indian Reservation and then in Donnelly, the Court departed from that and for the first time recognized something that now has been picked up by Congress in the definition of Indian Country, that they do not have to be original Indian lands, as long as they are lawfully set apart for the Indians.

In any event, as I was saying, --

QUESTION: You mentioned the Secretary of the Interior. This was in 1944, was it not?

MR. FARR: That is correct, Mr. Justice Marshall.

QUESTION: Isn't that kind of late?

MR. FARR: To declare this a Reservation?

QUESTION: Yes.

MR. FARR: I think that is because of the history of the Choctaws, which we have set out in our brief, which shows that what he was doing in this particular case was declaring a Reservation for a group of Indians who were left behind when the original Choctaw Tribe moved to the Western Territory so that is why he was coming at this late time to provide a Reservation for them.

QUESTION: All those or less.

MR. FARR: I'm sorry?

QUESTION: There is a great bunch of Choctaws in

Oklahoma.

MR. FARR: That is correct but what we are concerned with here is the provisions that the Secretary of the Interior then made for the ones who remained in Mississippi. And what he did was acting pursuant to Section Seven of the Indian Reorganization Act which contains an explicit authorization that the Secretary can declare an new Indian Reservation.

He proclaimed those lands a Reservation and that status continues to the present time and of course, includes the period of time during which the offenses here were committed.

Therefore, our first submission is that we think it is plain on its face that these lands fit within the definition of 1151(a).

In addition, I would like to point out that 1151(b) speaks to all independent Indian communities within the borders of the United States and while I do not intend to go back through the entire history of the Choctaws which we have set out at pages 18 to 23 of our brief, I would like to emphasize that the United States, having finally been moved by the sorrowful plight of the Mississippi Choctaws after the remainder of their Tribe moved to the Western Territory, has been providing benefits for this Tribe including educational benefits, schools, lands, agricultural benefits since 1918 and has held --

QUESTION: How long is it that the Mississippi Choctaws have been a Tribe?

MR. FARR: Well, they organized under the Indian Reorganization Act and that was approved by the Secretary of the Interior in 1945.

QUESTION: 1945?

MR. FARR: That is correct.

QUESTION: So that was from late 1918 to 1945 it was not providing aid to any Tribe.

MR. FARR: What it was doing was providing aid to a group of Indians who --

QUESTION: Individual members of a group.

QUESTION: Sure.

MR. FARR: Well, it was providing it to the individual members --

QUESTION: Not to a group as a group, but to individual members of that group.

MR. FARR: Well, in 1939, for example, they did provide for these lands to be held in trust for the common benefit of the Mississippi Choctaws so that was certainly legislation for a group and I think logically the provision of schools is for them as a group. It is not purely for single individuals.

QUESTION: Well, Mr. Farr, I suppose you are going to get to -- I take it that the State's submission is, in part at least that whether this is a Reservation or not, the United States is not permitted to treat these particular Choctaws as Indians because they were once subjected to state jurisdictions.

MR. FARR: Right, I intend to get to that right away. What I was just pointing out at the outset is that aside from those arguments, it seems to me quite clear that these lands fit within the definition of Indian Country in Section 1151 and it is just a question now of whether in some way Congress was disabled from putting them there.

QUESTION: Well, what does -- you have referred a couple of times to the fact that it is clear that these lands fit within the definition of Indian Country in 1151. What does that do for you if we accept that proposition?

MR. FARR: I think what that does is that it gives the Federal Court jurisdiction over crimes committed by Indians in Indian Country.

QUESTION: As long as you can surmount the other difficulty, too.

QUESTION: Yes.

MR. FARR: Assuming that these are legitimately Indian Country and that Congress had the power to make them Indian Country, then that is right.

QUESTION: This does not go to exclusivity, then?

MR. FARR: No, at this particular point it does not need to, although I should point out at this time that generally the federal jurisdiction over crimes involving Indians in Indian Country is exclusive of state jurisdiction.

QUESTION: But if you have created an Indian

Reservation and then just put non-Indians on it, the federal courts would not have exclusive jurisdiction on any crimes.

MR. FARR: The reason would be, though, because that is something that Congress could not validly do, as I will explain in just a moment but if, indeed, this is an Indian Reservation that Congress was entitled to establish or a dependent Indian community that Congress was entitled to establish, then it seems that the normal jurisdictional rules which are that the federal courts have jurisdiction over the crimes committed by Indians or involving Indians to the exclusion of the state should apply. I do not see any reason why they should not.

QUESTION: Would you say that the normal jurisdictional rule that an Indian living in Phoenix, Arizona off the Indian Reservation who has lived in Phoenix for 50 years is subject to the exclusive jurisdiction of the federal court there for crimes he may commit in violation of state law?

MR. FARR: No, Mr. Justice Rehnquist, I do not say that. What I am saying is that he would not be living in Indian Country by the very hypothesis that you put forward.

QUESTION: So Indian Country is essential to your argument.

MR. FARR: That is right. That is what gives the federal courts jurisdiction over these areas and that would include Reservations and independent Indian communities.

QUESTION: But a non-resident Indian does not live on the Reservation. He comes on the Reservation for a day and commits a crime. It would be within the reach of this statute.

MR. FARR: That is somewhat of an unsettled question, whether the federal court, whether the jurisdiction in Indian Country in 1152 and 1153 applies to people who have no connection with the Indian Reservation or the dependent Indian community where they are found is something that this Court noted in Antelope is left open.

But that certainly is not the case here. If these lands are a Reservation or a dependent Indian community, certainly Smith John was a member of that community, or a member of the Band living on the Reservation.

QUESTION: But you said, as has been suggested by my Brother White, there are at least two issues here; first of all, whether or not territorial -- well, at least two issues, probably three or four or five -- whether or not there is territorial jurisdiction.

Second, if so, is that exclusive?

And thirdly, even though there are the territorial jurisdictions, can there be federal jurisdiction over these people who were, years ago, made non-Tribal members and citizens of Mississippi?

MR. FARR: All right, I think that those may be separated out although I think the third in this case really is

sort of a false issue. I think that our position succinctly stated is that there is --

QUESTION: You hope it is.

MR. FARR: Pardon me?

QUESTION: You hope it is.

MR. FARR: Well, I certainly hope it is. But I also think it is and our position is that federal jurisdiction is -- that the federal courts do have jurisdiction over these lands because it is Indian Country but that jurisdiction, as in normal use of federal lands and in normal situations involving Indian Country or dependent Indian Communities, is exclusive of state jurisdiction and finally, that they do have jurisdiction over Smith John himself, who is the only person at issue here because he is a member of the Band that occupies those lands.

QUESTION: That is a little circular, is it not?

QUESTION: Well, also, you left --

MR. FARR: I thought it was as straight a line as --

QUESTION: Yes, you hope it is. Do you have exclusive jurisdiction over the Reservation because he is there and living on it? Do you have strict jurisdiction over it?

MR. FARR: Well, I agree, one has to follow from the other but you can follow in a straight line, not necessarily in a circle.

QUESTION: And you say they have jurisdiction over

Smith John because he is a member of the Band living there but still you have to answer the claim of the State that no matter if he be such, years ago he was declared not to be a member of any Tribe and much less a member of --

MR. FARR: Well, let be go ahead with that because --

QUESTION: -- or a citizen of Mississippi and it is too late now to reincorporate him in as a member of some Tribe.

MR. FARR: Well, I do not think it is too late.

QUESTION: Well, I know you don't but that is part of your case, too.

MR. FARR: That is correct. That is correct.

The notion that the Treaty of Dancing Rabbit Creek in 1830 somehow set in stone the relationship between the Choctaws and Mississippi and the Federal Government I do not think is supported by any authority. It is true that the treaty apparently contemplated that the Choctaws who did not go to the Western Territory would stay behind, would receive land and would presumably fend for themselves as citizens of the State of Mississippi.

The United States certainly did not in the treaty, surrender explicitly any power to help them if that proved to be unworkable and the State of Mississippi, of course, is not entitled to rely on any promises there, anyway, because it was not a party to the treaty. It was not made for their benefit.

Even if the Treaty could somehow be read to include

that sort of promise by the United States, it is clear from the decisions of this Court that Congress can amend treaties by later treaties and by subsequent legislation and it would seem to me extremely curious, as well as unfortunate, if that principle, which has often been used to change treaties over the Indians' objection was now somehow unavailable to change a treaty for their benefit and with their acquiescence.

Now, the point that Justice White makes is that after that period of time they were no longer a Tribe and therefore that Congress', as I understand it, constitutional power had somehow lapsed over the Choctaws.

But I think that is too grudging a view of Congress' power in Indian Affairs. Tribal existence, like tribal sovereignty, provides the necessary backdrop for viewing the relationship between the American Indians' and the Federal Government but this Court has already recognized that a continuing tribal existence is not a sine qua non of Congressional power to deal with Indian Affairs.

For example, in the case that we have discussed in our brief, in McGowan, the Court approved the exercise of Congressional jurisdiction over lands purchased for Indians in Nevada, many of whom were not members of an established Tribe at that point.

Indeed, logically, if Congress lost its power to provide for the Indians at the instant that an individual

Indian severed his tribal relationship or the Tribe for some reason, disbanded, it would completely prevent Congress from experimenting with independence of the Tribe because once the Tribe gained some measure of independence, to that degree, Congress would lose its ability to correct the situation if the Tribes were unable to cope with that independence.

QUESTION: Mr. Farr, in McGowan the Federal Government rather expressly did not assert exclusive jurisdiction.

MR. FARR: Well, when we are talking again about exclusive jurisdiction, this is the point I made originally, the type of jurisdiction they are asserting there is not the exclusive jurisdiction that you get under the Arsenals and Dockyards clause, for example, if the state consents to give it to you where basically you become the full, entire sovereign for that area and the state just keeps out -- with some limited exceptions.

What we are saying here is that as this Court recognized in Surplus Trading Company versus Cook, that the state continues to be a sovereign over these areas. It continues to have certain sovereign rights over these areas.

What the state does not have -- and this is exactly what the Court said in Surplus Trading Company by way of example -- what this case does not have is full sovereignty over the Indian wards. The Federal Government has the sovereignty and to that extent it premepts that bit of state sovereignty.

QUESTION: Well, Mr. Farr, suppose that the Federal Government just decided that there were some underprivileged people in the community and we will just buy them some federal land out in Arizona or some place and move these people onto the Reservation?

MR. FARR: If they are not Indians, they can't do it.

QUESTION: So you rely strictly on the fact of the Indian. And what provision of the Constitution do you rest on?

Do you keep the state on which to ground federal power to exclude the state?

MR. FARR: It is grounded on the provision to regulate commerce with the Tribes, the treaty-power making with the Tribes and the powers that flow from that that this Court has recognized in numerous cases.

QUESTION: Would your answer be any different if the Indians were moved to Colorado rather than Arizona?

MR. FARR: No, it would not. I mean, the Court --

QUESTION: Well, what would your answer be if they gave New York back, Manhattan?

MR. FARR: If they gave -- assuming that the Indians would take it, I mean, it seems to me that their power to deal with the Indians at all depends on some sort of original Tribal nexus. This Court in Sandoval said that Congress can not necessarily --

QUESTION: Well, they Indians did own Manhattan,

didn't they? And there are Indians there now. They are the guys that climb the skyscrapers.

MR. FARR: That may be but on the issue of the Indian power, the Court did say in Sandoval that Congress could not exercise that power simply by arbitrarily calling a group of people an Indian Tribe.

QUESTION: No, I am talking about the Secretary of the Interior.

MR. FARR: Well, the Secretary of the Interior --

QUESTION: He is referring to Mississippi by including it in New York.

MR. FARR: Well, he can do it if Congress authorizes it and Congress has authorized it.

QUESTION: Congress has not authorized it in Mississippi.

MR. FARR: Well, under the Indian Reorganization Act it did authorize, Congress did certain things directly and authorized the Secretary of the Interior to do the rest under the Indian Reorganization Act so he did have that authorization.

But back to the Sandoval point for a second. The Court said,"You cannot just call anybody --"

QUESTION: What does it depend on, blood?

MR. FARR: No. Well, blood would certainly be part of it. It depends, as the Court said there, on a distinctly Indian community.

QUESTION: Well, just anyone cannot join the Tribe and be recognized as an Indian.

MR. FARR: That is correct. I cannot. You know, I have no Indian grounding and in fact, the Indian Reorganization Act applies only to Indians of one-half or more Indian blood but it is a distinctly Indian community and the Mississippi Choctaws have a common history, they have common heritage, they have common customs and they have a common language.

In 1918, when Congress began legislating for the Choctaws, they had a report from the agent in front of them that said every one of the Choctaws still spoke Choctaw and many of them spoke it as the only language so this is not a group of Indians that has been completely -- I am sorry?

QUESTION: You had better limit that to Mississippi Choctaws.

MR. FARR: You are right. I had better limit that to Mississippi Choctaws and that is who I am talking about.

QUESTION: Because the former Chief Judge of the Court of Criminal Appeals in Oklahoma, which is a rather high office, was a Choctaw.

MR. FARR: Well, I am speaking and I apologize for not being precise in my answer, I am speaking of the Mississippi Choctaws but you know, Congress recognized at that time that they had not been assimilated into Mississippi society. As this Court said in Winston versus Amos, they were denied all

political social privileges and their children could not go to the state schools so it is not clear how they were going to be assimilated, even if that had been the purpose of the actions prior to that time so I do not think that, although there clearly are limits to the power, to reach out and just find someone in general non-Indian society, even if he has a very distant Indian ancestry and pulling within the reach of the power, it does not seem to me that that is the situation in this case.

QUESTION: Are the communities exclusively Indian, the so-called"Indian communities"that you are talking about?

MR. FARR: The dependent Indian communities? I do not think it would be necessary that they absolutely be populated by only Indians?

QUESTION: I did not ask you that. I asked you, are they or are they not exclusively Indian?

MR. FARR: Well, I think that --

QUESTION: The community you are talking about is an area.

MR. FARR: They are exclusively enough Indians so that they have that distinctively Indian character. That is what I am saying.

QUESTION: But there is land in the community that is owned by other non-Indians?

MR. FARR: In this case there is virtually none and

I think that is generally the rule, that the land is generally held for the Indians themselves. Here the United States, in the lands that they have declared a Reservation, is holding those in trust for the Choctaw Indians and not for anybody else.

QUESTION: This is all federal land, is it not?

MR. FARR: This is all federal land.

QUESTION: Federal-owned land.

QUESTION: Well, would your argument extend to a checkerboard situation such as we have had in a couple of the Reservation cases?

MR. FARR: Yes, it would. I mean, checkerboarding is an incident of certain actions that Congress takes and it is not always the most desirable thing. It might for simplicity's sake be better to have all the lands everywhere bunched by jurisdiction.

QUESTION: Don't we have a checkerboard design in any case?

MR. FARR: In this case there are Indian lands and then there are lands that are non-Indian and the jurisdiction varies between the two. That is correct but I think that is somewhat of a make-weight argument in the sense that you had that in Rosebud. You had that in DeCoteau. It is simply an incident of some things that Congress does without specifically addressing or perhaps without caring about the effect of checkerboard jurisdiction.

1151(c) gives you checkerboard jurisdiction everywhere it applies --

QUESTION: Mr. Farr, before you sit down, the one petitioner, the individual petitioner, has died?

MR. FARR: That's right, Harry Smith John has died.

QUESTION: And is the case moot as to him, now?

MR. FARR: I would believe it is, yes, sir.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Collins.

ORAL ARGUMENT OF RICHARD B. COLLINS, ESQ.

ON BEHALF OF SMITH JOHN

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

Our position on the basic Indian Country issue in the case is the same as the United States' and I shall endeavor not to repeat Mr. Farr's arguments because we essentially agree with them.

I would like to say a few words in opening about the people that we are referring to as the Mississippi Band of Choctaw Indians as I think it is relevant to this case.

The contemplation of the Treaty of Dancing Rabbit Creek, as the state correctly points out, was that the Choctaws would either move to Oklahoma or assimilate and I think it is important to point out that there are really three groups of descendants from those people; those that moved to Oklahoma

that obviously have no relevance to this case; those that stayed in Mississippi who did assimilate and intermarry with other Mississippi citizens and those who did not assimilate who are not all the descendants; only those who remained a separate and distinct Indian community -- an Indian community most of the members of which were entirely of Indian ancestry continued to speak the Choctaw language, continued to practice traditional Choctaw social customs and relationships.

And in 1918 when the United States came in and recognized that assimilation as to this particular group had not worked, at that time, Your Honors, the State of Mississippi, in I think a significant way, recognized the distinct nature of this group of people because the State of Mississippi was then providing public schools for white Mississippi children and black Mississippi children and even Chinese Mississippi children but not for this group of people.

They were the only people in Mississippi not entitled to go to any public schools. One of the reasons for the restoration of the federal assistance to them was this rather unique status that they had, recognized by the state in that manner.

The -- turning for a moment, then, to the Indian Country questions that have already been discussed, I would like to respond to a question raised by Mr. Justice Rehnquist concerning the relationship between the Indian Country statute

and the decisions of this Court.

QUESTION: Mr. Collins, before you do, can I go back to your last point about the two different groups of Choctaws that remained behind, those which were assimilated and those which were not? You pointed out those which were not assimilated could not go to school.

What about those which were not assimilated?

MR. COLLINS: I believe that, as I understand it, Mr. Justice Stevens, the people who assimilated would join the white community or the black community depending on which group they had intermarried with and they are treated as members of those communities today, essentially.

The people who remained distinctly Indian are the people I am talking about.

QUESTION: In other words, they are full-blooded Indians. Is that the line that Mississippi drew?

You are relying entirely on the line that Mississippi drew in deciding who was eligible for public education.

MR. COLLINS: Well, Your Honor, as you would suppose, there were occasional Indian people, I am sure, scattered throughout Mississippi but the people who maintained traditional Tribal relations were concentrated in one part of Mississippi, around Philadelphia and they are the ones that we are concerned with here.

We are not concerned with isolated individuals

elsewhere, some of whom may even be of substantial Indian ancestry. The people that remained in these communities are largely full-blood even today, almost all. Although the statutary definition under the IRA is half-blood and that is the legal definition for this Band.

QUESTION: And we are, of course, concerned with several noncontiguous areas, too. Would you say this third group is characteristic of all the non-contiguous areas that are now on the Reservation?

MR. COLLINS: You are referring to the land status now, sir?

QUESTION: Yes.

MR. COLLINS: The lands that are trust lands, that were purchased for the Mississippi Choctaws by the government beginning in 1918 at at seven locations where the Choctaws were largely concentrated before the land purchase program began.

The seven villages or communities are distinctly Choctaw communities. The population of those communities is over 98 per cent Choctaw and those that are not are either government employees or spouses of a few Choctaws.

The land ownership within those communities is somewhat fragmented. It was quite fragmented in 1944. The government and the Tribe, I believe, have worked toward consolidation of the land but --

QUESTION: You mean, to exclude nonIndian ownership?

MR. COLLINS: They have worked to exchange lands. I think it is done mostly by exchange, Mr. Justice White, to exchange lands to make the lands more contiguous. That has not entirely succeeded. There is some disjunctive nature of the lands. However, it seems to us that the statutes contemplate that in part with the definition of Indian Country in 18 USC 1151(b) which says, dependent Indian communities are Indian Country and the Tenth Circuit Court of Appeals in the Martine case, which we have cited in our brief, ruled that a community very much like these is Indian Country under I think rather similar circumstances.

Also, we would point out that disjointed land ownership has been a feature of Indian Country for many purposes.

In the McGowan case, the Court sustained Indian Country status for a piece of land purchased in Nevada for Nevada Indians and that is my point about the relationship between the statute and the Court's decision. The Court rendered four or five decisions defining Indian Country between 1913 and 1938 and it is very clear from the legislative history of the 1948 statute that Congress was codifying those decisions; it was recognizing those decisions as a law and putting them into the statute books.

So I think there is a very close relationship between the statutes and the decision which makes the decisions, even though they are prior to the statute, quite relevant to

its meaning.

QUESTION: They were codified in the Indian Reorganization Act?

MR. COLLINS: No, Your Honor, in the Indian Country statute of 1948, the statute defining what is Indian Country.

QUESTION: Was that at the time the entire federal statute law was codified? Was it called the 1948 revision?

MR. COLLINS: Yes, except this statute was new at that time. I realize that most of that 1948 codification was a codification of existing statutes but there was no existing Indian Country statute at that time except for an obscure portion of the Liquor Statutes which said that allotments were Indian Country.

Other than that, the only definition of Indian Country in federal law prior to 1948 was essentially the decisions of this Court. It was treated as a common law issue, except for this one liquor statute which included allotments.

But the definition of allotments in the Indian Country statute which, again, as I emphasized, codified prior decisions of this Court.

That is, 18 USC 1151(c) obviously contemplates some disjointed land ownership and I think Congress has made its decision that Indian Country may so exist. The Court has almost explicitly recognized that in the DeCoteau decision just a few years ago and therefore, we do not see that that is any

disability with regard to this land, the lands involved here being Indian Country.

In fact, the tracts of land recognized by the Court as Indian Country by McGowan was I believe about 28 acres and the tracts of land on which the crime we are concerned with here occurred is over 300 acres so as far as identifying an area as Indians' land, there would be less difficulty in this instance.

The principle argument that the state raises is that the United States by entering into the 1830 scheme irretrievably lost its authority over the Choctaw Indians in Mississippi.

In response, we contend that the actions of the United States since 1918 very clearly evidence an intent on the part of both Congress and the Executive Department to recognize again a portion of the descendants of the Choctaw people who were involved in 1830 who already said, "We think that that kind of authority has been continuously and unanimously recognized by the courts since the beginning of the Republic until the two cases below." They are the first time I can find where the United States, the political departments of this government have ever been disabled from dealing with people who were manifestly American Indians.

QUESTION: Do you think that if the Executive Branch and Congress said that "We have great sympathy for the plight of the remaining Choctaws in Mississippi and therefore,

whereever they may reside in Mississippi they shall be immune from the Mississippi Criminal Code."

MR. COLLINS: Your Honor, that is a more difficult question, of course. There was a power rather similar to that exercised by the Congress for the period from 1862 until 1953 and that was the prohibition against anyone selling alcoholic beverages to any Trust Indian, anywhere in the United States. That was repeatedly sustained by this Court.

I do not think we need to reach questions that --

QUESTION: Well, my hypothesis goes beyond a Trust Indian.

MR. COLLINS: Well, by Trust Indian, what I meant was, that statute said, "Any Indian who is enrolled at an Indian Agency." That was the definition, you know.

QUESTION: Well, my hypothesis goes beyond any Indian who is enrolled in an Indian agency and simply says, "Anyone who can prove to the satisfaction of the court trying the criminal case in this state that he is of Indian blood shall have a complete defense to the criminal charge."

MR. COLLINS: That goes beyond any question that has ever been presented to a criminal court and does present a difficult problem but I think we are so far from it that I do not think that that kind of situaion really applies here because --

QUESTION: Well, do you have an answer to it one way

or the other?

MR. COLLINS: I am quite uncertain, Your Honor. I think a fair argument can be made that the power is justified by the Constitution and that the Court should not overturn it. What one might say about it is that that sort of exercise of the power would be unwarranted but there are many exercises of legislative and executive authority that appear unwise but the courts have no authority to overturn.

I rather think that would be my opinion, in answer to your question.

It would depend in part on how one defined Indian. If you meant anyone descended from an American Indian Tribe, as my client is, then I would answer yes, the authority lies and the courts have no power to overturn it.

One of the main reasons that we feel that there is no question about federal authority is that the Court has consistently left this question of recognizing who are Indians under the federal authority to the political departments of the government and it is absolutely unprecedented to have the courts second-guessing that question.

The government responsibility is based on initial political relation with an Indian Tribe but once there is an Indian Tribe, as there clearly was with the Choctaws, the Court has not held and should not hold that fragmentation or even termination of a Tribe cannot be undone if the Government later

determines that the policy was unwise.

The federal policy with regard to Indians has obviously often split Tribes, fragmented Tribes by war, conquest, treaty or otherwise and what we contend has consistently been recognized by decisions of this and the other federal courts is that the United States can deal with the results of those actions.

Where the United States takes actions that result in the splitting or fragmenting of a tribe, the United States does not by those actions lose power to deal with the results. In fact, the Indian people who are affected by actions like that are often those most in need as is well-illustrated by the record in this case.

This Court sustained the constitutionality of the Indian Major Crimes Act, the statute that is basically at issue here, in 1886 in the decision in the United States against Kagama and in that very decision the Court recognized, I think, the principles that control this case.

The decision referred expressly to the remnants of a race once powerful. The word "remnants," which one might use to describe the remnants of the Choctaw Tribe of Mississippi that we are dealing with here was used by the Court in that opinion. Furthermore, the facts of that case are rather similar. It was a Reservation established well after California had become a state on lands that were set aside after California

had become a state and if you will, I suppose there was an interim between 1850 when California became a state and sometime after that when the Reservation was set aside when those Indians were technically under state jurisdiction, just as the people we are dealing with here.

Furthermore in that case, the Court noted very explicitly that the government is empowered to deal with Indians in part as the result of the consequences of conquest of the Indians. The Court explicitly noted that conquest has rendered the Indians dependent. I believe the Court emphasized that in the recent decision in the Oliphant case, that conquest rendered the Indians dependent on the United States and that dependence was relied on in the Kagama decision interpreting this very statute as giving the United States authority to deal with Indians in the manner that we are talking about here, to provide a criminal code for them.

If that action, if the action of 1830 were deemed irreversible, as Mississippi contends, it would severely hamper federal policy, would allow no corrective action. It would cause problems elsewhere because that kind of reassertion of power has occurred elsewhere and we contend that there is no precedent for it.

I would next like to point out that when the Major Crimes Act jurisdiction exists, when there is federal court jurisdiction as exercised here by the United States Circuit

Court for the Southern District of Mississippi to prosecute my client; when that exists, this court and all the other federal courts have always held that that authority is exclusive of state authority over the same crime, that it precludes or pre-empts state authority over the same crime.

This Court has twice held that as a holding, in the Seymour case and in Rice against Olson, which we cited. The lower federal courts have held it in numerous circumstances.

The Court has noted it in dictum frequently, most recently in the Antelope case. We can see no reason why Mississippi is any different in this regard from any other state in the union. The fact that the Indians involved were for a time under state jurisdiction does not serve to distinguish the situation in other states.

As I have pointed out, there have been frequent examples in the history of the country where Indians were for a time under state authority but federal jurisdiction to establish a Reservation was then asserted and they came under federal jurisdiction and that authority has been sustained by the courts.

In conclusion, we agree with the United States that this land was Indian Country. If it is Indian Country, the Major Crimes Act on its face applies. The Federal Court has jurisdiction. We contend that the subsequent state prosecution for precisely the same offense was therefore preempted by valid federal authority and that the conviction -- judgment of

conviction entered by the Mississippi court should be reversed.

QUESTION: Mr. Collins, could I just ask you, I am just curious -- is the Native American Rights Fund a legal services organization or does it have other functions?

MR. COLLINS: It is a nonprofit law firm, Your Honor. It is not --

QUESTION: So it is a law firm. That is what it is.

MR. COLLINS: Yes, Your Honor.

QUESTION: A professional organization under the Colorado law or whatever.

MR. COLLINS: Yes. Well, it is a nonprofit law firm. We are incorporated as a nonprofit firm.

QUESTION: Well, the firm is not authorized to practice law, is it, the corporation?

MR. COLLINS: No, Mr. Justice.

QUESTION: Thank you.

MR. COLLINS: It just employs --may I reserve my remaining time?

MR. CHIEF JUSTICE BURGER: Mr. Andre.

ORAL ARGUMENT OF CARL F. ANDRE, ESQ.,

ON BEHALF OF MISSISSIPPI

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

I think it important to look first at the factual situation of the Mississippi Choctaws today and the land

subject to this case.

First the land. It is my understanding that today, something over 19,000 acres in seven different counties -- perhaps five counties -- this land being neither continuous nor contiguous --

QUESTION: Well, which is it, five or seven?

MR. ANDRE: I cannot say. I have not seen a map. I do not know. I have seen --

QUESTION: Well, I have a map here which shows seven. Is that correct?

MR. ANDRE: It quite possibly is seven. There was some distinction there. I saw one map in a dissertation which showed, I think, five and another map which showed seven counties. I do not know.

It is curious. Looking at this, this land purchase started about 1918. It was authorized in 1918 and began in the early 1920's and each year a little land was purchased. By 1930 something like 3,000 acres had been purchased. By 1960, some 16,000 acres may have been purchased. Today it is something over 19,000 acres.

The particular indictment narrows the spot where this crime took place or supposedly took place to a section 880 yards square, according to the reckoning of the Fifth Circuit. This land, as I said, is neither continous nor contiguous. It is hither, thither and yon. I understand that

there are some 12,000 acres of it exclusively devoted to timber.

Now, as to the Choctaw people, they are not gathered together in one community. There are small communities gathered about, as it was pointed out earlier, not necessarily touching each other. But there are Choctaw citizens of Mississippi in some 56 of our 82 counties. There are some living in Western Tennessee in the Memphis area. There are others who are living in Louisiana and Alabama. Some have no affiliation with the Bureau of Indian Affairs Office there.

Some are called "Enrolled Choctaws" but not necessarily all of them are. Some have participated in the various activities of the Bureau of Indian Affairs but not all have.

That is what I said. They number some 3,000 to 4,000. I cannot say how many. I do not know where they all live. These are guesses.

QUESTION: Well, is it not possible that some may be subject to federal jurisdiction and some not?

MR. ANDRE: Possibly so. I would maintain that none of them are, under the basis of this case before the Court.

QUESTION: Well, are not these two particular individuals Choctaw Indians living in Mississippi?

MR. ANDRE: Yes.

QUESTION: And those are the two we are talking about.

MR. ANDRE: They are Choctaw Indians who were in

Mississippi.

QUESTION: And they are living on the Reservation.

MR. ANDRE: I think they were living on land alleged to be a Reservation.

QUESTION: And the offense occurred there.

MR. ANDRE: I beg your pardon?

QUESTION: The offense occurred there.

MR. ANDRE: Yes. Yes. No question on that.

But terms have been bandied about in this case at all levels, such terms as Reservation, Tribe, Wards, Guardianship and so forth which I think we need to look at a little more closely. It has been alleged, as I understand it, by the Government position and by John in this case that the Federal Government acknowledges that they had no jurisdiction over this group of Choctaws or exercised none from around 1830 to 19 -- when? When did they start reasserting or taking any jurisdiction? The record is not clear.

Certainly they were doing it by 1975. In this case they are asserting jurisdiction over them. But if they did not --

QUESTION: Did not the Secretary of the Interior issue and make it a Reservation in 1944?

MR. ANDRE: That is what his proclamation said. Our position is that it was grounded and improper legislation. We --

QUESTION: Is it still on the books?

MR. ANDRE: Yes, I suppose it is.

He based that proclamation, if I could continue along that line, on a 1939 Act of Congress which simply said "An Act to define the status of land purchased for the benefit of Choctaws in Mississippi." This was declarative of a title.

QUESTION: Did Mississippi ever protest?

MR. ANDRE: No, sir. No one paid any attention until recent years. So today we are faced with some 19,000 acres across the state, no clear knowledge as to when and where this land is bought nor how this land is to be used, some of it being set aside for timber. Presumably some of it has residences. I do not know whether or not any non-Indians live on it. I do know that all of the Indians do not live on this land. They live elsewhere.

The Federal Government is asserting a position to my mind not unlike a proposition if they came into Southern Louisiana and decided to take jurisdiction of the Cajuns of that area who spoke French and had been speaking French, who lived in rather close proximity to each other, solely because they were Cajuns or of French descent. Because Congress feels --

QUESTION: You are leaving out one element there, are you not? And that is the land, the Reservation aspect?

MR. ANDRE: Well, this land has been purchased, as we maintain, in a peculiar, transformed situation. It is held in trust for the Choctaws but I think that it really could be argued that if that is permissible, then Congress could

authorize the Department of Interior to buy land for the Cajuns.

QUESTION: Well, there certainly is no Cajun section to Article I of the Constitution. Would you say --

MR. ANDRE: No, that is true. That is true.

QUESTION: -- that it came under --

MR. ANDRE: That is true because, Mr. Justice Rehnquist, we state that Congress deals with the Indian Tribes and that there must be this Tribal consideration which goes down through history and we start off and let the treaties with the Choctaws from 1798, the treaties with the Choctaw Tribe -- we look at the Indian Removal Act just prior to the Treaty of Dancing Rabbit Creek in 1830 -- the removal of Choctaw Tribes, Indian Tribes to the West.

QUESTION: Well, you are assuming that once a Tribe disintegrates that it can never be restored to Tribal status.

MR. ANDRE: Yes. Yes.

QUESTION: What is your authority for that?

MR. ANDRE: Simply because to do otherwise, you are getting into racial law, which it is my understanding is not --

QUESTION: You have not given us any authority for this idea that a Tribe may not restore itself to tribal status, assuming that the federal authority takes the appropriate steps which they claim to have taken.

MR. ANDRE: Perhaps it could be done under certain situations and it might be reorganized on a bilateral basis

between if a group of Indian descendants got together and attempted to organize and then petitioned the Congress for some sort of corporation or some corporate status or something like that, then it could possibly evolve into a situation but to purely and simply take a group of people or the descendants of people who had become citizens of a state and were treated as other citizens of the state for almost 100 years, as individuals and then to set them up as a new Tribe which, in fact, it was because there was no organization to these people there in Mississippi there until about 1934 or 1935 and then there were two conflicting organizations which, as I understand from authorities, the Bureau of Indian Affairs favored one and breathed life into them and it followed with a proclamation of the Secretary of the Interior in 1944.

QUESTION: Have you not almost described a restoration of a disintegrated Tribe by what you have just said?

MR. ANDRE: But there must be some legislative cement to hold the argument together, Your Honor, and that is missing in this case for this reason:

If they are relying on the Indian Reorganization Act of 1934, it addresses itself to Tribal Reorganization and other matters and states such things as, "A majority of the Tribe may agree to come under this."

There was no list that I can find of any particular Choctaw Tribe in Mississippi at that time. These were

individuals living hither, thither and yonder, as we have said. There was not Tribe -- What is the majority of a number that today ranges between 3 and 5,000 people? It is an indefinite, impossible situation.

Then we find another peculiarity. The Relief Act of 1918 which Congress, the first time as far as I know that Congress had recognized any Indians in Mississippi directly since 1830 provided for certain relief and the purchase of land to be sold to the Choctaws on a repayable basis. This is where the land purchase started because the Choctaws took the land but did not pay for it and the Government repossessed. This in turn produced the 1939 Act to clarify the land title as to who should have title to the land?

So in the 1934's it is, to me, an impossible situation to suggest that a group of people across the state could satisfy the basic requirements of coming together in an organization and getting the majority of them to approve by a proper election, et cetera.

What I was going to say is that the 1918 Act addressed itself to whole-blood Choctaws.

The Indian Reorganization Act addressed itself to half-blood Choctaws.

The record is devoid of any anthropological study or otherwise to determine who is a whole-blood and who is a half-blood. Presumably they had something to go on because some 10

years before 1918, acting under the Dawes Commission authority, agents had gone into Mississippi and attempted to round up and get together various people of Choctaw descent so that they could join the Tribe in Oklahoma and that is where the Tribe and the Tribal Authority that Congress dealt with had been since 1830 removal from Mississippi.

Congress has not created any Tribal status for Mississippi Choctaws. The Act that the Secretary of Interior relied on did not address itself to Mississippi Choctaws.

This Court reviewed the entire status of Mississippi Choctaws in 1921 in Winton versus Amos and listed at length the whole history of the Tribe. There is no point in repeating all that today but sufficient to say, there were absent any Congressional direct action from 1830 until 1918.

QUESTION: Mr. Andre, could I interrupt, sir? Because I think the Court of Appeals relied so heavily on the absence of any authority in the 1934 Act.

Why is not Section 467 sufficient? It says in words, "The Secretary of the Interior is hereby authorized to proclaim new Indian Reservations on lands acquired pursuant to any authority conferred by various sections. Well, did it not do exactly that?

MR. ANDRE: Correct, Your Honor but you have to address yourself to the overall purpose of the Indian Reorganization Act which was to reorganize Tribes and possibly get them

out from under the Bureau of Indian Affairs -- or at least the domination of the Bureau of Indian Affairs.

QUESTION: Would you agree that the language of the statute as read literally does cover the situation?

MR. ANDRE: Cover our situation?

QUESTION: Yes.

MR. ANDRE: No, sir, I do not take it that it covers our situation.

QUESTION: Then I just wanted to know why not?

MR. ANDRE: Because I think we do not have a Tribe in Mississippi in 1934 subject to that Act which says that any Tribe on a Reservation/is under the jurisdiction of the United States Government. We had no Tribe in Mississippi. There was no Reservation. The Choctaws there were under the jurisdiction of the State and had been since 1830.

QUESTION: Which section of the statute limits the power of 467 to new Reservations for preexisting Tribes? I mean, what is it in the statute that supports your argument?

You just quoted the statute very directly.

MR. ANDRE: According to the statute, the Indian Reorganization Act, according to the authorities and Law Journal articles, et cetera, Coyne's Indian Affairs -- Handbook of Indian Law and others state that the purpose of an Indian Reorganization Act was to -- had several purposes: One, to stop the practice of Indian land allotments , where Indians were

land individually and were suffering a loss -- to permit the Tribes to come out from under the domination or complete control of the Bureau of Indian Affairs and back independently in their own affairs.

And therefore it directed itself to at least the nucleus of some Tribe or something that can be said to be a Tribe. Also it says, if I am not mistaken, it says to Tribes on an Indian Reservation.

There were many Reservations at that time, all over. T e Tribal organization, the various Indians on them varied. In some places it was highly organized. In some places it was not.

QUESTION: What you are saying is, the statute made -- you could only create a new Reservation by moving one from a preexisting location to a new location. Is that basically --

MR. ANDRE: I suspect that that was put in to buy additional lands in such places as Oklahoma and the West.

I suspect that. I do not say. As Coyne states it, The Indian Reorganization Act was finally put together, it was sort of a compromise between the Senate and the House variation and you have to be a little wary in making any positive statement about it at all.

I think one more point is necessary. We have talked here this morning about wardship, guardianship over Indians. The Choctaw Indians of Mississippi lived in close proximity to

the European settlers in the area from 1699 forward. At the time of the Treaty of Dancing Rabbit Creek they were not an untutored group of people. They are not today. True, their fortunes are mixed, just as the fortunes of black Americans, white Americans, Chinese Americans and others in Mississippi have mixed economic and educational fortunes.

QUESTION: They may not have been untutored but they were unschooled. They were not allowed to go to school, were they?

MR. ANDRE: The reference there was in 1918. I would suggest that in the areas in which the Choctaws lived in Mississippi there may not have been any schools in the early part of the 1900's.

QUESTION: Yes but if there were public schools, they were not allowed to go to them.

MR. ANDRE: I do not know that that is so.

QUESTION: According to an opinion of this Court.

MR. ANDRE: Well, that --

QUESTION: I do not know any better than you do.

MR. ANDRE: Sir?

QUESTION: I only know what I read.

MR. ANDRE: Yes, sir. Well, that is said.

QUESTION: Well, what about in your lifetime in Mississippi? Have these Choctaws been permitted to go to school or, say, in the 1940's?

MR. ANDRE: I cannot answer that. I do not know.

QUESTION: Or are you that old? I guess you are not.

MR. ANDRE: Well, I am that old but I do not know. I was reared in a section of the state where not many Choctaws live.

QUESTION: But history -- you just do not know whether, say, in the 1940's, the Choctaws could go to public schools?

MR. ANDRE: I think they could possibly go to the schools. I do not know if there was any prohibition against them but there had been some schools set up for them at that time.

QUESTION: By the Federal Government.

MR. ANDRE: They had sent them on into other schools, to boarding schools and I think it has been done recently that they have set up special schools and you know, you get into dissertations and learned articles on this and you find remarks like, the Choctaws did not want to go to school.

QUESTION: That could be said about a lot of children.

MR. ANDRE: I am sorry?

QUESTION: That is not anything unusual.

MR. ANDRE: No.

QUESTION: Well, at least the state did not attempt to establish its own schools in these communities.

MR. ANDRE: I do not think that there were any

state schools set up separate for Choctaws. At one time we had schools for blacks and schools for whites. I do not think any were set up for Choctaws.

QUESTION: And so far as you know, they did not go to either of the other two categories of schools?

MR. ANDRE: I cannot answer that. I just do not know what happened in the '40's and '50's and so forth.

In conclusion, we simply state that these are citizens of Mississippi, have been since 1830; that in truth, the position of the government attempts to apply acts of the Department of Interior retroactively to take a proclamation of 1944 and say, oh, this is based on a '39 Act which is based on a '34 Act which is based on a 1918 Act and therefore you have changed the character.

The historical truth does not support this position.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Collins.

REBUTTAL ARGUMENT OF RICHARD B. COLLINS, ESQ.

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

I have three replies.

First, in answer to the last question on schools. Until 1968, the Mississippi Choctaw children were attend a Bureau of Indian Affairs in Mississippi [school] until the eighth grade, at which time they would go to federal Indian

schools in Oklahoma to attend high school.

QUESTION: Why is that?

By preference or were they excluded from Mississippi high schools?

MR. COLLINS: In the part of Mississippi in which they they are concentrated where these schools exist, I think everyone has assumed that that is a proper way of things. I do not think there have been any challenges to the system so one cannot say that if there had been a challege or if there had been an attempt that they might not have been admitted but I am informing the Court of the way it was.

I cannot say precisely why it was.

QUESTION: Well, you cannot say, then, that Mississippi ever excluded them from Mississippi schools?

MR. COLLINS: Your Honor, we have cited historical tracts in our brief, particularly the tract by Mr. Peterson that indicate that in 1918, at least, they were not admitted to Mississippi schools and at that time the government established federal schools for them for that very reason.

Subsequent to 1918 all I know is that --

QUESTION: But you have never read a statute or a rule or anything else, that ever banned them from Mississippi schools?

MR. COLLINS: No, sir.

QUESTION: There is a street in Phoenix named Indian

School Road and the reason it is named Indian School Road is that there was a federal Indian School from which Indians from wide-ranging areas were sent by the Federal Government at their choice, subject to my colleague Stewart's remarks that maybe no child chooses to go to school but the issue really never arose whether they could have gone to school in Apache County or Navajo County since they all went to the Federal Indian School in Phoenix.

MR. COLLINS: That is correct, Your Honor and if we had a continuous pattern of federal relationship with these Indians, the matter would be precisely identical.

The only point I am making is that there is no doubt -- I think the relevant point is this: There is no doubt that we have an identifiable group of Indian people. Mississippi treated them as such. Their government recognized them as such and I think that is the relevant point and no more. I was not trying to make any more of it than that.

QUESTION: We can judge the case on the assumption that they could have gone to Mississippi schools if they had ever wanted to. Is that it?

MR. ANDRE: After 1918, I do not know, Your Honor.

QUESTION: No, before.

MR. COLLINS: Well, according to the historical sources I read, they were excluded. Why that is so, I cannot say.

QUESTION: I think you ought to look at the Mississippi statutes back in those days.

MR. COLLINS: There were no statutes, Your Honor.

QUESTION: Ha.

MR. COLLINS: Your Honor, I would further point out that the Court's opinion in 1921 indicates that they were not permitted to vote and there was no statute saying that they should not be permitted to vote, either. It is the same kind of situation. I am saying that Mississippi treated them as a different group of people and we are saying that there is not an irrational exercise of federal authority with regards to people who are not identifiable as Indians. They are identifiable as Indians and that is --

QUESTION: Your case is as good one way or another, I take it, whether they were excluded from voting or going to school or not; your case is not destroyed either way.

MR. COLLINS: I agree. As a legal matter, Your Honor, that is absolutely correct. The suggestion has been made, as I understand it, that the federal authority is being irrationally exercised in some manner and I am saying that that is not so and that these facts indicate that it is not so.

QUESTION: But if they were excluded from schools and excluded from voting it would lend some support to your argument that they were isolated into their restored Tribal groups.

MR. COLLINS: Yes, that is what I am referring to. I agree, Your Honor. That is precisely it.

And the next point I wanted to refer to was the Indian Reorganization Act of 1934 in response to Mr. Justice Stevens' question. The 1934 Act of Congress referring specifically to the Mississippi Choctaws indicates specifically in its legislative history, as we have pointed out in our brief, that the Indian Reorganization Act was thought by Congress in 1939 to apply to the Mississippi Choctaws because the legislative history indicates that one purpose of the Act was to enable then to organize the Tribal Government pursuant to the Indian Reorganization Act so Congress certainly thought that in 1939.

Secondly, the --

QUESTION: But you do not know what the educational condition was in 1939 or whether they could go to public schools or not?

MR. COLLINS: No, Your Honor, I do not. I mean, I know that in fact they were attending federal schools, but I do not know the answer to that question.

Furthermore, I would point out to the Court that there is a consistent pattern of administrative enforcement of this statute that indicates that it applies to the Mississippi Choctaws including an opinion of Assistant Solicitor Felix Cohen that is included in the government's petition and then finally, I would mention that the seven communities in which

the Choctaws live are identifiable in Mississippi as Choctaw communities. No one has suggested that people in the area we are talking about do not know which is a Choctaw community and which is not and in fact, they are clearly identifiable and known to local citizens.

QUESTION: In these communities, is there any fee land at all?

MR. COLLINS: As I understand it, Your Honor, and this is not in the record, over 90 per cent of the lands in the communities is federal land. There is a bit of fee land here and there, but very little is enclosed within the communities.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:53 o'clock a.m., the case was submitted.]