

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: MINNESOTA, ET AL., Petitioners v. MILLE LACS  
BAND OF CHIPPEWA INDIANS, ET AL.

CASE NO: 97-1337 *Q.2*

PLACE: Washington, D.C.

DATE: Wednesday, December 2, 1998

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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X  
3 MINNESOTA, ET AL., :  
4 Petitioners :  
5 v. : No. 97-1337  
6 MILLE LACS BAND OF CHIPPEWA :  
7 INDIANS, ET AL. :  
8 - - - - -X

9 Washington, D.C.

10 Wednesday, December 2, 1998

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 10:02 a.m.

14 APPEARANCES:

15 JOHN L. KIRWIN, ESQ., Assistant Attorney General of  
16 Minnesota, St. Paul, Minnesota; on behalf of the  
17 Petitioners.

18 RANDY V. THOMPSON, ESQ., Minneapolis, Minnesota; on behalf  
19 of the Respondents John W. Thompson, et al.

20 MARC D. SLONIM, ESQ., Seattle, Washington; on behalf of  
21 the Respondents Mille Lacs Band of Chippewa Indians,  
22 et al.

23 BARBARA B. MCDOWELL, ESQ., Assistant to the Solicitor  
24 General, Department of Justice, Washington, D.C.; on  
25 behalf of the Respondent United States.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 97-1337, Minnesota v. the Mille Lacs Band of  
5 Chippewa Indians.

6 Mr. Kirwin.

7 ORAL ARGUMENT OF JOHN L. KIRWIN

8 ON BEHALF OF THE PETITIONERS

9 MR. KIRWIN: Mr. Chief Justice, and may it  
10 please the Court:

11 This case is about two principles that this  
12 Court has emphasized repeatedly in recent years, upholding  
13 the traditional scope of sovereignty of the States, and  
14 upholding the plain language of treaties with the Indians.

15 At issue here is an Indian privilege to hunt and  
16 fish in an area of Minnesota that the Chippewa Indians  
17 ceded to the Federal Government in an 1837 treaty. Under  
18 the treaty, this privilege of hunting, fishing, and  
19 gathering, was guaranteed to the Indians only during the  
20 pleasure of the President. That phrase is at the heart of  
21 this dispute.

22 The State asserts that there are three  
23 independent events which terminated the temporary  
24 privilege under the 1837 treaty, an executive order in  
25 1850, which expressly revoked the treaty privilege,

1 Minnesota's admission to the Union in 1858 on an equal  
2 footing with the original States, and an 1855 treaty which  
3 revoked any and all rights the Indians had at that time in  
4 Minnesota but which relates to only one of the bands in  
5 this case.

6 QUESTION: Mr. Kirwin, may I ask you to clarify  
7 what was the nature of the right? It's a little confusing  
8 in the briefs. Is it a superior right to what any other  
9 person would have to hunt and fish, or just the same  
10 right?

11 MR. KIRWIN: Your Honor, the lower courts held,  
12 based on this Court's decision in the cases from the  
13 Northwestern United States, that it's a superior right  
14 that it guarantees the bands the right to take an  
15 allocation of the fish and game that are available to hunt  
16 without complying with the regulations of the State that  
17 apply to other persons.

18 QUESTION: In 1837, was there any difference,  
19 because as I understand it there weren't any regulations.

20 MR. KIRWIN: In 1837, Your Honor, there weren't  
21 any regulations, and there weren't any until Minnesota  
22 became a State in 1858 and enacted hunting and fishing  
23 laws.

24 QUESTION: So that legally, if the revocation  
25 had occurred in 1838, all of the members of the Indian

1 bands could have continued to do, so far as the law was  
2 concerned, exactly what they thought they had a right to  
3 do under the treaty, is that correct?

4 MR. KIRWIN: That would be true, Your Honor, as  
5 long as neither the Federal Government nor the territories  
6 that covered that area passed any hunting and fishing  
7 laws.

8 QUESTION: Right, but in fact there were none,  
9 as you said.

10 MR. KIRWIN: That's right.

11 QUESTION: So if there had been a revocation --  
12 excuse me -- they could have gone on doing it.

13 MR. KIRWIN: That's correct, Your Honor, and we  
14 think that the principal effect of the privilege and the  
15 revocation of the privilege was something that was  
16 recognized by President Andrew Jackson in his 1829 State  
17 of the Union address, and he said that if the Indians were  
18 asked to voluntarily remove from the area but refused to  
19 do so, then they would have to understand that they would  
20 be subject to the laws of the State, and so as the lower  
21 courts interpreted this privilege, the effect of it is to  
22 make the Indians not subject to many of the laws of the  
23 States of Minnesota and Wisconsin.

24 QUESTION: But I thought it was conceded that  
25 the State can place some limits on the harvest that the

1 Indians can take. Isn't that -- that puzzled me. By what  
2 authority can the State impose some limitations?

3 MR. KIRWIN: Your Honor, what this Court has  
4 said in the cases coming from the Northwest United States,  
5 Puyallup II, Antoine, Passenger Fishing Vessel, is that  
6 the State can regulate in the interest of conservation,  
7 the lower courts have extended that to health and safety,  
8 but that the State's regulatory authority is limited.  
9 There are significant encroachments on the State's  
10 regulatory authority.

11 QUESTION: Well, what could the State do, in  
12 your view, under the cases from the Pacific Northwest in  
13 terms of regulation or limiting the season for taking fish  
14 and game, or the quantity?

15 MR. KIRWIN: Your Honor, it appears under the  
16 lower courts rulings in this case, based on this Court's  
17 earlier decisions, that the State would be very limited in  
18 regulating to limit hunting and fishing seasons, for  
19 example.

20 If the bands were to insist on --

21 QUESTION: Well, it's very unclear to me what  
22 you think, under existing precedent, if we were to affirm,  
23 what do you think the State could do in terms of  
24 regulation?

25 MR. KIRWIN: If the bands insisted on taking

1 more than half of the resource, the State probably could  
2 prevent that with the Federal court's assistance.

3 QUESTION: Why? Why so? I mean, if the treaty  
4 gives them hunting and fishing rights, I assume they can  
5 hunt and fish to their heart's content.

6 MR. KIRWIN: Your Honor, in the cases from the  
7 Northwestern United States, this Court seemed to recognize  
8 that the Indians had a right to a share of the hunting and  
9 fishing resource, but that non-Indians also had a right to  
10 a share, and so this Court said that 45 or 50 percent  
11 might be the maximum Indian share. The lower courts in  
12 this case seemed, although it's not entirely clear from  
13 their opinions, they seem to have adopted --

14 QUESTION: In the Pacific Northwest cases some  
15 of them ended up with the district court kind of serving  
16 almost as a master, didn't they, in allocating various  
17 percentages?

18 MR. KIRWIN: That's correct, Your Honor, and  
19 ruling on particular kinds of regulation, and the State's  
20 concern here is that under the lower court's decision,  
21 that we have the same situation already.

22 QUESTION: What has been worked out in  
23 Wisconsin, where there's been a previous decision  
24 upholding the right of the tribes to hunt and fish, and  
25 yet the State has somehow worked out some kind of a -- an



1 agreement with the tribe. What sort of agreement has been  
2 worked out?

3 MR. KIRWIN: Your Honor, the ground rules, as I  
4 understand them in Wisconsin, are that the bands are  
5 entitled to take half of the available resource, and so  
6 the -- and the State of Wisconsin then has been required  
7 to allow the bands to do that.

8 QUESTION: At any time, without regard to the  
9 time of the taking?

10 MR. KIRWIN: Without regard to hunting seasons  
11 or times of day and so on. The State can make limited  
12 regulations for purposes of conserving or assuring the  
13 preservation of the species. The States can make limited  
14 regulations for purposes of public safety, but there is  
15 certainly a significant encroachment on the State's  
16 ability to regulate under this Court's decisions and as  
17 they've been applied by the lower court here.

18 QUESTION: This applies only, of course, on  
19 public lands on which hunting and fishing are permitted.  
20 It doesn't extend to private --

21 MR. KIRWIN: That's correct, Your Honor, yes,  
22 and the State asserts that this hunting and fishing  
23 privilege was terminated by three events, but the most  
24 basic of these, we think, was the President's executive  
25 order in 1850 expressly terminating the privilege.

1           QUESTION: The parties stay away from any  
2 property analogies. They don't say that this is an  
3 easement, or a profit, and I assume that's because it's  
4 not helpful. This is a -- and this is a discrete area of  
5 the law. This is --

6           MR. KIRWIN: Your Honor, there was some  
7 discussion in the lower courts, particularly by the  
8 landowners, as to what the particular nature of the right  
9 might be.

10           As far as the State is concerned, it probably is  
11 unique. What's unique about it is that it's something  
12 that comes from the Indian title to the land, and so it's  
13 part of the Indian title which includes an element of  
14 sovereignty or quasi-sovereignty, but what this Court made  
15 clear in the Winans case is that when Indians cede land to  
16 the Federal Government, but there's a reserved hunting and  
17 fishing right, that what's reserved is a part of, a  
18 remnant of that original interest that the Indians had in  
19 the land.

20           QUESTION: I don't --

21           QUESTION: But it's a sovereign interest and not  
22 a property interest that we're talking about, or not a  
23 sovereign interest, depending on how you come out.

24           MR. KIRWIN: Well, it's -- Your Honor, I think  
25 the important point is, it's part of the Indians' original

1 Indian title. It may be the sovereignty part of that  
2 rather than some other part of it, but nonetheless it  
3 certainly is --

4 QUESTION: Well, is there any authority from  
5 this Court that the right to hunt and fish is an interest  
6 in real property?

7 MR. KIRWIN: Your Honor --

8 QUESTION: Have we treated it as such?

9 MR. KIRWIN: I think --

10 QUESTION: That's such an odd concept, because  
11 if a non-Indian person wanted to hunt or fish, one  
12 wouldn't talk about that in terms of a property interest,  
13 would they?

14 MR. KIRWIN: Right, and I think, Your Honor,  
15 that it's different when you're dealing with Indian  
16 cessions of property, as the Court recognized in Winans,  
17 as the Court recognized in the Klamath case, where the  
18 Court said that where the Indians ceded all right, title,  
19 and interest to the land, the Court said, undoubtedly any  
20 special rights they had to hunt and fish went along with  
21 that, because what it is is a sovereign selling not only  
22 the land, but their special rights in the land, and to  
23 regulate the land, and to use it as they see fit. They're  
24 conveying all of that.

25 And what the Court said in Winans is that where

1 you have a conveyance of the land, that a reservation of  
2 the right -- and the Court was very emphatic about this.  
3 The Court said that the hunting and fishing right isn't a  
4 grant to the Indians, but the Indians are granting the  
5 land to the Government, or conveying the land to the  
6 Government and preserving something. They're preserving a  
7 remnant of what they have, and the total --

8 QUESTION: Let me ask you a couple of things  
9 that I'm curious about. The petition -- the respondents  
10 here got an award from the Indian Claims Commission --

11 MR. KIRWIN: That's right, Your Honor.

12 QUESTION: -- in 1970. Did that have any effect  
13 on the right to fish and hunt and gather wild rice? Did  
14 the claim encompass any of that when they were  
15 compensated?

16 MR. KIRWIN: Your Honor, in their final amended  
17 petition or complaint before the Indian Claims Commission  
18 the Indians had not mentioned hunting and fishing.

19 QUESTION: It was not mentioned.

20 MR. KIRWIN: Right. They did mention it at  
21 earlier stages and, in fact, before the court of claims,  
22 which was the beginning of that process for them, they  
23 specifically asserted that the privilege under the treaty  
24 was temporary, and that the Federal Government had ended  
25 it.

1           Now, they were not making that claim at the end  
2 of the ICC proceeding, but I think an important thing  
3 about the ICC proceeding is that the band's experts  
4 proposed a value for the land based on its highest and  
5 most valuable uses, and the ICC awarded the band an award  
6 of an additional \$9 million, about ten times as much as  
7 the original payment, to compensate them for the entirety  
8 of the land according to its highest, most valuable uses.

9           And this Court recognized in the Klamath case  
10 that where an Indian band or tribe receives full  
11 compensation without any deduction for hunting and fishing  
12 rights, then presumptively that compensation includes the  
13 hunting and fishing rights, too, that if there had been  
14 reserved hunting and fishing rights, there should have  
15 been a deduction for them, because the Indians were paid  
16 as -- in Klamath as though they were conveying all their  
17 Indian title to the land, which included hunting and  
18 fishing rights.

19           QUESTION: Was this the Fond du Lac Band that  
20 had the case in the Indian Claims Commission, or the Mille  
21 Lacs Band, or --

22           MR. KIRWIN: Your Honor, by the end of the  
23 proceeding it was all of the bands in this case.

24           QUESTION: All of the bands.

25           QUESTION: One other question. It was odd that

1 there were subsequent treaties, one in 1854 and one in  
2 1855, and they were different. The United States revoked  
3 treaty rights for the Mille Lacs Band in 1855 treaty, but  
4 it didn't do so with the other bands in the 1854 treaty.  
5 Is there any explanation for that?

6 MR. KIRWIN: We don't know the explanation of  
7 that for sure. I think the most likely explanation is  
8 that they were negotiated by different people.

9 The 1854 treaty was negotiated by an Indian  
10 agent out in Wisconsin. The 1855 treaty was negotiated by  
11 Commissioner Manypenny himself, and he had the Indians --  
12 the Indian chiefs brought to Washington to negotiate with  
13 him, and when you look at the 1854 treaty, as you point  
14 out there was actually a grant of some hunting and -- a  
15 reservation of some hunting and fishing rights in quite a  
16 remote area of Minnesota.

17 The whole approach of the treaty next year was  
18 different, in 1855. Not only did it not reserve hunting  
19 and fishing rights in the area ceded in that treaty, but  
20 there was a catch-all provision under which the Indians  
21 ceded any and all right, title, and interest of whatsoever  
22 nature they may be, a sort of --

23 QUESTION: Well, I thought it was right, title,  
24 and interest in land.

25 MR. KIRWIN: Your Honor, it was the right,

1 title --

2 QUESTION: And your argument was, land carries  
3 with it the hunting and fishing rights. They didn't -- as  
4 I recall, the terms of the 1855 treaty were not that they  
5 ceded every right, title, and interest of any sort  
6 whatsoever. That isn't the way it read, is it?

7 MR. KIRWIN: It has the language in and to the  
8 land.

9 QUESTION: Right.

10 MR. KIRWIN: Yes. Yes, and as this Court  
11 recognized in the Klamath case that the ordinary  
12 construction of meaning, or of language like that is to  
13 convey special hunting and fishing rights.

14 QUESTION: Well, but the trouble is, the -- I  
15 mean, we've got to judge ordinary construction in terms of  
16 this treaty, and one of the problems that we have, it  
17 seems to me, in seeing it your way, is just as was pointed  
18 out earlier, at the time in question anyone could have  
19 engaged in this sort of hunting and fishing. I could  
20 have -- you know, my ancestors could have wandered onto  
21 the land and done it. They never had any interest in the  
22 land.

23 So it seems to me you've got at least a burden  
24 to show that there was an understanding that hunting and  
25 fishing rights were thought to be rights in the land, as

1 opposed to rights which any member of the public, without  
2 any history of property ownership, could have exercised,  
3 and I think that's where I have difficulty in seeing how  
4 you make your argument.

5 MR. KIRWIN: Your Honor, I agree that there's a  
6 burden, but I think the burden goes the other way. As  
7 this Court recognized in Klamath, when you're dealing with  
8 Indian relinquishment of rights and selling of land, the  
9 context is different, and the understanding is that when  
10 Indians sell all their right, title, and interest in and  
11 to land, that unlike a private landowner, the Indians are  
12 selling any special hunting and fishing rights they had.

13 And in the Klamath case and in the Yankton case,  
14 this Court talked about the almost insurmountable  
15 presumption that arises from such plain language. We  
16 agree that there's a burden, but we think the burden is on  
17 the other side to show that the treaty meant something  
18 other than what it seemed to say on its face.

19 QUESTION: Well, isn't it also the case that  
20 any, what you might call nonspecial hunting and fishing  
21 rights, Souter-type hunting and fishing rights --

22 (Laughter.)

23 QUESTION: -- there's no question that the  
24 Indians retained that. They can -- I mean, there's no  
25 dispute that they can hunt and fish to the same extent



1 that Justice Souter can, were Justice Souter --

2 MR. KIRWIN: Could have.

3 QUESTION: -- a citizen of your State.

4 MR. KIRWIN: Could have.

5 QUESTION: Could have, right.

6 (Laughter.)

7 MR. KIRWIN: There isn't any question about that  
8 today, although there may well have been a question about  
9 that in 1837, because the Indians weren't citizens. In  
10 essence, they were --

11 QUESTION: No, but I thought you indicated --  
12 and I don't want to put words in your mouth, but I thought  
13 you indicated in an earlier answer to me that anyone,  
14 quote-unquote, could have gone on the land and engaged in  
15 this hunting and fishing. I didn't understand that  
16 citizenship was a condition of it.

17 MR. KIRWIN: Your Honor, it wasn't, but it was  
18 because neither a territory nor State nor the Federal  
19 Government had placed that limitation --

20 QUESTION: Right.

21 MR. KIRWIN: -- on the Indians.

22 QUESTION: There simply was no regulation --

23 MR. KIRWIN: Right.

24 QUESTION: -- of any, legal regulation of any  
25 sort.

1                   QUESTION: I thought we established that with  
2 your very first response, that until 1858 there was no  
3 regulation. Anybody could hunt and fish, and there was no  
4 proscription applied specially to the Indians. Are you  
5 retreating from that?

6                   MR. KIRWIN: No, Your Honor. That was the  
7 situation at that time, but one way of looking at this is  
8 that what was guaranteed to the Indians was that they  
9 would be able to continue to do that, and that the Federal  
10 Government or, more importantly, a territory or a State  
11 wouldn't take that right away from them.

12                   QUESTION: Well, Mr. Kirwin, are you sure that  
13 the Territory of Minnesota never had any hunting  
14 regulations?

15                   MR. KIRWIN: Your Honor, the record doesn't show  
16 that the Territory of Minnesota did, or Wisconsin.

17                   QUESTION: Or did or -- does it show that it did  
18 not?

19                   MR. KIRWIN: I believe that Wisconsin Territory  
20 in 1837, which included this area and Minnesota Territory  
21 later, did not include hunting and fishing regulations.  
22 It was only when Minnesota became a State in 1858.

23                   Mr. Chief Justice, if I may, I'd like to  
24 reserve --

25                   QUESTION: Can I ask you a question before --

1 I'd like to know what your response is to the Solicitor  
2 General's argument on what I think is the main point. You  
3 say that as President Taylor revoked the hunting and  
4 fishing and gathering rights and also told them to remove,  
5 and I take it you concede that the part that says remove  
6 is unlawful.

7 MR. KIRWIN: Your Honor, we have not argued this  
8 in our brief, but we don't concede --

9 QUESTION: Well, anyway, you're not contesting  
10 it, and in that case the question is severability, and I  
11 just want to know -- I mean, as a matter of common sense  
12 it's pretty hard to think that President Taylor, had he  
13 known that they weren't going to remove, would have wanted  
14 to have them sit there and starve.

15 I mean, there's no evidence of that, is there,  
16 that anybody would want them to stay on their land and  
17 starve, nor is there any evidence that they would have  
18 used this to try to evict them, since the way to try to  
19 evict them was to get them to go take their annuity 1,000  
20 miles away, and that didn't work, so how would the other  
21 have worked?

22 And then the SG's brief is just filled with  
23 instances where the Government went and gave them rifles  
24 and fishing gear and I guess maybe gathering equipment and  
25 all kinds of stuff all the time, so when I read that, I

1 thought, well, gee, there's 100 years of everybody  
2 thinking that they could fish and hunt and gather, and  
3 what's the evidence that this would have been -- that  
4 Zachary Taylor would have wanted the one to stay even  
5 though the other fell?

6 MR. KIRWIN: Your Honor, I'd like to make a  
7 quick, two-part response to that. One is that President  
8 Taylor's purpose in doing that would very likely have been  
9 what President Jackson said in 1829 when he was talking  
10 about removal, and he said that the Indians must  
11 understand that if they don't remove, they'll be subject  
12 to the laws of the States, and Wisconsin had just become a  
13 State in 1848, Minnesota had just become a Territory and  
14 was soon to become a State, and so the President could  
15 very well have wanted to clear the decks to allow those  
16 States to engage in their normal State regulation.

17 And the second point is that, yes, the Federal  
18 Government did allow the Indians to hunt on the land after  
19 this time. The Federal Government provided them equipment  
20 and so on to do this, but that doesn't indicate whether  
21 they were intended to be hunting pursuant to State law or  
22 not pursuant to State law and, in fact, the Federal  
23 Government provided them with the same assistance in  
24 hunting and fishing in the 1855 treaty area, where they  
25 had no reserved hunting and fishing right, and so the fact

1 that the Federal Government supported them in that simply  
2 is no indication one way or the other on that point.

3 QUESTION: It may be an indication that the  
4 Federal Government understood that the 1855 treaty did not  
5 convey any hunting and fishing rights.

6 MR. KIRWIN: Well, Your Honor --

7 QUESTION: I mean, we -- in terms of the  
8 evidence, the evidence is equivocal. It doesn't -- I  
9 don't see that it supports you clearly.

10 MR. KIRWIN: Your Honor, all I'm saying is, the  
11 Federal Government providing them those materials doesn't  
12 give any indication one way or the other on that point.

13 QUESTION: Thank you, Mr. Kirwin.

14 Mr. Thompson, we'll hear from you.

15 ORAL ARGUMENT OF RANDY V. THOMPSON

16 ON BEHALF OF THE RESPONDENTS JOHN W. THOMPSON, ET AL.

17 MR. THOMPSON: Mr. Chief Justice, and may it  
18 please the Court:

19 I'd like to address two issues, first, the  
20 President's decision under the 1850 order and why it is  
21 not reviewable and, secondly, why the Indian Claims  
22 Commission operates as a jurisdictional bar in this case.

23 But briefly, before I begin, Justice Kennedy and  
24 Justice O'Connor asked questions about whether or not  
25 these were property interests, these hunting and fishing

1 privileges.

2 This Court made that clear, I believe, in  
3 Klamath, and it had made it clear in Kennedy v. Becker,  
4 which Klamath refers to, that a privilege to hunt and fish  
5 is subject to State regulation, and it is in the nature of  
6 a profit of prendre.

7 We, of course, have --

8 QUESTION: Of what?

9 QUESTION: Of profit of prendre?

10 MR. THOMPSON: I'm sorry. A profit of prendre.

11 QUESTION: But the question is whether it would  
12 have been understood by the parties to this treaty at the  
13 time as an interest in land.

14 I mean, we're construing treaty language, and  
15 one of the difficulties, I think, that you have in  
16 maintaining your position is, as we said earlier, that the  
17 interest was an interest which could be exercised ad lib,  
18 as it were, by anybody, given the state of regulation at  
19 that time.

20 MR. THOMPSON: I believe that the evidence  
21 demonstrates that when the treaties were signed, because  
22 they were land cession treaties, the language used was the  
23 typical language of real estate conveyance.

24 If you look at the language of this treaty,  
25 during the pleasure of the President, and the explanation

1 in the treaty journal that they will be allowed and  
2 permitted during the President's pleasure to hunt and fish  
3 upon the lands, that's precisely the language of a real  
4 estate license. I under --

5 QUESTION: Well, may I just ask you -- I don't  
6 want to cut you off, but that raises another point that I  
7 want you to address.

8 MR. THOMPSON: Sure.

9 QUESTION: There was a considerable amount of  
10 material in the briefs on the other side to the effect  
11 that it is highly unlikely, almost to the point of  
12 impossible, that the Indian parties to the treaty  
13 understood the phrase, at the President's pleasure, in the  
14 way that we would understand it as property lawyers today.

15 And specifically there was a fair amount of  
16 information to the effect that the Indian parties to the  
17 treaties specifically assumed that they would enjoy these  
18 hunting and fishing rights as of right for a considerable  
19 period of time, certainly beyond the point of the claimed  
20 revocation, so in your answer, would you address that,  
21 too?

22 MR. THOMPSON: Certainly, and let me address  
23 that first. I think that the language of the treaty  
24 journal demonstrates that during the pleasure of the  
25 President was, in fact, explained to the Indians.

1           It was referenced twice in the treaty journal,  
2           and it was explained that they would be allowed and  
3           permitted during his pleasure to hunt and fish upon the  
4           land, and it would probably be many years before the Great  
5           Father would want all of these lands for his white  
6           Children.

7           Now, that's not a guarantee that it would be  
8           many years, but it was an indication that neither party  
9           was certain as to how quickly settlement pressures were  
10          going to occur.

11          QUESTION: But of course, the -- I suppose the  
12          intransigence of the tribes at the time the removal order  
13          came down, which ultimately the United States caved in to,  
14          is probably some indication of what they thought the  
15          period of time was that they were agreeing to.

16          MR. THOMPSON: Well, I'm not certain that that's  
17          the case, because we simply don't know what the bands were  
18          thinking in 1837, other than what we have in the treaty.

19          QUESTION: Well, we usually interpret treaties  
20          by their language, don't we, I mean, just reading the  
21          language?

22          MR. THOMPSON: That's right. That's right,  
23          Mr. Chief Justice, and the plain language we believe  
24          controls here, and that the -- there is no ambiguity, and  
25          there was no finding of ambiguity in the language, during



1 the pleasure of the President.

2 QUESTION: Well, there's at least this  
3 ambiguity, does during the pleasure of the President mean  
4 he only gets one shot at canceling it, or does it mean  
5 whenever the President wants you to hunt and fish you may,  
6 and whenever he doesn't, you may not?

7 MR. THOMPSON: Well --

8 QUESTION: In other words, was the -- assuming  
9 that it was severable, was the presidential termination of  
10 the hunting and fishing rights irrevocable, or could later  
11 Presidents reinstitute the hunting and fishing rights?

12 MR. THOMPSON: Well, we submit that while Taylor  
13 probably could have suspended, given the power he had over  
14 this privilege, he did not do so. He revoked it. Once he  
15 revoked it, we do not believe that the executive branch  
16 had any authority to reinstate that privilege. Certainly  
17 Congress could have, but the executive branch did not.  
18 There's nothing in the treaty to suggest it.

19 I would refer the Court, for example, to the  
20 language of the Federal Convention in which the term  
21 maladministration was proposed as a term for, under the  
22 impeachment article, and James Madison responded that such  
23 a term would be tenure during the pleasure of the Senate.  
24 I don't think James Madison was referring to the fact that  
25 they could put the President in and out of office.

1 QUESTION: But we do have also some notion that  
2 we read these treaties in the light of knowing that the  
3 party on the other side couldn't even speak the same  
4 language, so the interpretation is more favorable than if  
5 these were two sophisticated parties, meaning with equal  
6 language facility, sophistication, isn't that so?

7 MR. THOMPSON: Well, it is true, and I think  
8 this Court addressed it specifically in Klamath, in which  
9 the Court indicated that legal ambiguities are resolved in  
10 favor of the Indians, and I believe they cited DeCoteau  
11 for that proposition.

12 But the Court cannot ignore plain language,  
13 viewed in the historical context and given the fair  
14 appraisal, that runs counter to the band's claims.

15 QUESTION: Is there any indication that the  
16 tribes had -- since it's been stated that there was no  
17 regulation, so nothing would have changed, revocation or  
18 not, from 1850 until 1858, when this -- the introduction  
19 of regulation. Is there anything that indicates that the  
20 Indians were told, now you have no more hunting and  
21 fishing privileges?

22 MR. THOMPSON: Besides the President's order?  
23 Is that what -- I'm confused, Justice --

24 QUESTION: Yes. Was there anything that brought  
25 that order home to the Indians? Was there any

1 communication that said, the President did something  
2 that's going to change circumstances for you?

3 MR. THOMPSON: Well, I believe that the  
4 presidential order was, in fact, communicated to the  
5 Indians, and --

6 QUESTION: You believe it based on what?

7 MR. THOMPSON: Well, the evidence in the record  
8 demonstrates that they received it. After all, they even  
9 sent a delegation to Washington in 1852 to lobby President  
10 Fillmore to revoke the order, and were unsuccessful, so we  
11 know that this was communicated to them, that the  
12 President had issued his 1850 executive order.

13 Was I responsive to your question?

14 QUESTION: Yes, but there was still no change in  
15 actual circumstances, in what they could do.

16 MR. THOMPSON: Well, remember, Justice Ginsburg,  
17 we're on the edge of the American frontier, and very  
18 difficult for, even if the United States had wanted to  
19 enforce certain actions, to actually enforce hunting and  
20 fishing regulations, and it was really left up to the  
21 States when they were formed as to --

22 QUESTION: But there were no -- we were told, as  
23 far as this record shows, the first regulation comes in in  
24 1858.

25 MR. THOMPSON: That's correct.

1           If I might address the Indian Claims Commission  
2 Act briefly --

3           QUESTION: Is that part of the -- did we grant  
4 cert on that question?

5           MR. THOMPSON: Well, the -- we raise the Indian  
6 Claims Commission Act as a jurisdictional bar on the basis  
7 that jurisdiction be raised at any time with this Court.  
8 If the Court does not want me to address it, I'd be  
9 certainly -- I'll address something else, but --

10          QUESTION: Well, you did present that argument  
11 to the lower courts, and there was some disposition of it,  
12 was there not?

13          MR. THOMPSON: Yes. The lower courts decided  
14 that it did not operate as a bar.

15          QUESTION: And you didn't -- and there's no  
16 question before us.

17          MR. THOMPSON: It was not within the State's  
18 petition. It's within the landowner's petition that's  
19 pending.

20          QUESTION: If it's jurisdictional, I'd like to  
21 hear it anyway.

22          MR. THOMPSON: The --

23          QUESTION: It won't add anything --

24          MR. THOMPSON: I'm sorry. The --

25          QUESTION: If there's a jurisdictional point to

1 argue, let's hear from him.

2 MR. THOMPSON: Okay. The -- we believe that the  
3 Indian Claims Commission Act operates as a jurisdictional  
4 bar because it really has two provisions that are operable  
5 here. You have section 12 that says, any claim against  
6 the United States that was pending and could have been  
7 brought as of August 1946 had to be brought within 5 years  
8 or it was barred.

9 Under section 22, if a claim was brought and  
10 paid, it is also barred, as this Court decided in the  
11 United States v. Dann . It really doesn't matter for the  
12 analysis, in our view, whether the claim was brought and  
13 paid or not. Under either analysis, it is barred.

14 Now, the bands will argue that this is not a  
15 claim against the United States, so the ICC doesn't  
16 operate as a bar. But the Solicitor General in the Oglala  
17 case petitioned, when they opposed grant of petition of  
18 cert to this Court, argued that the bar against the State  
19 of -- the United States also operated as a bar in that  
20 case against the claim against South Dakota, which  
21 involves the Black Hills claim.

22 We believe that it was part of the Indian Claims  
23 Commission Act, claim made by this bands in docket 18(c).  
24 It was part of the original pleadings. The pleadings were  
25 amended to ask for the highest and best use, instead of

1 asking for specific items, but that merely reflects what  
2 the ICC was doing, giving a single award based on the  
3 highest and best use.

4 Without an offset, as this Court has indicated  
5 in Klamath, that operates as a bar, so the petition of the  
6 landowners in this case is under the Indian Claims  
7 Commission Act.

8 This is a case that certainly could have been  
9 brought against the United States of America --

10 QUESTION: I don't understand why that isn't a  
11 defense, rather than a jurisdictional point. In other  
12 words, if you're talking about subject matter jurisdiction  
13 it's a question we're obliged to raise on our own, but  
14 what you seem to be presenting is a defense to a claim --

15 MR. THOMPSON: Well --

16 QUESTION: -- not a question of the Court's  
17 authority.

18 MR. THOMPSON: I would address this as follows.  
19 Certainly it can be analyzed under res judicata or  
20 collateral estoppel or election of remedies defense, but  
21 the Eighth Circuit in Oglala I, which is a case against  
22 the United States and the State of South Dakota, also  
23 recognized that it operated as a jurisdictional -- it  
24 deprived the district court of jurisdiction to even hear  
25 the action, because the Indian Claims Commission was

1 designed to hear all claims pending against the United  
2 States in 1946, and this action is at heart --

3 QUESTION: This is the same circuit that ruled  
4 against you on it?

5 MR. THOMPSON: Correct, Your Honor.

6 QUESTION: Thank you, Mr. Thompson.

7 MR. THOMPSON: Thank you.

8 QUESTION: Mr. Slonim, we'll hear from you.

9 ORAL ARGUMENT OF MARC D. SLONIM

10 ON BEHALF OF THE RESPONDENTS MILLE LACS

11 BAND OF CHIPPEWA INDIANS, ET AL.

12 MR. SLONIM: Mr. Chief Justice, and may it  
13 please the Court:

14 I'd like to take just a moment to explain what  
15 this case is about from the Chippewa's perspective, and  
16 then turn to the 1850 order and the equal footing issues.

17 This case involves core Indian interests. For  
18 centuries, the Chippewa have hunted, fished, and gathered  
19 wild foods. These activities still put food on their  
20 tables. They help pay for life's necessities, and they  
21 are in a very real sense central to the culture and  
22 identity of the Chippewa.

23 QUESTION: Well, I suppose if State regulation  
24 were applicable, they would be entitled to hunt and fish,  
25 as anyone else would, with a hunting and fishing license.

1 MR. SLONIM: That is correct, Your Honor, but  
2 they could not use fish and game in the way they use it in  
3 their culture. Let me give you two examples. One of the  
4 most important fishing activities for the Chippewa is  
5 spring spear fishing. It's something their ancestors have  
6 done for generations. They still do today. It is illegal  
7 under State law in both Wisconsin and Minnesota to spear  
8 fish in the spring.

9 In each of these reservation communities, there  
10 are families that are providers.

11 QUESTION: Excuse me, did you say spring spear  
12 fishing?

13 MR. SLONIM: Yes, Your Honor.

14 QUESTION: And that means in the spring season?

15 MR. SLONIM: In the springtime. As the ice  
16 moves out on these northern lakes, they go out in canoes  
17 and they use spears and lights to take fish.

18 QUESTION: Is there some religious significance  
19 to this? I mean, I --

20 MR. SLONIM: Yes. Yes, there is, Your Honor.

21 QUESTION: There is.

22 MR. SLONIM: It's a part of their traditions,  
23 and they spoke to it in testimony in this case.

24 QUESTION: Well, I mean, certainly it can be a  
25 part of your tradition and not have any religious



1 connotation. I mean, if all you're saying is that they  
2 spear-fished for years and now they won't be able to  
3 spear-fish, I mean, that's just stating the obvious.

4 MR. SLONIM: It's --

5 QUESTION: What the case is about, but --

6 MR. SLONIM: It's more than that, Your Honor,  
7 and there was testimony in the trial about the importance  
8 of these activities to their culture and to their  
9 religion.

10 QUESTION: Mr. Slonim, have they been, say,  
11 spear-fishing in the spring over a long, long period of  
12 time without being subject to State regulation? I mean,  
13 if that was the case, why was this action brought?

14 MR. SLONIM: They have to sneak out -- before  
15 these rights were reaffirmed by the courts, they would  
16 have to sneak out and try to do it without getting caught.  
17 That was the only way they could do it.

18 QUESTION: So it was never established one way  
19 or the other as to whether they had these rights as  
20 between, say, the State of Minnesota and the tribes. The  
21 tribes said they did, and the State of Minnesota said they  
22 didn't.

23 MR. SLONIM: Not until this case was decided.

24 The other example I was going to give Your Honor  
25 was, in each of these communities there are people that

1 are providers. They go out and they get fish and game and  
2 they supply it to elders and others who are incapable of  
3 getting it themselves.

4 State bag limits and State seasons prevent them  
5 from pursuing those activities, from providing fish and  
6 game at funerals which occur out of season, or for -- as  
7 part of ceremonies in connection with births or other life  
8 cycle events that happen to take place in the wrong  
9 season. They cannot preserve these traditions if they are  
10 subject to State law, and that's why we're here.

11 Turning to the 1850 order, I wanted to provide  
12 our answer to Justice Ginsburg's question about what the  
13 Indians were told and what they understood at the time the  
14 1850 order was issued.

15 What the record shows is that they were told  
16 that the order was an order to remove. They were not told  
17 that the order was an order to stop hunting and fishing,  
18 or would have any effect on hunting and fishing. They  
19 were told they had to move.

20 In 1855 --

21 QUESTION: Is there any evidence that a copy of  
22 the order was given to the respondents?

23 MR. SLONIM: There was evidence that a circular  
24 was prepared which had a copy of the order, and that was  
25 sent to the bands in Wisconsin, which were -- who are the

1 targets of the removal effort.

2 It was not sent, for example, to the Mille Lacs  
3 Band, which was never a target of the removal effort, but  
4 that's what -- there was evidence to that effect.

5 In 1855, the Territorial Governor of Minnesota,  
6 who was the Superintendent of Indian Affairs, he was the  
7 highest Federal official responsible for implementing  
8 Federal Indian law in the Territory of Minnesota, wrote a  
9 letter and said that the Indians had no interest on these  
10 lands except hunting and fishing. He specifically  
11 recognized, 5 years after this order was issued, that they  
12 had hunting and fishing rights under the 1837 treaty.

13 There was an incident up at Mille Lacs Lake. He  
14 sent an investigator there, and the investigator reported  
15 that the lumbermen and all of the Chippewa believed that  
16 they still had hunting and fishing rights under the 1837  
17 treaty.

18 This correspondence went --

19 QUESTION: Why would that be? I mean, that  
20 couldn't make it so if it were not so, and your theory is  
21 that it was so because the presidential order was null and  
22 void --

23 MR. SLONIM: We have --

24 QUESTION: -- in its entirety.

25 MR. SLONIM: -- two theories, Your Honor, first

1 that it was null and void, it was invalid when it was  
2 issued, and second that it had been rejected as the policy  
3 of the United States, as the pleasure of the President,  
4 shortly after it was issued.

5 QUESTION: Well --

6 QUESTION: In what way? How was it rejected  
7 shortly after --

8 MR. SLONIM: The order, the purpose of the order  
9 was to remove the Indians, and the order specifically says  
10 that they're ordered to remove. In addition to revoking  
11 their rights, they're hereby ordered to remove.

12 QUESTION: Well, it was a two-part thing. It  
13 was the revocation of the rights and the removal order,  
14 and there certainly is clear evidence that the Government  
15 abandoned the efforts to remove the tribes, but what is  
16 the evidence that the Government tried to revoke in some  
17 fashion the other part of the order, other than the matter  
18 that you mentioned?

19 MR. SLONIM: Well, the question then turns on  
20 whether you can sever the order.

21 QUESTION: Well, I guess we don't know that. If  
22 it were a statute, would we sever them occasionally?

23 MR. SLONIM: Well, you do.

24 QUESTION: Yes.

25 MR. SLONIM: I mean, that's the issue, is should

1 you. That's the issue.

2 QUESTION: And would we not approach this in the  
3 same way we would a statutory issue, to determine if it's  
4 severable, and if so, if something remains?

5 MR. SLONIM: Yes.

6 QUESTION: Yes.

7 MR. SLONIM: Yes, Your Honor, but with the  
8 caveat that you would apply --

9 QUESTION: Yes.

10 MR. SLONIM: -- the rules you apply in Indian  
11 cases.

12 QUESTION: So as to the hunting and fishing,  
13 what evidence do we look to to see if that was somehow  
14 revoked?

15 MR. SLONIM: Well, we look to whether the order  
16 would have been issued revoking the hunting and fishing  
17 rights in the absence of the removal directive, and all of  
18 the evidence was that it would not have been, that the  
19 only purpose of this order was to remove the Indians.

20 QUESTION: Well, you say all the evidence. I  
21 mean, can you name some, or --

22 MR. SLONIM: Sure. The territorial legislature  
23 requested a removal order because they said the Indians  
24 were causing problems, and it doesn't make sense to say,  
25 all right, in response to that, we'll leave the Indians

1 where they are, but tell them they can't hunt and fish any  
2 more. That doesn't --

3 QUESTION: Well, but the fact that they -- they  
4 could hunt and fish the same way anybody else in the  
5 Territory of Minnesota could hunt without these rights.

6 MR. SLONIM: Sure, sure, and so unless you're  
7 removing them, the revocation of hunting and fishing  
8 doesn't serve any purpose. The only purpose it serves is  
9 as part of a removal effort, and that effort is abandoned.

10 QUESTION: Well, you're saying --

11 QUESTION: Well, but -- it's assuming the whole  
12 point in issue.

13 MR. SLONIM: Well, let me --

14 QUESTION: You're saying it doesn't even have  
15 any purpose as assisting removal. Since they could hunt  
16 and fish the way anybody else could, and in those days  
17 anybody else could fish and hunt ad libitum, I fail to see  
18 how revoking their hunting -- how revoking their special  
19 hunting and fishing rights would assist in their removal,  
20 so long as they could hunt and fish the way Justice Souter  
21 could, and he could fish and hunt to his heart's content.

22 How did the removal of the hunting and fishing,  
23 the special Indian hunting and fishing rights, assist the  
24 removal. I don't see that.

25 MR. SLONIM: I think the Federal officials who

1 were involved in preparing this order would have thought  
2 it illogical to order the Indians to remove at the same  
3 time they retained a treaty right to hunt and fish on the  
4 lands they were being removed from, that, if that wouldn't  
5 have made sense to say, you still have a treaty right to  
6 hunt and fish here, but you have to leave.

7 QUESTION: You're saying it's a logical  
8 necessity, but I --

9 MR. SLONIM: Right.

10 QUESTION: You know, your briefs seem to say  
11 that it was -- that the purpose of it was to coerce them  
12 to remove, but it wouldn't have coerced them to remove at  
13 all, because they could continue to exercise the normal  
14 white person's right to hunt and fish, and that would have  
15 been enough.

16 MR. SLONIM: Can I address your point about  
17 during the pleasure, Your Honor? I'd like to talk about  
18 that, because the State's interpretation of the 1837  
19 treaty and the President's authority under that treaty we  
20 think is really quite remarkable.

21 Under the State's interpretation, the President  
22 could revoke these rights at any time. He could revoke  
23 them, according to the State, as part of an unauthorized  
24 removal attempt, which led to hundreds of Chippewa deaths.  
25 He could revoke them at a time, as the district court

1 found, when the land wasn't needed for settlement and  
2 there was no other interest of the United States served by  
3 the revocation.

4 But what he couldn't do, according to the State,  
5 is, upon learning of the consequences of the removal  
6 order, he couldn't allow the Indians to remain and to hunt  
7 and fish during his pleasure. In other words, he couldn't  
8 do the one thing the treaty says he could do, and that  
9 doesn't make any sense.

10 QUESTION: This is your notion that during his  
11 pleasure means one President says you can, the next one  
12 says you can't, the next one says you can? It's off and  
13 on.

14 MR. SLONIM: It's up to the President.

15 QUESTION: Okay. Article III, section 1, you're  
16 talking about something close to my heart here, because  
17 Article III, section 1 says, the judges both of the  
18 Supreme and inferior courts shall hold their offices  
19 during good behavior. Does that mean that I can decide  
20 to, you know, just really be a really bad fellow for 2  
21 years, and step down from the bench, and then when I  
22 decide to reform again I can come back on the bench?

23 MR. SLONIM: No, because --

24 QUESTION: During good behavior means, once you  
25 behave badly you are out and you don't come back, as I



1 understand it.

2 MR. SLONIM: Well, I mean, there's a process in  
3 the Constitution for how that happens, and it says you  
4 have to be removed, and there's also a process for how  
5 Your Honors are appointed.

6 In this case we have a treaty that says there's  
7 a privilege, and all it says about the President is, it's  
8 guaranteed during the pleasure of the President, and it  
9 seems to me perfectly consistent with the language of the  
10 treaty to say the President can decide if he made a  
11 mistake, if he issued this order, and it turned out, as  
12 the record shows, to be a disaster, that it turned out, as  
13 the record shows, that there wasn't any need for it, to  
14 say, this was a mistake, they can stay, and during my  
15 pleasure they can hunt and fish.

16 QUESTION: Well, Mr. Slonim, are you resting  
17 your argument here simply on the language of the treaty,  
18 which I think you indicated a second ago, or are you  
19 resting your argument on the understanding of the Indian  
20 parties to the treaty?

21 MR. SLONIM: The language of the treaty, the  
22 rule that if there are ambiguities they should be resolved  
23 in favor of the Indians, and the understanding of the  
24 Indians, as shown in the record of this case.

25 QUESTION: All right. Does your argument go so

1 far as to get to the point that I raised earlier that, in  
2 fact, the understanding of at the pleasure at least meant  
3 it would not be the President's pleasure to end it for a  
4 long time?

5 MR. SLONIM: Yes, Your Honor, and it would not  
6 be the President's pleasure to end it unless he was  
7 displeased with the Indians.

8 QUESTION: Well, is it your position that in  
9 fact the President -- and I didn't think it was, but I  
10 want to be clear.

11 Is it your position that the President could not  
12 validly have revoked the hunting and fishing rights even  
13 if he had done it, as it were, with some just excuse and  
14 unconnected with any invalid removal order at the time he  
15 in fact issued the removal order in 1850?

16 In other words, did he have to give them more  
17 time, whether he wanted to or not, because they understood  
18 that 1850 would be too soon?

19 MR. SLONIM: I think they understood that it was  
20 too soon in light of the circumstances that were present  
21 then.

22 If settlement had proceeded at a different pace,  
23 the answer might be different, but there were no demand  
24 for these lands at that time.

25 QUESTION: Well then, why didn't they say in the

1 treaty, you know, when the lands are needed for  
2 settlement, or when the Indians misbehave, or anything  
3 like that? It would be easy to say that. They said, at  
4 the pleasure of the President.

5 MR. SLONIM: Because they didn't draft --

6 QUESTION: It's hard to conceive of language  
7 that puts something more in the utter discretionary  
8 control of one person than at the pleasure of the  
9 President.

10 MR. SLONIM: The answer is that they didn't  
11 draft -- the Chippewa didn't draft the treaty.

12 QUESTION: Well, they signed it.

13 MR. SLONIM: They made X's, yes, Your Honor.

14 QUESTION: But there were missionaries and  
15 others there representing their interests, and I assume  
16 they have -- I mean, the notion that they don't have a  
17 concept in Chippewa, I don't know, culture, for at the  
18 pleasure of someone I frankly don't believe.

19 MR. SLONIM: Well, Your Honor, there were a lot  
20 of people there with their own interests. The  
21 missionaries wrote, right after the treaty was signed,  
22 that they have no understanding of the duration of a man's  
23 pleasure.

24 What they were told --

25 QUESTION: I don't have an understanding of the

1 duration of a man's pleasure either. I mean, that's the  
2 whole point. It doesn't have any duration. It's whatever  
3 he wants.

4 But they didn't have a notion of, at somebody's  
5 pleasure?

6 MR. SLONIM: Well --

7 QUESTION: I can't believe that.

8 MR. SLONIM: Well, what they were -- the other  
9 thing they were told throughout this treaty council was  
10 that they would be treated justly by the President and  
11 that, of course, was a reflection of the provisions in the  
12 Northwest ordinance, the trust responsibility as  
13 articulated by this Court, and what we think that means in  
14 this context is there are some reasons the President could  
15 not act, and that was the case in 1850.

16 QUESTION: Thank you, Mr. Slonim.

17 Ms. McDowell, we'll hear from you.

18 ORAL ARGUMENT OF BARBARA B. MCDOWELL

19 ON BEHALF OF THE RESPONDENT UNITED STATES

20 MS. MCDOWELL: Mr. Chief Justice, and may it  
21 please the Court:

22 The Chippewa retained the privilege under the  
23 1837 treaty to fish, hunt, and gather within the portion  
24 of the Minnesota territory ceded by that treaty. Although  
25 the 1850 order stated that the Chippewa were required to

1 remove from the ceded territory and could no longer  
2 exercise their usufructuary privilege there, that order  
3 never took effect.

4 QUESTION: What do you mean, the order never  
5 took effect? I mean, if it says the privileges shall last  
6 as long as the -- at the pleasure of the President, and  
7 the President says, it's no longer my pleasure, I revoke  
8 it, that would seem to be self-executing. I mean, what  
9 more need be done?

10 MS. MCDOWELL: If that was all that was in the  
11 order, and if that was all that happened, we might agree  
12 with you, but that's not the case.

13 It was part of an order that was designed for  
14 the sole purpose, as the district court found, to remove  
15 the Chippewa.

16 QUESTION: Well, the district court finding is a  
17 matter of law. I mean, so that -- we interpret that as a  
18 matter of law. We're not bound by a district court  
19 finding.

20 MS. MCDOWELL: Certainly not, Your Honor, but  
21 there was no effort to enforce the usufructuary revocation  
22 separately from --

23 QUESTION: Why should there have to be an  
24 effort? I mean, if one -- if a treaty says, until such  
25 and such an event, then the event occurs, why should

1 something more have to occur?

2 MS. MCDOWELL: Because the President under a  
3 treaty such as this one, that allows him to exercise his  
4 pleasure with respect to the existence of these rights,  
5 certainly has the ability to think about, as he is  
6 carrying the policy into effect, whether in fact these  
7 rights ought to be revoked, and it was clear as time went  
8 on over the 2, 3, or 4-year period after the order was  
9 issued, that the President, the executive and Congress did  
10 not want the Chippewa to be removed.

11 QUESTION: Well, President Taylor died in 1850,  
12 the same year he revoked the order, so he didn't continue  
13 to think about it for 4 years.

14 (Laughter.)

15 MS. MCDOWELL: No, certainly not, but his  
16 successors did.

17 QUESTION: How about President Roosevelt's  
18 letter in March of 1938 recognizing that the thing had  
19 been revoked? How do you deal with that?

20 MS. MCDOWELL: Well, as we explained in our  
21 brief, Your Honor, that statement doesn't reflect any  
22 consideration of the context in which the order was  
23 issued, and what occurred afterward.

24 It particularly does not take into account the  
25 1854 and 1855 treaties, which created a new state of

1 affairs in the Minnesota ceded territory that was entirely  
2 different from that contemplated by the 1850 order.

3 Whereas the 1850 order had required the Chippewa  
4 to remove, the 1854 and 1855 treaties created what were  
5 said to be permanent homes for them within that new  
6 territory, and it was clear because --

7 QUESTION: It seems to me you take a very  
8 cavalier approach to President Roosevelt's order. He  
9 said -- or letter. He said, we've thought about this,  
10 we've looked at it, these rights are revoked, and you  
11 said, oh, well, he doesn't know -- he didn't know what  
12 happened in 1854. That's what your argument sounds like  
13 to me.

14 I'm amazed the Government would take such a  
15 cavalier attitude about a letter from the President of the  
16 United States. That's an amazing position.

17 MS. MCDOWELL: Well, certainly, Your Honor,  
18 President Roosevelt's statement is entitled to a certain  
19 amount of deference, but he was not entirely informed  
20 about the situation. If he had been, we don't know what  
21 position he would have taken.

22 QUESTION: What was the part he wasn't informed  
23 about? My understanding is this, that the Taylor,  
24 President Taylor's order says, no hunting, no fishing, go,  
25 all right. That's what it says.

1 MS. MCDOWELL: Uh-huh.

2 QUESTION: Now, I take it the last word, go,  
3 everyone in this case agrees, or do they or don't they?  
4 Are we supposed to consider that go as being illegal of no  
5 effect, because the President of the United States did not  
6 have the authority to say, go?

7 Are we supposed to take it as a given, because  
8 all that people seem to be arguing is severability, not  
9 whether that basic idea is valid or not, so I'm supposed  
10 to take it that go was not valid, everybody concedes that,  
11 or what?

12 MS. MCDOWELL: We are not conceding that, Your  
13 Honor, but we don't --

14 QUESTION: No, obviously you're not con -- you  
15 think the go was invalid, is that right?

16 MS. MCDOWELL: No, Your Honor. Our position is  
17 that the go never became effective because it was never  
18 carried out. That's consistent with --

19 QUESTION: Or that it was somehow revoked by  
20 implication. That was the gist of what I got out of the  
21 briefs, that the go part of the order by implication was  
22 abandoned or revoked.

23 MS. MCDOWELL: It was abandoned or revoked --

24 QUESTION: Yes, but I'm trying --

25 MS. MCDOWELL: -- before it took effect.



1 QUESTION: That's your argument, not that it was  
2 illegal in the first place for the President to --

3 MS. MCDOWELL: That's our position.

4 QUESTION: All right. In other words, the go is  
5 not legally valid. It doesn't -- I don't know how else to  
6 say this.

7 MS. MCDOWELL: It is of no effect because it was  
8 not carried out. If you look at --

9 QUESTION: And therefore what was attached to it  
10 also became -- is it your position that at the pleasure of  
11 the President is this on-again, off-again thing, depending  
12 on, you know --

13 MS. MCDOWELL: No, Your Honor --

14 QUESTION: You can have a new President comes  
15 in, you cannot fish now.

16 MS. MCDOWELL: If the removal happened --

17 QUESTION: It's going to make it difficult for  
18 the people of, you know, Wisconsin to know what's going on  
19 here, but is that the Government's position, the President  
20 can turn it on and off?

21 MS. MCDOWELL: No, Your Honor. If the --

22 QUESTION: Off is off.

23 MS. MCDOWELL: -- removal had been fully carried  
24 out and the rights had been revoked and the Chippewa were  
25 told that they could not go back there to hunt and fish,

1 we would say that would be final.

2 QUESTION: Okay.

3 MS. MCDOWELL: It would take an act of Congress  
4 to reinstate the rights then.

5 QUESTION: So then it must be the Government's  
6 position that if you have what you might call an  
7 irrevocable provision, no more hunting and fishing once he  
8 says it can't be changed, and you attach that irrevocable  
9 provision to a revocable one, namely, go, the President  
10 can change his mind about go and say, oh, I changed my  
11 mind, don't go.

12 When you attach an irrevocable one to a  
13 revocable one, the irrevocable one becomes revocable.

14 MS. MCDOWELL: Yes, in the context of what was  
15 going on here, which was an order which was solely  
16 designed for the purpose of removing the Chippewa, not for  
17 revoking their usufructuary rights while they remained in  
18 place.

19 QUESTION: I don't see how that follows. It  
20 seems to me irrevocable is irrevocable. If you've done  
21 it, you've done it. You can't pull it back.

22 I don't see how merely attaching it to a  
23 revocable one -- I can understand how attaching it to an  
24 invalid one might render it invalid, because it's  
25 nonseverable, but the Government's taking the very strange

1 position that the order to go is not invalid and therefore  
2 it doesn't invalidate the revocable portion.

3 MS. MCDOWELL: It would be an even --

4 QUESTION: Or the irrevocable, but rather  
5 renders the irrevocable portion revocable. I can't  
6 understand --

7 MS. MCDOWELL: It would be an even stranger  
8 position, Your Honor, if we were to say that the President  
9 had no ability to change his mind, that once he decided  
10 that removal --

11 QUESTION: Ms. McDowell --

12 MS. MCDOWELL: -- the purpose of the order was  
13 not to be carried out --

14 QUESTION: But he doesn't have --

15 MS. MCDOWELL: -- but he couldn't say that the  
16 Chippewa can't --

17 QUESTION: But I thought you've conceded that he  
18 can't change his mind. I thought you've conceded that  
19 once the President says, no more hunting and fishing, he  
20 can't come back a month later and say, you know, that was  
21 a really bad idea, okay, you can hunt and fish again. I  
22 thought you conceded that.

23 MS. MCDOWELL: No, we didn't concede that.

24 My --

25 QUESTION: So it can be changed. It is off-

1 again, on-again, whatever the President wants to do.

2 MS. MCDOWELL: No. If removal, which was the  
3 whole purpose of this order, had, in fact, been carried  
4 out --

5 QUESTION: Leave removal aside.

6 MS. MCDOWELL: -- then at that point these  
7 rights could --

8 QUESTION: Leave removal aside. It's just an  
9 order, Indians can't hunt and fish. Is it your position  
10 that the President can change his mind and say, oh, that  
11 was a mistake, I shouldn't have said that, you can hunt  
12 and fish? Can the President do that?

13 MS. MCDOWELL: If that was all there was to this  
14 order, perhaps so, perhaps not, but that was not all that  
15 there was to this order.

16 QUESTION: No, no. I mean, yes or no.

17 (Laughter.)

18 QUESTION: Do you have a -- yes or no.

19 MS. MCDOWELL: If it's part of an order that was  
20 never enforced, the Chippewa were not even told about, the  
21 President --

22 QUESTION: Well, are you then saying that the  
23 reason this seems to be an on-again, off-again kind of  
24 regime boils down to the fact that, at least in the  
25 circumstances of this treaty, in order for the President

1 in effect to exercise his pleasure to end the rights, he  
2 had to do it in an effective way, such that simply signing  
3 a piece of paper saying, stop, is not enough?

4 Are you saying that he had to communicate it and  
5 enforce it, and that that enforcement would in effect be  
6 the communication to the people involved, that he did not  
7 do that and he did not do that for the simple reason that  
8 he could not enforce the other order, either?

9 Is that what it boils down to, that he never  
10 really exercised his pleasure because he never carried it  
11 through to the point of making it clear?

12 MS. MCDOWELL: Yes, Your Honor.

13 QUESTION: And you are not making the argument  
14 that -- the legal argument that I thought the district  
15 court bought, and the Eighth Circuit, too -- maybe I'm  
16 wrong about that -- that the President could not, not that  
17 he did not.

18 Here you're telling us he did not. The  
19 President could not order the removal because of an 1830  
20 statute that says the Indians have to consent to a  
21 removal. That was an argument that I thought was accepted  
22 by the lower courts, but you are not making that argument.

23 MS. MCDOWELL: We're not making that argument  
24 now. We did join in that argument below.

25 QUESTION: But it is the position of the United

1 States, of the Department of Justice, as I understand it,  
2 that the executive order of a President is not effective  
3 ex opera operando, as we say, by its own force, but rather  
4 somehow must be enforced before an executive order is  
5 effective. Is that the position of the Justice  
6 Department?

7 MS. MCDOWELL: It would depend on the particular  
8 character of the executive order.

9 QUESTION: I see. Some executive orders are  
10 immediately effective when they are promulgated, but  
11 others are only effective when they are sought to be  
12 enforced. Is that --

13 MS. MCDOWELL: Certainly in the context --

14 QUESTION: -- do we know how to distinguish the  
15 one from the other?

16 MS. MCDOWELL: -- it's certainly in the context  
17 of this order, that had one purpose which was --

18 QUESTION: I have never heard this theory  
19 before.

20 QUESTION: No, I'm --

21 QUESTION: Ms. McDowell, isn't your -- I thought  
22 your point was that this order's effect, whether it has  
23 effect or doesn't, is a question of the treaty, not  
24 general executive order law. Is that your position? And  
25 therefore, at least under a treaty like this, in which

1 the -- whatever effect the order has is a creature of the  
2 treaty, not of general law. The President had to be  
3 effective in what he did.

4 Is that -- I'm putting words into your mouth,  
5 but I want you to tell me if they are not your words.

6 MS. MCDOWELL: Yes, it is the particular context  
7 of this treaty --

8 QUESTION: Well now, wait a minute, because the  
9 treaty says in Article 5, the 1837 treaty, the privilege  
10 of hunting, fishing, and gathering the wild rice upon the  
11 lands ceded is guaranteed to the Indians during the  
12 pleasure of the President of the United States. Now,  
13 that's all it says.

14 Now, can the President revoke that, enter an  
15 executive order saying, it is no longer my pleasure that  
16 you shall hunt and fish and gather wild rice under the  
17 terms of the treaty?

18 MS. MCDOWELL: Yes.

19 QUESTION: Is there anything confusing about  
20 that?

21 MS. MCDOWELL: No.

22 QUESTION: The President could do that.

23 MS. MCDOWELL: That's correct.

24 QUESTION: But you say, because it was done  
25 together with a removal order, the removal part of which

1 was not enforced, that he could not do it, is that it?

2 MS. MCDOWELL: We're not saying that he could  
3 not do it. We're saying that he did not do it in the  
4 context of this case, that the revocation of rights did  
5 not become effective because the removal did not become  
6 effective, and because the entire policy was superseded  
7 and contradicted --

8 QUESTION: Is it not possible that a President  
9 would think that the revocation should go forward so that  
10 territorial or State government could regulate hunting and  
11 fishing for all?

12 MS. MCDOWELL: There's absolutely no evidence of  
13 that in the record, Your Honor.

14 QUESTION: But that is certainly possible, that  
15 a President would think, yes, States or Territories, as  
16 the case may be, should regulate hunting and fishing for  
17 all.

18 MS. MCDOWELL: That's possible, although that  
19 would be a curious conclusion, because in the 1854 treaty  
20 new usufructuary rights were recognized for the Indians  
21 who were living in the 1854 ceded territory, the territory  
22 that was newly ceded by that treaty.

23 It would seem curious that the President and the  
24 administration wanted to give Indians those rights in that  
25 part of Minnesota but not to allow them to continue to



1 exercise those rights in the remainder of Minnesota that  
2 had originally been part of the 1837 ceded territory.

3 QUESTION: There's one respect that your brief  
4 seems to portray something that the argument brought out  
5 isn't. That is, you said, well, the President wanted to  
6 do indirectly what he couldn't do directly. I thought  
7 that was one argument that -- and it would be perverse to  
8 say, they can stay here, but they're going to starve to  
9 death.

10 We've heard now, everybody seems to agree that  
11 they wouldn't be prohibited from engaging in any of these  
12 activities, they just have to do them like everyone else,  
13 so why did you in the brief twice, I noticed, you said,  
14 that would be taking away their sustenance, but that's  
15 wrong, isn't it?

16 MS. MCDOWELL: We don't think that it's at all  
17 clear that the Indians would have had, as one of the  
18 Justices referred to, a white man's privilege to hunt and  
19 fish if the treaty right were indeed effectively revoked.  
20 The Indians were not citizens of the States, Territories  
21 of the United States at the time. There was no general --

22 QUESTION: You didn't say anything about it not  
23 being clear. You said the Chippewa could not have  
24 survived. You gave it that portrayal.

25 MS. MCDOWELL: Yes.

1 QUESTION: That the effect of this meant that  
2 they would starve to death.

3 MS. MCDOWELL: Yes.

4 QUESTION: They could stay, and so one could  
5 say, gee, that would be an irrational thing for a  
6 President to do, to say you could stay but starve to  
7 death. It wouldn't be so irrational for him to say, you  
8 can stay subject to the rules that govern everyone else.

9 MS. MCDOWELL: But he didn't say that, and  
10 there's no indication that the Chippewa would have been  
11 recognized as having the rights of citizens. Certainly --

12 QUESTION: Do you have any indication that  
13 noncitizens anywhere were not allowed to hunt and fish?

14 MS. MCDOWELL: Well, there is indication that  
15 a --

16 QUESTION: In some States, noncitizens were  
17 allowed to vote.

18 MS. MCDOWELL: In 1858, when Minnesota began --  
19 became a State, it enacted hunting and fishing regulations  
20 that among other things tried to prevent Indians from  
21 leaving the reservations to hunt and fish without a  
22 passport.

23 CHIEF JUSTICE REHNQUIST: Thank you,  
24 Ms. McDowell.

25 The case is submitted.

1 (Whereupon, at 11:04 a.m., the case in the  
2 above-entitled matter was submitted.)  
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