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IN THE SUPREME COURT OF THE UNITED STATES

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 MIKE CARPENTER, INTERIM WARDEN,        )  
   Petitioner,                    )  
   v.                                    ) No. 17-1107  
 PATRICK DWAYNE MURPHY,                 )  
   Respondent.                    )  
 - - - - -

Washington, D.C.

Tuesday, November 27, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:14 a.m.

1 APPEARANCES:

2

3 LISA S. BLATT, ESQ., Washington, D.C.; on behalf  
4 of the Petitioner.

5 EDWIN S. KNEEDLER, Deputy Solicitor General,  
6 Department of Justice, Washington, D.C.;  
7 for the United States, as amicus curiae,  
8 supporting the Petitioner.

9 IAN H. GERSHENGORN, ESQ., Washington, D.C.; on behalf  
10 of the Respondent.

11 RIYAZ A. KANJI, ESQ., Ann Arbor, Michigan; for the  
12 Muscogee (Creek) Nation, as amicus curiae,  
13 supporting the Respondent.

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

2 (11:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 17-1107, Carpenter versus  
5 Murphy.

6 Ms. Blatt.

7 ORAL ARGUMENT OF LISA S. BLATT

8 ON BEHALF OF THE PETITIONER

9 MS. BLATT: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 Eastern Oklahoma is not an Indian  
12 reservation for three reasons. First, Congress  
13 destroyed all features of a reservation by  
14 terminating all sovereignty over the land in  
15 the march up to statehood. Second, Solem is  
16 not to the contrary. And, third, affirmance  
17 would immediately trigger a seismic shift in  
18 criminal and civil jurisdiction.

19 First, Congress stripped the former  
20 Indian territory of reservation status by  
21 terminating all tribal sovereignty over the  
22 area to create Oklahoma.

23 Disestablishment occurred --

24 JUSTICE SOTOMAYOR: Exactly when did  
25 it do this? What's the exact date? It wasn't

1 in the Enabling Act when the state became --  
2 when the state was pro -- well, when Teddy  
3 Roosevelt proclaimed it a state, but nothing in  
4 the Enabling Act did that. So exactly what's  
5 the date?

6 MS. BLATT: I mean, our position is it  
7 was done by statehood. Our position is more  
8 fundamentally that we don't have --

9 JUSTICE SOTOMAYOR: But at statehood  
10 --

11 MS. BLATT: -- to give you a state --  
12 a date --

13 JUSTICE SOTOMAYOR: But at -- but at  
14 statehood, the tribe was still in existence.  
15 Shortly thereafter, Congress says it's not  
16 going to dismember it, and tribal members still  
17 owned property, they were getting property, and  
18 it was only after that that the government  
19 began to -- it wasn't even that it took the  
20 land away from the Indians; that through  
21 trickery and deceit, they were permitted to  
22 sell off their lands, but I'm trying to figure  
23 out --

24 MS. BLATT: Sure.

25 JUSTICE SOTOMAYOR: -- exactly when?

1 MS. BLATT: Sure. So, again, we don't  
2 have to give you a date. Rome did not fall in  
3 a day. We know it fell by 476, but it was  
4 sacked several times before that.

5 The other thing is that Congress does  
6 not have to terminate a tribe's government to  
7 disestablish the reservation. A reservation,  
8 by definition, signifies some tribal  
9 sovereignty, not tribal property, but tribal  
10 sovereignty over non-Indian-owned fee land.  
11 Otherwise, a reservation has no purpose if  
12 there's not non-Indian-owned fee land that's  
13 being reserved --

14 JUSTICE SOTOMAYOR: I'm sorry --

15 MS. BLATT: -- for any purpose.

16 JUSTICE SOTOMAYOR: -- what are all  
17 the Solomon cases -- all of those tribes, the  
18 issue was whether the deprivation of property  
19 was an allotment or a cessation, and in many of  
20 them, we held it was an allotment because there  
21 wasn't clear language of cessation. So we  
22 didn't tie it to the ownership of land.

23 MS. BLATT: Exactly, and that's my  
24 point. In every single Solem case, you have a  
25 statute that transfers surplus non-Indian-owned

1 land. But Congress is silent as to whether  
2 Congress also intended to sever the tribe or  
3 divest the land of Indian interest. And so  
4 cession, in all those cases, in Nebraska versus  
5 Parker, in Solem, in Yankton Sioux, cession  
6 itself in one step both terminates tribal title  
7 and tribal governance.

8 But, here, what happened with Oklahoma  
9 was that Congress acted in two steps. It first  
10 took away tribal title with allotment, and then  
11 20 years of statutes expressly abrogated every  
12 feature of tribal sovereignty.

13 JUSTICE KAGAN: But what does that  
14 mean, Ms. Blatt? Because, as I read the  
15 history, it goes something like this -- and you  
16 said terminating all sovereignty -- what  
17 happened was that, in 1901, Congress said we  
18 are going to terminate all sovereignty by 1906.  
19 So there was definitely an express intent to do  
20 that.

21 And then two things happened. First,  
22 as an interim measure, Congress extended the  
23 tribal government and it said we're going to  
24 extend it in order to wind things up. To wind  
25 things up but to extend it.



1           And then comes the Five Tribes Act.  
2 Congress actually changes its mind again and  
3 said, forget this, we thought it was kind of a  
4 bad idea. We're going to extend tribal  
5 government for all purposes authorized by law.

6           So, you know, whatever Congress  
7 thought it might want to do, it decided it  
8 didn't want to do it in the end.

9           MS. BLATT: No, that's fundamentally  
10 wrong in several respects. First of all, the  
11 1901 Act called for --

12           JUSTICE KAGAN: Fundamentally wrong?  
13 (Laughter.)

14           MS. BLATT: It's fundamentally wrong  
15 because the 19 -- well, it's -- it's factually  
16 wrong. The tribe -- the Allotment Act called  
17 for --

18           JUSTICE KAGAN: Factually and  
19 fundamentally?

20 (Laughter.)

21           MS. BLATT: And fundamentally. It's  
22 factually wrong because the allotment agreement  
23 called for the termination of the government.  
24 There is no question that Congress never  
25 changed its mind about termination of tribal

1 sovereignty.

2 Now Section 28 of the Five Tribes Act  
3 that you're talking about extended tribal  
4 governments only for the purposes already  
5 existing. And --

6 JUSTICE KAGAN: I'm sorry. You're  
7 going to have to go back a little bit for me.

8 MS. BLATT: Sure.

9 JUSTICE KAGAN: Now you're -- are you  
10 making a distinction between the tribal  
11 government and tribal sovereignty?

12 MS. BLATT: Absolutely.

13 JUSTICE KAGAN: And what is that  
14 distinction?

15 MS. BLATT: I'm telling you, every  
16 single cession case, the -- all that matters,  
17 and what the Court's words were in Solem, where  
18 there's a divestiture of the tribal interest in  
19 the land, a dissolution of tribal sovereignty,  
20 it has never been required that Congress has to  
21 terminate a tribe.

22 Now let's look at the -- let's talk  
23 about the continuing --

24 JUSTICE KAGAN: I'm still not getting  
25 it.

1 MS. BLATT: Okay. Let me --

2 JUSTICE KAGAN: What is -- just let me  
3 finish the question, yes? What is tribal --  
4 the tribal sovereignty that you say is critical  
5 to determine whether dissolution has occurred?

6 MS. BLATT: Some sovereignty over  
7 non-Indian-owned fee land. So that can be one  
8 of three things. It can be over the land. It  
9 can be over non-tribal members. Or it can even  
10 be over tribal members.

11 The Five Tribes had none of that. Not  
12 one single absolute smidgeon, de minimis act of  
13 sovereignty over the land.

14 JUSTICE BREYER: Wait. You just put  
15 in a little word there, "absolute."

16 MS. BLATT: Absolute no sovereignty.

17 JUSTICE BREYER: Yeah, yeah. That's  
18 because the President could veto what the  
19 tribes did. But my guess is that there was a  
20 tribal legislature. This is -- I don't mean to  
21 interrupt you. I'm just --

22 JUSTICE KAGAN: No, please.

23 JUSTICE BREYER: There was a tribal  
24 legislature, and what they said, I guess, in,  
25 whenever it was, the Enabling Act, 1906, that

1 the President had to approve it.

2 Now I'm not sure I can find any  
3 instance which says because the President has  
4 to approve the laws passed by a tribal council,  
5 that that means the tribe does not have  
6 sovereignty.

7 MS. BLATT: Right. So this is what --  
8 sorry -- on this section --

9 JUSTICE BREYER: If there's a case  
10 right on that, I doubt it.

11 MS. BLATT: Yeah. So --

12 JUSTICE BREYER: What?

13 MS. BLATT: -- Section 28 only  
14 extended the governments for purposes that were  
15 already existing. What you said was a -- what  
16 the actual statute says is that all tribal acts  
17 will be invalid, this is a restriction on  
18 residual authority, unless the President  
19 approves.

20 Now just remember, in Sections 26 and  
21 28 of the Curtis Act, all tribal courts are  
22 abolished. All tribal taxes are abolished in  
23 Section 16 of the Five Tribes Act. A tribal  
24 law was unenforceable. In Section 15, tribal  
25 -- all tribal buildings and furnitures, the

1 tribal schools, property, money, books, papers,  
2 and records were all ordered to be turned over  
3 or face imprisonment of five years in jail.  
4 Their -- I mean, I could keep going on, but let  
5 me --

6 JUSTICE KAGAN: Yeah, Ms. Blatt, isn't  
7 it true that in this period, the -- the U.S.  
8 Government was doing this with respect to many,  
9 many Indian tribes. I mean, in some ways, the  
10 Creek was unusual because it had had a good  
11 deal more tribal sovereignty than many tribes  
12 had had. But all over the place, the -- the --  
13 the theory of the U.S. Government during this  
14 period was to try to divest Indian tribes of as  
15 many sovereign powers as it could in order to  
16 essentially promote assimilation.

17 So, if we did that, we would have been  
18 thinking about this question in every single  
19 one of our Solem cases because, in every single  
20 one of our Solem cases, much the same history  
21 appears, with the U.S. Government progressively  
22 trying to strip tribes of various kinds of  
23 sovereign powers.

24 There's nothing in particular about  
25 the Creek that makes that history different.

1 MS. BLATT: Justice Kagan, that's just  
2 not true. In every Solem case, it's just  
3 talking about the transfer of land title.  
4 That's the whole point of Solem, is it --

5 JUSTICE KAGAN: That's exactly what  
6 I'm saying. It's --

7 MS. BLATT: Just title.

8 JUSTICE KAGAN: We would have been  
9 talking about the stripping of sovereignty if  
10 we had thought that that was relevant, because  
11 the stripping of sovereignty is there in every  
12 single one of the historic background to these  
13 cases, that the U.S. Government, at the same  
14 time that it was acting with respect to title,  
15 was also acting with respect to tribal  
16 sovereignty and was trying to strip the tribes  
17 of sovereignty.

18 And we have never thought that that  
19 was relevant to the question.

20 MS. BLATT: I mean, you -- you can  
21 read your cases just as well as I can, and I  
22 don't see anything in there that says what you  
23 just said. It's just -- just a --

24 JUSTICE SOTOMAYOR: Well, I do in  
25 Parker.

1 JUSTICE KAGAN: It's exactly what I'm  
2 saying, Ms. Blatt. It's -- it's not in there.  
3 Why isn't it in there?

4 It's not because it didn't happen to  
5 every single one of these tribes. It's not in  
6 there because we have never thought that the  
7 U.S. Government stripping a tribe of  
8 governmental powers was relevant to the  
9 question of whether a reservation existed.

10 MS. BLATT: I mean, I think this is  
11 semantics. Under your view -- I just don't  
12 know what you mean by "reservation."

13 JUSTICE ALITO: Well, in those cases,  
14 was there ever -- in those cases, was there an  
15 issue about the disestablishment of the tribe?  
16 Was there an issue about the extinction of  
17 sovereign power of the tribe in toto?

18 MS. BLATT: No. And -- and in  
19 Nebraska versus Parker, what the court said is  
20 that the problem, if you're going to have  
21 cession, what that means is to dissolve tribal  
22 governance. In Solem, it said you have to  
23 divest the tribe of its interest in the land.

24 In no case, I mean, you go through  
25 pages and pages of history, in no case do they

1 abolish tribal taxes, abolish tribal court,  
2 render tribal law enforceable, seize every  
3 scrap of paper, books, record, money, schools,  
4 furniture and property.

5 I mean, I'm not an Indian law expert,  
6 but I've never seen that happen. Oklahoma is  
7 unique. The whole point of taking every act of  
8 sovereignty --

9 JUSTICE SOTOMAYOR: I'm sorry, but if  
10 they did that, then allotment should account  
11 for that, because the tribe was totally absent  
12 with respect to every one of those features for  
13 over 100 years in the area it was claiming.

14 MS. BLATT: So in --

15 JUSTICE SOTOMAYOR: And despite that,  
16 the court didn't say that that was a cessation  
17 of the tribe with respect to that area. They  
18 didn't tie it in the way you're saying. They  
19 didn't look at whether there was a lack of  
20 sovereignty because the tribe had ceded its  
21 responsibilities in some way.

22 MS. BLATT: Sure. You're right, the  
23 tribe was absent, but what was not true in  
24 Nebraska versus Parker is that there is express  
25 abrogation of territorial sovereignty. It's



1 just that the tribe wasn't exercising it.

2 Here -- and let me just talk if I  
3 could about the express --

4 JUSTICE SOTOMAYOR: How could you say  
5 that? That's what they were claiming. They  
6 got out of the area. That's what the --

7 MS. BLATT: Not -- Congress --

8 JUSTICE SOTOMAYOR: -- other side was  
9 claiming. They got out of the area for 100  
10 years.

11 MS. BLATT: For the Cheyenne River  
12 Sioux in Solem, for the Omaha tribe in  
13 Nebraska, there's not a statute that takes away  
14 the territorial sovereignty. There's just a  
15 statute that severed the land title.

16 So what you have is non -- I mean,  
17 every single reservation case you've ever had,  
18 the only point of a reservation is that the  
19 tribe or the federal government can have some  
20 ousting of state jurisdiction.

21 Here, let me just talk about the  
22 express transfers. This is an express  
23 provision of the Enabling Act that took all  
24 criminal cases involving Indians and ordered  
25 their transfer into state court. And --

1           JUSTICE BREYER: That was wrong. I  
2 give you that point, and it was pending cases,  
3 but the -- the part that you said before, I  
4 mean, I agree with you that -- that the ball is  
5 in tribal courts. I agree with you. They did.

6           The second thing, though, I'm not sure  
7 because, in 1901, the 1901 allotment agreement,  
8 according to my law clerk, what she says is it  
9 -- for -- it -- it restricted but did not  
10 eliminate the authority of the Creek National  
11 Council to pass legislation "affecting the  
12 lands of the tribe or of individuals after  
13 allotment or the moneys or other property of  
14 the tribe or the citizens thereof," the  
15 President had to approve that.

16           Well, that doesn't get rid of it. The  
17 next sentence seems to because it says the  
18 Creek government's going to be dissolved in  
19 1906. But, in 1906, they changed it, and they  
20 said the tribal -- they still continue in full  
21 force and effect. Okay?

22           So what we have in practice is the  
23 President can limit the -- why say no -- what  
24 the tribal council does, but it doesn't. That  
25 doesn't sound like to me abolishing the tribal

1 government.

2 MS. BLATT: They --

3 JUSTICE BREYER: Now you're also right  
4 on the last part. They should have given the  
5 authority on pending cases to a federal court,  
6 not to state courts. So -- and they should  
7 have because of the Indian -- whatever it was.  
8 Okay. So you are right on that.

9 MS. BLATT: But they didn't want to.

10 JUSTICE BREYER: What?

11 MS. BLATT: When you say they should  
12 have, you're just -- you're --

13 JUSTICE BREYER: No, no, no, if you  
14 are wrong, they should have.

15 MS. BLATT: Right.

16 JUSTICE BREYER: Yeah.

17 MS. BLATT: And then, for the last 111  
18 years, there have been tens of thousands of  
19 cases that have been in state court. But --

20 JUSTICE BREYER: All right. I would  
21 say the question there is, is that a big deal?  
22 Is it a big deal that they, in fact, should  
23 have taken pending tribal cases and given them  
24 to federal courts and they didn't?

25 MS. BLATT: Well, it was --

1 JUSTICE BREYER: They gave them to  
2 state courts. Now, if that's the only thing,  
3 it's pretty hard for me to say that that's any  
4 kind of express --

5 MS. BLATT: Well --

6 JUSTICE BREYER: -- abrogation of the  
7 power of the tribe to legislate or carry on  
8 other governmental-type activities.

9 MS. BLATT: So the tribe could not  
10 exercise a single power. They could certainly  
11 elect a new chief and meet for 30 days at a  
12 time. But so what?

13 What they couldn't do is exercise any  
14 function that signified a reservation.

15 In order to have a reservation --

16 JUSTICE BREYER: What about "affecting  
17 the lands of the tribe or of individuals after  
18 allotment or the moneys or other property of  
19 the tribe"? What about that?

20 MS. BLATT: Justice Breyer --

21 JUSTICE BREYER: They can do it, but  
22 it's subject to the President.

23 MS. BLATT: No, in 1906, you're  
24 reading from 1901 --

25 JUSTICE BREYER: Yeah.

1 MS. BLATT: -- every piece of paper,  
2 record, book, dollar bill or coin or property,  
3 their buildings, their furniture, their desks,  
4 everything was taken away from the tribes.

5 So I don't know how they could be  
6 doing anything. Their taxes were abolished.  
7 Their tribal law was rendered unenforceable.  
8 Every single federal court, tribal chief,  
9 tribal lawyer, members of Congress, Oklahoma  
10 historians, and the popular press recognized  
11 that the only authority they had was to  
12 equalize allotments with the money and sign  
13 deeds.

14 JUSTICE BREYER: But what about 1906,  
15 they say "the tribal existence and present  
16 tribal governments of the Five Tribes are  
17 hereby continued in full force and effect for  
18 all purposes authorized by law unless otherwise  
19 provided by law." That does not sound like an  
20 abrogation.

21 MS. BLATT: If -- if -- the Act is  
22 entitled Final Disposition. In the same act I  
23 just read to you, there's at least seven  
24 provisions stripping them of every authority  
25 they had left.

1           In your view, I do concede that they  
2 could meet and elect tribal chiefs, and that is  
3 it.

4           JUSTICE KAGAN: But, Ms. Blatt, what  
5 you're suggesting is that the idea of a  
6 reservation is -- is -- is -- is always and  
7 necessarily linked to full tribal authority  
8 over that land. And that has just never been  
9 the case.

10           In many instances, with respect to  
11 many tribes, the idea of a reservation was --  
12 was viewed as perfectly consistent with U.S.  
13 Government control over that land.

14           And so -- and that's why we've never  
15 thought that where it's sort of measuring  
16 tribal power. What we've always thought is  
17 that what we're trying to figure out was  
18 whether there was ever any a time when this  
19 reservation, whether the Indians exercised  
20 power over it or whether the U.S. Government  
21 exercised power over it or whether it was  
22 something in between, whether that reservation  
23 was ceded to the public domain, was given up.

24           And that's what Solem emphasizes. And  
25 that it seems is -- is missing from your

1 analysis.

2 MS. BLATT: Justice Kagan, I would  
3 concede that you have a reservation with any  
4 tribal power, not full tribal power or some  
5 federal power that displaced state power, but  
6 here it's a null set.

7 It's fine, there is no such  
8 reservation, but you could have a reservation  
9 where just the federal government can control  
10 non-Indian-owned fee land.

11 But any -- I'll take any act of tribal  
12 sovereignty that the tribe could exercise over  
13 the non-Indian-owned fee land and non-tribal  
14 member, and they don't even have it over the  
15 tribal members because they had none.

16 JUSTICE KAGAN: Okay. Could I --  
17 could I just go to what I thought cession was  
18 about -- Solem was about, which is about this  
19 idea of -- of cession.

20 So, as I understand the history, you  
21 have this 1893 act and it establishes the Dawes  
22 Commission, and it very clearly says, look,  
23 there are two alternatives here: You can  
24 either get cession of the land, or you can do  
25 allotment of the land and go figure it out.

1           And the Dawes Commission goes and it  
2 actually tries to get the Indians to cede the  
3 land and says we want cession, cession is  
4 easier, cession is -- is better, from the U.S.  
5 Government's point of view, and for whatever  
6 reason, they think that they need tribal  
7 consent and the tribes aren't giving that  
8 consent, and so the Commission comes back and  
9 they say: No, we're not going to get cession.  
10 We're only going to get allotment.

11           And, indeed, that was what happened.  
12 They got allotment, not cession, which is what  
13 makes all the difference under Solem and  
14 Solem's progeny, isn't it?

15           MS. BLATT: No. Remember, Solem was  
16 not on the books until 80 years after Oklahoma  
17 became a state. And --

18           JUSTICE KAGAN: Well, Solem wasn't on  
19 the books until long after all of the cases  
20 that Solem --

21           MS. BLATT: Exactly.

22           JUSTICE KAGAN: But -- but what Solem  
23 makes relevant is, when we look back to those  
24 periods, we ask about was it cession or was it  
25 something short of cession, meaning allotment?



1 MS. BLATT: And Congress did the same  
2 when they had allotment plus dissolution.

3 Can I reserve the remainder of my  
4 time?

5 CHIEF JUSTICE ROBERTS: Certainly.  
6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER  
8 FOR THE UNITED STATES, AS AMICUS  
9 CURIAE, SUPPORTING THE PETITIONER

10 MR. KNEEDLER: Mr. Chief Justice, and  
11 may it please the Court:

12 What Congress did in the statutes at  
13 issue here is fundamentally different from what  
14 it did in the line of cases involving Solem.  
15 What Congress was doing here was transform --  
16 transforming a territory to a state. And in  
17 order to do that, Congress broke up the  
18 national domain of the tribes. They had been  
19 independent nations, and it was a territory,  
20 the tribal domain was the territorial domain.

21 Congress, as it always does in  
22 transforming a territory to a state, changed  
23 the territorial domain from here the tribes to  
24 the state. And then it vested the governmental  
25 authority over that domain in the state because

1 that domain had become the states, the general  
2 governmental authority.

3 And it did that with respect to  
4 Indians and non-Indians alike, as the history  
5 that -- that preceded it shows. Beginning in  
6 1897, Congress extended the laws of Arkansas to  
7 everyone in the Indian territory, irrespective  
8 of race, and gave the Indian territorial courts  
9 exclusive jurisdiction over all cases.

10 The next year, it abolished tribal  
11 courts and said that their laws could not be  
12 enforced in the law -- in the courts of the  
13 Indian territory.

14 And in 1904, immediately before  
15 statehood, Congress once again subjected  
16 Indians and non-Indians alike to incorporated  
17 state law. That is fundamentally inconsistent  
18 with the proposition that immediately after  
19 statehood, all of a sudden, Indians and  
20 non-Indians were to be treated differently in  
21 -- in -- in -- in the new state.

22 And, in fact, we know that wasn't true  
23 because Congress provided in the statehood act  
24 for the transfer from the Indian territorial  
25 courts to the state courts of all --

1 JUSTICE SOTOMAYOR: What's so  
2 interesting --

3 MR. KNEEDLER: -- all crimes of a  
4 local nature.

5 JUSTICE SOTOMAYOR: Mr. Kneedler,  
6 what's so interesting about that transfer is  
7 that, in 1906, the Enabling Act does say  
8 transfer, but in 1907, the Enabling Act  
9 amendment makes clear that the transfer is only  
10 of criminal cases.

11 And your opponent says that -- and if  
12 you read it, they're right -- that federal  
13 question issues were supposed to remain in the  
14 federal courts.

15 Now they didn't. The functionaries  
16 transferred all criminal cases even involving  
17 Indians on Indians to the state courts. But  
18 how do we know what Congress intended, except  
19 by its words?

20 MR. KNEEDLER: Well, by it -- by  
21 its --

22 JUSTICE SOTOMAYOR: And by its words,  
23 it said all federal question cases, which  
24 include major crime act cases, should stay in  
25 federal court. How do we read into what the

1       functionaries did in the court systems into  
2       what Congress's intent was?

3               MR. KNEEDLER:  With all respect, I  
4       don't think it's fair to say functionaries.  
5       These were courts -- excuse me -- courts that  
6       transferred the cases.

7               JUSTICE SOTOMAYOR:  Courts are not  
8       Congress.

9               MR. KNEEDLER:  I understand that, but  
10       -- but these were courts that were  
11       contemporaneously interpreting the statute that  
12       Congress --

13              JUSTICE SOTOMAYOR:  But the problem is  
14       that Congress, when it did speak, basically  
15       said we're not going to end tribal sovereignty.  
16       So the -- the Congress, exactly around this  
17       same time period, basically says, we're not  
18       going to disenfranchise the tribes.  We're  
19       going to keep them alive.

20              MR. KNEEDLER:  The -- the question in  
21       this case is tribal authority -- is actually  
22       federal and state authority over lands in which  
23       there is no tribal interest at all.

24              We -- we assume for present  
25       purposes --

1 JUSTICE SOTOMAYOR: Well, there was  
2 tribal interests there. The lands were still  
3 allotted to Indians.

4 MR. KNEEDLER: Yes. But -- but once  
5 they were -- once they were allotted, there is  
6 -- and -- and -- and passed out of Indian  
7 ownership or at least passed out of restricted  
8 status, they were like all other lands in the  
9 -- in the state. And referring to the language  
10 that Justice Breyer quoted, he referred to  
11 tribal ordinances affecting tribal lands and --  
12 and the lands of individuals. Those are not  
13 the allotted -- the allotted lands that have  
14 passed out of tribal ownership.

15 Today, there is -- less than 5 percent  
16 of the land in the Creek Nation is now  
17 restricted or trust property. The rest of it  
18 has all passed out of Indian ownership --

19 JUSTICE ALITO: Mr. Kneedler, could  
20 you say --

21 MR. KNEEDLER: -- as Congress  
22 intended.

23 JUSTICE ALITO: I'm sorry. Could you  
24 say something about the practical effects of  
25 the Tenth Circuit's decision on federal law

1 enforcement and the federal judiciary in  
2 eastern Oklahoma?

3 MR. KNEEDLER: Yes, it -- it would be  
4 -- it would be dramatic. It would -- it would  
5 transfer -- and we assume this would apply to  
6 all of eastern Oklahoma, not just the Creek  
7 Nation. All of eastern Oklahoma -- any crime  
8 involving an Indian as a victim or a  
9 perpetrator would be subject to federal  
10 jurisdiction, not state jurisdiction, and there  
11 -- there are not the -- the FBI resources, the  
12 -- the -- the U.S. Attorney resources, the  
13 other resources. It would also call into  
14 question a number of convictions that have been  
15 obtained under -- under state law over -- over  
16 the intervening years.

17 But -- and beyond law enforcement,  
18 under this Court's decisions in Sac and Fox and  
19 -- and Chickasaw, the Indians could not be  
20 taxed by the state in the entire area of the  
21 former reservation of -- income tax, if they  
22 earned it there, they couldn't be imposed a  
23 sales tax.

24 This would be a dramatic change from  
25 the -- from the way everyone has understood it

1 for the past 100 years.

2 JUSTICE ALITO: And what is the --  
3 what would be the definition of an Indian for  
4 these purposes?

5 MR. KNEEDLER: I -- I think an Indian  
6 would be any tribal -- at least any tribal  
7 member. For criminal jurisdiction, you don't  
8 actually have to be a tribal member. Being  
9 eligible for tribal membership is sufficient.  
10 Something like 10 percent, I think, of the  
11 population of 1.8 million in this area,  
12 including the City of Tulsa, is -- is in this  
13 area. And that would be -- there's no  
14 reservation like that in the country.

15 And after 110 years of everyone  
16 agreeing with this Court's decision in Hendrix,  
17 as we point out in our brief, shortly after --  
18 after statehood, involved a special  
19 jurisdictional statute, but the underlying  
20 premise was that a case involving an Indian  
21 otherwise would have been transferred to the  
22 state. No one questioned that.

23 JUSTICE SOTOMAYOR: All of those  
24 things can be changed by Congress, can't they?

25 MR. KNEEDLER: They --

1 JUSTICE SOTOMAYOR: Congress has the  
2 plenary power to take -- to give or take.

3 MR. KNEEDLER: Well, with respect to  
4 retroactive effects on existing convictions,  
5 there would be a serious question as to whether  
6 -- and that's no small matter. There could be  
7 several thousand convictions, as I understand  
8 it, in state court that might be -- that might  
9 be called into -- into -- into question.

10 But if I could go back and just  
11 explain why -- why this is so different from  
12 the -- from the Solem line of cases. If you  
13 look between -- beginning in 1893, Congress  
14 believed that it had to break up the national  
15 domain of these Indian nations in order to have  
16 a state. The two went hand in hand. So  
17 breaking up the national domain, which now  
18 includes a whole lot of --

19 JUSTICE SOTOMAYOR: No. It made -- it  
20 made breaking up the ownership of land.

21 MR. KNEEDLER: But it -- it was --

22 JUSTICE SOTOMAYOR: And it -- and it  
23 accomplished that with the allotment.

24 MR. KNEEDLER: It was more than that  
25 because the tribes in their treaties were given



1     this -- these as permanent homelands, which was  
2     both governmental and property. Congress  
3     believed it had to break up those, that  
4     national domain and the national sovereignty,  
5     and transfer it to the state in order to have a  
6     state.

7                     And in the meantime, Congress --

8                     JUSTICE KAGAN: Well, but the question  
9     is, Mr. Kneedler, did Congress, in fact, do  
10    that? Did Congress, in fact, decide that that  
11    was essential to statehood, or did it do  
12    something less? Did it -- did it decide that  
13    it could make do with something that was short  
14    of the cession of lands that we've required in  
15    these cases?

16                    MR. KNEEDLER: Well --

17                    JUSTICE KAGAN: So if I could just go  
18    back to the question that I ended with Ms.  
19    Blatt on, I mean, it seems here Congress is  
20    very clear about we have two pathways and we'd  
21    prefer cession. And then the Dawes Commission  
22    comes back and says we prefer cession too, but  
23    we're not getting cession; we're only getting  
24    allotment.

25                    And -- and that is exactly the

1 distinction that our cases have deemed relevant  
2 when it's come to looking as to whether there's  
3 the kind of transfer of land that -- that  
4 destroys a reservation.

5 MR. KNEEDLER: If I -- if I may,  
6 there's nothing in the Draw -- in the Dawes Act  
7 that said Congress preferred one over the  
8 other. It --

9 JUSTICE KAGAN: Yeah, it said that  
10 there are two pathways. And then the -- the  
11 Dawes Commission --

12 MR. KNEEDLER: The Dawes Act --

13 JUSTICE KAGAN: -- says it's really  
14 simpler to do cession, we wish we could do  
15 cession, we can't do cession.

16 MR. KNEEDLER: It's simpler, but that  
17 has nothing to do with jurisdictional  
18 authority. On page 79a, the Dawes Act in  
19 relevant part is set out. It commanded the  
20 commission, either by cession or allotment, to  
21 -- to do what it did to enable the ultimate  
22 creation of a state in -- in the area. So  
23 Congress saw --

24 JUSTICE KAGAN: It's agreed. Agreed.  
25 They thought that -- you could get a state

1 either way. Cession was not necessary for a  
2 state. It was preferable for a state, but it  
3 wasn't necessary.

4 And the Dawes Commission comes back  
5 and says we can't do cession; we're going for  
6 allotment.

7 They got their state anyway. What  
8 they did not do was to destroy the reservation  
9 in the way that Solem and all those cases that  
10 we've decided, and we've decided lots of them,  
11 have -- have indicated is necessary to cede --

12 MR. KNEEDLER: I --

13 JUSTICE KAGAN: -- before we say that  
14 a reservation --

15 MR. KNEEDLER: I --

16 JUSTICE KAGAN: -- doesn't exist  
17 anymore.

18 MR. KNEEDLER: I respectfully disagree  
19 because what they did was they broke up the  
20 nation, which was the -- and allotted it to  
21 individual members. There were already at the  
22 time of statehood 700,000 non-Indians living in  
23 this area and I think only maybe 70,000  
24 Indians. It was overwhelmingly non-Indian at  
25 the time.

1           Congress -- and Congress had become  
2 very dissatisfied with tribal government over  
3 that area. That was the very reason that it  
4 prohibited the enforcement of tribal ordinances  
5 and gave all jurisdiction to the territorial  
6 courts.

7           It's fundamentally inconsistent with  
8 that to think that upon statehood, Congress all  
9 of a sudden wanted the -- or not all of a  
10 sudden -- wanted to continue tribal sovereignty  
11 that did not exist.

12           Congress had already taken away the  
13 governmental or sovereign part that is tied  
14 to -- that is tied to cession in those other  
15 statutes.

16           JUSTICE GINSBURG: Mr. Kneedler,  
17 before you sit down, you said very quickly the  
18 ramifications of the court of appeals decision  
19 in areas other than criminal jurisdiction. You  
20 mentioned tax, I think. Can you -- can you  
21 state again what is the effect of this decision  
22 on areas other than state versus federal  
23 jurisdiction?

24           MR. KNEEDLER: Under this Court's  
25 cases, a -- a tribal member cannot be taxed,

1 for example, for sales tax, cigarette tax,  
2 gasoline tax, where the incidence is on a  
3 tribal member anywhere in -- within a  
4 reservation.

5 And a tribal member cannot be assessed  
6 state income tax at least where he resides and  
7 works on the reservation. And given the size  
8 of these territories, that could be quite a  
9 number of people.

10 The -- the liquor ordinance that was  
11 at issue in -- in Parker requires tribal  
12 consent to the sale of liquor on a reservation.  
13 I imagine that would apply to any bar or any  
14 liquor establishment that -- that may be in all  
15 of eastern Oklahoma.

16 So -- and -- and, again, 10 percent of  
17 the population is -- is Indian. So the  
18 criminal jurisdiction concerns are -- are  
19 really very serious, and the United States is  
20 very concerned about what would be a drastic  
21 shift in criminal jurisdiction.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Mr. Gershengorn.

25

1 ORAL ARGUMENT OF IAN H. GERSHENGORN  
2 ON BEHALF OF THE RESPONDENT

3 MR. GERSHENGORN: Mr. Chief Justice,  
4 and may it please the Court:

5 Justice Thomas's opinion in Parker  
6 from just three terms ago requires that the  
7 Tenth Circuit decision be affirmed.

8 Parker confirmed that the text is what  
9 governs, and the text here is particularly  
10 clear.

11 Congress considered hallmark language  
12 that would have disestablished the reservation  
13 and Congress rejected it. So, in 1901,  
14 Congress initially sought cession, and when the  
15 Creeks refused to cede their land to the United  
16 States, Congress instead enacted text that  
17 instead went for only allotment.

18 And in 1906, when Congressional  
19 inaction would have dissolved the tribe and  
20 disestablished the reservation, Congress  
21 instead enacted text that preserved the tribal  
22 government for all purposes authorized by law,  
23 and it did so precisely to prevent the land  
24 from going into the public domain.

25 JUSTICE ALITO: Is it your position

1 that there's certain magic words that have to  
2 appear in statutes?

3 MR. GERSHENGORN: Absolutely not, Your  
4 Honor. So our position is not that there be  
5 magic words but that the words be clear. But  
6 our particular point here is not the absence of  
7 words but that Congress specifically rejected  
8 the magic words that this Court has identified.

9 JUSTICE BREYER: But I think that I  
10 just quoted the very thing you did, which is  
11 from the 1906 Five Tribes Act.

12 MR. GERSHENGORN: Uh-huh.

13 JUSTICE BREYER: Okay. But Ms. Blatt  
14 said, well, if you read the whole Act, which I  
15 confess I haven't, you will see that in that  
16 Act they removed, having previously removed all  
17 the courts, they removed the power to legislate  
18 anything, except perhaps electing a chief.

19 Now, if that is so, is that so? And  
20 that would be my first part.

21 MR. GERSHENGORN: No.

22 JUSTICE BREYER: That is not so. So,  
23 when I read this, I will discover that even  
24 after 1906, when it says the tribal existence  
25 and present tribal governments are hereby

1 continued in full force and effect for all  
2 purposes authorized by law, that that has  
3 content.

4 MR. GERSHENGORN: So, Your Honor --

5 JUSTICE BREYER: So what is the  
6 content?

7 MR. GERSHENGORN: So I want to be very  
8 clear that we're talking about on the  
9 Congressional text. The points Your Honor made  
10 earlier is exactly correct, that Section 42 of  
11 the 1901 allotment act preserved Creek  
12 legislative power over in any manner affecting  
13 the lands of the tribes or of individuals after  
14 allotment. So that preserved presidential  
15 power -- legislative power subject to the  
16 presidential veto.

17 In Section 28, what Congress did was  
18 exactly what Your Honor said. It -- the tribal  
19 existence and present tribal government are  
20 hereby continued in full force and effect for  
21 all purposes authorized by law.

22 So what the text does --

23 JUSTICE BREYER: And what were those?  
24 Because 1901 is followed by 1906, and I  
25 believe, though I don't want to put words in



1 her mouth, I believe that Ms. Blatt said, if I  
2 read earlier in the 1906 Act, what I will find  
3 is lots of provisions that suggest they're  
4 simply winding up affairs, and the purpose of  
5 the government is to wind up affairs and then  
6 perhaps continue to elect a chief.

7 MR. GERSHENGORN: So, Your Honor --

8 JUSTICE BREYER: That's what I'm  
9 interested in your view.

10 MR. GERSHENGORN: Yes. So, Your  
11 Honor, that's pure ipse dixit. That's not what  
12 the text says. And what's critical here is  
13 that Congress had done that wind-up authority.  
14 In the 1906 joint resolution that's cited in  
15 our brief, Congress had preserved tribal  
16 authority until all of the allotments had been  
17 made and the deeds had been sent out.

18 What Congress did in the 19 -- in the  
19 Five Tribes Act was something very different.  
20 Congress added Section 28, which preserved the  
21 tribe for all purposes authorized by law.

22 In -- and it's critical when you think  
23 about how this was implemented, as opposed to  
24 the text, that the United States opposed that.  
25 So Congress implemented Section 20 -- I'm

1       sorry, the United States, the Executive Branch  
2       opposed that.

3                 Congress implemented Section 28,  
4       preserving the tribal authority, over the  
5       objection of the Secretary --

6                 JUSTICE SOTOMAYOR:   Could you tell me  
7       what --

8                 MR. GERSHENGORN:   -- and over the  
9       objection of the Executive Branch.

10                JUSTICE SOTOMAYOR:   Could you tell me  
11       what remained?

12                MR. GERSHENGORN:   Yeah.   So, Your  
13       Honor, I just -- what remained is the ability  
14       to legislate over the land.

15                Now it was dependent on the Secretary  
16       approving it and it was dependent on the  
17       President approving it.

18                So Executive Branch hostility was a  
19       problem.   But, in the wake of the Act, there  
20       were a number of legislative actions that the  
21       tribe took.   It abolished tribal offices.   It  
22       created the office of executive interpreter and  
23       funded it.

24                These were legislative acts that went  
25       to the Secretary --

1 CHIEF JUSTICE ROBERTS: That's --  
2 that's the best you've -- that's the best  
3 you've got?

4 MR. GERSHENGORN: So, Your Honor, I --  
5 there is no doubt that the -- in practice, on  
6 the ground, the legislative power of the tribe  
7 was greatly reduced. It was working with an  
8 Executive Branch dedicated to its -- to the  
9 tribal extinction. But that's not what  
10 Congress did. And what this Court has said is  
11 we look to see what Congress did.

12 And the exact purpose --

13 CHIEF JUSTICE ROBERTS: In terms of  
14 the ongoing functioning and relationship, the  
15 best example you have of the tribe's continuing  
16 authority is hiring an interpreter?

17 MR. GERSHENGORN: So, Your Honor, the  
18 -- I just want to be very clear. What the  
19 tribe did was approve appropriations and  
20 payments out. They were going to the Secretary  
21 and to the President. They hired and they  
22 fired.

23 Then, in 1909 and 1914, when Congress  
24 needed to equalize -- equalize allotments, what  
25 Congress did was say: We want to know whether

1 the tribal legislature approves. The tribal  
2 legislature got together and disapproved --  
3 this was in 1909 -- disapproved the  
4 Congressional action.

5 After 1909, it is -- and the same  
6 thing happened in 1914. But I just really want  
7 to step back and -- and distinguish between  
8 what Congress did and what was happening on the  
9 ground, because I think it's really critical.

10 As we detail in our brief, both the  
11 Executive Branch and the state were acting very  
12 much in hostility to the tribe, trying to  
13 eliminate the tribe.

14 And, in fact, what the Harjo Court  
15 said -- I urge the Court to read the Harjo  
16 decision, it's cited in our brief -- was this  
17 was a campaign of bureaucratic imperialism  
18 precisely because the Executive Branch didn't  
19 get its way in Section 28, and, therefore, was  
20 hostile to the tribe.

21 So, in fact, what the tribe was doing  
22 in -- in continuing to legislate was really  
23 critical.

24 Now what -- what Mr. Kneedler was  
25 suggesting was somehow they had to get rid of

1 tribal sovereignty in order for there to be a  
2 state. That's just not true, okay?

3 In 19 -- in 1790, in Tennessee,  
4 three-quarters of the state was reservation.  
5 When South Dakota came into the union,  
6 47 percent of South Dakota was reservation.  
7 And when Arizona came in, 24 percent was  
8 reservation.

9 So the idea that you had to eliminate  
10 a reservation is not correct. And, in fact --

11 JUSTICE BREYER: That is correct. But  
12 I wish at some point you would go back to  
13 Justice Alito's question.

14 There are 1.8 million people living in  
15 this area. They have built their lives not  
16 necessarily on criminal law but on municipal  
17 regulations, property law, dog-related law,  
18 thousands of details.

19 And now, if we say really this land,  
20 if that's the holding, belongs to the tribe,  
21 what happens to all those people? What happens  
22 to all those laws?

23 Should we -- for example, were we to  
24 decide this -- I'm not saying one way or the  
25 other -- do what the court did in Marathon and

1 say Congress has a certain number of months  
2 before the -- our holding goes into effect, so  
3 you can try to work out whatever compromises  
4 are necessary with the state and with the feds  
5 and with the tribe? Should we just leave it  
6 all to the Tenth Circuit? What would you do?

7 MR. GERSHENGORN: So, Your Honor, I --  
8 I understand the point. And my overall answer,  
9 which I will then provide more details, my  
10 overall answer is the state's concerns are  
11 dramatically overstated, but, in any event,  
12 this Court has doctrines designed to address  
13 it, and what Parker made clear is that's not  
14 part of the disestablishment analysis. That's  
15 separate under a Sherrill analysis.

16 But let me address just point blank  
17 all the kinds of concerns. Let me start with  
18 criminal jurisdiction.

19 So, with respect to completed criminal  
20 cases, the Tenth Circuit has already held in a  
21 case called In Re Brown that you can't bring a  
22 Murphy claim in a second or successive habeas  
23 and presumably can't bring it after the  
24 one-year mark. The Second -- Tenth Circuit has  
25 already held that.

1           In the state already completed  
2       convictions, we don't know what the state would  
3       do, but the state has a laches doctrine. The  
4       state hasn't tried to apply that yet.

5           With respect to --

6           CHIEF JUSTICE ROBERTS: Well, just to  
7       pause for a moment --

8           MR. GERSHENGORN: Yes.

9           CHIEF JUSTICE ROBERTS: -- obviously,  
10      the Tenth Circuit decision hasn't been looked  
11      at by us. What we're talking about, people who  
12      were convicted of murder and sentenced to life  
13      by somebody who had no authority to prosecute  
14      them.

15           That's a matter or should be a matter  
16      of some concern to the government, don't you  
17      think?

18           MR. GERSHENGORN: So, Your Honor, I --  
19      it is a concern and as are habeas rules, which  
20      this Court has repeatedly upheld, and as I say,  
21      the Tenth Circuit has addressed this question  
22      squarely and said that the cases -- the cases  
23      cannot be brought in a second or successive  
24      habeas petition.

25           Going forward, Mr. Kneedler identified

1 the burdens on the government. I will say that  
2 at the Tenth Circuit, the government said there  
3 would be 2,000 cases a year that they had to  
4 deal with. Then, in the opt to this Court,  
5 they said 500 cases a year. And then, in the  
6 merits brief to this Court, there was no  
7 discussion at all of any case numbers.

8 So I -- I view that with some degree  
9 of skepticism. There is no doubt there will be  
10 a transfer of resources. There is also no  
11 doubt that the federal government --

12 JUSTICE BREYER: What about --

13 MR. GERSHENGORN: -- has a lot of  
14 resources.

15 JUSTICE BREYER: My question is really  
16 --

17 MR. GERSHENGORN: So, on the civil  
18 side, Justice Breyer --

19 JUSTICE BREYER: Yes.

20 MR. GERSHENGORN: -- which I  
21 understand is -- is your concern, I found it  
22 interesting that you asked -- that Justice  
23 Alito asked Mr. Kneedler what the impact would  
24 be, and the thing he identified, which we agree  
25 with, is that there will be limits on state



1 authority over income tax and sales tax of  
2 tribal members on the reservation.

3 I would agree that's significant. I  
4 would not call it existential. And in any  
5 event, this Court has authority under the  
6 Sherrill doctrine and certainly Congress has  
7 authority to change that.

8 Stepping back, this Court's cases in  
9 -- in cases like Plains Commerce Bank and the  
10 whole Montana line of cases have drastically  
11 limited tribal authority over non-member,  
12 non-fee land, even within a reservation. And  
13 --

14 CHIEF JUSTICE ROBERTS: But just to  
15 pause --

16 JUSTICE BREYER: So I'm asking you --  
17 yeah.

18 CHIEF JUSTICE ROBERTS: Go ahead.

19 JUSTICE BREYER: I'm asking you what  
20 -- what you would do if you were me if you  
21 thought on all the doctrinal things that you  
22 were right.

23 MR. GERSHENGORN: Right.

24 JUSTICE BREYER: Because imagine you  
25 are a small businessman in Tulsa, and suddenly

1 our Court decision, and all they know is  
2 they're part of the reservation. What I'm  
3 concerned about is they think I have 5,000 laws  
4 already to deal with, infinite numbers of forms  
5 to figure out. What do I do?

6 MR. GERSHENGORN: So, Justice Breyer,  
7 I'd like to make a factual point and then a  
8 "how would I solve it" point if you thought  
9 there was a problem. This Court has already  
10 drastically restricted --

11 JUSTICE BREYER: I'm asking you  
12 whether there's a problem.

13 MR. GERSHENGORN: I -- there is not,  
14 but let me explain why, but then, even if you  
15 disagree why -- what you could do about it, all  
16 right?

17 I don't think there is a problem  
18 because this Court has already -- although the  
19 person may wake up and say, gee, I'm in a  
20 reservation now, in fact, this Court's cases  
21 have already limited tribal authority over  
22 non-members on fee land within a reservation.

23 That is the point of the whole Plains  
24 Commerce line of cases. So although the person  
25 may wake up and say, oh, I'm in a reservation,

1 the answer is your life doesn't change all that  
2 much.

3 But if Your Honor disagreed with that,  
4 what this Court did in Justice Thomas's opinion  
5 in Parker was say we separate the -- the  
6 equitable and remedy -- remedial issues such as  
7 are at issue -- Your Honor's question go to.  
8 We separate those and deal with that through a  
9 separate doctrine called City of Sherrill.

10 And the Court, of course, has that at  
11 its disposal, and the Court could in an  
12 appropriate case or if there was a -- an effort  
13 to exercise authority, the Court could decide  
14 whether that was a problem.

15 So I don't think that the kind of  
16 seismic change that -- that Ms. Blatt  
17 identifies or that Mr. Kneedler alludes to  
18 would exist.

19 CHIEF JUSTICE ROBERTS: Well, just to  
20 pause -- just to pause for a moment, you say  
21 it's not going to be any difference when you  
22 wake up. What if the tribe decides not to  
23 allow the type of business in which you're  
24 engaged, such as alcoholic beverages?

25 MR. GERSHENGORN: So --

1 CHIEF JUSTICE ROBERTS: And you're in  
2 a reservation. Can they say you -- you need a  
3 license from the tribe to sell alcoholic  
4 beverages --

5 MR. GERSHENGORN: So, Your Honor --

6 CHIEF JUSTICE ROBERTS: -- and we're  
7 not going to give you one?

8 MR. GERSHENGORN: -- alcohol --  
9 alcohol has always been separate -- has been  
10 special in Indian lands, and with respect to  
11 alcoholic beverage in particular, there may be  
12 additional -- additional regulation. That  
13 depends on what the court does with Sherrill.

14 With respect to a construction  
15 business operated by a non-member on fee land,  
16 no.

17 CHIEF JUSTICE ROBERTS: What about  
18 when operated by a member?

19 MR. GERSHENGORN: So additional --  
20 yes, there would be additional regulation of a  
21 member on fee land, but that is -- but the  
22 Court has always been --

23 CHIEF JUSTICE ROBERTS: What about  
24 dealings between non-members and members on fee  
25 land?

1           MR. GERSHENGORN: So I don't think  
2 that that's part of -- part of the -- I don't  
3 think that is part of the tribe's regulatory  
4 authority. But the bigger point, Your Honor,  
5 is that this Court addressed this --

6           CHIEF JUSTICE ROBERTS: Well, I guess  
7 just to be -- I don't mean to -- I'm trying to  
8 find -- could -- could the tribe require those  
9 non-members doing business with members on  
10 Indian land to obtain a license to do that?

11          MR. GERSHENGORN: So, Your Honor, I  
12 don't think the answer to that is yes. I don't  
13 think so. But, in any event, this Court  
14 addressed this, all right? This is not new to  
15 the Court. The Court faced this very question  
16 in Parker, right?

17                 In Parker, the tribe, unlike the  
18 Creek, unlike -- the tribe had been absent for  
19 120 years and the -- and then asserted  
20 regulatory authority. And what the Court said  
21 was that is no -- not part of the  
22 disestablishment analysis, right? That's part  
23 of the remedial analysis because that is --  
24 that goes to --

25          CHIEF JUSTICE ROBERTS: Right. That's

1 --

2 MR. GERSHENGORN: -- what should the  
3 consequences on the reservation --

4 CHIEF JUSTICE ROBERTS: -- I  
5 understand that's part of the -- the remedial  
6 issues with respect to a tiny village like  
7 Pender in -- that was at issue in Parker and  
8 with respect to half of Oklahoma are obviously  
9 going to be quite different.

10 MR. GERSHENGORN: I agree that the  
11 remedial issues could be different and -- but  
12 -- although I want to address that a little  
13 more. But the statutory construction issues  
14 are not different. And that really is the  
15 fundamental piece --

16 JUSTICE KAVANAUGH: But, here, you  
17 have --

18 JUSTICE ALITO: There's a fundamental  
19 principle of law that derives from Sherlock  
20 Holmes, which is the dog that didn't bark. And  
21 how can it be that none of this was recognized  
22 by anybody or asserted by the Creek Nation, as  
23 far as I'm aware, for 100 years?

24 MR. GERSHENGORN: So, Your Honor, I --  
25 I don't think that's accurate for a number of

1 reasons. First of all, for the last 40 years  
2 -- when the Creek Nation adopted a constitution  
3 in 1979, they asserted political jurisdiction  
4 to the extent of their 1900 boundaries. And  
5 the Secretary approved that constitution. So  
6 this is not like the situation in Parker where  
7 the tribe was absent for 130 years.

8 JUSTICE ALITO: But I mean as a --

9 MR. GERSHENGORN: The place where  
10 you --

11 JUSTICE ALITO: -- as a practical  
12 matter, have they at any time prior to this  
13 case attempted to do -- to assert any of the  
14 sovereignty that you now claim they possess --

15 MR. GERSHENGORN: So the --

16 JUSTICE ALITO: -- under this vast  
17 territory?

18 MR. GERSHENGORN: So the answer is  
19 yes.

20 JUSTICE ALITO: And where?

21 MR. GERSHENGORN: And so I'll give you  
22 an example. So the tribe currently is engaged  
23 in -- the tribe currently, pursuant -- pursuant  
24 to cross-deputization agreements throughout the  
25 historic boundaries, the 11-county area,

1 exercises arrest authority over Indians and  
2 non-Indians alike. The reason they do that is  
3 because they have entered into agreements that  
4 are premised on the assertion of jurisdiction  
5 throughout the land.

6 In fact, if you were in a car accident  
7 at -- in fee land within the historic  
8 boundaries, you would be driving -- you might  
9 be driving on roads owned and paved by the  
10 tribe, the first responder might be a tribal  
11 police officer, and you might be taken to a  
12 community hospital built and run by the tribe.

13 JUSTICE KAVANAUGH: We have --

14 MR. GERSHENGORN: So this is not a  
15 situation where the -- I'm sorry, Justice  
16 Kavanaugh.

17 JUSTICE KAVANAUGH: Go ahead, finish.

18 MR. GERSHENGORN: No, I -- this is not  
19 a situation where the tribe has been absent.

20 JUSTICE KAVANAUGH: We have a lot of  
21 cases that say historical practice helps inform  
22 the text, and we have these debates about the  
23 text. And I'm not sure I agree with you, given  
24 the abolishment of tribal courts and -- and the  
25 things we've discussed. But even if it were



1     ambiguous on the text, the historical practice  
2     for a century has been against you.

3             And stability is a critical value in  
4     judicial decision-making, and we would be  
5     departing from that and creating a great deal  
6     of turmoil. And so why shouldn't the  
7     historical practice, the contemporaneous  
8     understanding, the 100 years, all the practical  
9     implications say leave well enough alone here?

10            MR. GERSHENGORN: So, Your Honor, I  
11     would like -- I just want to put a footnote  
12     that I'd like to come back to you on the text  
13     because I -- I disagree with your concern about  
14     the courts, and I think it's critical to  
15     address it.

16            But, with respect to your larger  
17     point, I'm not saying the Court needs to ignore  
18     it. And the Court in Parker did not say we  
19     should ignore it. The Court there dealt with  
20     somebody -- with the absence of a statutory --

21            JUSTICE KAVANAUGH: This is  
22     massively --

23            MR. GERSHENGORN: So, Your Honor --

24            JUSTICE KAVANAUGH: The size is  
25     different.

1 MR. GERSHENGORN: Absolutely,  
2 absolutely. Tulsa --

3 JUSTICE KAVANAUGH: The number of  
4 people affected --

5 MR. GERSHENGORN: -- Tulsa is not  
6 Pender, but what I'm suggesting to you is the  
7 question of whether --

8 JUSTICE KAVANAUGH: If this were 1910,  
9 maybe we'd talk about differently, but it's  
10 not.

11 MR. GERSHENGORN: What I'm suggesting  
12 to you, though, is the difference between Tulsa  
13 and Pender comes into the question about what  
14 is the -- what is the -- the sovereign  
15 authority that the tribe gets to exercise? It  
16 is not about the question about whether the  
17 reservation continues to exist.

18 That is a statutory question, and --  
19 although Your Honor is correct that cases have  
20 said history matters. Actually, in Parker,  
21 what the case said was exactly the opposite.  
22 When it comes to disestablishment, history does  
23 not matter. It's a clue at the end.

24 And the reason for that, of course, is  
25 because what you're engaged in is fundamentally

1 an exercise of statutory construction.

2 JUSTICE KAVANAUGH: What you're  
3 looking at is -- okay, you're looking at a  
4 series of statutes here. Look at  
5 contemporaneous understanding, which is against  
6 you. The practice for 100 years, the practical  
7 implications. Trying to remedy this, as  
8 Justice Breyer points out, just seems like a  
9 lot.

10 MR. GERSHENGORN: So I don't think  
11 that the text is against us, Your Honor. I  
12 really think that when you read the cases, what  
13 the cases say is we're looking for language of  
14 cession precisely to distinguish cases where  
15 all that happened was they opened the land to  
16 tribal settlement.

17 JUSTICE KAVANAUGH: It's not a single  
18 piece of text, I'll grant you that, but it's a  
19 series of things that, together, when you look  
20 at the courts, you look at the laws of  
21 Arkansas, the forbidding the enforcement of  
22 tribal law, subjecting tribal members to state  
23 law, the federal courts transfer the  
24 jurisdiction to state courts upon statehood,  
25 it's all these acts together, which is

1 different, in the context of statehood --

2 MR. GERSHENGORN: So two --

3 JUSTICE KAVANAUGH: -- is a major  
4 difference.

5 MR. GERSHENGORN: Yes. Two points on  
6 that, Your Honor. So a lot of the things you  
7 -- you -- you referenced were in the 1901 Act.  
8 It's the -- there's no doubt that the  
9 reservation continued post-1901.

10 JUSTICE KAVANAUGH: Right.

11 MR. GERSHENGORN: And so those things  
12 you're talking about, the courts and others,  
13 those happened, and yet the reservation  
14 continued.

15 Now, with respect to courts in  
16 particular, I -- I forget now which Justice  
17 said it, but the -- maybe it was Justice Kagan  
18 -- the elimination of particular powers, like  
19 the power over the courts and things like that,  
20 it's a misunderstanding, I think, of what it  
21 takes to disestablish -- what -- what  
22 sovereignty -- what reservations are getting at  
23 here.

24 There's no particular sovereign power  
25 that a tribe needed to have. In fact, there --

1 you could see a time, for example, if a state  
2 overran tribal government where the federal  
3 government would take over all three branches  
4 of tribal government because the reservation is  
5 a combination of tribal and federal authority  
6 protecting against state hostility.

7 And so it's a mistake --

8 CHIEF JUSTICE ROBERTS: Does it matter  
9 --

10 MR. GERSHENGORN: I'm sorry, Your  
11 Honor.

12 CHIEF JUSTICE ROBERTS: But does that  
13 take into account the significance of the fact  
14 that the Creek received the land in fee rather  
15 than in trust?

16 Because, once you say the reservation  
17 doesn't matter, well, maybe it doesn't matter  
18 if you -- in -- in a trust relationship, but if  
19 you've already gotten a situation where it's  
20 ownership direct, then maybe the significance  
21 of what you can still actually do as -- as --  
22 not whether they -- what particular powers they  
23 could exercise, but whether they could exercise  
24 any powers, then the fact that you really don't  
25 have a reservation to start with that is like

1 the other reservations in the country, what is  
2 the significance of that distinction?

3 MR. GERSHENGORN: So we think, Your  
4 Honor, that that strengthens our position. We  
5 said it in the briefs. The reason for that is  
6 it's crystal-clear there was a reservation to  
7 start and the fee patent was an additional  
8 boost.

9 Remember, the fee patent is not fee  
10 simple. Of course, they can't sell the land  
11 without -- they can't alienate it. If they  
12 abandon the land or disappear as a tribe, it  
13 reverts to the United States. So it's not a  
14 fee patent in that --

15 CHIEF JUSTICE ROBERTS: But that  
16 changed with respect to the allotments.

17 MR. GERSHENGORN: Yes, Your Honor.  
18 There is no doubt that the reason Congress did  
19 -- the reason they broke up the communal land  
20 ownership and broke up fee patents was to allow  
21 sort of increased sale. They needed to do  
22 that. But that doesn't change the fact that  
23 there was a reservation ahead of time.

24 There was -- it was land set aside for  
25 the use and residents of the tribe. Congress

1 repeatedly referred to it as a reservation.  
2 It's noted in our brief. In the 1866 treaty,  
3 the Creek reservation. In the 1866 Cherokee  
4 treaty, the Creek reservation. In the 1873  
5 statute, "authorizes the Secretary to negotiate  
6 a cession of the Creek reservation."

7 So there was a reservation ahead of  
8 time. That reservation was not disestablished.  
9 Congress chose precisely the words that don't  
10 disestablish when it acted.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Mr. Kanji.

14 ORAL ARGUMENT OF RIYAZ A. KANJI

15 ON BEHALF OF MUSCOGEE (CREEK) NATION

16 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

19 If I may, I would like to address  
20 three things: first, this issue of  
21 consequences; second, to return to the question  
22 of governmental powers; and, finally, to talk a  
23 little bit about contemporary understanding.

24 With respect to consequences, there  
25 will not be turmoil from an affirmance. The

1 Creek Nation wishes to be very clear that  
2 significant practical disruption would result  
3 from disestablishment, not from retention of  
4 the tribe's -- of the recognition of the  
5 reservation.

6 It is true that Tulsa is not Pender,  
7 but Tulsa is not different from Tacoma, the  
8 City of Tacoma, much of which lies within the  
9 Puyallup reservation, or from the millions of  
10 other acres of land which this Court said in  
11 Atkinson, non-Indian fee land, lie within  
12 reservation boundaries.

13 There will not be turmoil because of  
14 three reasons:

15 One, this Court's precedents restrict  
16 tribal power over non-Indians on fee lands  
17 within reservations. Those are restraints that  
18 we understand and respect.

19 Secondly, and conversely, the state  
20 retains plenary authority over non-Indian fee  
21 lands within reservation; plenary authority to  
22 tax and -- and to regulate.

23 And, third -- and Oklahoma, the  
24 history of Oklahoma is not exceptional, but  
25 what is exceptional in Oklahoma is the extent



1 to which the State and the Nations have forged  
2 cooperative agreements that already address  
3 many of these issues.

4 JUSTICE ALITO: Well, suppose an  
5 Indian is charged in -- with having committed a  
6 mugging in Tulsa. What -- where would that  
7 case end up?

8 MR. KANJI: If -- an Indian, Your  
9 Honor?

10 JUSTICE ALITO: Yeah.

11 MR. KANJI: That -- well, that case  
12 would end up either being prosecuted by the  
13 federal government or by the Nation itself or  
14 both concurrently.

15 JUSTICE ALITO: Okay. And how many  
16 cases like that do you think there may be?

17 MR. KANJI: Well, the -- as Mr.  
18 Gershengorn said, we have these estimates from  
19 the federal government, which I think were  
20 clearly inflated. There may be 100, 200 a  
21 year, that sort of thing.

22 It's important to --

23 JUSTICE ALITO: Really? There are  
24 only within -- what percentage of the  
25 population of this area would qualify as -- as

1 Indians?

2 MR. KANJI: Of the entire reservation  
3 area, 9 -- about 9 percent, Your Honor.

4 JUSTICE ALITO: Nine percent of -- of  
5 how many people?

6 MR. KANJI: Nine percent of about --  
7 the Creek population is 43,000 within the  
8 reservation.

9 JUSTICE ALITO: Yeah, but all the  
10 Indians -- so this would apply as far as  
11 criminal cases to all Indians, am I right?

12 MR. KANJI: That's correct, Your  
13 Honor.

14 JUSTICE ALITO: And how many would  
15 that be?

16 MR. KANJI: Well, about -- we don't  
17 have exact numbers, but 50- to 60,000 Indians  
18 within the reservation area.

19 JUSTICE ALITO: So, if any of those  
20 individuals was charged with any offense that  
21 would normally be prosecuted in state court,  
22 they would all have to be prosecuted in federal  
23 court?

24 MR. KANJI: Or by the Nation. And I  
25 think it's important to reinforce that the

1 Nation has a robust criminal jurisdiction, has  
2 robust courts, is already prosecuting many  
3 Indians.

4 The Nation also supplies a special  
5 U.S. Attorney to the United States to prosecute  
6 major crimes. That's pursuant to congressional  
7 authorization.

8 It's critical to understand nobody has  
9 a greater interest in law enforcement and  
10 security within the Creek reservation than the  
11 --

12 JUSTICE BREYER: It isn't just that.  
13 What's -- you said something about cooperative  
14 nature. And most of the laws that have been  
15 passed by the Creeks, which were mentioned by  
16 Mr. Gershengorn, were passed pursuant to much  
17 later statutes passed by Congress.

18 And how is there anything we can do to  
19 encourage, require, what, to have the Creek  
20 Nation, the state, and Congress work this out  
21 to see if there are difficulties, and, if so,  
22 resolve them by statute or regulation. You  
23 see, you're asking me something I don't know.  
24 I don't know how much trouble this causes.

25 And the reason there is a picture of

1 Tulsa in the brief, I thought, was to stimulate  
2 me to ask such a question.

3 (Laughter.)

4 MR. KANJI: Exactly. Your Honor, I  
5 think that the simplest answer is that an  
6 affirmance will stimulate exactly that kind of  
7 discussion and agreement.

8 The last time this Court had a case  
9 from Oklahoma involving jurisdiction was the  
10 Chickasaw Nation case in 1995. This Court  
11 ruled in favor of the Chickasaw Nation.  
12 Shortly thereafter, fuel tax agreements were  
13 forged in -- in the wake of that.

14 The same will -- will happen here.  
15 There already are discussions taking place here  
16 about the allocation of jurisdiction. Congress  
17 has provided mechanisms for the allocation of  
18 both criminal and civil jurisdiction.

19 JUSTICE ALITO: Can there --

20 CHIEF JUSTICE ROBERTS: You're talking  
21 about discussions between Congress, the state,  
22 and the Nations?

23 MR. KANJI: Correct, Your Honor.

24 CHIEF JUSTICE ROBERTS: And you think  
25 that'll lead fairly quickly to an agreement

1 that will settle all these disputes?

2 MR. KANJI: I think these -- I think  
3 all sovereigns have an interest, a very common  
4 shared interest, Your Honor, in law  
5 enforcement.

6 The -- the brief of the Oklahoma  
7 officials, I think, evidences that there is a  
8 very close working relationship, in fact, on  
9 the ground between the state, the local units  
10 of government, and -- and the Nation. That  
11 will continue.

12 JUSTICE ALITO: Can there be such a  
13 thing as a reservation that exists as an  
14 abstract matter, but in this territory, the  
15 Nation is able to exercise no sovereign powers  
16 as a practical matter? Is that a possibility?

17 MR. KANJI: It is -- it is, Your  
18 Honor. A reservation, as Justice Kagan said,  
19 when Congress takes any block of land, reserves  
20 it from the public domain, reserves it from  
21 sale, that creates the reservation.

22 Then, in order for that to be returned  
23 to the public domain or to be disestablished,  
24 Congress has to expressly indicate that intent.  
25 There have been not just with -- and I think

1 this is a critical point that Justice Kagan  
2 suggested to -- there have been reservations  
3 around the country over time where Congress has  
4 abrogated tribal powers to the --

5 JUSTICE ALITO: So, if we don't agree  
6 with you on that point, if we think this is a  
7 practical inquiry, can you tell me what  
8 sovereign powers the Nation retained within  
9 this territory after statehood?

10 MR. KANJI: Absolutely, Your Honor.  
11 It retained legislative powers. I think the  
12 1909 Congressional Act that we cite at page 24  
13 of our brief is instructive. There, Congress  
14 was attempting to equalize allotments on the  
15 reservation.

16 It made its efforts contingent upon  
17 approval by the Creek national legislature.  
18 The national legislature refused to give that  
19 consent. So not only did Congress recognize  
20 that the legislature remained in force, but the  
21 legislature had the authority to say no to  
22 Congress, we don't want --

23 JUSTICE ALITO: Could tribal laws --  
24 could tribal laws be enforced at that time  
25 after statehood?

1           MR. KANJI: Yes, Your Honor, just as  
2 before statehood, they were being enforced by  
3 the Secretary. And I think a critical point is  
4 this Court in *Morris v. Hitchcock* and the  
5 Eighth Circuit in *Buster* immediately before  
6 statehood affirmed the Nation's continuing  
7 legislative authority, including with respect  
8 to non-Indians, and said that the secretarial  
9 enforcement mechanism was the mechanism to  
10 enforce the continuing legislative  
11 jurisdiction.

12           JUSTICE KAGAN: Could -- could you say  
13 a little bit more, Mr. Kanji, though, about the  
14 converse proposition, that there, indeed, have  
15 been reservations that everybody has understood  
16 to be reservations historically throughout the  
17 country, where tribal governments exercised  
18 precious little authority?

19           MR. KANJI: Absolutely, Your Honor.  
20 And I'll give you a general and a specific  
21 example.

22           Generally speaking, Congress has told  
23 the tribes over time: You -- your -- your  
24 government will be structured in this fashion.  
25 Your membership will consist of the following.

1 You will allow this mining and these easements  
2 along your land, even if you don't want it.

3 You will allow your children to be  
4 taken away and placed in boarding schools, even  
5 if no parent would want that. Even this -- the  
6 rhetoric about buildings being sold, the Creek  
7 Nation is not the only tribe in this country,  
8 far from the only one, to have run its  
9 government out of churches and house basements  
10 for decades.

11 A specific example is the Metlakatla  
12 reservation in Alaska, the only Indian  
13 reservation in Alaska, as this Court said in --  
14 in the Venetie decision.

15 This -- this Court's decision in Egan  
16 from 1962 indicates the draconian restrictions  
17 that that government was laboring under. It  
18 had no authority to approve anything without  
19 the approval of the local education  
20 commissioner.

21 And yet that was still understood and  
22 is still recognized as an intact Indian  
23 reservation.

24 CHIEF JUSTICE ROBERTS: Counsel --

25 MR. KANJI: Justice Breyer talked



1 about the approval of ordinances by the  
2 President. I think it's instructive today the  
3 Creek Nation does not have a presidential or  
4 secretarial approval requirement.

5 But many tribes in this country do,  
6 including the Omaha Tribe that was the subject  
7 of Parker, the Cheyenne River Tribe that was  
8 the subject of Solem. In both of their  
9 constitutions, there is a requirement that the  
10 United States inserted that the Secretary has  
11 to approve largely any and all of their --  
12 their ordinances.

13 CHIEF JUSTICE ROBERTS: Counsel, would  
14 this expand the reach of the Indian Gaming Act  
15 in the area?

16 MR. KANJI: It would not, Your Honor,  
17 in the sense that there is a compact in place  
18 between the nation and the state already. The  
19 nation has eight gaming operations within --  
20 within the area.

21 JUSTICE BREYER: What about the Oneida  
22 Tribe idea of laches or something like that?

23 MR. KANJI: Well, I think that's --  
24 that was a critical point in Parker, Your  
25 Honor. In Parker, this Court declined to reach

1 the diminishment decision and said we will  
2 apply this laches doctrine to this particular  
3 exercise of power by the -- by the Oneida  
4 Tribe.

5 Here, we don't even have an assertion  
6 of power by the Creek Nation. The Creek Nation  
7 had nothing to do with the genesis of this  
8 litigation.

9 If in future cases we were to assert  
10 our authority in a way that others found  
11 objectionable, they could raise a Sherrill  
12 claim, and that could be adjudicated at the  
13 time.

14 But the important thing is reservation  
15 disestablishment is a binary thing. The state  
16 is asking to snuff out all Creek governmental  
17 powers over this area.

18 As we document in our brief, the  
19 Creeks are doing many things that pose no  
20 affront to the justifiable expectations of  
21 anybody but that, in fact, serve the  
22 expectations of all but hardened criminals.

23 The Creek Lighthouse Force polices the  
24 entire reservation pursuant to these  
25 cross-deputization agreements. The Creek's

1 providing healthcare, education,  
2 infrastructure. And this is all vital, and a  
3 disestablishment would snuff all that out.

4 JUSTICE SOTOMAYOR: Chief --

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 JUSTICE SOTOMAYOR: -- Chief, may I  
8 just ask one question to follow on that?

9 CHIEF JUSTICE ROBERTS: Sure.

10 JUSTICE SOTOMAYOR: Your colleague  
11 also said the same thing, but when you say  
12 they've been policing and doing these things in  
13 the reservation, are you talking about the  
14 entire area in dispute right now?

15 MR. KANJI: Absolutely, Your Honor.  
16 There are -- there are 44 county and municipal  
17 jurisdictions in the Creek Nation Reservation.  
18 The nation has cross-deputization agreements  
19 with 40 of them. So almost the entire area.

20 JUSTICE SOTOMAYOR: And for how long  
21 has this been in effect?

22 MR. KANJI: Those agreements first  
23 started in the year 2000, Your Honor, and  
24 they -- a critical point I'd like to make in  
25 terms of disruption is they are all subject to

1 renewal each and every year.

2 CHIEF JUSTICE ROBERTS: Thank --

3 JUSTICE SOTOMAYOR: And in 1936, the  
4 tribal courts were reignited?

5 MR. KANJI: That's right.

6 JUSTICE SOTOMAYOR: Tribal courts.  
7 And what area did those tribal courts exist in?

8 MR. KANJI: They exercised -- they  
9 likewise exercise jurisdiction over the entire  
10 thing.

11 JUSTICE SOTOMAYOR: Entire  
12 reservation?

13 MR. KANJI: That's correct, Your  
14 Honor.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Two minutes, Ms. Blatt.

18 REBUTTAL ARGUMENT OF LISA S. BLATT

19 ON BEHALF OF THE PETITIONER

20 MS. BLATT: Thank you, Mr. Chief  
21 Justice.

22 Here are the two earth-shattering  
23 consequences that Congress can't fix, Sherrill  
24 can't fix, and this will stimulate you.

25 There are 2,000 prisoners in state

1 court who committed a crime in the former  
2 Indian territory who self-identify as Native  
3 American.

4 This number is grossly under-inclusive  
5 because, if the victim was Native American, the  
6 state court also lacked jurisdiction. That's  
7 155 murderers, 113 rapists, and over 200 felons  
8 who committed crimes against children. Here's  
9 why habeas is not going to help.

10 As -- as Footnote 5 in the Tenth  
11 Circuit's decision says, there are no apparent  
12 procedural bars in state court to lack of  
13 subject matter jurisdiction. The reopening of  
14 any of these cases would re-traumatize the  
15 victims, the families, and the communities.  
16 Nor is it clear that the federal government  
17 could retry any of these cases because the  
18 evidence is too stale or the statute of  
19 limitations has expired, which appears to be  
20 the case in about half of them.

21 Here's the earth-shattering  
22 consequence on the civil side. Under the  
23 Indian Child Welfare Act, any tribe, any  
24 parent, and any child can undo any prior Indian  
25 child welfare custody proceeding if the state

1 court lacked jurisdiction because the Indian  
2 child lived on a reservation.

3 Affirmance raises a specter of tearing  
4 families all across eastern Oklahoma, and  
5 probably beyond, for years and years and years  
6 and years after the fact.

7 ICWA also means -- and I don't see the  
8 tribe agreeing not to enforce ICWA -- ICWA also  
9 means that any Indian child welfare proceeding  
10 must be brought exclusively in tribal court,  
11 even over the parents' objection. That's on  
12 the consequences.

13 On the tribal sovereignty, with all  
14 due respect, I didn't hear an answer. The most  
15 that they said was they disbursed tribal funds.  
16 That is not sovereignty over non-Indian-owned  
17 fee land.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you.

20 JUSTICE ALITO: Well, Ms. Blatt, since  
21 there was an extension for the time on the  
22 other side, could I ask this question?

23 There seems to be a disagreement  
24 between the attorneys here about the authority  
25 of the -- of the nation to enact and enforce

1 laws after statehood. Could you just briefly  
2 address that?

3 MS. BLATT: I mean, that's  
4 preposterous to the extent that it affected  
5 non-Indian-owned fee land, non-tribal members,  
6 or tribal members.

7 Every tribal chief that we cited,  
8 every federal court, every tribal lawyer,  
9 members of Congress, every Oklahoma historian,  
10 and the popular press recognized -- and some of  
11 these are not racist, but they are the foremost  
12 Indian scholars at the time of Oklahoma -- that  
13 the tribal governments had ceased to function.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel. The case is submitted.

17 (Whereupon, at 12:19 p.m., the case  
18 was submitted.)

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