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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 -- 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 are
18 going to terminate all sovereignty by 1906. So
19 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 -- 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 this tribal sovereignty that you say is
5 critical to determine whether dissolution has
6 occurred?

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

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

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

17 MS. BLATT: Absolute no sovereignty.

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

23 JUSTICE KAGAN: No, please.

24 JUSTICE BREYER: There was a tribal
25 legislature and what they said, I guess, in,

1 whenever it was, the Enabling Act, 1906, that
2 the President had to approve it.

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

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

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

12 MS. BLATT: Yeah. So --

13 JUSTICE BREYER: What?

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

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

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

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

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

25 There's nothing in particular about

1 the Creek that makes that history different.

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

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

8 MS. BLATT: Just title.

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

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

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

25 JUSTICE SOTOMAYOR: Well, I do in

1 Parker.

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

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

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

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

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

25 In no case, I mean, you go through

1 pages and pages of history, in no case do they
2 abolish tribal taxes, abolish tribal court,
3 render tribal law enforceable, seize every
4 scrap of paper, books, record, money, schools,
5 furniture and property.

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

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

15 MS. BLATT: So in --

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

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

1 abrogation of territorial sovereignty. It's
2 just that the tribe wasn't exercising it.

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

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

8 MS. BLATT: Not -- congress --

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

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

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

22 Here, let me just talk about the
23 express transfers. This is an express
24 provision of the Enabling Act that took all
25 criminal cases involving Indians and ordered

1 their transfer into state court. And --

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

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

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

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

1 doesn't sound like to me abolishing the tribal
2 government.

3 MS. BLATT: They --

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

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

11 JUSTICE BREYER: What?

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

14 JUSTICE BREYER: No, no, no, if you
15 were wrong, they should have.

16 MS. BLATT: Right. And then, for the
17 last 111 years, there have been tens of
18 thousands of cases that have been in state
19 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 abrogation of the power of the
5 tribe to legislate or carry on other
6 governmental type activities.

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

11 What they couldn't do is exercise any
12 function that signified a reservation.

13 In order to have a reservation --

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

18 MS. BLATT: Justice Breyer --

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

21 MS. BLATT: No, in 1906, you're
22 reading from 1901 --

23 JUSTICE BREYER: Yeah.

24 MS. BLATT: -- every piece of paper,
25 record, book, dollar bill or coin or property,

1 their buildings, their furniture, their desks,
2 everything was taken away from the tribes.

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

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

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

24 In your view, I do concede that they
25 could meet and elect tribal chiefs. And that

1 is it.

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

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

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

21 And that's what Solem emphasizes. And
22 that it seems is -- is missing from your
23 analysis.

24 MS. BLATT: Justice Kagan, I would
25 concede that you have a reservation with any

1 tribal power, not full tribal power or some
2 federal power that displaced state power, but
3 here it's a null set.

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

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

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

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

23 And the Dawes Commission goes and it
24 actually tries to get the Indians to cede the
25 land and says we want cession, cession is

1 easier, cession is better, from the U.S.
2 Government's point of view, and for whatever
3 reason, they think that they need tribal
4 consent and the tribes aren't giving that
5 consent, and so the Commission comes back and
6 they say: No, we're not going to get cession.
7 We're only going to get allotment.

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

12 MS. BLATT: No. Remember, Solem was
13 not on the books until 80 years after Oklahoma
14 became a state. And --

15 JUSTICE KAGAN: Well, Solem wasn't on
16 the books until long after all of the cases.

17 MS. BLATT: Exactly.

18 JUSTICE KAGAN: But -- but what Solem
19 makes relevant is, when we look back to those
20 periods, we ask about was it cession or was it
21 something short of cession, meaning allotment?

22 MS. BLATT: And Congress did the same
23 when they had allotment plus dissolution.

24 Can I reserve the remainder of my
25 time?

1 CHIEF JUSTICE ROBERTS: Certainly.

2 Mr. Kneedler.

3 ORAL ARGUMENT OF EDWIN S. KNEEDLER

4 FOR THE UNITED STATES, AS AMICUS

5 CURIAE, SUPPORTING THE PETITIONER

6 MR. KNEEDLER: Mr. Chief Justice, and

7 may it please the Court:

8 What Congress did in the statutes at
9 issue here is fundamentally different from what
10 it did in the line of cases involving Solem.

11 What Congress was doing here was transform --
12 transforming a territory to a state. And in
13 order to do that, Congress broke up the
14 national domain of the tribes. They had been
15 independent nations, and it was a territory,
16 the tribal domain was the territorial domain.

17 Congress, as it always does in
18 transforming a territory to a state, changed
19 the territorial domain from here the tribes to
20 the state. And then it vested the governmental
21 authority over that domain in the state because
22 that domain had become the states, the general
23 governmental authority.

24 And it did that with respect to
25 Indians and non-Indians alike, as the history

1 that -- that preceded it shows. Beginning in
2 1897, Congress extended the laws of Arkansas to
3 everyone in the Indian territory, irrespective
4 of race, and gave the Indian territorial courts
5 exclusive jurisdiction over all cases.

6 The next year, it abolished tribal
7 courts and said that their laws could not be
8 enforced in the law -- in the courts of the
9 Indian territory. And in 1904, immediately
10 before statehood, Congress once again subjected
11 Indians and non-Indians alike to incorporated
12 state law. That is fundamentally inconsistent
13 with the proposition that immediately after
14 statehood, all of a sudden, Indians and
15 non-Indians were to be treated differently in
16 -- in -- in -- in the new state.

17 And, in fact, we know that wasn't true
18 because Congress provided in the statehood act
19 for the transfer from the Indian territorial
20 courts to the state courts of all --

21 JUSTICE SOTOMAYOR: What's so
22 interesting --

23 MR. KNEEDLER: -- all crimes of a
24 local nature.

25 JUSTICE SOTOMAYOR: Mr. Kneedler,

1 what's so interesting about that transfer is
2 that, in 1906, the Enabling Act does say
3 transfer, but in 1907, the Enabling Act
4 amendment makes clear that the transfer is only
5 of criminal cases.

6 And your opponent says that -- and if
7 you read it, they're right -- that federal
8 question issues were supposed to remain in the
9 federal courts.

10 Now they didn't. The functionaries
11 transferred all criminal cases even involving
12 Indians on Indians to the state courts. But
13 how do we know what Congress intended, except
14 by its words?

15 MR. KNEEDLER: Well, by it -- by
16 its --

17 JUSTICE SOTOMAYOR: And by its words,
18 it said all federal question cases, which
19 include major crime act cases, should stay in
20 federal court. How do we read into what the
21 functionaries did in the court systems into
22 what Congress's intent was?

23 MR. KNEEDLER: With all respect, I
24 don't think it's fair to say functionaries.
25 These were courts -- excuse me -- courts that

1 transferred the cases.

2 JUSTICE SOTOMAYOR: Courts are not
3 Congress.

4 MR. KNEEDLER: I understand that, but
5 -- but these were courts that were
6 contemporaneously interpreting the statute that
7 Congress --

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

15 MR. KNEEDLER: The -- the question in
16 this case is tribal authority -- is actually
17 federal and state authority over lands in which
18 there is no tribal interest at all.

19 We -- we assume for present
20 purposes --

21 JUSTICE SOTOMAYOR: Well, there was
22 tribal interests there. The lands were still
23 allotted to Indians.

24 MR. KNEEDLER: Yes. But -- but once
25 they were -- once they were allotted, there is

1 -- and -- and -- and passed out of Indian
2 ownership or at least passed out of restricted
3 status, they were like all other lands in the
4 -- in the state. And referring to the language
5 that Justice Breyer quoted, he referred to
6 tribal ordinances affecting tribal lands and --
7 and the lands of individuals. Those are not
8 the allotted -- the allotted lands that have
9 passed out of tribal ownership.

10 Today, there is -- less than 5 percent
11 of the land in the Creek Nation is now
12 restricted or trust property. The rest of it
13 has all passed out of Indian ownership --

14 JUSTICE ALITO: Mr. Kneedler, could
15 you say --

16 MR. KNEEDLER: -- as Congress
17 intended.

18 JUSTICE ALITO: I'm sorry. Could you
19 say something about the practical effects of
20 the Tenth Circuit's decision on federal law
21 enforcement and the federal judiciary in
22 eastern Oklahoma?

23 MR. KNEEDLER: Yes, it -- it would be
24 -- it would be dramatic. It would -- it would
25 transfer -- and we assume this would apply to

1 all of eastern Oklahoma, not just the Creek
2 Nation. All of eastern Oklahoma -- any crime
3 involving an Indian as a victim or a
4 perpetrator would be subject to federal
5 jurisdiction, not state jurisdiction, and there
6 -- there are not the -- the FBI resources, the
7 -- the -- the U.S. Attorney resources, the
8 other resources. It would also call into
9 question a number of convictions that have been
10 obtained under -- under state law over -- over
11 the intervening years.

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

19 This would be a dramatic change from
20 the -- from the way everyone has understood it
21 for the past 100 years.

22 JUSTICE ALITO: And what is the --
23 what would be the definition of an Indian for
24 these purposes?

25 MR. KNEEDLER: I -- I think an Indian

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

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

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

20 MR. KNEEDLER: They --

21 JUSTICE SOTOMAYOR: Congress has the
22 plenary power to -- to give or take.

23 MR. KNEEDLER: Well, with respect to
24 retroactive effects on existing convictions,
25 there would be a serious question as to whether

1 -- and that's no small matter. There could be
2 several thousand convictions, as I understand
3 it, in state court that might be -- that might
4 be called into -- into -- into question.

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

14 JUSTICE SOTOMAYOR: No. It made -- it
15 made breaking up the ownership of land.

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

17 JUSTICE SOTOMAYOR: And it -- and it
18 accomplished that with the allotment.

19 MR. KNEEDLER: It was more than that
20 because the tribes in their treaties were given
21 this -- these as permanent homelands, which was
22 both governmental and property. Congress
23 believed it had to break up those, that
24 national domain and the national sovereignty,
25 and transfer it to the state in order to have a

1 state.

2 And in the meantime, Congress --

3 JUSTICE KAGAN: But the question is,
4 Mr. Kneedler, did Congress, in fact, do that?
5 Did Congress, in fact, decide that that was
6 essential to statehood, or did it do something
7 less? Did it -- did it decide that it could
8 make do with something that was short of the
9 cession of lands that we've required in these
10 cases?

11 MR. KNEEDLER: Well --

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

20 And -- and that is exactly the
21 distinction our cases have deemed relevant when
22 it's come to looking as to whether there's the
23 kind of transfer of land that -- that destroys
24 a reservation.

25 MR. KNEEDLER: If I -- if I may,

1 there's nothing in the -- in the Dawes Act that
2 said Congress preferred one over the other. It
3 --

4 JUSTICE KAGAN: Yeah, it said that
5 there are two pathways. And then the -- the
6 Dawes Commission --

7 MR. KNEEDLER: The Dawes Act --

8 JUSTICE KAGAN: -- says it's really
9 simpler to do cession, we wish we could do
10 cession, we can't do cession.

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

19 JUSTICE KAGAN: It's agreed. Agreed.
20 They thought that -- you could get a state
21 either way. Cession was not necessary for a
22 state. It was preferable for a state, but it
23 wasn't necessary.

24 And the Dawes Commission comes back
25 and says we can't do cession; we're going for

1 allotment.

2 They got their state anyway. What
3 they did not do was to destroy the reservation
4 in the way that Solem and all those cases that
5 we've decided, and we've decided lots of them,
6 have -- have indicated is necessary to cede --

7 MR. KNEEDLER: I --

8 JUSTICE KAGAN: -- before we say that
9 a reservation --

10 MR. KNEEDLER: I --

11 JUSTICE KAGAN: -- doesn't exist
12 anymore.

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

21 Congress -- and Congress had become
22 very dissatisfied with tribal government over
23 that area. That was the very reason that it
24 prohibited the enforcement of tribal ordinances
25 and gave all jurisdiction to the territorial

1 courts.

2 It's fundamentally inconsistent with
3 that to think that upon statehood, Congress all
4 of a sudden wanted the -- or not all of a
5 sudden -- wanted to continue tribal sovereignty
6 that did not exist.

7 Congress had already taken away the
8 governmental or sovereign part that is tied
9 to -- that is tied to cession in those other
10 statutes.

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

19 MR. KNEEDLER: Under this Court's
20 cases, a -- a tribal member cannot be taxed,
21 for example, for sales tax, cigarette tax,
22 gasoline tax, where the incidence is on a
23 tribal member anywhere in -- within a
24 reservation.

25 And a tribal member cannot be assessed

1 state income tax at least where he resides and
2 works on the reservation. And given the size
3 of these territories, that could be quite a
4 number of people.

5 The liquor ordinance that was at issue
6 in -- in Parker requires tribal consent to the
7 sale of liquor on a reservation. I imagine
8 that would apply to any bar or any liquor
9 establishment that -- that may be in all of
10 eastern Oklahoma.

11 So -- and -- and, again, 10 percent of
12 the population is -- is Indian. So the
13 criminal jurisdiction concerns are -- are
14 really very serious, and the United States is
15 very concerned about what would be a drastic
16 shift in criminal jurisdiction.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Gershengorn.

20 ORAL ARGUMENT OF IAN H. GERSHENGORN
21 ON BEHALF OF THE RESPONDENT

22 MR. GERSHENGORN: Mr. Chief Justice,
23 and may it please the Court:

24 Justice Thomas's opinion in Parker
25 from just three terms ago requires that the

1 Tenth Circuit decision be affirmed.

2 Parker confirmed that the text is what
3 governs, and the text here is particularly
4 clear.

5 Congress considered hallmark language
6 that would have disestablished the reservation
7 and Congress rejected it. So, in 1901,
8 Congress initially sought cession, and when the
9 Creeks refused to cede their land to the United
10 States, Congress instead enacted text that
11 instead went for only allotment.

12 And in 1906, when Congressional
13 inaction would have dissolved the tribe and
14 disestablished the reservation, Congress
15 instead enacted text that preserved the tribal
16 government for all purposes authorized by law,
17 and it did so precisely to prevent the land
18 from going into the public domain.

19 JUSTICE ALITO: Is it your position
20 that there's certain magic words that have to
21 appear in statutes?

22 MR. GERSHENGORN: Absolutely not, Your
23 Honor. So our position is not that there be
24 magic words but that the words be clear. But
25 our particular point here is not the absence of

1 words but that Congress specifically rejected
2 the magic words that this Court has identified.

3 JUSTICE BREYER: But I think that I
4 just quoted the very thing you did, which is
5 from the 1906 Five Tribes Act.

6 MR. GERSHENGORN: Uh-huh.

7 JUSTICE BREYER: Okay. But Ms. Blatt
8 said, well, if you read the whole Act, which I
9 confess I haven't, you will see that in that
10 Act they removed, having previously removed,
11 all the courts, they removed the power to
12 legislate anything except perhaps electing a
13 chief.

14 Now, if that is so, is that so? And
15 that would be my first part.

16 MR. GERSHENGORN: No.

17 JUSTICE BREYER: That is not so. So,
18 when I read this, I will discover that even
19 after 1906 when it says the tribal existence
20 and present tribal governments are hereby
21 continued in full force and effect for all
22 purposes authorized by law, that that has
23 content.

24 MR. GERSHENGORN: So, Your Honor --

25 JUSTICE BREYER: So what is the

1 content?

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

12 In Section 28, what Congress did was
13 exactly what Your Honor said. It -- the tribal
14 existence and present tribal government are
15 hereby continued in full force and effect for
16 all purposes authorized by law.

17 So what the text does --

18 JUSTICE BREYER: And what were those?
19 Because 1901 is followed by 1906, and I
20 believe, though I don't want to put words in
21 her mouth, I believe that Ms. Blatt said, if I
22 read earlier in the 1906 Act, what I will find
23 is lots of provisions that suggest they're
24 simply winding up affairs, and the purpose of
25 the government is to wind up affairs and then

1 perhaps continue to elect a chief.

2 MR. GERSHENGORN: So, Your Honor --

3 JUSTICE BREYER: That's what I'm
4 interested in your view.

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

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

17 In -- and it's critical when you think
18 about how this was implemented as opposed to
19 the text, that the United States opposed that.
20 So Congress implemented Section 20 -- I'm
21 sorry, the United States, the Executive Branch
22 opposed that.

23 Congress implemented Section 28,
24 preserving the tribal authority, over the
25 objection of the Secretary --

1 JUSTICE SOTOMAYOR: Could you tell me
2 what --

3 MR. GERSHENGORN: -- and over the
4 objection of the Executive Branch.

5 JUSTICE SOTOMAYOR: Could you tell me
6 what remained?

7 MR. GERSHENGORN: Yeah. So, Your
8 Honor, I just -- what remained is the ability
9 to legislate over the land.

10 Now it was dependent on the Secretary
11 approving it and it was dependent on the
12 President approving it.

13 So Executive Branch hostility was a
14 problem. But, in the wake of the Act, there
15 were a number of legislative actions that the
16 tribe took. It abolished tribal offices. It
17 created the office of executive interpreter and
18 funded it.

19 These were legislative acts that went
20 to the Secretary --

21 CHIEF JUSTICE ROBERTS: That's --
22 that's the best you've -- that's the best
23 you've got?

24 MR. GERSHENGORN: So, Your Honor, I --
25 there is no doubt that the -- in practice, on

1 the ground, the legislative power of the tribe
2 was greatly reduced. It was working with an
3 Executive Branch dedicated to its -- to the
4 tribal extinction, but that's not what Congress
5 did. And what this Court has said is we look
6 to see what Congress did.

7 And the exact focus --

8 CHIEF JUSTICE ROBERTS: In terms of
9 the ongoing functioning and relationship, the
10 best example you have of the tribe's continuing
11 authority is hiring an interpreter?

12 MR. GERSHENGORN: So, Your Honor, the
13 -- I just want to be very clear. What the
14 tribe did was approve appropriations and
15 payments out. They were going to the Secretary
16 and to the President. They hired and they
17 fired.

18 Then, in 1909 and 1914, when Congress
19 needed to equalize -- equalize allotments, what
20 Congress did was say: We want to know whether
21 the tribal legislature approves. The tribal
22 legislature got together and disapproved --
23 this was in 1909 -- disapproved the
24 Congressional action.

25 After 1909, it is -- and the same

1 thing happened in 1914. But I just really want
2 to step back and -- and distinguish between
3 what Congress did and what was happening on the
4 ground because I think it's really critical.

5 As we detail in our brief, both the
6 Executive Branch and the state were acting very
7 much in hostility to the tribe, trying to
8 eliminate the tribe.

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

16 So, in fact, what the tribe was doing
17 in -- in continuing to legislate was really
18 critical.

19 Now what -- what Mr. Kneedler was
20 suggesting was somehow they had to get rid of
21 tribal sovereignty in order for there to be a
22 state. That's just not true, okay?

23 In 19 -- in 1790, in Tennessee,
24 three-quarters of the state was reservation.
25 When South Dakota came into the union,

1 47 percent of South Dakota was reservation.
2 And when Arizona came in, 24 percent was
3 reservation.

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

6 JUSTICE BREYER: That is correct. But
7 I wish at some point you would go back to
8 Justice Alito's question.

9 There are 1.8 million people living in
10 this area. They have built their lives not
11 necessarily on criminal law but on municipal
12 regulations, property law, dog-related law,
13 thousands of details.

14 And now, if we say really this land,
15 if that's the holding, belongs to the tribe,
16 what happens to all those people? What happens
17 to all those laws?

18 Should we -- for example, were we to
19 decide this -- I'm not saying one way or the
20 other -- do what the court did in Marathon and
21 say Congress has a certain number of months
22 before the -- our holding goes into effect, so
23 you can try to work out whatever compromises
24 are necessary with the state and with the feds
25 and with the tribe? Should we just leave it

1 all to the Tenth Circuit? What would you do?

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

11 But let me address just point blank
12 all the kinds of concerns. Let me start with
13 criminal jurisdiction.

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

21 In the state already completed
22 convictions, we don't know what the state would
23 do, but the state has a laches doctrine. The
24 state hasn't tried to apply that yet.

25 With respect to --

1 CHIEF JUSTICE ROBERTS: Well, just to
2 pause for a moment --

3 MR. GERSHENGORN: Yes.

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

10 That's a matter or should be a matter
11 of some concern to the government, don't you
12 think?

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

20 Going forward, Mr. Kneidler identified
21 the burdens on the government. I will say that
22 at the Tenth Circuit, the government said there
23 would be 2,000 cases a year that they had to
24 deal with. Then, in the opt to this Court,
25 they said 500 cases a year. And then, in the

1 merits brief to this Court, there was no
2 discussion at all of any case numbers.

3 So I -- I view that with some degree
4 of skepticism. There is no doubt there will be
5 a transfer of resources. There is also no
6 doubt that the federal government --

7 JUSTICE BREYER: What about --

8 MR. GERSHENGORN: -- has a lot of
9 resources.

10 JUSTICE BREYER: My question is really
11 --

12 MR. GERSHENGORN: So, on the civil
13 side, Justice Breyer --

14 JUSTICE BREYER: Yes.

15 MR. GERSHENGORN: -- which I
16 understand is -- is your concern, I found it
17 interesting that you asked -- that Justice
18 Alito asked Mr. Kneedler what the impact would
19 be, and the thing he identified, which we agree
20 with, is that there will be limits on state
21 authority over income tax and sales tax of
22 tribal members on the reservation.

23 I would agree that's significant. I
24 would not call it existential. And in any
25 event, this Court has authority under the

1 Sherrill doctrine and certainly Congress has
2 authority to change that.

3 Stepping back, this Court's cases in
4 -- in cases like Plains Commerce Bank and the
5 whole Montana line of cases have drastically
6 limited tribal authority over non-member,
7 non-fee land, even within a reservation. And
8 --

9 CHIEF JUSTICE ROBERTS: But just to
10 pause --

11 JUSTICE BREYER: So I'm asking you --
12 yeah.

13 CHIEF JUSTICE ROBERTS: Go ahead.

14 JUSTICE BREYER: I'm asking you what
15 -- what you would do if you were me if you
16 thought on all the doctrinal things that you
17 were right.

18 MR. GERSHENGORN: Right.

19 JUSTICE BREYER: Because imagine you
20 are a small businessman in Tulsa, and suddenly
21 our Court decision, and all they know is
22 they're part of the reservation. What I'm
23 concerned about is they think I have 5,000 laws
24 already to deal with, infinite numbers of forms
25 to figure out. What do I do?

1 MR. GERSHENGORN: So, Justice Breyer,
2 I'd like to make a factual point and then a
3 "how would I solve it" point if you thought
4 there was a problem. This Court has already
5 drastically restricted --

6 JUSTICE BREYER: I'm asking you
7 whether there's a problem.

8 MR. GERSHENGORN: I -- there is not,
9 but let me explain why, but then, even if you
10 disagree why -- what you could do about it, all
11 right?

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

18 That is the point of the whole Plains
19 Commerce line of cases. So although the person
20 may wake up and say, oh, I'm in a reservation,
21 the answer is your life doesn't change all that
22 much.

23 But if Your Honor disagreed with that,
24 what this Court did in Justice Thomas's opinion
25 in Parker was say we separate the -- the

1 equitable and remedy -- remedial issues such as
2 are at issue -- Your Honor's question go to.
3 We separate those and deal with that through a
4 separate doctrine called City of Sherrill.

5 And the Court, of course, has that at
6 its disposal, and the Court could in an
7 appropriate case or if there was a -- an effort
8 to exercise authority, the Court could decide
9 whether that was a problem.

10 So I don't think that the kind of
11 seismic change that -- that Ms. Blatt
12 identifies or that Mr. Kneedler alludes to
13 would exist.

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

20 MR. GERSHENGORN: So --

21 CHIEF JUSTICE ROBERTS: And you're in
22 a reservation. Can they say you -- you need a
23 license from the tribe to sell alcoholic
24 beverages --

25 MR. GERSHENGORN: So, Your Honor --

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

3 MR. GERSHENGORN: -- alcohol --
4 alcohol has always been separate -- has been
5 special in Indian lands, and with respect to
6 alcoholic beverage in particular, there may be
7 additional -- additional regulation. That
8 depends on what the court does with Sherrill.

9 With respect to a construction
10 business operated by a non-member on fee land,
11 no.

12 CHIEF JUSTICE ROBERTS: What about
13 when operated by a member?

14 MR. GERSHENGORN: So additional --
15 yes, there would be additional regulation of a
16 member on fee land, but that is -- but the
17 Court has always been --

18 CHIEF JUSTICE ROBERTS: What about
19 dealings between non-members and members on fee
20 land?

21 MR. GERSHENGORN: So I don't think
22 that that's part of -- part of the -- I don't
23 think that is part of the tribe's regulatory
24 authority. But the bigger point, Your Honor,
25 is that this Court addressed this --

1 CHIEF JUSTICE ROBERTS: Well, I guess
2 just to be -- I don't mean to -- I'm trying to
3 find -- could -- could the tribe require those
4 non-members doing business with members on
5 Indian land to obtain a license to do that?

6 MR. GERSHENGORN: So, Your Honor, I
7 don't think the answer to that is yes. I don't
8 think so. But, in any event, this Court
9 addressed this, all right? This is not new to
10 the Court. The Court faced this very question
11 in Parker. Right?

12 In Parker, the tribe, unlike the
13 Creek, unlike -- the tribe had been absent for
14 120 years and the -- and then asserted
15 regulatory authority. And what the Court said
16 was that is no -- not part of the
17 disestablishment analysis, right? That's part
18 of the remedial analysis because that is --
19 that goes to --

20 CHIEF JUSTICE ROBERTS: Right. That's
21 --

22 MR. GERSHENGORN: -- what should the
23 consequences on the reservation --

24 CHIEF JUSTICE ROBERTS: -- I
25 understand that's part of the -- the remedial

1 issues with respect to a tiny village like
2 Pender in -- that was at issue in Parker and
3 with respect to half of Oklahoma are obviously
4 going to be quite different.

5 MR. GERSHENGORN: I agree that the
6 remedial issues could be different and -- but
7 -- although I want to address that a little
8 more. But the statutory construction issues
9 are not different. And that really is the
10 fundamental piece --

11 JUSTICE KAVANAUGH: But, here, you
12 have --

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

19 MR. GERSHENGORN: So, Your Honor, I --
20 I don't think that's accurate for a number of
21 reasons. First of all, for the last 40 years
22 -- when the Creek Nation adopted a constitution
23 in 1979, they asserted political jurisdiction
24 to the extent of their 1900 boundaries. And
25 the Secretary approved that constitution. So

1 this is not like the situation in Parker where
2 the tribe was absent for 130 years.

3 JUSTICE ALITO: But I mean as a --

4 MR. GERSHENGORN: The place where
5 you --

6 JUSTICE ALITO: -- as a practical
7 matter, have they at any time prior to this
8 case attempted to do -- to assert any of the
9 sovereignty that you now claim they possess --

10 MR. GERSHENGORN: So the --

11 JUSTICE ALITO: -- under this vast
12 territory?

13 MR. GERSHENGORN: So the answer is
14 yes.

15 JUSTICE ALITO: And where?

16 MR. GERSHENGORN: And so I'll give you
17 an example. So the tribe currently is engaged
18 in -- the tribe currently, pursuant -- pursuant
19 to cross-deputization agreements throughout the
20 historic boundaries, the 11-county area,
21 exercises arrest authority over Indians and
22 non-Indians alike. The reason they do that is
23 because they have entered into agreements that
24 are premised on the assertion of jurisdiction
25 throughout the land.

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

8 JUSTICE KAVANAUGH: We have --

9 MR. GERSHENGORN: So this is not a
10 situation where -- I'm sorry, Justice
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Go ahead, finish.

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

15 JUSTICE KAVANAUGH: We have a lot of
16 cases that say historical practice helps inform
17 the text, and we have these debates about the
18 text. And I'm not sure I agree with you, given
19 the abolishment of tribal courts and -- and the
20 things we've discussed. But even if it were
21 ambiguous on the text, the historical practice
22 for a century has been against you.

23 And stability is a critical value in
24 judicial decision-making, and we would be
25 departing from that and creating a great deal

1 of turmoil. And so why shouldn't the
2 historical practice, the contemporaneous
3 understanding, the 100 years, all the practical
4 implications say leave well enough alone here?

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

11 But, with respect to your larger
12 point, I'm not saying the Court needs to ignore
13 it. And the Court in Parker did not say we
14 should ignore it. The Court there dealt with
15 somebody -- with the absence of a statutory --

16 JUSTICE KAVANAUGH: This is
17 massively --

18 MR. GERSHENGORN: So, Your Honor --

19 JUSTICE KAVANAUGH: The size is
20 different.

21 MR. GERSHENGORN: Absolutely,
22 absolutely. Tulsa --

23 JUSTICE KAVANAUGH: The number of
24 people affected --

25 MR. GERSHENGORN: Tulsa is not Pender,

1 but what I'm suggesting to you is that a
2 question of whether --

3 JUSTICE KAVANAUGH: If this were 1910,
4 maybe we'd talk about differently, but it's
5 not.

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

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

19 And the reason for that, of course, is
20 because what you're engaged in is fundamentally
21 an exercise of statutory construction.

22 JUSTICE KAVANAUGH: What you're
23 looking at is -- okay, you're looking at a
24 series of statutes here. Look at
25 contemporaneous understanding, which is against

1 you. The practice for 100 years, the practical
2 implications. Trying to remedy this, as
3 Justice Breyer points out, just seems like a
4 lot.

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

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

22 MR. GERSHENGORN: So two --

23 JUSTICE KAVANAUGH: -- is a major
24 difference.

25 MR. GERSHENGORN: Yes. Two points on

1 that, Your Honor. So a lot of the things you
2 -- you -- you referenced were in the 1901 Act.
3 It's the -- there's no doubt that the
4 reservation continued post-1901.

5 JUSTICE KAVANAUGH: Right.

6 MR. GERSHENGORN: And so those things
7 you're talking about, the courts and others,
8 those happened, and yet the reservation
9 continued.

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

19 There's no particular sovereign power
20 that a tribe needed to have. In fact, there --
21 you could see a time, for example, if a state
22 overran tribal government where the federal
23 government would take over all three branches
24 of tribal government because the reservation is
25 a combination of tribal and federal authority

1 protecting against state hostility.

2 And so it's a mistake --

3 CHIEF JUSTICE ROBERTS: Does it matter

4 --

5 MR. GERSHENGORN: I'm sorry, Your

6 Honor.

7 CHIEF JUSTICE ROBERTS: But does that
8 take into account the significance of the fact
9 that the Creek received the land in fee rather
10 than in trust?

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

23 MR. GERSHENGORN: So we think, Your
24 Honor, that that strengthens our position. We
25 said it in the briefs. The reason for that is

1 it's crystal clear there was a reservation to
2 start and the fee patent was an additional
3 boost.

4 Remember, the fee patent is not fee
5 simple. Of course, they can't sell the land
6 without -- they can't alienate it, if they
7 abandon the land or disappear as a tribe, it
8 reverts to the United States. So it's not a
9 fee patent in that --

10 CHIEF JUSTICE ROBERTS: That changed
11 with respect to the allotments.

12 MR. GERSHENGORN: Yes, Your Honor.
13 There is no doubt that the reason Congress did
14 -- the reason they broke up the communal land
15 ownership and broke up fee patents was to allow
16 sort of increased sale. They needed to do
17 that.

18 But that doesn't change the fact that
19 there was a reservation ahead of time.

20 There was -- it was land set aside for
21 the use and residents of the tribe. Congress
22 repeatedly referred to it as a reservation.
23 It's noted in our brief. In the 1866 treaty,
24 the Creek reservation. In the 1866 Cherokee
25 treaty, the Creek reservation. In the 1873

1 statute, "authorizes the Secretary to negotiate
2 a cession of the Creek reservation."

3 So there was a reservation ahead of
4 time. That reservation was not disestablished.
5 Congress chose precisely the words that don't
6 disestablish when it acted.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Kanji.

10 ORAL ARGUMENT OF RIYAZ A. KANJI
11 ON BEHALF OF MUSCOGEE (CREEK) NATION
12 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

13 MR. KANJI: Mr. Chief Justice and may
14 it please the Court:

15 If I may, I would like to address
16 three things: First this issue of
17 consequences; second, to return to the question
18 of governmental powers; and, finally, to talk a
19 little bit about contemporary understanding.

20 With respect to consequences, there
21 will not be turmoil from an affirmance. The
22 Creek Nation wishes to be very clear that
23 significant practical disruption would result
24 from disestablishment, not from retention of
25 the tribe's -- of the recognition of the

1 reservation.

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

9 There will not be turmoil because of
10 three reasons:

11 One, this Court's precedents restrict
12 tribal power over non-Indians on fee lands
13 within reservations. Those are restraints that
14 we understand and respect.

15 Secondly, and conversely, the State
16 retains plenary authority over non-Indian fee
17 lands within reservation; plenary authority to
18 tax and -- and to regulate.

19 And, third -- and Oklahoma, the
20 history of Oklahoma is not exceptional, but
21 what is exceptional in Oklahoma is the extent
22 to which the State and the Nations have forged
23 cooperative agreements that already address
24 many of these issues.

25 JUSTICE ALITO: Well, suppose an

1 Indian is charged in -- with having committed a
2 mugging in Tulsa. What -- where would that
3 case end up?

4 MR. KANJI: If -- an Indian, Your
5 Honor?

6 JUSTICE ALITO: Yeah.

7 MR. KANJI: That -- well, that case
8 would end up either being prosecuted by the
9 federal government or by the Nation itself or
10 both concurrently.

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

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

18 It's important to --

19 JUSTICE ALITO: Only within -- what
20 percentage of the population of this area would
21 qualify as -- as Indians?

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

24 JUSTICE ALITO: 9 percent of -- of how
25 many people?

1 MR. KANJI: 9 percent of about -- the
2 Creek population is 43,000 within the
3 reservation.

4 JUSTICE ALITO: Yeah, but all the
5 Indians -- so this would apply as far as
6 criminal cases to all Indians, am I right?

7 MR. KANJI: That's correct, Your
8 Honor.

9 JUSTICE ALITO: How many would that
10 be?

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

14 JUSTICE ALITO: So if any of those
15 individuals was charged with any offense that
16 would normally be prosecuted in a state court,
17 they would all have to be prosecuted in federal
18 court?

19 MR. KANJI: Or by the Nation. And I
20 think it is important to reinforce that the
21 Nation has a robust criminal jurisdiction, has
22 robust courts, is already prosecuting many
23 Indians.

24 The Nation also supplies a special
25 U.S. attorney to the United States to prosecute

1 major crimes. That's pursuant to congressional
2 authorization.

3 It's critical to understand, nobody
4 has a greater interest in law enforcement and
5 security within the Creek reservation than the
6 --

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

13 And how is there anything we can do to
14 encourage, require, what, to have the Creek
15 Nation, State, and Congress work this out to
16 see if there are difficulties, and, if so,
17 resolve them by statute or regulation. You
18 see, you are asking me something I don't know.
19 I don't know how much trouble this causes.

20 And the reason there is a picture of
21 Tulsa in the brief, I thought, was to stimulate
22 me to ask such a question.

23 (Laughter.)

24 MR. KANJI: Exactly. Your Honor, I
25 think the simplest answer is that an affirmance

1 will stimulate exactly that kind of discussion
2 and agreement.

3 The last time this Court had a case
4 from Oklahoma involving jurisdiction was the
5 Chickasaw Nation case in 1995. This Court
6 ruled in favor of the Chickasaw Nation.
7 Shortly thereafter, fuel tax agreements were
8 forged in the -- in the wake of that.

9 The same will -- will happen here.
10 There already are discussions taking place here
11 about the allocation of jurisdiction. Congress
12 has provided mechanisms for the allocation of
13 both criminal and civil jurisdiction.

14 JUSTICE ALITO: Can there --

15 CHIEF JUSTICE ROBERTS: You're talking
16 about discussions between Congress, the State,
17 and the Nations?

18 MR. KANJI: Correct, Your Honor.

19 CHIEF JUSTICE ROBERTS: And you think
20 that will lead fairly quickly to an agreement
21 that will settle all these disputes?

22 MR. KANJI: I think these -- I think
23 all sovereigns have an interest, a very common
24 shared interest, Your Honor, in law
25 enforcement.

1 The brief of the Oklahoma officials, I
2 think, evidences that there is a very close
3 working relationship, in fact, on the ground
4 between the State, the local units of
5 government, and -- and the Nation. That will
6 continue.

7 JUSTICE ALITO: Can there be such a
8 thing as a reservation that exists as an
9 abstract matter but in this territory the
10 Nation is able to exercise no sovereign powers
11 as a practical matter? Is that a possibility?

12 MR. KANJI: It is -- it is, Your
13 Honor. A reservation, as Justice Kagan said,
14 when Congress takes any block of land, reserves
15 it from the public domain, reserves it from
16 sale, that creates the reservation.

17 Then in order for that to be returned
18 to the public domain or to be disestablished,
19 Congress has to expressly indicate that intent.
20 There have been not just with -- and I think
21 this is a critical point that Justice Kagan
22 suggested to -- there have been reservations
23 around the country over time where Congress has
24 abrogated tribal powers.

25 JUSTICE ALITO: So if we don't agree

1 with you on that point, if we think this is a
2 practical inquiry, can you tell me what
3 sovereign powers the Nation retained within
4 this territory after statehood?

5 MR. KANJI: Absolutely, Your Honor.
6 It retained legislative powers. I think the
7 1909 Congressional Act that we cite at page 24
8 of our brief is instructive. There Congress
9 was attempting to equalize allotments on the
10 reservation.

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

18 JUSTICE ALITO: Could tribal laws --
19 could tribal laws be enforced at that time
20 after statehood?

21 MR. KANJI: Yes, Your Honor, just as
22 before statehood, they were being enforced by
23 the Secretary. And I think a critical point is
24 this Court in *Morris v. Hitchcock* and the
25 Eighth Circuit in *Buster* immediately before

1 statehood affirmed the Nation's continuing
2 legislative authority, including with respect
3 to non-Indians and said that the secretarial
4 enforcement mechanism was the mechanism to
5 enforce the continuing legislative
6 jurisdiction.

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

14 MR. KANJI: Absolutely, Your Honor.
15 And I will give you a general and a specific
16 example.

17 Generally speaking, Congress has told
18 the tribes over time: You -- your government
19 will be structured in this fashion. Your
20 membership will consist of the following. You
21 will allow this mining and these easements
22 along your land, even if you don't want it.

23 You will allow your children to be
24 taken away and placed in boarding schools, even
25 if no parent would want that. Even this -- the

1 rhetoric about buildings being sold, the Creek
2 Nation is not the only tribe in this country,
3 far from the only one, to have run its
4 government out of churches and house basements
5 for decades.

6 A specific example is the Metlakatla
7 reservation in Alaska, the only Indian
8 reservation in Alaska, as this Court said in --
9 in the Venetie decision.

10 This -- this Court's decision in Egan
11 from 1962 indicates the draconian restrictions
12 that that government was laboring under. It
13 had no authority to approve anything without
14 the approval of the local education
15 commissioner.

16 And yet that was still understood and
17 is still recognized as an intact Indian
18 reservation.

19 CHIEF JUSTICE ROBERTS: Counsel --

20 MR. KANJI: Justice Breyer talked
21 about the approval of ordinances by the
22 President. I think it's instructive today The
23 Creek Nation does not have a Presidential or
24 Secretarial approval requirement.

25 But many tribes in this country do,

1 including the Omaha Tribe that was the subject
2 of Parker, the Cheyenne River Tribe that was
3 the subject of Solem. In both of their
4 constitutions, there is a requirement that the
5 United States inserted that the Secretary has
6 to approve largely any and all of their --
7 their ordinances.

8 CHIEF JUSTICE ROBERTS: Counsel, would
9 this expand the reach of the Indian Gaming Act
10 in the area?

11 MR. KANJI: It would not, Your Honor,
12 in the sense that there is a compact in place
13 between the nation and the state already. The
14 nation has eight gaming operations within --
15 within the area.

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

18 MR. KANJI: Well, I think that's --
19 that was a critical point in Parker, Your
20 Honor. In Parker, this Court declined to reach
21 the diminishment decision and said we will
22 apply this laches doctrine to this particular,
23 exercise of power by the -- by the Oneida
24 Tribe.

25 Here, we don't even have an assertion

1 of power by The Creek Nation. The Creek Nation
2 had nothing to do with the genesis of this
3 litigation.

4 If in future cases we were to assert
5 our authority in a way that others found
6 objectionable, they could raise a Sherrill
7 claim, and that could be adjudicated at the
8 time.

9 But the important thing is reservation
10 disestablishment is a binary thing. The state
11 is asking to snuff out all Creek governmental
12 powers over this area.

13 As we document in our brief, the
14 Creeks are doing many things that pose no
15 affront to the justifiable expectations of
16 anybody but that, in fact, serve the
17 expectations of all but hardened criminals.

18 The Creek Lighthouse Force polices the
19 entire reservation pursuant to these
20 cross-deputization agreements. The Creek's
21 providing healthcare, education,
22 infrastructure. And this is all vital, and a
23 disestablishment would snuff all that out.

24 JUSTICE SOTOMAYOR: Chief --

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

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

4 CHIEF JUSTICE ROBERTS: Sure.

5 JUSTICE SOTOMAYOR: Your colleague
6 also said the same thing, but when you say
7 they've been policing and doing these things in
8 the reservation, are you talking about the
9 entire area in dispute right now?

10 MR. KANJI: Absolutely, Your Honor.
11 There are -- there are 44 county and municipal
12 jurisdictions in the Creek Nation Reservation.
13 The nation has cross-deputization agreements
14 with 40 of them. So almost the entire area.

15 JUSTICE SOTOMAYOR: And for how long
16 has this been in effect?

17 MR. KANJI: Those agreements first
18 started in the year 2000, Your Honor, and
19 they -- a critical point I'd like to make in
20 terms of disruption is they are all subject to
21 renewal each and every year.

22 CHIEF JUSTICE ROBERTS: Thank --

23 JUSTICE SOTOMAYOR: And in 1936, the
24 tribal courts were reignited?

25 MR. KANJI: That's right.

1 JUSTICE SOTOMAYOR: Tribal courts.
2 And what area did those tribal courts exist in?

3 MR. KANJI: They exercised -- they
4 likewise exercise jurisdiction over the entire
5 thing.

6 JUSTICE SOTOMAYOR: Entire
7 reservation?

8 MR. KANJI: That's correct, Your
9 Honor.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Two minutes, Ms. Blatt.

13 REBUTTAL ARGUMENT OF LISA S. BLATT

14 ON BEHALF OF THE PETITIONER

15 MS. BLATT: Thank you, Mr. Chief
16 Justice.

17 Here are the two earth-shattering
18 consequences that Congress can't fix, Sherrill
19 can't fix, and this will stimulate you.

20 There are 2,000 prisoners in state
21 court who committed a crime in the former
22 Indian territory who self-identify as Native
23 American.

24 This number is grossly under-inclusive
25 because, if the victim was Native American, the

1 state court also lacked jurisdiction. That's
2 155 murderers, 113 rapists, and over 200 felons
3 who committed crimes against children. Here's
4 why habeas is not going to help.

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

16 Here's the earth-shattering
17 consequence on the civil side. Under the
18 Indian Child Welfare Act, any tribe, any
19 parent, and any child can undo any prior Indian
20 child welfare custody proceeding if the state
21 court lacked jurisdiction because the Indian
22 child lived on a reservation.

23 Affirmance raises a specter of tearing
24 families all across eastern Oklahoma, and
25 probably beyond, for years and years and years

1 and years after the fact.

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

8 On the tribal sovereignty, with all
9 due respect, I didn't hear an answer. The most
10 that they said was they disbursed tribal funds.
11 That is not sovereignty over non-Indian-owned
12 fee land.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you.

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

18 There seems to be a disagreement
19 between the attorneys here about the authority
20 of the -- of the nation to enact and enforce
21 laws after statehood. Could you just briefly
22 address that?

23 MS. BLATT: I mean, that's
24 preposterous to the extent that it affected
25 non-Indian-owned fee land, non-tribal members,

1 or tribal members.

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

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.

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

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