

Focus On

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Carcieri v. Salazar: The Supreme Court's Definition of "Now" Creates Uncertainty for Indian Tribes

THE INDIAN REORGANIZATION ACT (IRA), which was enacted in 1934, authorizes the secretary of the interior to acquire land and hold it in trust "for the purpose of providing land to Indians" and defines "Indian" to include all persons of Indian descent who are members "of any Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479.

On Feb. 24, 2009, the U.S. Supreme Court held in *Carcieri v. Salazar* that the term "now under Federal jurisdiction" in § 479 refers to those tribes that were under the federal jurisdiction of the United States when the Indian Reorganization Act was enacted in 1934. The Court ruled that, because the Narragansett Tribe was not under federal jurisdiction in 1934, the secretary of the interior does not have the authority to take a 31-acre parcel of land into trust on the tribe's behalf.

Background

This case involves facts going back more than 300 years. First, in 1676, the Narragansett Tribe was decimated in King Philip's War and forced to accept the sovereignty of King Philip and submit to the guardianship of the Colony of Rhode Island.

Approximately 200 years later, in 1880, the state of Rhode Island passed a "detrribalization" law that purported to abolish tribal authority and sell all tribal lands. The Narragansett Tribe originally agreed to the detrribalization and ceded all but two acres of land to the state and received \$5,000 in return. Almost immediately after agreeing to the detrribalization, the Narragansett Tribe embarked on a campaign to regain its ancestral lands and tribal status. During a 10-year period from 1927 to 1937, federal officials declined the tribe's petitions; noting that the tribe was—and had long been—under the jurisdiction of Rhode Island rather than the federal government.

In 1978, Congress enacted the Rhode Island Claims Settlement Act, under which 1,800 acres of land were returned to the tribe. The tribe agreed that the 1,800 acres of land would be subject to the civil and criminal laws as well as the jurisdiction of the state of Rhode Island. In 1983, the Bureau of Indian Affairs granted formal recognition to the Narragansett Tribe, determining that the Narragansett community had existed autonomously since first contact was made between the state and the tribe.

In 1991, the tribe purchased 31 acres of land in the town of Charlestown, R.I., adjacent to the 1,800 acres the tribe had received as a result of the Claims Settlement Act. Ultimately, the tribe petitioned the secretary of the interior to place those 31 acres in trust on behalf of the tribe. On March 6, 1998, the secretary notified the tribe of his acceptance of the tribe's land into trust.

The secretary's decision was quickly appealed by the petitioners to the Interior Board of Indian Appeals, which upheld the secretary's decision. That decision was challenged in the U.S. District Court for the District of Rhode Island, which granted summary judgment in favor of the secretary. The Court of Appeals for the First Circuit affirmed that decision; the U.S. Supreme Court granted certiorari and reversed it.

The Court's Opinion

Justice Thomas wrote the Court's opinion in which Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito joined. Justice Breyer filed a concurring opinion. Justice Souter filed an opinion concurring in part and dissenting in part, in which Justice Ginsburg joined. Justice Stevens filed a dissenting opinion.

In reversing the First Circuit's decision in favor of the secretary of the interior, Justice Thomas pointed to principles of statutory construction to determine whether the pertinent statutory text—"The term 'Indian' as used in this Act shall include all persons of Indian descent *who are members of any recognized Indian tribe now under Federal jurisdiction.* ..." (emphasis added)—is plain and unambiguous. 25 U.S.C. § 479.

The parties agreed that the question of the secretary's authority hinged on whether the Narragansett Tribe consists of members of a "recognized Indian tribe now under Federal jurisdiction." Justice Thomas wrote that that question turns on whether "now under Federal jurisdiction" refers to 1998, when the secretary accepted the 31-acre parcel into trust, or 1934, when Congress enacted the IRA. Justice Thomas first pointed to the ordinary definition of "now" at the time the IRA was enacted. He cited *Webster's New International Dictionary* and *Black's Law Dictionary*, and he noted that those definitions are consistent with interpretations of "now" by the Court before and after passage of the IRA.

Justice Thomas next looked to the reading of "now" within the context of the IRA for support and found importance in Congress' use of the words "now and hereafter" elsewhere in the IRA. Justice Thomas noted that tenets of statutory construction require the Court

to give meaning to the fact that Congress includes language in one section of the statute but omits it in another. Justice Thomas next noted that the secretary's current interpretation of § 479 conflicts with the executive branch's interpretation of the same provision in 1934 citing correspondence from then Commissioner of Indian Affairs John Collier.¹ Justice Thomas rejected the secretary's argument that Congress had no policy justification for limiting the secretary's trust authority to those tribes under federal jurisdiction in 1934. The secretary argued that the purpose of the IRA was to strengthen Indian communities as a whole regardless of their status in 1934. Justice Thomas countered that the plain reading of the statute precluded the Court from considering such policy arguments.

Justice Thomas also rejected two alternative arguments that had nothing to do with the definition of "Indian" in § 479. The secretary argued—and the First Circuit agreed—that the narrow definition of "Indian" in § 479 is made irrelevant by the broader definition of "tribe" found later in § 479. The term "tribe" is broadly defined in § 479 to include all political entities generally understood to be tribes—Indian tribes, organized bands, and pueblos—as well as Indians residing on one reservation. The "now under Federal jurisdiction" language, it was argued, appears only in the definition of "Indian," not in the separate definition of "tribe."

The secretary of the interior argued that § 465 of the IRA authorizes the secretary to take title to lands "in the name of the United States in trust for the Indian tribe..." for "the purpose of providing land to Indians." In short, the secretary argued, because the temporal restriction does not apply to the definition of "tribe," the secretary is authorized to take land into a trust not under federal jurisdiction in 1934. Justice Thomas provided two reasons for rejecting this argument. First, he noted that the definition of "tribe" in § 479 also applies to "any *Indian tribe*" [emphasis added] found earlier in the section, which includes the temporal restriction. Second, although § 465 authorizes the United States to take land into trust for an Indian tribe, it also limits the secretary's use of that authority for "the purpose of providing land to Indians." The definition of "Indian" requires reference back to § 479 and the temporal restriction.

The second alternative argument other than the question of the definition of "Indian" in § 479 was provided by the National Congress of American Indians, which argued that 25 U.S.C. § 2202—enacted as part of the Indian Land Consolidation Act of 1983—remedies the limitations found in § 479. Section 2202 provides that § 465 "shall apply to all tribes notwithstanding the provision of § 478,"² under which tribes can voluntarily elect to opt out of the IRA. Justice Thomas countered that § 2202 did not have to be read as conflicting with the plain reading of "now" in § 479, but could be read as simply ensuring that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478.

In ruling against the secretary of the interior, Justice

Thomas noted that the petition for writ of certiorari expressly represented that, in 1934, the Naragansett Tribe was neither federally recognized nor under the jurisdiction of the federal government. The respondents' brief did not refute this assertion, and Justice Thomas noted that the record did not provide any support for a case that the tribe was under federal jurisdiction in 1934. Consequently, in overturning the First Circuit's decision and ruling against the secretary, the Court did not remand the case for further trying of facts.

Although Justice Thomas' opinion provided a straightforward holding that "now under Federal jurisdiction" applies to Indians under federal jurisdiction in 1934, it left at least two important questions unresolved. The concurring opinions of Justice Breyer and Justices Souter and Ginsburg provide some ideas on how those questions may ultimately be answered.

The Concurring Opinions

Justice Breyer

Justice Breyer concurred with the opinion of the Court subject to three qualifications. First, Justice Breyer stated that the plain meaning reading of the statute by itself is not determinative. He could not give the secretary of the interior deference in the statute's interpretation, however, because (1) in 1934, the department favored the Court's present interpretation and (2) circumstances indicated that Congress did not intend to delegate interpretive authority of the word "now" to the secretary. Second, where the opinion of the Court expressly did not rely on legislative history or Commissioner Collier's correspondence, Justice Breyer relied on the legislative history of § 479 to support his interpretation.

It is Justice Breyer's third qualification to the Court's opinion that will provide the most buzz and fodder for practitioners of Indian law, the government, and other interested parties. Justice Breyer pointed out that the interpretation of "now" as meaning "in 1934" may not be as restrictive as it first appears. He observed that a tribe may have been "under Federal jurisdiction" in 1934, even though the federal government *did not believe so* at the time. Justice Breyer cited the fact that, shortly following enactment of the IRA, the department compiled a list of 258 tribes covered by the IRA and later recognized other tribes on the grounds that they should have been recognized in 1934. He also observed that sometimes the department has considered "circumstances" sufficient to show that a tribe was "under Federal jurisdiction" in 1934, even though the department *did not know* it at the time. Justice Breyer observed that the statute does not impose a time limit on recognition.

Justice Breyer noted three administrative decisions involving post-1934 recognition on grounds that implied a 1934 *relationship* between the tribe and the federal government that could be described as

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jurisdictional. According to Justice Breyer, the three decisions, which could indicate a jurisdictional relationship, could include a treaty with the United States in effect in 1934, a pre-1934 congressional appropriation, or enrollment as of 1934 with the Indian Office. Even though Justice Breyer used the words “recognized” and “jurisdiction” interchangeably at times, his concurrence highlighted the difference between the terms.

Justice Souter, Joined by Justice Ginsburg

Justices Souter and Ginsburg concurred with Justice Breyer’s concurring opinion but dissented with the Court on the straight reversal of the First Circuit’s ruling. Justices Souter and Ginsburg would have reversed and remanded for the respondents to pursue a “jurisdictional” claim.

In addition, Justice Souter’s concurrence elaborated on Justice Breyer’s observation that nothing in the Court’s opinion foreclosed the possibility that “recognition” and “jurisdiction” are to be given separate meanings. Dissenting with Justice Thomas’ holding that the respondents did not counter the petitioners’ claim that the Narragansett Tribe was not under federal jurisdiction in 1934 (and therefore there was no need to remand), Justice Souter stated that he would have given the secretary and the tribe an opportunity to advocate a construction of “jurisdiction” that might help their case.

Dissent

Justice Stevens provided a lengthy dissent, which hinged on the use of both “Indian tribe” and “individual Indian” in § 465. He wrote that the use of both terms authorizes the secretary of the interior to take land into trust for a tribe or for an individual Indian. Justice Stevens then wrote that § 479 specifies which individuals qualify as “Indians” and which entities qualify as “tribes.” He noted that the definition of “tribes” does not include a temporal restriction, while the definition of “Indian” does.

Consequently, Justice Stevens would have held that the secretary is authorized to take land into trust for any federally recognized tribe, without any temporal qualifications. He then noted that this is in fact the way the secretary has applied the IRA over the years.

Conclusion

The Supreme Court’s holding in this case, although seemingly a straightforward decision related to statutory construction, disrupts decades of practical implementation of the IRA’s fee-to-trust mechanism. But because the decision leaves open the question of how the key phrase “under Federal jurisdiction” is defined, the precise scope of the decision is not yet known.

How this phrase is defined will keep lawyers very busy. The concurring opinions of Justices Breyer and Souter provide a potential avenue of ways in which to define “under Federal jurisdiction.” Justice Breyer ob-

served three factual examples that could provide a tribe with an argument that it was under federal jurisdiction in 1934: because of federal treaty, congressional appropriation, or enrollment. The first example—the existence of a federal treaty—sets a fairly high procedural bar to reach. After all, a treaty involves a negotiated document that must be ratified by two-thirds of the Senate. The procedural bars for the second and third examples—a congressional appropriation and a recognition of enrollment—are much lower. Congressional appropriations occur at least every year, and they are full of items that receive very little consideration or attention. It is not exactly clear what a recognition of enrollment meant in 1934, but it may have involved simple acknowledgment of the members of an Indian tribe by Congress or an official of the Department of Interior.

Justice Breyer’s second and third examples raise the possibility that any number of federal interactions with Indians in 1934 could satisfy the jurisdictional requirement of the decision. In fact, taken to its logical conclusion, Justice Breyer’s rationale could result in an interpretation of “under Federal jurisdiction” that means that any tribe that was not expressly under state jurisdiction in 1934 was under federal jurisdiction. After all, the Indian Commerce Clause gives Congress the authority (that is, the jurisdiction) to regulate commerce with Indian tribes. Unfortunately for the Narragansett Tribe, the Court points out that, from 1927 to 1937, federal authorities considered the tribe to be under state jurisdiction and not under federal jurisdiction. Justice Souter would have remanded the case to the District Court in order to allow the Narragansett Tribe to dispute the Court’s finding.

The Court’s decision does allow for the possibility of applying § 465 to a tribe that was *recognized* later than 1934 but was under federal jurisdiction in 1934. The Court’s temporal limitation of the clause “under Federal jurisdiction” does not apply to “recognition.” The concurring opinions highlight this point. In fact, the Narragansett Tribe was not recognized until 1983, but if the Court had not found that the tribe was under state jurisdiction between 1927 and 1937, the result for the tribe could have been the opposite of what it was. As a practical matter, going forward, it is not clear that the definition of “under Federal jurisdiction” will not also include the concept of “recognition.” Even the authors of the majority opinion and Justice Breyer’s concurring opinion sometimes use the two terms interchangeably.

As stakeholders attempt to provide guidance to the federal government in the wake of this case, we may see those who want a broad application of *Carciери* to propose a conflation of the concepts of “recognition” and “under Federal jurisdiction.” Because there is no clear agreement of what “under Federal jurisdiction” means, some may argue that the phrase includes recognition by the federal government. In other words, if a tribe was recognized in 1934, it is also under federal jurisdiction. Such an interpretation could result in a rule that holds

that any tribe not recognized in 1934 cannot have land taken into trust on its behalf pursuant to § 465.³

The outcome of how “under Federal jurisdiction” is defined will determine the scope of tribes that are affected by *Carcieri*. And even that analysis may not determine what remedies or privileges are available in those situations where the federal government has taken land into trust on behalf of a tribe determined not to have been under federal jurisdiction in 1934.

As the secretary of the interior pointed out in the respondent’s brief to the Court, after a land title is acquired by the federal government, a challenge to the acquisition would be barred by the Indian land exception in the Quiet Title Act, 28 U.S.C. 2409a. When the secretary acquires a title on behalf of a tribe, the land becomes Indian country.

The decision also obviously raises the possibility of a statutory remedy that could be relatively simple to implement from a drafting standpoint—for example, by deleting “now” or “now under Federal jurisdiction” and applying the change retroactively—but such a fix may pose political problems, and it is not clear whether the modification would need to be applied retroactively (depending on the scope of the decision and the application of the Quiet Title Act).

At the time of this writing, Congress has had one hearing on the potential impact of the decision, and the Department of Interior has asked stakeholders for comment on the scope of the decision to individual situations. This process will not be resolved quickly, especially because many of the political appointees relevant to this issue have not yet been confirmed. It is clear that both Congress and the Obama administration will need help and input from stakeholders—often on a fact-specific, case-by-case basis. And, unless there is a quick “legislative fix” to the decision, we may see further challenges to existing and future fee-to-trust decisions based on *Carcieri*. **TFL**

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web of resources that forms the basis of discussions and activities at Wikiversity. Learning resources can be freely exported and used by educators outside of the Wikiversity community for their own purposes.

Wikimedia Commons

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Wikiquote

Wikiquote (en.wikipedia.org/wiki/Wikiquote) is a project that seeks to collaboratively produce a vast reference of quotations from prominent people, books,

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Endnotes

¹Footnote 5 of the Court’s opinion provides some detail of Collier’s role in the textual development of § 479. Apparently, Collier was a principal author of the IRA and was responsible for the insertion of the words “now under Federal jurisdiction.” The Court noted that Commissioner Collier’s responsibilities relating to implementation of the IRA make him an “unusually persuasive” source as to the meaning of the relevant statutory language.

²25 U.S.C. § 2202 states:

The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title: Provided, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

³Many tribes that were recognized post-1934 pursuant to federal legislation have in their recognition legislation a clause that specifically applies the IRA to the tribe. Tribes that were recognized post-1934 through the administrative process, however, are not able to rely on a specific congressional provision that applies the IRA to the tribe. This could result in a dichotomous outcome resulting from the rather arbitrary distinction of whether the tribe was recognized pursuant to federal legislation or pursuant to the administrative process.

films, and proverbs and to give details about the quotations. There are many online collections of quotations, but Wikiquote is distinguished by being among the few that provide an opportunity for visitors to contribute to the site. Wikiquote pages are cross-linked to articles about the notable personalities on Wikipedia.

Conclusion

As noted earlier, the Wiki family of sites is not without its detractors. Perhaps it’s not surprising that there is a very extensive article in Wikipedia itself that exhaustively catalogs the bases for criticism of its site (see “Criticism of Wikipedia” at en.wikipedia.org/wiki/Criticism_of_Wikipedia). Wikipedia, in particular, should be treated like a conversation with strangers—some of whom may be brilliant, some of whom may be

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