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ORAL ARGUMENT OF:

P A G E

Omer Luellen, Esq., on behalf
of Petitioners

2

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM

3 -----)
4 JAMES TOOAHIMPAH TATE, ET AL.,)
))
5 Petitioners)
))
6 vs) No. 300
))
7 WALTER J. HICKEL, SECRETARY OF THE)
8 INTERIOR OF THE UNITED STATES, ET AL.,)
))
9 Respondents)
-----)

10 The above-entitled matter came on for argument at
11 10:05 o'clock a.m., on Wednesday, January 14, 1970.

12 BEFORE:

13 WARREN E. BURGER, Chief Justice
14 HUGO L. BLACK, Associate Justice
15 WILLIAM O. DOUGLAS, Associate Justice
16 JOHN M. HARLAN, Associate Justice
17 WILLIAM J. BRENNAN, JR., Associate Justice
18 POTTER STEWART, Associate Justice
19 BYRON R. WHITE, Associate Justice
20 THURGOOD MARSHALL, Associate Justice

21 APPEARANCES:

22 OMER LUELLEN, ESQ.
23 P. O. Box 96
24 First State Bank Building
25 Hinton, Oklahoma 73047
On behalf of Petitioners

RICHARD B. STONE,
Office of the Solicitor General
Department of Justice
Washington, D. C.
On behalf of Respondents

1 conclusive.

2 Then we have Section 2 of the 1910 Act which is codi-
3 fied as 25 U.S.C. 373, which states that if an Indian dies
4 owning an interest in trust -- it doesn't really say an Indian,
5 it says "any person dying owning an interest in trust or re-
6 stricted lands or funds that are restricted, he shall have a
7 right" -- this person shall have a right to make a will, pro-
8 vided the will shall not have any force and effect until and
9 unless -- unless and until it is approved by the Secretary of
10 the Interior.

11 Now, that is the general situation here. This
12 Indian, George Chahsenah, made a will, his last will in March,
13 1963. He was a member of the Comanche Tribe of Indians. He
14 lived in the little town of Apache, Oklahoma, located about 20
15 miles north of Fort Sill.

16 I don't know whether any of you gentlemen or any
17 member of this Court has ever been to Fort Sill in World War I
18 or World War II. Apache is about 25 miles north of Fort Sill.

19 George Chahsenah was a member of the Comanche Tribe
20 of Indians. He made his last will; he made several wills and I
21 certain that will be brought out here later. His last will was
22 made in March, 1963. He died approximately five or six months
23 later and the procedure for making wills where the Indians have
24 restricted trust lands, we go to the Bureau of Indian Affairs,
25 which in this case, of course, was in Anadarko, Oklahoma, about

1 about 30 miles north of Apache, Oklahoma. He went there in
2 March, 1963 and made his last will in the office of the Field
3 Solicitor and his will was properly drawn, according to pro-
4 cedures, and he died some six months later.

5 And his will, of course, was presented for Probate and
6 several hearings were had before the Examiner of Inheritance,
7 Ken R. Blaine, who had the position of Examiner of Inheritance.
8 It is a position created by the Secretary of the Interior,
9 giving the hearing examiners the general authority to make
10 determinations concerning the deceased heirs of Indians that die
11 without wills and also in regard to the approval or nonapproval
12 of the will.

13 We had, I think, around four hearings in this case
14 and finally, the Examiner of Inheritance made a -- rendered an
15 opinion or ruling or opinion, in which he upheld the validity
16 of this will of George Chahsenah, and he approved the will. In
17 his finding, which, of course, is contained in the appendix, he
18 goes into certain findings about the fact that this Indian
19 apparently was addicted to alcohol and perhaps I should have
20 said prior to this time that in the hearings on this bill there
21 the devisees and legatees were represented by legal counsel.
22 The certain disinherited nieces and nephews were represented by
23 Mr. Hill; also Dorita High Horse, who it was found later by the
24 Court to be his natural daughter.

25 And the Examiner of Inheritance had made a finding

1 that although this Indian apparently was addicted to alcohol
2 and was an excessive drinker and he had made different wills at
3 different times. At the time he made his will he was perfectly
4 competent to make his will; he was not intoxicated. In fact,
5 the will was proper in every respect and Examiner of Inheritance
6 approved the will.

7 Q That's not challenged by anyone; is it?

8 A No.

9 Then on appeal by the contestants of the will, the
10 appeal was taken to the Secretary of the Interior, as directed
11 by the regulations and at that time the authority to approve or
12 disapprove of wills of Indians had been delegated to the
13 Regional Solicitors.

14 Now, originally, up until a short time prior to that
15 they brought those appeals up here to the Washington office
16 and usually the Solicitor or the Associate Solicitor for the
17 Department of Interior made the determination. But this time
18 it was sent down by a delegation of authority to the Regional
19 Solicitors. And the Regional Solicitor for this region was at
20 Tulsa, Oklahoma. Mr. Sanford, the Regional Solicitor, is still
21 the Regional Solicitor.

22 The hearing before the Regional Solicitor of Oklahoma
23 reviewed before the Regional Solicitor. The Regional Solicitor
24 found that the factum of the will was proper as the Examiner
25 had found. He found that this Dorita High Horse was the natural

1 daughter of the decedent, George Chahsenah, and he found, al-
2 though the factum of the will was proper in every respect, the
3 fact that George Chahsenah apparently had not supported Dorita
4 High Horse during her minority, that there had not been an
5 equitable treatment of the heirs of law of George Chahsenah by
6 his will, and under his -- the Regional Solicitor, from his
7 discretionary authority, held that equity had not been achieved
8 and he disapproved the will of George Chahsenah and directed
9 that the estate be distributed to his natural daughter.

10 Now, he also, in his order, disapproved or disallowed
11 that he would also make the same finding as to any other wills
12 of George Chahsenah. Now, he had made several other wills prior
13 to this time. He made that same finding in regard to any other
14 wills.

15 Q They were what, some five previous wills?

16 A Correct, Your Honor.

17 Q And normally, when a will is set aside for some
18 reason or another, you go back to the next previous will. But
19 that wasn't done here at all. You just set aside all of them.

20 A Set aside all of them. That's in the last para-
21 graph of the original Solicitor's decision.

22 Q Who were the relatives in the will as written?

23 A In the will as written? It was his niece, Viola
24 Epinpotter and her three children. He had lived with this
25 niece a considerable portion of his lifetime and was living with

1 her at the time of his death. He had no children except Dorita
2 High Horse; he had no wife; he had no father and mother. He
3 had nieces and nephews, of which Viola was one of them and
4 then he gave his estate to Viola and her three children.

5 Q And under this decision, Miss High Horse gets
6 the whole estate?

7 A Yes. Under the decision of the Regional Solici-
8 tor acting in delegated authority for the Secretary of the
9 Interior, he held that equity was not achieved by this will.
10 The Indian did not make an equitable distribtuion of his estate,
11 therefore his will was disapproved and the entire estate would
12 go to Dorita High Horse because the Examiner of Inheritance had
13 made a finding that she was his daughter and heir at law.

14 Q And the findings of the Examiner as to the com-
15 petency of the testator were not disturbed?

16 A No. On appeal the original Solicitor specifically
17 found that the factum of the will was proper. All the techni-
18 calities had been complied with.

19 Q Has the doctrine of dependent relative revocation
20 of wills been applied in the area of Indian wills?

21 A The regulations provide there shall be no
22 implied revocation of Indian wills.

23 Q Well, that wouldn't necessarily take care of that
24 doctrine.

25 A What doctrine was it, Your Honor?

1 Q The doctrine of dependent relative revocation,
2 which Mr. Justice Stewart was referring to indirectly, or
3 directly.

4 A Do you mean the conditions of the family?

5 Q If the will fails, if a given will fails for
6 some reason it falls back on the prior will.

7 A Well -- Oh, yes, I understand what you mean.

8 Q Do the regulations preclude the application of
9 that doctrine?

10 A No, there are no regulations that preclude falling
11 back on prior wills.

12 Q Did the particular official who made this
13 decision, have before him the prior wills?

14 A He had the record, and I believe they are in the
15 record, Your Honor; at least the substance of the prior wills
16 were in the record, what they provided.

17 His first will that he made he gave his entire estate
18 to Viola Epintanger, the one that later on came in in his last
19 will, practically his entire estate. Then he gave some mis-
20 cellaneous friends some property at different times in his wills.

21 Q Would you mind clarifying for me, if you will, in
22 just plain, simple words, so that they are easy to understand,
23 say, to whom he devised his property in the will that was held
24 bad?

25 A He devised his will, it is found at Appendix

1 page 64.

2 Q To whom was it?

3 A He gave it to his niece, Viola Epinpotter and
4 her son, Frankie Lee Tooahnippah in equal shares, an interest
5 in the allotment of Rupirock.

6 Q Now, who is that, his niece?

7 A Yes, and her son.

8 Q His niece and her son.

9 A That's his interest in one allotment.

10 Q Who is fighting that?

11 A The natural daughter, the one that he does not
12 mention in his wills --

13 Q You mean natural daughter -- you mean by that an
14 illegitimate or legitimate child?

15 A Well, I called her illegitimate. Mr. Hill has
16 contested all my statements of illegitimacies. She is his
17 daughter, born out of wedlock at least.

18 Q Yes.

19 A He never lived with this mother, except maybe
20 for a short interlude.

21 Q Is that who all the fights are between?

22 A That's who the fight is between.

23 Q And if this is upheld what would happen with the
24 property?

25 A If the will is upheld?

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Q If the verdict is upheld, the judgment of the Court of Appeals?

A If the judgment of the Court of Appeals is upheld it will go to the actual daughter who is not mentioned in his will.

Q All of it or part of it?

A All of it.

Q All of it.

A Yes, sir.

Q And what was the next prior will; to whom would it have gone?

A Well, I'm not certain who the next prior will -- I think it went to a nephew.

Q It went to a cousin, Rosa Mae Waha Rastow.

A They are on the record.

Q Yes.

Q Are you challenging the constitutionality of the law to which the Secretary acted?

A No, I'm not challenging the constitutionality of the law under which the Secretary acts. The Circuit Court held that the -- The Tenth Circuit held that the action of the Secretary of the Interior, whatever he says about an Indian will either approves or disapproves an Indian will and that is final and conclusive and cannot be taken to judicial review, it cannot be taken of the Secretary --

1 Q Are you making that holding on the ground that
2 that's not what the statute says? That such a statute would be
3 unconstitutional?

4 A I didn't say the statute -- it doesn't apply as
5 to Indian wills, is the way I interpret it. Section 1 applies
6 to intestate succession. It says it shall be final and con-
7 clusive and this Court in several cases have held that the
8 determination of heirs under the Section 1 is final and con-
9 clusive and not subject to judicial review.

10 Section 2 does not have the final and conclusive
11 clause that the determination or the approval or non-approval
12 of an Indian's will by the Secretary of the Interior is final
13 and conclusive. That's omitted from Section 2.

14 But, the Tenth Circuit in two or three cases, the
15 Heffelman case, the Attocknie case and this case have held that
16 Sections 1 and 2 complement each other and that final and con-
17 clusive as it applies to Section 1 of the intestate succession,
18 means that it also applies to complement Section 2; therefore,
19 it's final and conclusive and not subject to judicial review
20 by the court, even though --

21 Q Then is your argument based solely on the
22 question of the statutory construction, or is it based on
23 attacking the constitutionality of the law?

24 A I'm not attacking the constitutionality of the
25 law, I just -- my position is that Section 2 does not have

1 the final and conclusive clause and therefore --

2 Q Well, Mr. Luellen, / your whole argument -- the
3 in brief
4 only issue for us to decide, as I understand it, / is whether or
5 not the action of the Secretary of the Interior when a judicial
6 review of that action is precluded by the statute. That's all
7 it is; isn't it?

8 A That's it --

9 Q Well, I must say you haven't really gotten to
10 as I understood it,
11 that issue, which, / is the only issue we have before us.

12 A Well --

13 Q We have nothing to do with the background of the
14 wills or --

15 A It's not in the statute, Your Honor --

16 Q I know it's not, but that's the issue for us to
17 decide; isn't it? That's what your position is; isn't it?

18 A Although --

19 Q That's a matter of statutory construction,
20 according to your judgment?

21 A What?

22 Q That is a matter of statutory construction,
23 according to your judgment?

24 A Well, yes, it would be a matter for this Court,
25 the construction under Section 2 means its final and conclusive
or whether it doesn't mean it?

Q Do you raise a constitutional question? If so,

1 what is it?

2 A I don't think I raised a constitutional question;
3 in my opinion, I don't.

4 Q Well, haven't you got a subsidiary issue? Let's
5 assume that you prevail on the ground that this review is not
6 precluded, then don't you have the question as to whether the
7 Secretary, in doing what he did, acted within the scope of his
8 authority?

9 A That is true.

10 Q And that's in issue, as well as the one that Mr.
11 Justice Brennan was talking about.

12 A Yes. You take one issue, and then if you say
13 you still have the right to review and he still has the other
14 issues.

15 Q Right.

16 A Whether the District Court was proper in this
17 case or whether the Secretary of Interior was proper.

18 Q But, Mr. Luellen, that's not the question in
19 issue here to us. If you prevail and it's judicially reviewable,
20 all you are entitled to is for a remand to the Court of Appeals
21 to have the Court of Appeals decide the merits; isn't it?

22 You have only raised with us, as I understand it, the
23 question presented is whether the decision of the Secretary of
24 the Interior approving or disapproving the will of an Indian is
25 subject to judicial review. That's the only question presented

1 here. You haven't asked us to decide the merits.

2 A No --

3 Q The Court of Appeals refused to decide the
4 merits.

5 A That's right; it did.

6 Q But the Government seeks to sustain the judgment
7 below on the grounds that the discretion was properly exer-
8 cised.

9 A They say that the decision of the Secretary of the
10 Interior was proper. Of course, we contested that and the Dis-
11 trict Court held it was improper.

12 Q Your claim must, of necessity, be, as has been
13 suggested, that first it's subject to judicial review and that
14 there might be some standards by which the Secretary of Interior
15 exercises his authority. Are you suggesting that the judicial
16 review is based upon general standards of review as administra-
17 tive action? That it must not be arbitrary and capricious; it
18 must be based on some rational --

19 A Yes. We -- I think that would be our position,
20 yes. We feel that there is no statutory preclusion of review;
21 that Section 1 does not complement Section 2; therefore, it's
22 on the general review abilities of the courts to review some-
23 time, someplace there must be a question that has an action in
24 the administrative review unless the statutes preclude the re-
25 view and we feel like Section 1 does not preclude review under

1 Section 2.

2 Now, of course, this has been up in several cases.
3 It has been up in Homovich versus Chapman, in the circuit here;
4 the District of Columbia Circuit. And they raised that point
5 in that case that it is not subject to -- The decision of the
6 Secretary of the Interior was final and conclusive and not sub-
7 ject to review.

8 In Homovich versus Chapman, the decision in the
9 District of Columbia, they held it was subject to judicial
10 review.

11 Then, later on in Hayes versus Seaton case, which was
12 discussed, and you had your dissenting opinion in Hayes versus
13 Seaton, which goes into that much in detail.

14 Then we come along with the Heffelman case in the
15 Tenth Circuit and they say Section 1 and Section 2 complement
16 each other; therefore it's -- you cannot review the Secretary
17 of the Interior's decision approving or not approving the wills
18 of Indians, going back and saying Section 1 complements Section
19 2.

20 Approaching the factum of this will, why this -- why
21 the District Court held that the Secretary, acting in an
22 arbitrary and capricious manner, directed the approval of the
23 will, that goes back to the facts, of course.

24 But when it went up on appeal the Tenth Circuit
25 didn't go into the facts whatsoever. They just said, "No

1 jurisdiction," and directed the action be dismissed and the
2 estate redistributed in accordance with the decisions of the
3 Secretary of the Interior.

4 Now, of course, in the District Court the facts were
5 gone into and the District Court held that in this case the
6 Secretary of Interior was acting in an arbitrary and capricious
7 manner, without the rationale for his decision and directed
8 that the estate be distributed pursuant to the terms of the
9 will.

10 The question is, going back to the facts of that
11 particular phase of it, which I think gets into this case any
12 way you / figure it, is first, whether the Secretary of the Interior
13 could sit up there and determine whether this Indian did equity
14 to his heirs and does the discretionary authority go that far?
15 Can you just arbitrarily say to an Indian, "I don't want to
16 approve this will; this is an unjust will, unactual will,"
17 something like that. And I don't believe the prior cases with
18 memorandums to the Secretary of the Interior in 1941, which is
19 in my brief in two or three different places; at that time it
20 was thought by Mr. Slattery who was Chief of the Indian section
21 of the Interior, that the will of an Indian -- he had a right
22 to make his own will, and that the Secretary of the Interior
23 didn't have the right to substitute his will for that of the
24 Indian.

25 Q Is there any suggestion made that the Secretary

1 should fix up the legacy, sort of a comparative rule of bene-
2 ficiaries and due equity by fixing up a legacy for this woman
3 and letting the rest of it go according to the testator's will?

4 A There is no --

5 Q No suggestion of that kind?

6 A No suggestion of that kind, that I know of your
7 Honor, and there is no power that I know of, to do that.

8 Q Well, he relied on equity; didn't he?

9 A I didn't rely on equity.

10 Q No, you didn't, but the Secretary did.

11 A The Secretary did. I say that that's not a
12 valid disposition of this Indian's property, to just say "We're
13 going to do equity." Where is the criteria? When could you
14 ever say when is equity done? Suppose the Secretary of the
15 Interior had said, as I put in one of my briefs: "Well, this
16 Indian here, he's a member of the Comanche Tribe of Indians.
17 The Comanches were notorious warriors. You read about the
18 Comanches. I just never would approve of a will of an Indian
19 -- a Comanche Indian." That would be arbitrary and capricious
20 and be subject to judicial review; and also would be subject to
21 mandamus, I think, under 1361.

22 Q Could I ask you whether this provision covers
23 all property which is covered by the will? I suppose Section 2
24 is figured only when the Indian owns restricted property; is
25 that it? That is, property which the United States is holding

1 in trust for him. If he doesn't own any of that property, but
2 owns a lot of other property, then the Secretary has no power?

3 A No power over his other property.

4 Q Well, now, assume he owns both kinds of property
5 restricted and unrestricted and he make a will covering both.
6 Does the Secretary's invalidation of the will invalidate as
7 respects the other property, too?

8 A In my opinion it does not affect the other
9 property, the nonrestricted property.

10 Q So, in an Indian will the non-trust property is
11 unaffected?

12 A Yes. Now, of course, the Osage Indians have a
13 different situation. The Secretary of Interior has to approve
14 it and also the courts, but you can probate an Indian's will
15 where you have two witnesses and the will has complied with the
16 Oklahoma statutes. The fact that the Secretary of the Inter
17 could not approve his will, I don't think it affects his non-
18 trust property. That is my opinion; at least.

19 Now, this will gave all of his property to his
20 various -- and I didn't finish up. Of course, in the next
21 paragraph he gave his -- he gave to Vila Tooahnippah and Julia
22 Tooahimpah, daughters of Viola, and equal shares in his interest
23 will of George Chahsenah. Then he made a residue clause and
24 gave all of his residue to Viola and her three children.

25 His entire estate, which was in trust and restricted

1 property, was distributed and taken care of in this will. He
2 never did mention Dorita High Horse in any of his wills. His
3 first will he gave it to Viola. That's the niece that he lived
4 with most of his lifetime.

5 Then there, a period of some three or four years, as
6 Mr. Justice Stewart, I believe was noting there a while ago,
7 he tells the different ones he gave his properties to and then
8 when he knew he was in bad health and got ready to really go
9 on out into this other world, he came in and made this will
10 and he had it spelled out. He told certain allotments to cer-
11 tain persons. And then he set the residue to these four.

12 The factum of this will has never been disputed. The
13 only thing is the Secretary of the Interior, acting through the
14 Regional Solicitor said this Indian did not achieve an equitable
15 purpose because he should have been held liable for the support
16 of this Indian girl while she was a minor and therefore, using
17 his -- what the Secretary says is his discretionary power, he
18 withheld the approval of this will.

19 The District Court said that was arbitrary and capri-
20 cious and there was no rationale for this action and he directed
21 the Secretary of the Interior to approve the will.

22 And then on appeal to the Circuit Court the Circuit
23 Court said Section 2 is under Section 1 so far as final
24 and conclusive; it's not subject to judicial review and they
25 refused to review it and directed the case be dismissed and the

1 estate be distributed pursuant to the judgment of the Secretary
2 of the Interior.

3 I filed my petition for certiorari here, which this
4 Court has seen fit to allow. I am not certain what actions you
5 could take. You could either, I suppose, direct the Circuit
6 Court to go ahead and hear the case on the facts, if they have
7 jurisdiction; if you hold they have jurisdiction, or you could
8 direct that.

9 It would be distributed as directed by the trial
10 court.

11 Q If we send it back, assuming that you prevail
12 and we send it back to the Court of Appeals, what standards
13 should the Court of Appeals apply? I put that question to you
14 before, but I am not clear on your answer. Should they apply
15 general rules of administrative action?

16 A I would think so --

17 Q To support the --

18 A I think they would apply the general rules of
19 review. In my opinion, I don't know what other rules they can
20 apply. I think would be the general rules; yes.

21 I believe I have taken up most of my time. I'll
22 just reserve any time I may have left.

23 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Luellen.
24 Mr. Stone.

25 ORAL ARGUMENT BY RICHARD B. STONE, OFFICE
OF THE SOLICITOR GENERAL, ON BEHALF OF RESPONDENTS

1 Q Let me ask at the outset, Mr. Stone, whether the
2 power to review the will and grant or withhold approval, is one
3 in which the Secretary, for which the Secretary must have
4 reasons, or whether you think its an absolute, unreviewable
5 power?

6 A The Government's position, Mr. Chief Justice, is
7 that this is an unreviewable power under Section 2 of the 1910
8 Act. Of course, we are basically putting forth two contentions
9 in this case: one is that the Secretary's determinations are,
10 in fact, unreviewable, and the other is that even if there is a
11 limited standard of review, which is to review whether the
12 Secretary has exceeded the scope of his authority in rendering
13 his discretionary decisions.

14 Q Is that a question on the merits, Mr. Stone?
15 That's the merits.

16 A Yes, I believe it is.

17 Q And that was not reached by the Court of Appeals?

18 A That question was not reached --

19 Q Why does the Government ask us to reach it?

20 If we should decide that there is judicial review, why shouldn't
21 we send it back to the Court of Appeals to decide the merits?
22 Why should we reach it?

23 A Well, I think that is a possible disposition of
24 the case, and it would be understandable if the Court chose to
25 decide it this way.

1 I think the question was sufficiently clear that the
2 Court could -- that it is sufficiently clear that the Secretary
3 has the right to apply equitable considerations to the case,
4 that this Court could reach that decision quite easily, and
5 remand, if necessarily, with instructions to apply that rule.

6 Q Would you think that the Court of Appeals, having
7 thought it had no jurisdiction at all, do you think if you go
8 back to them that they might need some guidance as to what
9 standards would apply to the review?

10 A I think it would be helpful, Mr. Chief Justice,
11 if the Court of Appeals were given some standards of review, and
12 I think that the standard that they should be given is a very
13 broad one and the Secretary has extremely wide powers in this
14 area and that a reversal would only be in order if the
15 Secretary had grossly abused his scope of discretion.

16 But, I would like, with the Court's permission, to
17 discuss very briefly the historical context in which the general
18 Allotment Act and the Act of 1910 appears, because I think it
19 bears -- this historical context bears very / ^{heavily} on both of the
20 contentions that the Government is making in this case: the
21 contention that the Secretary is given absolute discretion, non-
22 reviewable and the contention that Congress intended for him to
23 exercise very wide range of considerations in deciding whether
24 to approve or disapprove a will.

25 The General Allotment Act was one of the major

1 aspects of Congress's effort to make reservation Indians
2 economically integrated and self-sufficient members of society.
3 Under the allotment system prior to 1934 the Government
4 divided and allotted reservation property and gave them to
5 individual Indians and their families. The properties were
6 conveyed under an arrangement which this Court has characterized
7 not as a technical trust arrangement, but as a kind of special
8 guardianship by which the Department of Interior was entrusted
9 with the duty of restricting alienation of the Indians' interest
10 in these lands in furtherance of a Congressional policy which
11 this Court has described as "The promotion of prudence to
12 afford protection to dependent and natural heirs"and also,
13 "reserving restrictive land for the Indians.

14 This Court has recognized that the legal relationship
15 is a very special one between the Government and reservation
16 Indian tribes/and that special relationship has survived the
17 breakup of certain reservations and the allotment to individual
18 Indians of tribal land. At least it has survived with respect
19 to the allotted lands themselves, and at least to the extent
20 that the Government continues to guard against improvident
21 alienation of these properties by the Indian allottees.

22 It was Congress's hope at the time that the original
23 Allotment Act was passed, that the Government's guardianship
24 from the time at which it would be deemed advisable to remove
25 the restrictions would be only about 25 years. It was hoped

1 that at the end of that time these lands could be conveyed to
2 the Indians in fee simple.

3 In the majority of instances, however, the removal
4 of restrictions on alienation soon resulted in acquisition
5 of these properties by parties unrelated to the Indian
6 allottees, usually, in fact, by nonIndians.

7 In furtherance of the statutory purpose of the
8 Allotment Act, which was to preserve the value of the allotted
9 property for the benefit of the allotted ^{Indians} /and their families,
10 in most cases the period of guardianship has been extended.

11 Q Mr. Stone, looking at the brief filed by the
12 Solicitor General, he's posed two narrow questions: whether
13 Section 372 read with, apparently, 373, gives final and con-
14 clusive posture and status to his decision and whether he may
15 take equitable considerations into account.

16 Now, most of the members of the Court are familiar
17 with this historical background. It would be helpful, I think,
18 if you would address yourself to the specific question.

19 A Well, I am about to do this, Mr. Chief Justice.
20 I thought a reminder of the historical background, and par-
21 ticularly, the historical purpose of the General Allotment Act
22 ^{which} /was to assure that these conveyed Indian lands were made for
23 the benefit of Indian allottees and their families, would be
24 rather helpful to an understanding of the statutory context.
25 It's rather helpful to an understanding of range of the

1 Secretary's powers in approving or disapproving alienation of
2 Indians Rules.

3 The Secretary's statutory duty to preserve these
4 lands in the hands of the allottee during his lifetime is
5 supplemented by a duty to supervise disposition of allotted
6 properties upon the death of the allottee, pursuant to the Act
7 of June 25, 1910, which is the Act under consideration in this
8 case.

9 And Sections 1 and 2 of this Act, taken together,
10 provide a complete enumeration of the Secretary's powers over
11 the disposition of allotted properties on the death of the
12 allottee.

13 Section 1, as you know, authorizes the Secretary to
14 determine the legal heirs of the deceased; and this determina-
15 tion, by statute, / is to be made under State law, in this case the law of the
16 State of Oklahoma, Section 1 as this Court is doubtless aware,
17 provides that the Secretary's determination of heirship is to
18 be final and conclusive and requires only that the Secretary
19 hold a hearing with notice.

20 This Court has explicitly held that the Secretary's
21 determinations of heirs are not reviewable by any court. In
22 other words, this Court has specifically held that Section 1
23 determinations are not reviewable, even if errors of law are
24 alleged. This is the First Moon v. White Tail case, cited in
25 our brief at 270 U.S. 243.

1 The Court recognized in the First Moon case the
2 Secretary's unique and pervasive role with respect to these
3 restricted properties and found that "Abundant reason for the
4 provision precluding review becomes apparent upon consideration
5 of the infinite difficulties which otherwise would arise in
6 connection with the sundry duties of the Secretary of the
7 Interior relative to Indian allotments."

8 Now, Section 2 of the Act of 1910, which is, of
9 course, the key provision ^{under} / consideration in this case, re-
10 quires the Secretary, in a case in which the deceased Indian
11 has left a will, to approve or disapprove that will, if the
12 will is disapproved, as in this case, the property passes in its
13 entirety by the laws of intestacy; that is, the restricted
14 property bequeathed in the will.

15 Q How about Mr. Justice White's question: What if
16 an Indian owns, in addition to allotted land, what if he owns
17 realty or personailty of his own, does the Secretary have any
18 right to disapprove that will with respect to that property?

19 A No, the Secretary, as far as I am aware, has no
20 right to disapprove any disposition of that other property at
21 all.

22 Q Well, if he owns both kinds of property --

23 A Restrictions were only to the --

24 Q Allotted.

25 A Both and testamentary restrictions

1 run only to the restricted property and of course, are tied
2 into the conveyance of the restricted property, at the time the
3 allotment is made.

4 Q Is that regardless of whether he is on the
5 reservation or not?

6 A I believe that it is regardless of whether he is
7 on the reservation or not.

8 Q Would I be correct in saying that former Chief
9 Judge of the Court of Criminal Appeals of Oklahoma, Judge
10 Barefoot, couldn't make a will? Suppose you have a full-blooded
11 Choctaw Indian?

12 A I'm not aware of any reason why he couldn't make
13 a will, Mr. Justice Marshall.

14 Q Well, would it have to be approved by the
15 Secretary?

16 A Only with respect to the restricted property
17 that has been allotted.

18 Q You're sure that it still would have to be
19 approved by the Secretary.

20 A Yes, I assume the Secretary in the case of such
21 a testator would give great weight to the testator's will and
22 would assume that the disposition that he made of the property
23 was provident, and I assume that actually, by the time that such
24 a person would have been granted his restricted land in fee
25 simple, which the Secretary also has the power to do.

1 But if, by some chance he stillheld land under,
2 subject to restrictions, that the Secretary would continue to
3 have the power to approve the will insofar as disposal of the
4 restricted territories.

5 Q If the Judge was alive he might put him in
6 contempt.

7 A Yes, that would pose a very knotty question.

8 Q Are there any rules or regulations or statements
9 of administrative policy with respect to classes of benefi-
10 ciaries who will be disapproved or who must be included, or
11 anything like that?

12 In other words, can an Indian will his property to a
13 white man or a whisky dealer or somebody to whom he owes money?

14 A There is no regulation or statutory provision
15 prohibiting him from willing this land to a white man, but the
16 purpose and the mandate given to the Secretary by the/Act of
17 1910 would subject the Secretary to very close scrutiny if he
18 were to -- or would cause the Secretary to very closely
19 scrutinize any will which gave restricted property to a white
20 person.

21 I noted in this connection that there was at one time
22 at the moment the regulations of the Secretary of the Interior
23 are/^{quite}general and don't refer to what specifically, what types of
24 considerations are to be taken into account in approving or
25 disapproving a will.

1 Q And no such administrative standards --

2 A There was at one time, a set of regulations
3 which the Secretary -- which were laid out in the Nimrod case
4 which is cited in our brief at 24 Fed.2d. I don't have the
5 cite in front of me.

6 Q Mr. Stone, as far as the regulations are con-
7 cerned -- I haven't read them -- is it fair to say or what is
8 the fact, do they go to the factum of the will, the way a will
9 should be executed?

10 A Well, there, Mr. Justice Harlan, the regulations
11 are very silent with respect, both to the factum and to the
12 equitable considerations to be taken into account. There are
13 practically no technical requirements laid out in the regulation
14 at all, simply that the testator should have testamentary
15 capacity and that there should be two competent witnesses.

16 Unlike the Section 1 determination, which is pres-
17 cribed according to state law, that is, the determination of
18 heirship, approval of the will is subject to the Secretary's
19 own standards altogether. There are no technical requirements
20 and the Secretary has produced very few technical requirements.
21 The regulations, in short, like the statute, leave the Secretary
22 and his delegates with maximum flexibility and discretion and
23 that is quite informative with the entire statutory scheme under
24 which the Secretary supervises these restricted lands, both
25 during the lifetime of the allottees and after the death of the

1 allottees.

2 Q Are there any other instances in the administra-
3 tive precedent where the Secretary has done what he did here
4 that you have been able to find?

5 A There are other instances in which the Secretary
6 has applied equitable considerations.

7 Q And rewritten the wills -- not rewritten the
8 will, but set it aside because of the disposition?

9 A No; I have only been able to find cases in which
10 the wills have been approved, though it was clear that equitable
11 considerations were taken into account. Now, I have been un-
12 able to locate a decision that is cited in the decision of the
13 ^{Regional} Solicitor; it appears to be unrecorded. I have searched for it
14 in the Interior Department cases, and haven't been able to find
15 it.

16 The Regional Solicitor cited one case in which a will
17 had been disapproved on equitable grounds. That case was not
18 reviewed later by any court; it wasn't brought to any court and
19 I haven't been able to find the decision.

20 Q Mr. Stone, we have observed that we don't have
21 the merits before us, but the merits are not totally irrelevant.
22 Would you agree that the contest between a daughter -- a natural,
23 illegitimate daughter, who had relatively little contact with
24 the testator and a niece with whom he had lived and who had a
25 relationship somewhat like that of a natural child; is it a

1 close question?

2 A Mr. Justice Burger, I believe, in view of the
3 policy of the Allotment Act to preserve Indian lands, restricted
4 lands in the hands of the allottees and their families and
5 dependents is not a close question in a case in which an
6 Indian has -- an Indian allottee has totally neglected his only
7 born child all through her childhood and thereafter. However,
8 I don't think it's important to note whether this is a close
9 question or not, because it is a question that has been left to
10 the discretion of the Secretary of the Interior and it is --

11 Q That's the question here; isn't it? That's the
12 question which we have in the case, whether it's been left
13 entirely to his discretion.

14 A Yes, and it is the Government's view that the
15 Secretary's discretion at least applies to determining whether
16 property has been allocated for the purposes -- consistent with
17 the purpose of the Act.

18 I know in this regard, if the Chief Justice is
19 interested in the closeness of the question from an equitable
20 point of view, that the reason the Solicitor didn't find it
21 close at all, decided the fact that the testator had made five
22 or six wills and had changed his place of residence around a
23 number of times so that he could feel that there wasn't that
24 much weight to be given to the equitable considerations on the
25 side of approving the testator's will and he felt quite

1 compelled by the fact that this man had never in his entire
2 lifetime, done anything to support his daughter; never used any
3 of the substantial income from his restricted properties in
4 furtherance of her support and the Regional Solicitor felt that
5 this was quite contrary to the purpose of the allotment act
6 and of its conveyances.

7 Q Am I correct that all the parties in this case
8 are Indians?

9 A Yes; I believe that all the parties in this case
10 are Indians.

11 Q So, when you keep emphasizing the fact that
12 Congress meant for this to stay with the Indians, that's
13 irrelevant; isn't it?

14 A Well, no, Mr. Justice Marshall, I divide that
15 point into two. I think that it is -- part of Congress's
16 purpose was to make sure that these lands passed on to Indians
17 as opposed to nonIndians.

18 Q And what was the other point?

19 A But the other point which I think was really more
20 central and was borne out by the statutory scheme, is that
21 Congress intended for the specific -- Congress was looking, not
22 only to the interest of Indians in general, but to specific
23 allottees and their immediate families and dependents. The
24 original Allotment Act allotted land on the basis of the size
25 of the family. The head of the household got a certain amount

1 and each dependent or ward of the household received a small
2 amount of allotted land which was held by the Secretary in
3 trust for that individual.

4 Q Is there anything in the legislative history
5 that said that the Secretary of the Interior should have the
6 right to decide as to whether or not the testator distributed
7 it fairly among his heirs, providing they were all Indians?

8 A Yes, there most certainly is, Mr. Justice
9 Marshall. I would like to quote now from the Congressional
10 Record, which is laid out at pages 11 and 12 of our brief, a
11 conversation occurring in the debate on the Floor of the House
12 of Representatives between Representative Cox of Indiana and
13 Mr. Burke, who is the -- was the Chairman of the Indian Affairs
14 Committee of the House of Representatives.

15 In discussing the reasons why the law of 1910 was
16 passed, Congressman Cox asked Congressman Burke what the purpose
17 of Section 2 was, from two points of view. He was interested,
18 first of all, in knowing why Indians were given the power to
19 write wills with respect to restricted properties which they
20 had never had before and furthermore, what the Secretary of the
21 Interior's role was with respect to approval or disapproval of
22 those wills. And Mr. Burke cited the primary case to which he
23 thought that Section 2 was directed, which was case in which an
24 Indian allottee has after-born children who are not covered in
25 the original allotment and in a case of that kind the Indian

1 frequently wishes to have these after-born children provided
2 for and one way to provide for them would be to give them a
3 disproportionate share of his own allotment upon his death.

4 As Chairman Burke says -- I am now on page 12 of my
5 brief: "In a case of that kind undoubtedly the Interior Depart-
6 ment would okay it, whereas if it was a will giving his estate
7 to some person who ought not to have it, then they would dis-
8 approve it."

9 Q Well, what is there in this case to say that
10 these people ought not to have it?

11 A Well, there isn't necessarily --

12 Q Isn't the best equitable argument you've got that
13 Miss High Horse should have a part of it?

14 A There is no provision, Mr. Justice Marshall, for
15 giving her a part of it. The only power that the Secretary has
16 is to approve the will or disapprove the will and he must take
17 into account which of those produces a disposition of the
18 property that is more in harmony with the purpose of the General
19 Allotment Act to preserve this land in the family, and in
20 harmony with the purpose to give some consideration, at least,
21 to the testator's will.

22 Q Just from a technical standpoint, could he have
23 let the fifth will stand; or the 4th or the 3rd?

24 A From a technical point of view, I believe he
25 could have let the fifth will stand if it was still in existence

1 and were found to be properly executed, he could. I'm not
2 familiar with that and counsel for co-respondent, Dorita High
3 Horse, Mr. Hill, I believe, is better acquainted with that.

4 Q Mr. Stone, am I right about this, that what you
5 have been saying about equitable considerations, that's not that
6 broad; is it? I gather what you've been saying is that what
7 the Secretary decides, if someone who should have been the
8 object of his bounty was excluded by the will and the Secretary
9 thinks that was unfair to exclude that person, then the
10 Secretary may disapprove the will; is that it?

11 A I am sure, Mr. Justice Brennan, that I see the
12 distinction between --

13 Q Well, obviously -- these words "equitable con-
14 siderations," I don't know what that means. I gather what you
15 have been saying is that really it comes down to whether he
16 unfairly excluded someone who should have some provision --

17 A I don't think it has to be posed that narrowly,
18 Mr. Justice Brennan. I think it's better posed in terms of
19 whether the disposition which he made of his lands is in con-
20 formity with the purpose of the allotment act, which was to
21 keep those lands in the hands of the testator and his family
22 or more generally, within the Indian community.

23 Q Well, I know, but you -- what you have here is
24 that everyone involved is within the family, either nieces or --

25 A But, there is surely a distinction, however,

1 with respect to that, and I think the laws of intestacy bear
2 this distinction out altogether, since they give all of the
3 property to the daughter and none to the nieces and nephews.
4 There is a distinction.

5 Q Yes, but the basic consideration here was that
6 he should not have excluded from his will, his natural daughter
7 in the distribution or the devises, rather, of these allotted
8 lands.

9 A That is correct.

10 Q That's what the whole thing turned on. The
11 Secretary just thought it wasn't fair not to have made a pro-
12 vision, for a share at least, of those lands to the daughter;
13 isn't that right?

14 A The Secretary made the decision that it was not
15 in keeping with the purpose behind the allotment for this girl
16 to be left out of her father's will. Now --

17 Q But, does it appear in the record, Mr. Stone,
18 whether the nieces were also allottees or potential allottees
19 from their parents?

20 A From my knowledge it doesn't, Mr. Justice White.
21 It's possible that Mr. Hill may be better acquainted with that.
22 I didn't pick that up.

23 Q Well, it isn't in the record; is it?

24 A Excuse me?

25 Q It isn't in the record.

1 A Certainly not in the printed record. It may be
2 in the transcript of the administrative hearing, which was
3 stipulated out of the printed record. But I don't think this
4 was the focus of the hearing examiner's inquiries.

5 The selection from the Congressional Record which I
6 just read to this Court, is illuminating, I think, not only
7 because it shows that Congress intended to give the Secretary
8 broad discretion with respect to whether restricted lands ought
9 to be alienated by wills from the immediate heirs of the allot-
10 ment holder; but also because it shows the purpose that Congress
11 had in mind when it gave allottees the right to make wills was
12 not to advocate prior policies of assuring that restricted lands
13 remained in the family of the allottee. So, rather than to
14 allow the allottee in certain situations, later flexibility in
15 providing an even distribution of assets to his own heirs.

16 It would be a rather startling development in the
17 statutory context under which the Secretary maintains complete
18 power, both in and testamentary to determine whether
19 this lands ought to be alienated to read the right of an Indian
20 to make a will, all of a sudden, to mean that in this particular
21 context, in other words, the context of a debt by will that --

22 Q Tell me, Mr. Stone, is there any suggestion that --
23 these particular petitioners are nieces and nephews of the
24 decedent; weren't they?

25 A One was a niece and three others who were deeded

1 land were nephews.

2 Q Well, now, would they be excluded from the class
3 of allottees?

4 A I'm sorry, Mr. Justice Brennan.

5 Q Well, the allottee here was a decedent; right?

6 A That's right.

7 Q And for the purposes of the allotment act, would
8 these nieces and nephews, whatever they are, be included in the
9 class?

10 A No. They might have if they were not his --
11 if he was living in their home they may be included in another
12 allotment from another household.

13 Q No, no. In his allotment?

14 A No, they would not be included in his allotment.

15 Q Well, then is the Government's point that they
16 have to lose because Congress never intended that any except
17 his immediate family should be the beneficiary of these allotted
18 lands?

19 A I wouldn't say it that flatly, Mr. Justice
20 Brennan. I think Congress has left the Secretary greater dis-
21 cretion than that. I think it evinces the policy that there
22 ought to be general disposition made to those within the
23 immediate allotment.

24 Q Well, is that an answer to me, then, that they
25 might have approved this will, even though all the allotted

1 lands went to nieces and nephews, rather than to the --

2 A Yes, the Secretary might have conceivably found
3 it --

4 Q Well, he certainly would have if there hadn't
5 been a natural daughter.

6 A Oh, yes; I think that's true. He certainly
7 would have. At least I have not been able to ascertain any
8 reason from the record why he would not.

9 Q If the Court had jurisdiction on this, would it
10 have to decide what it felt was fair; would that be the
11 question?

12 A I don't believe, Mr. Justice Black, that the
13 Court would decide whether, what it thought was fair. I think
14 that the Regional Solicitor would decide what he thought was
15 fair.

16 Q Yes, but I understand that the argument is --

17 A Yes, I think the Court would only have to take a
18 look at the record and decide whether there was any substantial
19 evidence to support the Regional Solicitor's reasoning.

20 Q Well, in the final analysis he would be overruling
21 him as to whether he thought it was fair; if he would go con-
22 trary to the thing; wouldn't he?

23 A If the Court would --

24 Q Would the Court be finally passing on all of --

25 A Under the very limited standard of review of

1 discretionary finding of an administrative agency, which is
2 simply to determine whether there was a substantial reason,
3 substantial evidence --

4 Q I'm not talking about the degree now, but in the
5 final analysis --

6 A That's right; in the final analysis the
7 Secretary's determination were reversed his discretion would --

8 Q And your claim is that the Government was left by
9 the Congress with complete and conclusive powers to decide this
10 question, without any judicial review?

11 A Yes, that is the Government's contention. I
12 think that, although it is not always the most appealing posi-
13 tion for the Government to take, to say that there is absolutely
14 no review, I think that all of these special conditions under
15 which allotted properties are subject to the guardianship of the
16 Secretary of the Interior, might be viewed as this Court has
17 viewed them in the historical context of the Government's re-
18 lationship to Indian tribes and tribal lands.

19 Q You don't think there is any significance to the
20 presence of nonreviewability clause in the case of an Indian who
21 has not left a will, in the absence of such a clause --

22 A I think, Mr. Justice Harlan, that there is -- it
23 would certainly be better, from the Government's point of view,
24 if the words "final and conclusive" were cited again --

25 Q It certainly would. How do you explain the

1 difference between those two provisions in that regard?

2 A Well, it is our position that the final and
3 conclusive language was not repeated in Section 2 because it
4 was unnecessary. It was so clear that Sections 1 and 2 were
5 complementary provisions, which together, encompassed all of
6 the Secretary's powers in respect to reviewing disposition of
7 debt of restricted lands. And we have charted, I think, con-
8 siderable positive evidence to the effect that Congress intended
9 for both Section 1 and 2 provisions to be nonreviewable. I
10 just read very, very briefly from Page 11 in our brief from the
11 same date which this Court -- on the basis which this Court
12 decided in Section 1 determinations were in fact, nonreviewable
13 in which Mr. Cox asks Mr. Burke under the provisos that now
14 exist in Section 2, does it not place complete power in the
15 hands of the Secretary of the Interior and the Commissioner of
16 Indian Affairs, over the will of an Indian, with absolute power
17 to revoke the Indian's will and the answer is: "Yes, I think it
18 does."

19 At this point I must ask the Court's permission to
20 give the rostrum to co-respondent Dorita High Horse's attorney,
21 with whom I agreed to split the time in this case.

22 Thank you.

23 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stone.

24 Mr. Hill.

25 ORAL ARGUMENT BY HOUSTON BUS HILL, ESQ.

1 ON BEHALF OF RESPONDENT DORITA HIGH HORSE

2 MR. HILL: Mr. Chief Justice and Honorable Justices
3 of this Court: In order to enlighten Mr. Justice White and
4 Justice Thurgood Marshall on the point as to what effect this
5 will would have if the Secretary of Interior had disapproved it
6 and there was unrestricted property which would be handled by
7 the state courts in our state. And the only thing about the
8 unrestricted property, in the State of Oklahoma we have a
9 statute which makes the surviving spouse a fourth heir to the,
10 toone-third of the property. So, if it's that situation, why,
11 the surviving spouse would be entitled to one-third of it,
12 regardless of the will. And the only thing that the county
13 judge and probate judge might take into consideration is
14 the fact that the Secretary, acting by and through his agent,
15 had either approved or disapproved the will. They could take
16 that into consideration and might be persuasive to him, but he
17 wouldn't have to be bound by that as to whether or not the will
18 should be probated in the county court of that county on the
19 unrestricted property.

20 Q But now, the same statutory provisions in most
21 states which give what is sometimes called "the dower right,"
22 to the surviving widow, also give virtually unrestricted power
23 to the testator to omit his children if he wants to.

24 A Yes, sir.

25 Q Now, is that true?

1 A Yes, sir. Normally, it's required that they
2 make some indication in the will that they intended to deprive
3 that child. Now, if the Court please, I handled this case
4 throughout the trial before the Examiner of Inheritance and
5 am thoroughly familiar with the facts of the case. And I
6 want to say this --

7 Q Who did you represent?

8 A I represented Dorita High Horse and some of the
9 other nieces and nephews. Now, bear this in mind, that here
10 this full blood Comanche Indian was another allottee. He in-
11 herited this land, itself, from his mother and some of the
12 others, under the General Allotment Act of February 7, 1887.
13 That was the General Allotment Act which only affected the wild
14 tribes and it did not include the five civilized tribes which
15 the Justice was making mention a while ago about Justice
16 Barefoot. I am a member of the Choctaw Tribe, myself, but it
17 didnt have any effect upon the five civilized tribes or the
18 Osage tribes, themselves.

19 But of these wild tribes, you take the Comanche and
20 the Apaches, the Otoes and Wastows and tribes like that. Now,
21 the first -- after the legislation was enacted in 1910 giving
22 the power and authority to the Secretary of the Interior to
23 determine, under Section 372 whether or not certain heirs were
24 entitled to be heirs of the deceased and holding that, in the
25 statute, that that was final and conclusive, then in Section 373

1 of that Act, they gave the power and authority to the Indian to
2 make a will if he is 21 years of age, pursuant to the regula-
3 tions prescribed by the Secretary of Interior. And then it was
4 not valid unless and until it was approved by the Secretary of
5 the Interior and then it would be approved or disapproved by
6 him after the death of the Indian. And normally, that's the
7 way they handled those matters down there, to wait until after
8 the Indian dies. Then his will is submitted to the Examiner
9 of Inheritance and he has a hearing on this and determines whether
10 or not the Indian was competent to make the will and whether or
11 not the will itself complied with all the requirements made
12 under the rules promulgated by the Secretary of Interior.

13 Now, once having done that, then he determines
14 whether or not there are any other causes by which, or reasons
15 by which he might say, "Well, I don't think this will is fair
16 and equitable because it doesn't take care of the decedent's
17 or the testator's heirs, themselves.

18 Now, this Dorita High Horse, it is true that she didn't
19 live with her father, who was George Chahsenah, but the trial
20 court, the Examiner of Inheritance found that she was the legi-
21 timate child of George Chahsenah and that she didn't get any
22 benefits from his estate and he didn't provide for her all dur-
23 ing that period of time and even after she became of age, didn't.
24 He made six wills down there and I want to say to the Court that
25 I am thoroughly familiar.

1 The first will he made he made and left the bene-
2 ficiary, this Viola Attuwattu, which is her name and she was
3 married to a man by the name of James Tate, who was also a
4 Comanche Indian.

5 Q What relation, if any, was there between that
6 beneficiary and the decedent?

7 A She was a niece.

8 Q A niece.

9 A And then he made a will to a white man and then
10 next he made a will to Sammy Schwartzer who ran a grocery store
11 there; Sammy was a white man. Sammy was the one who bailed him
12 out every time he got put in jail when he got drunk and he would
13 pay his fine and he would help him and give him money. And he
14 testified that he didn't think that this will had any consequence.
15 After he found out about it he thought that the Indian didn't
16 even know what he was doing and that was part of the testimony,
17 of course, that I tried to submit to the Examiner of Inheritance
18 that the man wasn't even competent to make a will in the first
19 place. And all of the evidence was to the effect that he
20 didn't know what he was doing; he had never transacted any
21 business for himself and was an habitual drunkard all of his
22 life.

23 Q From what period of time did he make these six
24 wills?

25 A From 1956 to 1963. He died -- he made his last

1 will early in 1963 and he died in October of 1964.

2 Now, bear this in mind that up until 1954 he lived
3 with his mother, his father having died when he was a young
4 man. But they were living there in Apache.

5 Q Well, didn't a Government lawyer help him draw
6 his last will?

7 A Yes, that's true and the Government lawyer draws
8 all these wills, Your Honor and he --

9 Q Did he draw all six of them?

10 A Well, somebody in there drew all six of them;
11 yes, sir. And they, under the rules and regulations they are
12 required to ascertain whether or not he had a child, or has any
13 surviving brothers or sisters or mother and father. Now, they
14 didn't ascertain that and yet it was on record there in the
15 Department of Interior, Bureau of Indian Affairs, the area
16 office at Anadarko, that he did have this child, Dorita High
17 Horse. She was on the _____ and Comanche and Apache rolls,
18 he even made the per capita payment in 1958 as his child and
19 the nieces and nephews knew about that. They knew that she was
20 on the roll as his daughter.

21 Q Who was Fred Benke?

22 A Sir?

23 Q Who was Fred Benke?

24 A Now, that was a white man. I don't know anything
25 about him.

1 Q And so was Schwartzner?

2 A But all the evidence was, if the Court please,
3 that this Indian was an alcoholic and he would do anything to
4 get a drink.

5 Q Well, the Government lawyer who drew this will,
6 wasn't he required to find out whether the man was capable?

7 A Yes, but --

8 Q Did he raise the question at all?

9 A He didn't raise the question at all, Your Honor.

10 Q He drew six wills; he talked to them at least
11 six times.

12 A I beg your pardon, Your Honor. He wouldn't be
13 the one that would be in there all that time.

14 Q Well, it would be a Government lawyer.

15 A They can change from time to time.

16 Q But they are all Government lawyers?

17 A Yes, sir; well, they could be or they could have
18 been somebody else in there. They might have had someone else
19 in there that wasn't a lawyer, but he knew how they drew these
20 wills.

21 Q But, did he not represent the Government?

22 A Yes, sir.

23 Q The Government had the responsibility of finding
24 out whether this man was apparently capable?

25 A Yes, sir.

1 Q Obviously he was apparently capable?

2 A Obviously, and they testified that they had no
3 independent recollection of when he came into the office to
4 execute this last will.

5 Q That issue is not before us now?

6 A No, sir; it really isn't, Your Honor.

7 Q It's been resolved against you by the Solicitor
8 or by the trial examiner or whoever it was.

9 A Well, the trial examiner did hold, Your Honor --

10 Q They found that he was competent and the
11 Solicitor agreed with that?

12 A That is right, Your Honor. And we don't have to
13 go into that, but I thought it might be helpful for the Court to
14 know that here was a man who was a drunkard and who would make
15 a will on the slightest provocation. He would exchange goods
16 and property and meat and groceries and everything else to get
17 some money to buy his liquor and was either drinking or drunk
18 all the time.

19 Q But this is not before us now.

20 A No. And he, as a matter of fact, when he was
21 with this beneficiary under the will, this Viola Attuwattu and
22 her children and family he was only there just a short time. He
23 had been living with all these other nieces and nephews from
24 time to time, so he wasn't one that was just living with them
25 and they were taking care of him or anything like that. They

1 didn't take care of him, he was paying his own way all of the
2 time.

3 Q There is no evidence he ever lived with his
4 daughter; is there?

5 A No, there is not, sir; no, sir.

6 Q Is there substantial evidence that she is his
7 daughter?

8 A Substantial evidence, Your Honor, that she was
9 his legitimate daughter and under Section 371, I think it is,
10 that where the Indians cohabit and their offsprings, for all
11 intents and purposes, that offspring is a legitimate child and
12 the Secretary of Interior, acting by and through the Solicitor's
13 office so held that Dorita High Horse was the natural daughter
14 of George Chahsenah, who was the testator of this will.

15 Q So that there can be no doubt --

16 A That's right --

17 Q -- be no doubt that she is his daughter --

18 A Yes, sir and under Section 372 --

19 Q And if part of the property or all of it went to
20 her, it would be an Indian.

21 A Yes, sir. When the will was vacated and set
22 aside, all the property went to Dorita High Horse, the daughter.
23 Now, the Secretary of Interior said we don't need to go into
24 these other wills, because we are familiar with them; we know
25 what they held; they didn't any of them mention anything about

1 Dorita High Horse or didn't take care of her in any way and she
2 wasn't the beneficiary under any of them.

3 So, we're setting those aside, too. So, it isn't
4 like, Justice, that you were speaking of, where you would go
5 back to the next will and if you had gone back to the next
6 will you would have gone back to this cousin of his --

7 Q All that all of his wills had in common was that
8 they showed a very clear intention not to make Dorita High
9 Horse the object of his bounty; is that right?

10 A At least she wasn't mentioned. I don't think
11 that he didn't intend to take care of her, but he certainly
12 didn't mention her in any of those wills.

13 Q And if he had died intestate, I suppose she would
14 have been the sole heir.

15 A She would have been the sole heir; yes.

16 Q And so probably one could see as the sole pur-
17 pose of making a will was to see to it that she did not inherit
18 his property; is that right?

19 A Not necessarily so. I think the sole purpose
20 of making the will was in order to get some money to buy some
21 liquor, Your Honor.

22 Q If he hadn't made any will she would have --

23 A If he hadn't made a will she would have been the
24 one to inherit all of this property; yes, sir.

25 Now, I handled this case that went before this Court.

1 This Homovich versus Chapman that went in the Circuit Court of
2 Appeals for the District of Columbia. And that's a case where-
3 in I had taken the position and the Government had taken the
4 position that under Section 373 that the courts could not re-
5 view the decision of the Secretary of Interior where he had
6 passed upon or either approved or disapproved the will. In
7 that case he approved the will in Homovich. Homovich was a
8 full-blooded Comanche Indian and he had married a white woman
9 who was a school teacher in Warwick, Oklahoma, and she came in
10 and wanted to set aside this will so she could participate and
11 it was almost like the case of Blanset versus Cardin which came
12 up from the east side of the State of Oklahoma where a Choctaw
13 Indian had married a white man and he was willing to participate
14 in her estate and that was the leading case in construing these
15 particular statutes.

16 And they held there that the Congress under its
17 plenary powers, had given a great supervision over these
18 Indians and their property and he had placed that supervision in
19 the hands of the Secretary of the Interior with all the dis-
20 cretionary power and authority necessary to take care of that
21 without any interference on the outside by the courts or any-
22 body else. And whatever he did with respect to that, why, that
23 was it. It was more or less final.

24 Q If your argument is accepted, does that settle
25 who will get this property?

1 A Yes, it would, but I --

2 Q Who would get it?

3 A I think the Court here --

4 Q Justice Black has a question.

5 Q Who would get it?

6 A Who would get this?

7 Q The property when it's finally settled. If
8 your argument is accepted.

9 A Dorita High Horse, the daughter, would get the
10 property if my argument is accepted, Your Honor.

11 Q That is the illegitimate child.

12 A And I want to bring this out. Since this case
13 has been in litigation, Miss Viola Attuwattu, who is the niece,
14 is deceased now and one of the other beneficiaries; one of the
15 other nephews, or grand nephew, is also deceased, so there are
16 only two children left.

17 Q Does the record show how much this property is
18 worth?

19 A Sir?

20 Q Does the record show how much this Indian left?

21 A Yes, it does, but it probably wouldn't in the
22 Court here, but when it was at the Circuit Court of Appeals it
23 did show.

24 Q You could just tell us the size.

25 A Well, I would say this property is worth in the

1 neighborhood of \$100,000, because it's got some production on
2 it, if the Court please.

3 Q Well, it's \$64,000-odd that's the official
4 finding.

5 A That's the official finding; yes, sir.

6 Q But you know that's worth \$50,000?

7 A Well, I would say it was worth a little more
8 than that. I think this productiveness had probably made it
9 worth a little more and of course, they had production on it
10 at the time that they made this appraisal, Your Honor; and I am
11 sure they were trying to get enough --

12 Q That was an official appraisal; was it?

13 A Yes, sir; it was. They have official appraisals
14 after any of these Indians die and are under the supervision of
15 the area offices, sworn on behalf of the Secretary of the
16 Interior, they had to make an appraisal of these properties.

17 Q If your argument is accepted, as I understand
18 it, the property would go to the daughter, even though she is
19 illegitimate?

20 A Yes, sir.

21 Q And if it is rejected, it would go to his niece.

22 A No; it wouldn't even go to his niece, Your Honor.
23 She is deceased. It would go to two of these grand nieces. The
24 two grand nieces, they are the only ones surviving now.

25 Q Just one grand niece?

1 A Yes. And that's what the Congress had in mind
2 and that's what --

3 Q These new people.

4 A Yes, sir; and that's what the Secretary of the
5 Interior had in mind when he asked Congress to pass this 1910
6 Act, was to give him all this power and authority so he could
7 determine these things himself, rather than leave it to the
8 United States court.

9 And certainly that was the first time that they ever
10 had any authority to make any wills, was under the 1910 Act.

11 Q You mean Indians didn't have the authority to
12 make wills on their property, real and personal property?

13 A Well, if they owned personal property independent
14 of their restricted which was being held in trust by the United
15 States Government under the General Allotment Act, they could
16 have disposed of that property, if it is unrestricted property.

17 Restricted property could not be disposed of by the
18 Indians until the 1910 Act, and then in 1913 amended Section
19 373 so that the Secretary of Interior then could either approve
20 or disapprove this will after the death of the Indian. I
21 think they decided that sometimes they might approve this will
22 before the Indian died and then they would be caught with
23 having permitted the estate of this Indian to go to somebody
24 who was not entitled to receive it or they shouldn't receive it.
25 And that is the whole purpose behind this thing, is to protect

1 these Indians and the Indian heirs of these testators and the
2 Indians who took advantage of this section to make a will.

3 So, I think if this Court would determine that it
4 didn't have jurisdiction to hear this under -- they claim under
5 28 U.S.C. Section 1361 --

6 MR. CHIEF JUSTICE BURGER: Your time is up.

7 MR. HILL: Thank you.

8 MR. CHIEF JUSTICE BURGER: Mr. Luellen, you have a
9 few minutes left; do you have anything else? I think we have
10 the picture pretty clearly and you can be brief, I think.

11 MR. LUELLEN: I will just take a few minutes, Your
12 Honor.

13 Justice Harlan made some inquiry about the regulations
14 there found in Brief for Petitioner's appendix A, Judge
15 Osterico's regulations. Nothing in the regulations whatsoever
16 about an Indian must disburse equity when he makes his will.

17 Q Where did you say they appear?

18 A They are in Appendix A in the Brief for
19 Petitioner. Appendix A, Brief for Petitioner.

20 Q Thank you.

21 A And here is what it really says about an Indian.
22 It says, "Making approval as to form, an Indian at the age of
23 21 years and of testamentary capacity, who has any right, title
24 or interest in trust or restricted property, may dispose of such
25 property by a will executed in writing and attested by two

1 disinterested adult witnesses." Now, that's the meat of the
2 regulations right there in the factum of the will.

3 Q Where were you reading from?

4 A That was on Page -- Appendix A-2, page A-3.
5 A-3, Subsection --

6 Q 15.28?

7 A Yes, 15.28.

8 Q Thank you.

9 A In those wills that the Department of the
10 Interior prepares and sends down to the various field offices
11 for the Government employees, the Government attorneys to use,
12 It has instructions, it is in my reply brief, it has instruc-
13 tions in there that says, "Be sure to find out what the Indian
14 wants to do when you make this will." It's printed right on
15 the back of those forms. If you look up the original record
16 you will find in that original will, the instructions to the
17 field officers tell them to find out what the Indian's desires
18 are. There is nothing in there about finding out about who --
19 about disposing the equity between the heirs.

20 Now, the Counsel, Mr. Stone, he said there was no
21 case he could find where they had disallowed a will of an Indian
22 for equity, and I agree with him. There is no case where they
23 have ever thrown out a will and said, "Well, we didn't disburse
24 equity; we didn't do equity, therefore we will disallow this
25 will." This will be a new field in that respect if this becomes

1 the law in this case.

2 I -- Mr. Hill mentioned about -- one more point and
3 I'll let the Court decide this case, in which you are going to
4 anyway.

5 Now, Mr. Hill stated that this niece had died since
6 this hearing had been held before the Examiner of Heirs and one
7 of her children have died. That's immaterial to the issues in
8 this matter. It is very well Dorita High Horse could have died
9 the next day. The sin is cast as of the date of the death of
10 the testator. What happens after that is immaterial and the
11 Secretary of the Interior as to who is going to die and who is
12 going to live, he couldn't make any determination about that,
13 because one or two of these devisees and legatees have died
14 since this matter came into the courts. That's immaterial in
15 this matter.

16 The Secretary can't sit back and say, "Well, so and
17 so is going to die, so we will give it to them to give to some-
18 one else.

19 Thank you, Your Honor.

20 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Luellen.

21 Thank you, gentlemen; the case is submitted.

22 (Whereupon, at 11:22 o'clock a.m. the argument in the
23 above-entitled matter was concluded)