

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHEROKEE NATION OF OKLAHOMA :

4 AND SHOSHONE-PAIUTE TRIBES OF :

5 THE DUCK VALLEY RESERVATION, :

6 Petitioners :

7 v. : No. 02-1472

8 TOMMY G. THOMPSON, SECRETARY :

9 OF HEALTH AND HUMAN SERVICES, :

10 ET AL.; :

11 and :

12 TOMMY G. THOMPSON, SECRETARY :

13 OF HEALTH AND HUMAN SERVICES, :

14 Petitioner :

15 v. : No. 03-853

16 CHEROKEE NATION OF OKLAHOMA. :

17 - - - - -X

18 Washington, D.C.

19 Tuesday, November 9, 2004

20 The above-entitled matter came on for oral

21 argument before the Supreme Court of the United States at

22 10:12 a.m.

23 APPEARANCES:

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25 Cherokee Nation and Shoshone-Paiute Tribes.

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3 behalf of the Federal Parties.
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P R O C E E D I N G S

(10:12 a.m.)

JUSTICE STEVENS: We will now hear argument in the Cherokee Nation against Thompson and Thompson against the Cherokee Nation.

Mr. Miller.

ORAL ARGUMENT OF LLOYD B. MILLER
ON BEHALF OF THE CHEROKEE NATION
AND SHOSHONE-PAIUTE TRIBES

MR. MILLER: Justice Stevens, and may it please the Court:

These two contract cases concern whether the Government is liable in money damages under the Contract Disputes Act and section 110 of the Indian Self-Determination Act when the Secretary fails to fully pay a contract price for the --

JUSTICE O'CONNOR: Would you mind explaining to us how these two cases relate? The Court of Appeals for the Federal Circuit decision went one way and the Tenth Circuit went another. And are the claims at all overlapping? How are they differentiated?

MR. MILLER: No, Justice O'Connor. They're -- they're not overlapping. The claims in the Federal Circuit case involved three contracts covering fiscal years 1994, 1995, and 1996. And the Cherokee contract at

1 issue in the case that went through the Tenth Circuit is
2 fiscal year 1997 contract and funding agreement.

3 The section -- remedial section of the act,
4 section 110 --

5 JUSTICE O'CONNOR: But they're certainly at odds
6 on the legal theory.

7 MR. MILLER: Yes, they are, Your Honor. The
8 Federal Circuit applied standard, bedrock Government
9 contracting law, primarily the rule that when a contract
10 payment is conditioned on there being an appropriation,
11 the payment right vests in full once the appropriation is
12 enacted by Congress.

13 And secondly, the court ruled that the Indian
14 Self-Determination Act does not bar the payment of the
15 contracts in this case under the circumstances presented.
16 And to the contrary. We submit that the Secretary's
17 construction of that clause would undo the act, would undo
18 section 106(b) of the act --

19 JUSTICE O'CONNOR: Are the circumstances any
20 different in the two situations, the Cherokee Nation case
21 and the one in the Federal Circuit? Are -- are the
22 circumstances, giving rise to the claim, different in any
23 respect that could account for a difference in outcome?

24 MR. MILLER: No, Justice O'Connor. There --
25 there is no difference in that respect, and there is an

1 overlap in -- in this sense. The Shoshone-Paiute contract
2 that arose through the Tenth Circuit case did involve
3 fiscal year 1996, the same fiscal year as the Cherokee
4 contract that covered fiscal year 1996. So in that sense,
5 both cases involved the -- the same relevant issues.

6 The -- the key, we think, to the resolution of
7 the act is found in the act on page 12a of the appendix to
8 our opening blue brief. The act was amended in this
9 section twice, in 1988 and in 1994, for three reasons: to
10 secure contract funding, to reduce the Federal
11 bureaucracy, and to eliminate secretarial funding
12 discretion over contract funding issues.

13 In section 12a, 450j-1(a), the bottom half of
14 the page, it is stated in subparagraph (1) that the amount
15 of funds provided under the terms of self-determination
16 contracts entered into pursuant to this subchapter shall
17 not be less than the appropriate Secretary would have
18 otherwise provided.

19 And then directly pertinent to this case is
20 subparagraph (2), which directs -- which addresses
21 contract support costs. There shall be added to the
22 amount required by paragraph (1) contract support costs
23 which shall consist of certain items. Incidentally, these
24 items typically cover the cost of insurance, audit costs,
25 procurement costs that might otherwise be administered for

1 the Government by the Office of Personnel Management or
2 personnel costs that might otherwise be administered by
3 the Office of Personnel Management.

4 JUSTICE SOUTER: Does the -- do the actual
5 contracts reduce the -- the CSC's to a dollar amount or --

6 MR. MILLER: Yes, they do.

7 JUSTICE SOUTER: So -- so we know -- they --
8 they knew at the moment the contract was signed what it
9 was going to cost.

10 MR. MILLER: That is correct, Justice Souter.
11 In the case of the Shoshone-Paiute contract, when the
12 parties decided to renegotiate the contract amount, they
13 entered into an amendment to specify the new, updated
14 contract amount.

15 JUSTICE KENNEDY: I don't want to get ahead of
16 you in taking us through the statute, so you can defer the
17 question if -- if you choose. But it seems to me relevant
18 to (a). Does -- is -- is part of the submission that the
19 Government used some of the funds that otherwise would
20 have gone to you for its own monitoring and -- of -- of
21 health contracts and that that's what's in dispute? Or
22 was it just general overhead for other programs it used?

23 MR. MILLER: It -- it is precisely, Justice
24 Kennedy, what -- what you stated. In fact, we can turn
25 directly to page 14a --

1 JUSTICE KENNEDY: I -- I stated an or. I --
2 what I -- I stated at the outset?

3 MR. MILLER: The -- the Government took money
4 for its own Federal functions instead of -- including
5 contract monitoring --

6 JUSTICE KENNEDY: Including contract monitoring.

7 MR. MILLER: Including contract monitoring.
8 Including contract monitoring. In fact, they say so in
9 their brief and -- and defend that action.

10 The -- the sections on page 12a and 13a
11 articulate in quite a lot of detail the nature of the
12 contract support costs that must be added.

13 JUSTICE SCALIA: These are strange contracts, of
14 course, aren't they? I mean, are there any other
15 contracts that the Government has to enter into? I mean,
16 the Secretary has to give these tribes the authority to
17 take over, in effect, implementation of the -- of a
18 Federal health program, doesn't he?

19 MR. MILLER: That is correct, Justice Scalia.

20 JUSTICE SCALIA: Well, I -- why would you expect
21 that this strange kind of contract should -- should, prima
22 facie, be governed by the same rules as to appropriations
23 as other contracts --

24 MR. MILLER: Because --

25 JUSTICE SCALIA: -- where -- where an agency,

1 having due regard to how much money is appropriated, will
2 limit the number of contracts it enters into? But -- but
3 here you're creating a situation where the agency has to
4 contract and yet has no control over having enough money
5 to -- to meet the contractual obligations. It seems to me
6 a -- a strange way to run a railroad.

7 MR. MILLER: It -- it is a unique contractual
8 situation, Justice Scalia, but one that Congress fully
9 anticipated. And -- and I would explain it this way.

10 First of all, there is the Contract Disputes Act
11 which Congress said applies to these contracts. The
12 contracts were so unique that prior to 1988, the Interior
13 Board of Contract Appeals, in a decision called the Busby
14 case, had ruled that these contracts could not be enforced
15 under the Contract Disputes Act precisely for the reason
16 Justice Scalia articulated. Congress changed that. In
17 1988, Congress amended section 110 of the act, reproduced
18 at the bottom of page 26a, and gave the Court of Claims,
19 then the Court of Claims, and the district courts
20 concurrent jurisdiction over money damages claims under
21 the Contract Disputes Act. And the legislative history
22 explains that Congress did this precisely to overcome the
23 Busby decision and to make these contracts enforceable for
24 the stated contract price.

25 JUSTICE KENNEDY: But further to Justice

1 that the Secretary has no authority under this statute or
2 generally to reserve some portion of this for what you
3 call Federal functions, that it -- every penny of the
4 appropriation could go to the costs of this contract and
5 nothing left in the till for the so-called Federal
6 functions?

7 MR. MILLER: Justice Ginsburg, I -- I would put
8 my answer in this context. There are many sources from
9 which the Government could have reprogrammed to pay these
10 contracts. It could have been, yes, as we submit, from
11 the funds spent on Federal functions and secretarial
12 administration. It could have been from the up to \$88
13 million increases Congress was making every year. It
14 could have been from the up to \$98 million in leftover
15 appropriations the agencies had every year, and it could
16 have been from the regional and headquarters offices that
17 the agencies had where they don't administer services.

18 JUSTICE GINSBURG: But your -- your answer is,
19 yes, if it came to that, they --

20 MR. MILLER: That's the duty Congress imposed
21 upon the Secretary. The Secretary was free not to
22 reprogram. That's -- that's a choice the Secretary had
23 and the Secretary made it. The question is what are the
24 ramifications of that choice and we submit --

25 JUSTICE GINSBURG: Well, let me ask you another

1 question related. Suppose -- this is an individual
2 action. These are individual actions. They're not class
3 actions.

4 MR. MILLER: Correct, Your Honor.

5 JUSTICE GINSBURG: Do the ones who come to court
6 to sue get paid in full even though there may be many
7 other self-determination contracts out there, and that if
8 you gave them all their fair share, none of them would be
9 paid in full? Does it just depend on first come to court,
10 first served, and the less litigious are just out of luck?

11 MR. MILLER: Your Honor, we -- we do not believe
12 that that -- that should be the outcome. That would
13 advantage the contractors that came forward and not take
14 account of the entire situation. We think the global
15 situation has to be looked at. The total amount of the
16 contracts that were not paid in fiscal year 1994 --

17 JUSTICE SCALIA: I mean, you can't get blood out
18 of a turnip. I mean, Justice Ginsburg is asking the
19 question, what if there is not enough money to go around?

20 MR. MILLER: If there were only sufficient money
21 to pay half of the contract shortfalls --

22 JUSTICE SCALIA: Right.

23 MR. MILLER: -- without violating the clause and
24 the Secretary had the discretion not to reduce
25 appropriations, or he could, for programs serving other

1 tribes, and then the tribes would only be entitled to half
2 of the shortfall, if there was only a sufficient amount of
3 money.

4 JUSTICE KENNEDY: Didn't the tribes get notice
5 they might not get the full amount of the -- the CSC, and
6 so they had ample opportunity to cut back on their
7 spending?

8 MR. MILLER: No, Justice Kennedy, and -- and to
9 the contrary. In fiscal year 1994, the Indian Health
10 Service was telling everybody they were paying them in
11 full. They told the General Accounting Office they paid
12 everybody in full on page 32 of the GAO report cited in
13 the Government's brief. But --

14 JUSTICE KENNEDY: So these -- these are reliance
15 damages in a sense.

16 MR. MILLER: The -- the tribes expected to be
17 paid. The Shoshone-Paiute tribes were told they would be
18 paid in full in the first year.

19 JUSTICE KENNEDY: I mean, they -- they were out
20 of pocket for money they spent before they knew, other
21 than the statutory notice they had, that they wouldn't get
22 the full amount?

23 MR. MILLER: That is correct. That is correct.

24 JUSTICE O'CONNOR: Well, when do the tribal
25 contractors know how much money the Government actually

1 will have available to spend?

2 MR. MILLER: The contractors don't know until
3 the year is over because throughout the year, the
4 Government reserves the power, although not exercised, but
5 stated in a circular, to reprogram. And the
6 appropriations --

7 JUSTICE SOUTER: What -- what do you mean by
8 that? You said a second ago the Secretary had the option
9 to reprogram. What do you mean by reprogram?

10 MR. MILLER: When the Secretary prepares a
11 budget to the Congress, it states usually a lump sum
12 amount of, say, \$1.8 billion. We -- we take \$400 million
13 off the top or \$300 million off the top because that was
14 specified by Congress for certain purposes. But the
15 balance is a lump sum. The Secretary crafts a budget.
16 The budget is not adopted by Congress, just a dollar
17 amount is adopted by Congress. Now, Congress can step in
18 and take a particular item and earmark that item and cap
19 it if it chooses, but it didn't do that in these years.

20 JUSTICE O'CONNOR: Yes, but the -- the tribes
21 have to enter contracts not knowing how much money is
22 going to be there at the end of the day?

23 MR. MILLER: The tribes enter into contracts, as
24 most Government contractors do when they enter into
25 contracts before an appropriation is made, not knowing if

1 the agency will have the money to pay them. That's okay.
2 The problem is when the statute says it's subject to the
3 availability of appropriations and Congress enacts the
4 appropriations. It's been the law for 120 years that at
5 that point, the right to payment vests and the tribe is
6 entitled to be paid.

7 JUSTICE O'CONNOR: All right. So how was that
8 appropriation money in fact used by the Federal
9 Government, do you say?

10 MR. MILLER: The Federal Government --

11 JUSTICE O'CONNOR: There was the appropriation.

12 MR. MILLER: Yes.

13 JUSTICE O'CONNOR: And the tribes had already
14 entered into contracts. Now, how was that lump sum used?

15 MR. MILLER: The agency then, under this Court's
16 teaching in *Lincoln v. Vigil*, has complete discretion over
17 how it spends its appropriation except insofar as --

18 JUSTICE SOUTER: Is that what you mean by
19 programming?

20 MR. MILLER: Yes, thank you, Justice Souter, for
21 taking me back to your question. What we mean is that the
22 Secretary submits a budget, but the budget is not binding
23 on the Secretary. It's not binding as a matter of law
24 because Congress didn't adopt it. And as conditions
25 change over the course of the year, the agency readjusts

1 its budget, which we call reprogramming.

2 JUSTICE SOUTER: So programming is allocating
3 various segments of the lump sum to various purposes.

4 MR. MILLER: Correct.

5 JUSTICE SOUTER: Okay.

6 MR. MILLER: And the Secretary retains complete
7 discretion as this Court taught --

8 JUSTICE O'CONNOR: And is that done without
9 regard to the contract amounts that the tribes have
10 entered into?

11 MR. MILLER: Well, it should not be done without
12 regard to the contract amounts --

13 JUSTICE O'CONNOR: Is that in fact how it was
14 done?

15 MR. MILLER: That is in fact how it was done.

16 JUSTICE O'CONNOR: And is it still done that
17 way?

18 MR. MILLER: Well, the times have changed.
19 Since 1998, fiscal year 1998, Congress has imposed caps on
20 the contracts and court costs that the agency has. So
21 there's no question the agency cannot pay more than
22 Congress gives it. When Congress only gives it \$100
23 million or \$200 million for contract support costs, that's
24 it. The Secretary cannot be sued for failing to pay more.

25 JUSTICE SCALIA: But didn't -- didn't Congress,

1 even before that, impose a significant limitation on how
2 much the Secretary could pay? What do you with the
3 provision in -- in (b) of -- of the section that you were
4 reading from? Notwithstanding any other provision in this
5 subchapter, the provision of funds under this subchapter
6 is subject to the availability of appropriations and the
7 Secretary is not required to reduce funding for programs,
8 projects, or activities serving a tribe to make funds
9 available to another tribe or tribal organization under
10 this chapter. I mean, what -- what money that the
11 Secretary expends is -- is not expended for programs,
12 projects, or activities that serve a tribe?

13 MR. MILLER: Justice Scalia, we read this --
14 this clause with -- keeping in mind the first sentence
15 first of the sentence. The first sentence, which begins
16 on the preceding page, page 14a, says that the amount of
17 funds required by subsection (a), (1) shall not be reduced
18 to make funding available for contract monitoring or
19 administration by the Secretary. And the subparagraph (3)
20 in the middle of page 15a, shall not be reduced by the
21 Secretary to pay for Federal functions.

22 JUSTICE SCALIA: Well, that's all very good,
23 but --

24 MR. MILLER: But then there's an exception.

25 JUSTICE SCALIA: -- then the last paragraph

1 begins with the word notwithstanding any other provision
2 of this subchapter. So this --

3 MR. MILLER: We --

4 JUSTICE SCALIA: -- it seems to me, overrides
5 everything else. Unless -- unless you can persuade me
6 that that -- that that provision doesn't give the
7 Secretary the authority to -- to allocate the available
8 funds among other activities that serve tribes, I -- I
9 think it trumps whatever else you appeal to.

10 MR. MILLER: Justice Scalia, for -- for two
11 reasons we think it cannot.

12 First of all, if that exception swallowed up the
13 rule set forth in the first sentence, it would defeat the
14 whole purpose of the act.

15 And more, in the statute on page 21, there is a
16 mandatory rule of construction that Congress has
17 articulated which, interestingly enough, the Government
18 never cites in the statutory interpretation case. And
19 this rule says on page 21, 1(a)(2), each provision of the
20 act --

21 JUSTICE SCALIA: Wait.

22 MR. MILLER: Page -- sorry --

23 JUSTICE SCALIA: 21 of --

24 MR. MILLER: 21a of our opening blue brief.

25 JUSTICE SCALIA: Okay, 21a, good.

1 MR. MILLER: 21a, correct.

2 Each provision of the Indian Self-Determination
3 and Education Assistance Act and each provision of this
4 contract shall be liberally construed for the benefit of
5 the contractor. That statement is repeated as well in
6 every --

7 JUSTICE O'CONNOR: Oh, fine, but you still have
8 to look at that last sentence in subsection (b) and
9 grapple with what it means. The Secretary is not required
10 to reduce funding for programs, projects, or activities
11 serving a tribe to make funds available to another tribe.

12 MR. MILLER: So what could it mean? That's our
13 challenge.

14 JUSTICE O'CONNOR: Now, what does it mean?

15 MR. MILLER: We have to give it meaning. We
16 believe it means the -- as the Secretary always said when
17 -- and -- and said at the time these amendments were
18 adopted in 1988, that's services on the ground, the
19 hospitals and clinics. If I walked into the office of the
20 headquarters of the Indian Health Service in Rockville,
21 Maryland, I'm not going to see doctors and nurses in white
22 jackets. I'm not going to see patients and counselors.
23 There aren't programs serving tribes in these headquarters
24 offices, and in these area offices, large portions of what
25 they do are administrative functions.

1 JUSTICE SOUTER: All right. May -- may I
2 interrupt you there? And tell me if I understand the --
3 the position in your brief correctly. I thought the
4 position that you took there was ultimately regardless of
5 what the notwithstanding clause means, there's enough
6 money to pay all the contracts in the appropriation that
7 is actually made. And if any money is going to be
8 squeezed, the person who's going to be squeezed or the --
9 is the -- is the agency itself. Its bureaucracy is going
10 to have less money. And I understood your argument to be
11 that given the provisions you read earlier in this
12 section, Congress has made a positive decision that if
13 there's a choice between paying the contract amounts and
14 squeezing the bureaucracy, the bureaucracy gets squeezed.
15 Is that your position?

16 MR. MILLER: That is our position.

17 JUSTICE SOUTER: If that is your position, do
18 you have to even grapple with difficulties about the
19 notwithstanding clause?

20 MR. MILLER: Well, we still need to provide some
21 meaning to the -- to the provision that says the Secretary
22 may not -- does not have to reduce funding for programs
23 serving other tribes. I guess, I think we do need to
24 grapple with the clause in order not to --

25 JUSTICE SOUTER: But -- but I thought you were

1 saying you could -- you could -- the -- the Secretary
2 doesn't have to reduce funding for other tribes. The
3 Secretary can pay the full contract costs, and if anybody
4 is going to get the short end, it's going to be the
5 bureaucracy.

6 MR. MILLER: It's going to be the bureaucracy.

7 JUSTICE SOUTER: Just give them the -- just give
8 them the money.

9 MR. MILLER: It's not going to be the programs
10 on the ground serving the tribes. It's going to be the
11 bureaucracy.

12 JUSTICE SOUTER: Okay.

13 MR. MILLER: Now, it may be felt --

14 JUSTICE SCALIA: To put it -- this is a
15 competition between two bureaucracies, the tribal
16 bureaucracy that is administering the program and the
17 Secretary's bureaucracy which is administering the program
18 of programs. I mean, it's -- it's not as though it's a
19 bureaucracy against the people. The whole purpose of this
20 was to turn over the bureaucratic management of these
21 programs from Government bureaucrats to tribal
22 bureaucrats. I mean, it --

23 MR. MILLER: Well, I would -- I would --

24 JUSTICE SCALIA: -- you -- you paint it as
25 though the -- you know, who cares about the bureaucrats.

1 The -- the Government just wasn't interested in the
2 bureaucrats. That may well be, but there -- there are
3 bureaucrats at both ends of this thing.

4 MR. MILLER: I say that for two reasons. First
5 of all, the -- the Congress, in our opinion, clearly
6 privileged the tribal contracts over the Secretary's
7 Federal functions.

8 But more practically, let's look at the
9 Shoshone-Paiute Tribes. They took over a hospital that
10 had a \$5 million budget in round numbers, and the contract
11 support costs requirement was \$2 million. So the contract
12 was in round numbers \$7 million. So they get the
13 hospital, \$5 million to run it. They don't get the \$2
14 million. Now, they have \$3 million to run the hospital.
15 It's not that they didn't get their bureaucracy. They
16 didn't get the full hospital operational budget because
17 they had to pay the fixed costs of carrying insurance,
18 undertaking the audits required by Federal law. There
19 were actual reductions in services so severe, in fact,
20 that the Shoshone-Paiute Tribe nearly lost accreditation.

21 JUSTICE BREYER: Can I ask you a basic
22 question --

23 MR. MILLER: Yes, Justice Breyer.

24 JUSTICE BREYER: -- which maybe others
25 understand, but I'm confused.

1 Imagine that this has nothing to do with
2 Indians. It is simply an ordinary contract. Now, my
3 understanding is that ordinary contracts say subject to
4 appropriations. So we have to decide was there an
5 appropriation. In our imaginary department of Government,
6 the appropriation is \$1 billion. Nothing is earmarked for
7 anything. They enter into contracts that amount to \$999
8 million. Now, they pay out \$990 million, and their --
9 what the department says is, look, everybody knows we need
10 at least \$10 million to run our central bureaucracy. So
11 there's no valid contract here. The appropriation wasn't
12 made.

13 Now, my understanding of ordinary Government
14 contract law is to decide whether that \$10 million was in
15 principle available for the contracts. You look to
16 something called the purpose-time-amount test. So was it
17 during the same time? Yes. Is it in an appropriate
18 amount? Yes. But is it available for this purpose? Ah,
19 I'm not sure.

20 All right. Now, I want -- if I have the -- the
21 theory of it right, I want you to tell me what the money
22 was in your case that is the equivalent of the \$10 million
23 in my example that you believe in principle was available
24 to pay these -- for this Indian expenditure. Just pretend
25 it's a regular contract. What is the equivalent of that

1 JUSTICE BREYER: All right. So you think -- you
2 and the Government agree then that were this an ordinary
3 contract case, there is no doubt that a legally binding
4 contract would have been entered into and the clause,
5 subject to appropriations, would not work for the
6 Government.

7 MR. MILLER: That is correct, Your Honor.

8 JUSTICE BREYER: Okay.

9 JUSTICE GINSBURG: Well, you can't say that the
10 Government agrees to that. You certainly agree to it.

11 JUSTICE BREYER: No, no. Were it an ordinary --

12 MR. MILLER: The Government --

13 JUSTICE BREYER: -- were it an ordinary
14 contract.

15 MR. MILLER: In -- in the hypothetical.

16 No. I think the Government would agree that the
17 rule of Ferris and Blackhawk, the Dougherty rule from the
18 Court of Claims, 1983, all stand for the proposition when
19 you sign a contract with the Government and a lump sum
20 appropriation comes, it's not your job to start monitoring
21 Government operations and figuring out how much do they
22 want to boost their functions for this or that or the
23 other, and the --

24 JUSTICE BREYER: So our issue as far as you're
25 concerned -- and I'll ask the Government the same question

1 -- is, is this contract different from an ordinary
2 contract because of A, B, C, D Indian reservations, et
3 cetera? And your claim is, I can't find any difference.
4 And their claim is there will be some difference. Is that
5 right?

6 MR. MILLER: That is correct. They claim these
7 aren't contracts -- Justice Kennedy.

8 JUSTICE KENNEDY: Well, you did say the -- these
9 contracts were unique.

10 MR. MILLER: These contracts are unique. The
11 contracts in Winstar were unique. The contracts in the
12 United States v. New Mexico advance costs -- advance
13 funded cost reimbursable contracts. Many contracts are
14 unique. The question is whether the distinction makes a
15 difference in the law. The distinction here that these
16 are not procurement contracts, that can't be decisive.

17 JUSTICE KENNEDY: Well, the Government says it's
18 unique because the tribes are providing governmental
19 services. It doesn't really cite us a case where, say, a
20 city or a subdivision has sued under a contract.

21 MR. MILLER: But that's not unique either
22 because the -- the Government, the Department of Defense
23 in Iraq contracts out governmental services, the provision
24 of food to our troops in Iraq. That's a quintessential
25 governmental services, feeding the military. But they

1 contract it out. No one would suggest there that just
2 because it's a governmental service, it qualifies that
3 contract as a lesser contract than any other contract.

4 JUSTICE SCALIA: Well, they didn't contract it
5 out to the government of Iraq. They contracted it out to
6 a private contractor. I mean, what -- what makes this
7 unique is that the whole purpose of it was to give these
8 -- these tribes more governmental power, more self-
9 determination. The whole purpose was to enable the tribes
10 to act as governments.

11 MR. MILLER: Absolutely. And even Congress
12 considered --

13 JUSTICE SCALIA: That's -- that's what makes it
14 different from private contracts --

15 MR. MILLER: We --

16 JUSTICE SCALIA: -- even -- even with
17 Halliburton.

18 MR. MILLER: We --

19 JUSTICE SCALIA: I mean, Halliburton is not an
20 Indian tribe and doesn't purport to be governing anybody.

21 MR. MILLER: We submit that that difference was
22 considered by Congress. In the 1988 amendments, there's
23 even language that says, we're thinking about maybe
24 calling this an intergovernmental agreement, but we've
25 decided to call it a contract because we want it to be

1 enforceable as a contract, just as other Government
2 contracts for goods and services are enforced. And that
3 was the language of the -- of the Senate report. They
4 then imposed the Contract Disputes Act and provided a
5 remedy in money damages. In those respects, along with
6 the canon of construction, we believe that these contracts
7 are fully enforceable for the stated contract amount.

8 I'd like to reserve the balance of my time,
9 Justice Stevens.

10 JUSTICE STEVENS: Thank you.

11 Mr. Srinivasan.

12 ORAL ARGUMENT OF SRI SRINIVASAN

13 ON BEHALF OF THE FEDERAL PARTIES

14 MR. SRINIVASAN: Thank you, Justice Stevens, and
15 may it please the Court:

16 Apart from the roughly 2 percent of the annual
17 lump sum appropriation that the Secretary withheld for
18 performance of those core agency functions that the agency
19 itself was required to perform, the Secretary allocated
20 the entire remaining 98 percent of its lump sum
21 appropriation among tribes.

22 Now, the tribes have to point to some source of
23 funding within that lump sum appropriation.

24 JUSTICE BREYER: Well, they just did, the 2
25 percent. So my question to you is the same. I asked,

1 let's imagine this had nothing to do with tribes, nothing
2 to do with it. It was a typical, ordinary Government
3 contract for pencils. All right? Or for soda water.
4 Now, and everything were the same. Under those
5 circumstances, just an ordinary contract -- and they point
6 to that 2 percent and they say that is legally speaking --
7 we didn't expect you to pay it. We just won a lawsuit in
8 the Court of Claims. But -- but we have -- we have a
9 contract here. Okay? That's what we're just saying. The
10 -- the subject to appropriation clause doesn't nix the
11 contract because that 2 percent is available, legally
12 speaking, time, purpose, and -- and amount. Okay?
13 Classic.

14 Now, what's the Government's view there?

15 MR. SRINIVASAN: No.

16 JUSTICE BREYER: Is it available or not were
17 this an ordinary contract?

18 MR. SRINIVASAN: No. With respect to the 2
19 percent that's reserved for inherent Federal functions,
20 that's not available.

21 JUSTICE BREYER: I'm asking -- all right. Are
22 -- is the Government's view then let's treat this just as
23 an ordinary contract? Still it -- there was no money
24 available.

25 MR. SRINIVASAN: With respect to --

1 JUSTICE BREYER: Legally speaking under the
2 time-purpose-amount test.

3 MR. SRINIVASAN: Well, Justice Breyer, I'm
4 drawing a distinction between the 2 percent that's
5 reserved for core agency functions and --

6 JUSTICE BREYER: No.

7 MR. SRINIVASAN: -- it's been a background
8 principle of Government contracting law that there are
9 certain core agency functions that -- that the Government
10 is required to perform for itself and that it can't
11 contract out. So I think that informs the interpretation
12 of the subject to availability clause.

13 JUSTICE BREYER: Now, I would like an answer to
14 my question, yes or no. If this were an ordinary contract
15 with a subject to appropriations clause, is -- would the
16 Government be saying this is invalid because the
17 appropriations were not there?

18 MR. SRINIVASAN: Well, you have to look at the
19 particular context.

20 JUSTICE BREYER: There must be a yes or no
21 answer to that.

22 MR. SRINIVASAN: It would be no if this
23 statutory regime governed, Justice Breyer.

24 JUSTICE BREYER: No. What it is is a contract
25 for pencils. Can you not -- is it impossible --

1 MR. SRINIVASAN: If -- if all --

2 JUSTICE BREYER: -- to make -- you see what I'm
3 driving --

4 MR. SRINIVASAN: If -- if all that's at issue is
5 a standard subject to availability clause in a contract
6 and there were no reduction clause, as there is in this
7 statute, and you're dealing with the standard procurement
8 context, then there is a Court of Claims decision, the
9 Blackhawk decision, that suggests, albeit in a footnote,
10 that in that situation, there are funds available in the
11 sense that they're legally unrestricted.

12 JUSTICE BREYER: Correct, and which are the
13 funds that are -- that would be available here? Which are
14 they?

15 MR. SRINIVASAN: There aren't any funds that are
16 available here in our view because --

17 JUSTICE BREYER: If this were under Blackhawk.

18 MR. SRINIVASAN: Under Blackhawk, it would be --
19 it would -- it would essentially affect the entire lump
20 sum appropriation because there's no legal requirement
21 that the lump sum appropriation be -- be directed in any
22 particular manner.

23 Now, there are some provisions in the --

24 JUSTICE SOUTER: That includes the 2 percent
25 that you keep referring to.

1 MR. SRINIVASAN: That -- that would include in
2 the -- that would include the 2 percent.

3 But there are provisions, I should note
4 parenthetically, in the appropriations act that say
5 specifically, for example, that not to exceed a certain
6 amount is to be used for a particular function or at least
7 a certain amount is to be used, for example, for contract
8 health services. So you'd have to take into account --

9 JUSTICE BREYER: Okay. Then let me do this
10 then.

11 MR. SRINIVASAN: -- those particular provisos.

12 JUSTICE BREYER: You say if this were a classic,
13 ordinary contract, the money would have been available
14 legally speaking. Nobody says practically speaking, and
15 they could have brought their lawsuit. Now, tell me
16 specifically, if you can -- and this may take you the
17 whole time. You want to make whatever argument you want.
18 What is it that's special about this contract that brings
19 it out of ordinary contracting principles?

20 MR. SRINIVASAN: Well, first and foremost, the
21 text of the statute. If you look at page 15a of the
22 appendix to -- to the tribes' briefs, this isn't your
23 standard, garden variety subject to availability clause.
24 You have to look at the particular context in which this
25 statute --

1 JUSTICE O'CONNOR: Well, the language is the
2 same.

3 MR. SRINIVASAN: It's not, Justice O'Connor,
4 with respect. It says, notwithstanding any other
5 provision -- and I'm reading at the bottom of page 15a --
6 the provision of funds under this subchapter is subject to
7 the availability of appropriations and -- and this is --

8 JUSTICE O'CONNOR: That phrase is the same,
9 subject to the availability of appropriations.

10 MR. SRINIVASAN: That particular phrase
11 resembles the one that Justice Breyer posited in his
12 hypothetical.

13 JUSTICE O'CONNOR: Exactly.

14 MR. SRINIVASAN: But the term available -- and I
15 think this is critical. The term available is repeated in
16 what's been referred to as the reduction clause, and I
17 don't think one can understand what the term available
18 means unless it considers the meaning of that term
19 throughout that entire sentence.

20 JUSTICE SOUTER: But -- but the other -- the
21 other side says you don't have to get to that because you
22 could have paid the contract amounts here without reducing
23 funds available for other tribes. It's simply that it
24 would have squeezed you in your budget, your -- your
25 headquarters operating budget for IHS. So they say, if I

1 understand them, that the -- that the nonreduction clause
2 doesn't save you here because you could have paid it
3 without reducing things for other tribes.

4 MR. SRINIVASAN: I -- I think that argument is
5 incorrect. First of all, it's an incorrect interpretation
6 of the terms of the reduction clause. But second of all,
7 the notion that funds for inherent Federal functions, the
8 2 percent that the agency reserved to perform its core
9 agency functions, were available for contracting is
10 contrary to -- to the terms of the ISDA itself. And if
11 you'll look at page 12a -- and I'm quoting from
12 450j-1(a)(1) -- what provision says is the amount of funds
13 provided under the terms of self-determination contracts
14 include the amount that the Secretary, quote, would have
15 otherwise provided. And then later on down in the
16 paragraph --

17 JUSTICE SCALIA: I don't see that. Where?

18 MR. SRINIVASAN: I'm sorry. It's --

19 JUSTICE SCALIA: Not less. Right?

20 MR. SRINIVASAN: Shall not -- shall be not less
21 than the amount that the appropriate Secretary would have
22 otherwise provided.

23 And then further down in the paragraph in the
24 last -- in the last clause, including support of
25 administrative functions that are otherwise contractable.

1 And what otherwise contractable denotes is that there are
2 certain functions that are not otherwise contractable,
3 namely those core, inherent Federal functions that the
4 agency itself is required to provide. And so what 450j-
5 1(a) implements is the background understanding that funds
6 for core agency functions don't have to be turned over to
7 the contracting tribes because the agency requires those
8 funds in order to continue essentially to exist as a
9 Federal agency.

10 JUSTICE KENNEDY: But -- but I thought the
11 submission of the petitioners' counsel was that some of
12 these funds were used to monitor the contracts which are
13 functions the tribes could have performed. So is there a
14 factual disagreement here?

15 MR. SRINIVASAN: I don't think so, Justice
16 Kennedy. I think it's more of a characterization
17 disagreement. There -- it's true that in a descriptive
18 sense, one might refer to some of these funds as used for
19 contract monitoring, but what 450j-1(a) says is that
20 whatever you might call it, the funds that are used for
21 core agency functions are outside the funds to be -- to be
22 turned over.

23 JUSTICE BREYER: It doesn't say that. It
24 doesn't say that. What it says is otherwise contractable.
25 And they could certainly -- for a lay person like me in

1 this, you'd think, well, we could have a provision that
2 says \$180,000 is hereby authorized to be spent only for
3 the Secretary of Veterans Affairs or Secretary of
4 Interior. Well, if it said that, then that's not
5 otherwise contractable because there's a statutory limit.

6 JUSTICE SCALIA: But -- but --

7 JUSTICE BREYER: So otherwise contractable
8 sounds like a -- a statutory question.

9 JUSTICE SCALIA: But it -- it's not talking
10 about money that's otherwise contractable. It says,
11 including supportive administrative functions that are
12 otherwise contractable. It's talking about a limitation
13 upon the contractability of functions --

14 MR. SRINIVASAN: Correct.

15 JUSTICE SCALIA: -- not the use of funds.

16 MR. SRINIVASAN: Well, it's talking about both
17 because the -- the first part of subparagraph (1) is the
18 amount of funds. It's relating to the amount of funds
19 that are required to be transferred, and what it stands
20 for is that funds for supportive administrative functions
21 that are not otherwise contractable, i.e., those core
22 agency functions that the agency is required to perform
23 itself, those funds aren't required to be turned over to
24 contracting tribes. And that just reflects the common
25 sense principle that the agency has to continue to exist

1 to perform some core functions.

2 JUSTICE GINSBURG: But how do you -- how do you
3 square that with the -- on page 14a -- reductions and, as
4 Mr. Miller read to us, shall not be reduced to make
5 funding available for contract managing -- monitoring or
6 administration by the Secretary, shall not be reduced by
7 the Secretary to pay for Federal functions, including but
8 not limited to, and then a string of what I assume falls
9 under the heading Federal functions.

10 MR. SRINIVASAN: Justice Ginsburg, the way we
11 square that under the statute is that the leading -- the
12 initial sentence in subsection (b) says the amount of
13 funds required by subsection (a) of this section. And our
14 view of the statute is that funds for inherent Federal
15 functions were never required to be transferred under
16 subsection (a) to begin with. And so what (b) deals with
17 is the funds that are left over after the funds for
18 inherent Federal functions are taken off the top.

19 JUSTICE GINSBURG: So are these noninherent
20 Federal functions shall not be reduced to pay for Federal
21 functions? So there's inherent Federal functions and
22 noninherent?

23 MR. SRINIVASAN: Oh, absolutely there are. The
24 Federal functions is the broader set of -- it could
25 essentially encompass everything the Federal Government

1 does. Inherent Federal functions refers to that core set
2 of functions that the agency itself is required to
3 perform. And the distinction between inherent Federal
4 functions and Federal functions, although it might seem
5 trivial as a semantic matter, is reflected in fact in the
6 definitions in title V of the ISDA where it specifically
7 defines inherent Federal functions as a subset of Federal
8 functions.

9 JUSTICE SOUTER: Does it ever define them as
10 noncontractable? I mean, I -- I -- your answer, I
11 suppose, is well, what -- what do you think they're
12 talking about, but does it ever expressly get to --

13 MR. SRINIVASAN: It -- it does.

14 JUSTICE SOUTER: -- the point of
15 contractability?

16 MR. SRINIVASAN: It does, Justice Scalia --
17 Justice Souter. Excuse me.

18 JUSTICE SOUTER: Thank you, but apologize to
19 him.

20 (Laughter.)

21 MR. SRINIVASAN: And we describe the -- the
22 relevant provision in our brief, if you'll bear with me
23 for just one second, on page 31. When Congress enacted
24 the title IV self-governance provisions that relate to the
25 BIA -- and this is at the beginning of the first partial

1 paragraph that begins with of particular significance.
2 There's a provision there, 25 U.S.C. 458cc(k). And the
3 provision reads that nothing in this section is intended
4 or shall be construed to expand or alter existing
5 statutory authorities so as to authorize the Secretary to
6 enter into any agreement with respect to functions that
7 are inherently Federal. And I think what that signifies
8 is that there are some functions that are not contractable
9 and can't be turned over to the tribes.

10 JUSTICE BREYER: That -- that all may be true,
11 of course. They're talking about don't contract out to
12 the Indians something that should be done in Washington.
13 But what has that got to do with the issue? We're
14 talking, I thought, about -- about Government contracts.
15 People who enter into Government contracts need certainty.
16 They have to know whether that word, subject to
17 appropriations, invalidates the contract or whether they
18 have a valid contract. And a set of principles have come
19 up that are used to decide that. And under that set of
20 principles, money is available to pay for the contract if
21 it's time, purpose, and amount. Okay? That's the
22 principle. And --

23 JUSTICE O'CONNOR: You don't think --

24 JUSTICE BREYER: -- and I don't see anything
25 contrary to that.

1 MR. SRINIVASAN: Justice Breyer, one background
2 principle -- and it's reflected, by the way, in the terms
3 of the contracts themselves. One background principle is
4 that funds for inherent Federal functions are not required
5 to be transferred to tribes. And the contracts --

6 JUSTICE O'CONNOR: Well, Mr. Srinivasan, do you
7 say that the contracts that were entered into by IHS and
8 the tribes did somehow contract away Federal -- inherent
9 Federal functions?

10 MR. SRINIVASAN: No. They specifically --

11 JUSTICE O'CONNOR: They didn't violate that
12 section, did they? The contracts that we're talking
13 about.

14 MR. SRINIVASAN: They specifically did not
15 transfer --

16 JUSTICE O'CONNOR: No. So we're not dealing
17 with that. We're dealing with contracts that didn't
18 violate that section. And you're just saying that some of
19 the lump sum appropriation was diverted by the Government
20 to pay for some kind of core Federal function, not that
21 the contracts violated that provision.

22 MR. SRINIVASAN: No. The -- that's correct,
23 Justice O'Connor. What I'm responding to is the
24 suggestion that funds that were allocated by the Secretary
25 to pay for inherent Federal functions were required to be

1 diverted to pay for the indirect costs --

2 JUSTICE KENNEDY: You're not saying -- you're
3 addressing not what was contracted out, but what funds are
4 available.

5 MR. SRINIVASAN: Correct.

6 JUSTICE KENNEDY: That's where your argument is
7 going.

8 MR. SRINIVASAN: Correct. It relates to the
9 funds that are available.

10 And the tribes' position --

11 JUSTICE SCALIA: And you rely on the statement
12 in (a) that the -- the only funds that are available are
13 funds that include funds to -- to pay for supportive
14 administrative functions that are otherwise contractable.

15 MR. SRINIVASAN: Right. Not funds --

16 JUSTICE SCALIA: And not funds that are used to
17 pay for administrative functions that are not
18 contractable.

19 MR. SRINIVASAN: Right. We think that funds for
20 inherent Federal functions were taken off -- off the --

21 JUSTICE STEVENS: Can I --

22 JUSTICE SOUTER: You said that --

23 JUSTICE STEVENS: Can I ask you sort of a basic
24 question that I'm having trouble following? As I
25 understand, you're saying 98 percent of the appropriation

1 have been allocated to programs, projects, activities, and
2 so forth that can't be reduced. Now, is there anything in
3 the statute that would have prevented the Secretary from
4 allocating only 96 percent of the budget to those funds?

5 MR. SRINIVASAN: Well, there is, Justice
6 Stevens, in the following sense. It's not at all the case
7 that the Secretary had unfettered discretion in composing
8 the allocation scheme in any fiscal year.

9 JUSTICE STEVENS: But his budget that he
10 actually worked out with the 98 percent was not mandated
11 by the statute, as I understand.

12 MR. SRINIVASAN: In -- in part it was mandated
13 by the statute.

14 JUSTICE STEVENS: In part but not in whole.

15 MR. SRINIVASAN: Perhaps not in whole --

16 JUSTICE STEVENS: Well, that's the point.

17 MR. SRINIVASAN: -- but at least in significant
18 part. And let me -- but I think this is significant, and
19 if I can just walk the Court through the process by which
20 the budget is developed and any appropriation ultimately
21 is allocated.

22 The Secretary has always, both before the ISDA
23 and after the ISDA, taken the current year's allocation
24 across programs as a given, as a baseline from which the
25 next year's allocation will be built. And that's

1 reflected in the terms of the statute on pages 14a to 15a
2 of the appendix to the blue brief. There's a provision,
3 450j-1(b)(2), that says that the amount that's transferred
4 to contractors shall not be reduced by the Secretary in
5 subsequent years except pursuant to certain limited
6 criteria and one of which, the principal one of which, is
7 the reduction in appropriations. But we're not dealing
8 with that in the relevant fiscal years. There was always
9 an increase. And so the Secretary, pursuant to the
10 statute, kept the funding for across programs at least at
11 the level that it was at the previous fiscal year.

12 Now, in addition to that, the Secretary builds
13 two -- two considerations on top. The first is mandatory
14 across-the-board increases for things such as salary
15 COLA's and inflationary adjustments. And that's a
16 standard feature of budgeting, and it's reflected again in
17 the terms of the statute. And that -- I'd point the Court
18 to page 9 of the Government's brief, the gray brief, where
19 we cite a provision, 25 U.S.C. 1680a.

20 JUSTICE STEVENS: Is the -- is the nub of what
21 you're trying to tell me is that the 98 percent was, in
22 fact, mandated by a statute?

23 MR. SRINIVASAN: It was -- I -- I think in
24 principal part it was mandated by the -- by --

25 JUSTICE STEVENS: Principal part, but --

1 MR. SRINIVASAN: Well, let --

2 JUSTICE STEVENS: Does that mean that there was

3 not enough?

4 MR. SRINIVASAN: At least as far --

5 JUSTICE STEVENS: They could have made it 97

6 percent --

7 MR. SRINIVASAN: -- insofar as what I've said

8 with respect --

9 JUSTICE STEVENS: -- and had enough money --

10 MR. SRINIVASAN: Sorry.

11 JUSTICE STEVENS: -- to pay these contract

12 obligations.

13 MR. SRINIVASAN: No, Justice Stevens.

14 JUSTICE STEVENS: See, the thing that troubles

15 me is it seems to me your reading of the statute makes the

16 contractual problem -- provision illusory because they can

17 always allocate funds to all these other projects and say,

18 well, we've already used up the money.

19 MR. SRINIVASAN: No, I don't think that they

20 have discretion to do that. And that's what I'm trying to

21 explain. At least with respect to the existing baseline

22 and a mandatory across-the-board increases, it's mandated

23 by the statute that the -- that the Secretary conduct his

24 budgeting allocation process in the way that he's done.

25 With respect to the mandatory across-the-board

1 increases, on page 9 of the Government's brief, 25 U.S.C.
2 1680a, a provision that relates specifically to the
3 administration of the Self-Determination Act, it requires
4 the Secretary to provide funds to contracting tribes for,
5 quote, cost-of-living increases, closed quote, and, quote,
6 other expenses relating to the provision of health
7 services, closed quote, on the, quote, same basis as such
8 funds are provided to programs and services operated
9 directly. In other words, with respect to mandatory
10 across-the-board increases, the Secretary has to allocate
11 those proportionately amongst contracting tribes and non-
12 contracting tribes.

13 And that leaves the additional set of an
14 increase from one year to the next year that deals with
15 specific targeted items, and principally that would
16 include, for example, staffing of new facilities that come
17 on board during the course of a particular fiscal year.
18 And with respect to those specific targeted items, the
19 critical point is that the contracting tribes often
20 benefit from the addition of those and from the
21 enforcement by the Secretary of those sorts of earmarks.

22 For example, in this particular case, the -- one
23 of the facilities that's at issue is the Stillwell clinic
24 in Oklahoma. That was a new facility that came on board
25 in the early 1990s and for which the -- for which the

1 Cherokee Nation assumed administration of it through a
2 self-determination agreement. Now, the staffing for that
3 facility was specifically earmarked in the Secretary's
4 budget submissions and in -- in Congress' appropriation
5 committee reports. And it, of course, is in the Cherokee
6 Nation's interest to ensure that those earmarks are
7 honored.

8 JUSTICE STEVENS: Are you telling me that the
9 committee reports are -- are binding law?

10 MR. SRINIVASAN: They're not binding law,
11 Justice Stevens. We fully recognize that. But at the
12 same time, I don't think that what Congress intended to do
13 was to require the Secretary to completely ignore the
14 committee reports.

15 JUSTICE SOUTER: No. But you got a conflict
16 apparently between the committee reports and what seems to
17 be pretty clear law, which says we're going to treat these
18 contracts as contracts, not as intergovernmental
19 agreements. And in -- in that conflict, I don't see why
20 contracting principles don't trump the committee reports.

21 MR. SRINIVASAN: It's not just the committee
22 reports, Justice Souter. It's the reduction clause. The
23 reduction clause is a part of the statute and no one has
24 ever suggested the reduction clause doesn't inform the
25 proper interpretation of the contract.

1 JUSTICE SOUTER: And -- and their -- their
2 argument is that you can pay the contract amount without
3 robbing other tribes of the amounts that the -- that the
4 nonreduction clause refers to. They are saying -- I think
5 they're saying, look, you, the governmental bureaucracy,
6 get squeezed. Yes. And if so, the contract comes first
7 and you have to live with the squeeze and go back to
8 Congress and say, we're doing what you told us and we're
9 getting squeezed out of existence. I think that's what
10 they're saying.

11 MR. SRINIVASAN: That is what they're saying,
12 Justice Souter, but with respect to, I think it's
13 incorrect. The Government bureaucracy consists of two
14 separate types of bureaucracy. There's that core
15 bureaucracy that is the inherent Federal functions. And
16 one of their arguments is that the Secretary was required
17 to divest himself of the funds that were necessary to
18 perform those functions.

19 JUSTICE BREYER: No, he's not. But if -- if --
20 where I'm really coming from, to be honest -- and I'd like
21 -- you might as well reply to what I'm actually -- is why
22 I'm asking these slightly hostile questions.

23 (Laughter.)

24 JUSTICE BREYER: I -- I read here -- look, the
25 question really is was this money like the bureaucracy

1 money. Is it legally speaking an appropriation available,
2 not practically speaking but legally? And here it seems
3 to me, in looking through this somewhat quickly, that you
4 say no, but the Board of Contract Appeals say yes. And so
5 I think in my mind, you know, one group of people who
6 really know about this is the Board of Contract Appeals.
7 So if they're saying that money from a contract point -- a
8 point of normal contract law is legally available, I
9 promise you I'm predisposed to think they're right. So I
10 might as well expose that to you so you can tell me now
11 why I'm wrong or they're wrong or whatever.

12 MR. SRINIVASAN: Because, Justice Breyer, I
13 think the core of it is that even if you think that
14 they're right, that these funds are legally available,
15 that's not enough under the ISDA because the ISDA
16 specifically reserves to the Secretary the discretion that
17 he not be required to reduce funding for programs,
18 projects, or activities serving a tribe in order to make
19 funds available to another tribe under this subchapter.

20 JUSTICE BREYER: Well, there is -- is -- the
21 kind -- the money that's available to one tribe can't be
22 taken for the other. But I thought the Board of Contract
23 Appeals was saying taking that into account, there's still
24 enough money left over. Am I wrong about that? I thought
25 you should take money from one tribe to give it to

1 another. What did they think?

2 MR. SRINIVASAN: No. They thought -- the -- the
3 board -- the Federal Circuit at least, which echoed the
4 Board of Contract Appeals, thought --

5 JUSTICE BREYER: Well, I'm thinking the Board of
6 Contract Appeals and the Federal Circuit.

7 MR. SRINIVASAN: Well, I don't think the Board
8 of -- of Contract Appeals really wrestled directly with
9 where the funds were coming from. They just thought that
10 legal availability would be sufficient.

11 Now, what the Federal Circuit said was that
12 funds for inherent Federal functions are available. And
13 we think that's wrong for the reasons I've said. I don't
14 think those funds ever came into the group of funds that
15 were subject to be transferred to begin with. But even if
16 you thought that they did, I think it's clear that funds
17 for inherent Federal functions are funds for programs,
18 projects, or activities serving a tribe in the sense that
19 one example of a core Federal function --

20 JUSTICE SOUTER: No, but if that's true, then
21 everything -- then every penny in the -- in the IHS
22 bureaucracy qualifies. I mean, that swallows the -- that
23 swallows the entire budget.

24 MR. SRINIVASAN: Well, let's -- Justice Souter,
25 if I -- if I could, let's look at the particular

1 sources --

2 JUSTICE SOUTER: No, no. But I mean, just
3 conceptually isn't that -- isn't that the -- the
4 implication of what you're saying?

5 JUSTICE SCALIA: You -- you can't limit it to
6 inherent Government functions. Both the inherent and the
7 noninherent Government functions would fall within this
8 provision --

9 JUSTICE SOUTER: Yes.

10 JUSTICE SCALIA: -- if you read it as broadly as
11 you've just read it.

12 MR. SRINIVASAN: Well, I -- I guess the way I'd
13 like to make the point is to say that the sources of funds
14 that they point to, which include inherent Federal
15 functions and the -- the noninherent Federal function
16 bureaucracy that supports the administration of programs
17 that serve tribes that are directly served by the Federal
18 Government, those two are in fact programs, projects, or
19 activities serving a tribe.

20 With respect to the administrative support --

21 JUSTICE GINSBURG: On -- on that point -- on
22 that point, in the Federal Circuit Judge Dyke expressed
23 considerable displeasure with the Government because he
24 said three times I said, tell me what existing programs
25 with other tribes would have been reduced if these

1 contract support costs are paid in full. And he said, I
2 asked them again and again and again, and they were
3 unresponsive. So since the Government declined to tell
4 the court what programs -- existing programs with other
5 tribes would have been reduced, mustn't we assume, as I
6 think the Federal Circuit did, that the proof is
7 unavailable and no existing program with other tribes
8 would have been diminished?

9 MR. SRINIVASAN: I don't -- I don't think so,
10 Justice Ginsburg. I mean, one straightforward reason why
11 you don't have to take that assumption is that it's not
12 only the Federal Circuit case that's before the Court,
13 it's also the Tenth Circuit case. And there's -- there
14 are declarations in the Tenth Circuit case that
15 specifically assert that diverting funding for -- to pay
16 for the contract support costs of these tribes would have
17 required reducing funds for programs, projects, or
18 activities serving a tribe.

19 JUSTICE GINSBURG: Now, what does that mean?

20 MR. SRINIVASAN: So --

21 JUSTICE GINSBURG: I mean, one thing is existing
22 contracts, things that are already ongoing, and then
23 another thing is, well, we think that there's a new
24 program that could be good for some tribe. So we're going
25 to put that new program in and say that that steps in

1 front of these contract support costs. Are we talking
2 just about existing programs that -- that the Government
3 has made a commitment to, or are we saying the Government
4 is at liberty to benefit tribes? And so what if the
5 contract support costs are, as a result, diminished?
6 We're still doing good for tribes.

7 MR. SRINIVASAN: We're talking about both
8 existing programs and new programs, and with respect to
9 new programs, there's -- it's every bit as likely that
10 those new programs would benefit contracting tribes as
11 noncontracting tribes. And again, one of the new
12 facilities --

13 JUSTICE SCALIA: It's strange to talk of
14 reducing -- is -- is not required to reduce funding for a
15 new program. I mean, for a new program, there isn't any
16 funding. How can you reduce the funding for a new
17 program?

18 MR. SRINIVASAN: Because --

19 JUSTICE SCALIA: That provision makes sense with
20 regard to existing programs, but it doesn't make any sense
21 with regard to proposed programs.

22 MR. SRINIVASAN: Well, I don't think that reduce
23 necessarily takes the existing year's appropriation as the
24 baseline. We think that what it takes as the baseline is
25 the current year's appropriation allocation which takes

1 into account increases. And one way to see that is 25
2 U.S.C. 1680a, which is the provision that I cited earlier
3 that requires the Secretary to apportion mandatory across-
4 the-board increases on a proportionate basis as between
5 contracted programs and noncontracted programs. And what
6 that provision means is that the reduction takes into
7 account those mandatory across-the-board increases from
8 year to year. So in some sense, I think reduce does mean
9 this year's allocation of appropriations as opposed to
10 last year's spending amount.

11 JUSTICE SOUTER: Mr. Srinivasan, you -- you
12 alluded a moment ago in -- in answering Justice Ginsburg,
13 I guess, to declarations on file on the Tenth Circuit case
14 that -- that specifically said we would have to reduce
15 funds available for other programs. Did those
16 declarations get specific in the way that her original
17 question was -- was asking about? Did it say -- did the
18 declarations say we will have to reduce the X program for
19 the Navajo Tribe and the Y program for the Apache Tribe
20 and so on, or was it -- did the declarations simply say,
21 as a general matter, we would have to reduce allocations
22 for other tribes?

23 MR. SRINIVASAN: Well, they -- they make the
24 point as a general matter, and they also give an example.
25 I think the one example that they give -- and maybe there

1 are more -- is -- is a diabetes program. But I think it's
2 more the general principle --

3 JUSTICE GINSBURG: Was that a new program or an
4 existing program?

5 MR. SRINIVASAN: That's an -- the -- the
6 particular example is an existing program. But I think
7 it's more --

8 JUSTICE STEVENS: It seems to me you can
9 interpret those comments as saying we don't -- they did
10 not leave enough room in the budget for the programs we
11 now want to support and our prior contractual obligations.

12 MR. SRINIVASAN: You're -- you're speaking with
13 particular respect to the new programs, Justice Stevens?

14 JUSTICE STEVENS: Yes. It seems to me that you
15 can interpret what you're saying as the -- as the -- the
16 Government adopting a budget in which there's not enough
17 room for all the programs it wants to support in the
18 current year and continuing to honor the obligations under
19 the existing contracts.

20 MR. SRINIVASAN: Well, I don't think that even
21 with respect to the current year there wouldn't be enough
22 money to pay for the complete shortfall in contract
23 support costs. If you look at the figures, the shortfall
24 in contract support costs, for example, in 1997
25 cumulatively was \$82 million, and that's -- that is more

1 than the amount of the appropriation increase from FY 1996
2 to FY 1997. It's more than the amount that was reserved
3 by the Government for inherent Federal functions. And so
4 even if you accepted that interpretation, it wouldn't be
5 sufficient to fully fund the contract support costs.

6 JUSTICE O'CONNOR: Is there some way to avoid
7 these problems now? Has anything changed?

8 MR. SRINIVASAN: Justice O'Connor, Congress
9 changed things by imposing a statutory cap, explicit
10 statutory cap, on contract support cost funding beginning
11 with 1998. It had done so since 1994 for the BIA and it
12 did so beginning in 1998 with respect to IHS.

13 JUSTICE GINSBURG: Why was there that difference
14 between the BIA that got the statutory caps earlier and
15 not till, was it, 4 years later for the IHS?

16 MR. SRINIVASAN: I think the difference lies in
17 the extent to which there was perceived to be a shortfall.
18 My understanding is that there was a shortfall already in
19 BIA programs whereas the shortfall didn't really become
20 evident with respect to the IHS until 1994 and beyond.
21 And that's why you might see the discrepancy between the
22 two.

23 But Congress also acted, by the way, in 1998 in
24 the 1999 Appropriations Act in enacting section 314 of the
25 1999 Appropriations Act. And I think, if nothing else,

1 section 314 at list -- at least expresses the view of a
2 subsequent Congress that the Secretary's allocation scheme
3 from 1994 to 1997 was legitimate and was fully within his
4 discretion under the ISDA. And under this Court's
5 decisions in Red Lion and its progeny, that determination
6 by a subsequent Congress is at least entitled to great
7 weight in determining what the Secretary appropriately
8 exercised discretion in 1994 through 1997. So even if you
9 thought that there was some doubt on whether the Secretary
10 had carried out his functions consistently with the ISDA,
11 I think Congress' saying later in the 1999 Appropriation
12 Act that its view was that Secretary had done so
13 legitimately should push the Court towards ruling in our
14 favor on the initial interpretation of the ISDA.

15 I want to address really quickly, if I could,
16 the notion that the funds for administrative support for
17 programs that are administered directly by the Federal
18 Government are available. And that would have significant
19 consequences because one of the policies underlying the
20 act is not only to protect the interests of tribes that
21 are currently entered into self-determination contracts,
22 but it's to protect the amounts that are available to
23 tribes that might some day choose to enter into self-
24 determination contracts. And if, under the tribes' view,
25 the Secretary was required to divert the entire amount of

1 the increase in any particular year to contracting tribes
2 or to -- to divert the entire amount of administrative
3 support for -- for noncontracted programs to contracting
4 tribes, the effect of that would be to freeze in place the
5 amounts that were available for potentially contracting
6 tribes in future years.

7 Thank you.

8 JUSTICE STEVENS: Mr. Miller, you have about 4
9 minutes left.

10 REBUTTAL ARGUMENT OF LLOYD B. MILLER

11 ON BEHALF OF THE CHEROKEE NATION

12 AND SHOSHONE-PAIUTE TRIBES

13 MR. MILLER: Justice Stevens, thank you.

14 First, I'd like to address the availability of
15 appropriations clause briefly. That is a term of art with
16 a well-established meaning. This Court in *Morrisette* said
17 that if -- unless there's a contrary direction from
18 Congress that the term of art should not be given its
19 well-established meaning, it controls. And that is the
20 meaning, purpose, time, and amount, that the appropriation
21 is available for the purpose during the time and in the
22 amounts necessary to fully --

23 JUSTICE BREYER: I think they disagree with you
24 about the purpose in respect to the core Government
25 function.

1 MR. MILLER: Secondly, with regard to the core
2 governmental functions, in Blackhawk, the contractor had a
3 settlement with the Veterans Administration. The Veterans
4 Administration had to reprogram. From where? We don't
5 know, but the Veterans Administration had to reprogram and
6 wanted to get approval from the Congress for that
7 reprogramming action. Congress then stepped in but after
8 the payment was due and forbade any reprogramming, and the
9 Court then held when the payment was due, money was
10 legally available and it doesn't matter where it comes
11 from. There is no protection for inherent Federal
12 functions. It may have come from some other hospital
13 budget. It may have come from some other activity of the
14 Veterans Administration. No doubt everything the VA does
15 is important, but it doesn't mean it didn't have a legal
16 obligation to pay the contract. There is no rule that has
17 an IFF exception to the governmental duty to pay, and if
18 there was, it would upset Government contract law deeply
19 as the amicus brief from the National Chamber explains.

20 Secondly, when funds are not available, we know
21 what happens. This Court's decision, Justice Brandeis'
22 decision for the Court, in Sutton explains what happens
23 when funds are not available. There was a line item
24 appropriation of \$20,000 for a construction project. We
25 understand that the contractor was on notice. Everything

1 is square.

2 Here, the entire lump sum appropriation was
3 available, and I'd like to give the Court a sense of where
4 the money could have come from, not that the Government
5 had to do it. Just as in Blackhawk, if they chose not to
6 reprogram, that's their right. But then there's a remedy.
7 Where could the money have come from?

8 In 1994, there was slightly under \$2 million in
9 a shortfall, just to the Cherokee contractor. No other
10 contractor was apparently shorted. There was up to \$98
11 million in leftover appropriations that year. There was
12 55 -- \$88 million in an increase, up to \$88 million in
13 increase every year from \$36 million to \$88 million.
14 There was \$25 million in inherent Federal functions. They
15 couldn't have shaved that by 10 percent to pay this
16 contractor? Not that they had to. They could have taken
17 some of it from there, some of it from the leftover, some
18 of it from the increase, some of it from the offices at
19 headquarters and area offices. That was their decision.

20 But the contractor didn't take the risk that the
21 Secretary would say, at the end of the day, I've decided
22 to allocate 100 percent of my money this way, and by
23 golly, there's nothing left for you. No contractor takes
24 that risk in dealing with the Government, and surely, a
25 tribal contractor with a mandatory contract set forth in

1 the statute doesn't take that risk either.

2 There is no limitation to the Secretary's theory
3 in this case. The Secretary's theory means that we come,
4 the contractors come, after the allocation of the
5 Secretary. Well, the Secretary could, in a reduction
6 year, decide to allocate the entire reduction to the
7 contracts and enhance even his own Federal bureaucracy and
8 programs serving other tribes and say, now I've made my
9 decision and I've made my judgment. I don't have enough
10 money to pay you. There's no limit here on contract
11 support costs. It could be the secretarial amount. They
12 could zero out these contracts and say it's practical
13 availability. And we've decided there isn't enough money
14 to deal with all of the health care needs in the country,
15 so we're going to deal with the ones we operate and you
16 come last. Now, that's not what the -- that's not what
17 the statute permits. That sort of interpretation would
18 lead to an absurdity.

19 With regard to the Tenth Circuit decision,
20 Justice, you asked a question about the declarations in
21 the Tenth Circuit. There was a declaration in the Tenth
22 Circuit, but all it had was a conclusory statement, to
23 have reprogrammed anything would have caused reductions in
24 programs serving other tribes. Now, that is not
25 sufficient proof to withstand summary judgment, and it's

1 certainly not sufficient proof to establish summary
2 judgment.

3 So for all these reasons, we believe the Tenth
4 Circuit decision should be reversed and the Federal
5 Circuit decision affirmed.

6 Unless the Court has more questions.

7 JUSTICE STEVENS: Thank you, Mr. Miller.

8 MR. MILLER: Thank you, Justice Stevens.

9 (Whereupon, at 11:12 a.m., the case in the
10 above-entitled matter was submitted.)

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