

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: HAROLD F. RICE, Petitioner v. BENJAMIN J.
CAYETANO, GOVERNOR OF HAWAII

CASE NO: 98-818 12

PLACE: Washington, D.C.

DATE: Wednesday, October 6, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HAROLD F. RICE, :
4 Petitioner :
5 v. : No. 98-818

6 BENJAMIN J. CAYETANO, GOVERNOR :

7 OF HAWAII :
8 - - - - - - - - - - - - - - - X

9 Washington, D.C.

10 Wednesday, October 6, 1999

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:02 a.m.

14 APPEARANCES:

15 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of
18 the Respondent.

19 EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the United States, as amicus curiae,
22 supporting the Respondent.

23

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

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-818, Harold Rice v. Benjamin Cayetano.

5 Mr. Olson.

6 ORAL ARGUMENT OF THEODORE B. OLSON

7 ON BEHALF OF THE PETITIONER

8 MR. OLSON: Mr. Chief Justice, and may it please
9 the Court:

10 This is a case of ballot box racial
11 discrimination, plain and simple, that violates the two
12 bedrock constitutional provisions that commit our Nation
13 to racial equality. Petitioner Harold Rice, his parents,
14 his grandparents, his great-grandparents, as well as his
15 children and grandchildren, were born in Hawaii. His
16 ancestors first arrived in Hawaii in 1831. He is a
17 citizen of the United States, and a citizen --

18 QUESTION: Mr. Olson, I just want to make one
19 question. Is it not correct that your case would be
20 precisely the same if your plaintiff were any one of
21 thousands of other voters?

22 MR. OLSON: It would be, particularly with
23 respect to the Fifteenth Amendment, Justice Stevens. I
24 make the point about my client's relationship with the
25 State of Hawaii and the Territory of Hawaii because of the

1 arguments that are made by the respondent with respect to
2 the justification for the racial classification under the
3 Fourteenth Amendment.

4 QUESTION: No, but your answer to my question is
5 yes, isn't it?

6 MR. OLSON: Yes, particularly with respect to
7 the Fifteenth Amendment, but Hawaii prohibits, despite the
8 fact he is a citizen, Mr. Rice from voting in a State-
9 conducted election for State officials who annually
10 distribute millions of dollars of proceeds from State-
11 owned property and money appropriated from Hawaiian
12 taxpayers.

13 When it comes time to vote in the election for
14 the board of Office of Hawaiian Affairs, it no longer
15 matters that Mr. Rice is a Hawaiian citizen and a Hawaiian
16 native. In that election, because he has the wrong
17 ancestors he is no longer a Hawaiian, and he may not vote.

18 The clearest, simplest, and narrowest ground for
19 deciding this case may be found in the Fifteenth
20 Amendment, which declares that no citizen may be denied
21 the right to vote on account of race. The right to vote,
22 this Court has said, is the essence of a democratic
23 society.

24 QUESTION: Well, wouldn't a clear, simple way to
25 resolve this case in your favor be to say that the

1 mechanism here is just an overreading of Salyer and James
2 v. Ball, and that it denies one person one vote? This is
3 a general agency which is involved in housing, health,
4 education, taking general appropriations, and so it just
5 denies one person, one vote.

6 MR. OLSON: Well, I think that issue was in the
7 case and was withdrawn from the case. I do agree with you
8 that it violates that provision of the Fourteenth
9 Amendment, but I think it is much easier to say that it
10 denies the right to vote on account of race. This is a
11 racial determination, and the right to vote is being
12 denied here. This Court has been particularly scrupulous
13 about holding that there are no exceptions to the
14 Fifteenth Amendment. Evasions and subterfuges such as
15 grandfather clauses, white primaries, and racial
16 gerrymanders --

17 QUESTION: But if we were to say it denies one
18 person one vote under Reynolds v. Sims, that would give
19 you the relief you seek.

20 MR. OLSON: If this Court rules in our favor on
21 that grounds, we of course would be satisfied. As I say,
22 it has been briefed and argued in this case on the
23 Fifteenth Amendment and Fourteenth Amendment with respect
24 to a racial discrimination. Hawaii --

25 QUESTION: You say it was in the case earlier

1 and withdrawn. Would you explain that?

2 MR. OLSON: I can't recall the circumstances,
3 Justice O'Connor. I remember reading something as I was
4 preparing today that that issue was involved in the case,
5 but it was brought as a racial discrimination case, and
6 pursued as a racial discrimination case.

7 QUESTION: May I ask on the racial
8 discrimination point, supposing there is a citizen of
9 Hawaii who has the same racial makeup as the native
10 Hawaiian, he came, however, from Tahiti or some place
11 else, and is a citizen of the State, has exactly the same
12 race as the others, but he's denied the vote. Would he be
13 denied the vote on account of race?

14 MR. OLSON: Yes, he would be denied a vote on
15 account of race, because --

16 QUESTION: Even though he's of the same race as
17 those who were allowed to vote?

18 MR. OLSON: Well, it depends upon -- this Court
19 has said repeatedly that the definition of race relates to
20 drawing a line with respect to a person's ancestors. This
21 is what Hawaii has done, and the reason why they have
22 drawn that line, and they've drawn it on the year 1778, is
23 that is the first date on which a European arrived on a
24 permanent basis on the islands.

25 There is no question that what Hawaii was

1 attempting to do here was discriminate on the basis of
2 race. It defines the program's beneficiaries in terms of
3 their race or their blood. It defines the right to vote
4 in terms of aboriginal peoples, having an ancestor with
5 aboriginal peoples that were there in 1778, and when that
6 definition was adopted the legislature said, make no
7 mistake about it, aboriginal peoples means race.

8 The Attorney General of the State of Hawaii has
9 issued a formal legal opinion that says racial descent is
10 what is the key to voting in this election. If you an
11 adopted child of a person, persons that qualify for
12 election, because you do not have the right racial descent
13 you are not qualified to vote.

14 QUESTION: Well, I -- even if the Tahitian is of
15 the same race, I mean, the fact that you give special
16 privileges to some people of one race, though not to all
17 people of that race, would not make it any better, would
18 it?

19 MR. OLSON: I agree completely. That is --
20 that -- racial discrimination doesn't --

21 QUESTION: The thing is, unless you're of that
22 race, you can't qualify.

23 MR. OLSON: That's --

24 QUESTION: Not everybody of that race may
25 qualify.

1 MR. OLSON: That's correct, and an interesting
2 example of that is Loving v. Virginia, where the Supreme
3 Court there was dealing with racial discrimination with
4 respect to miscegenation, interracial marriage. There was
5 a particular definition that allowed certain ancestors,
6 descendants of American Indians to qualify as white
7 persons for that purpose on the grounds that they may have
8 been descendants of Pocahontas.

9 It is a question of ancestry, which this Court
10 has repeated over and over again, the decision of this
11 Court in College of St. Francis involved the
12 discrimination against an individual because he was of the
13 Arabian race. Even though he may have looked like other
14 people that were going to be admitted to the faculty --

15 QUESTION: The Twenty-sixth Amendment treats age
16 identically to race in the Fifteenth Amendment, doesn't
17 it? The words are the same, but age instead of race, so
18 is it unconstitutional -- I'm sure it isn't. I would
19 think it wasn't -- to say that every 18-year-old in the
20 neighborhood has to vote for the director of the
21 neighborhood senior services center? I mean, sometimes
22 you make discriminations, don't you? I'm going back to
23 the point that they're not being treated on the basis of
24 race, but because they're beneficiaries of a trust.

25 MR. OLSON: Well, Justice Breyer, the definition

1 ties to race. The legislature thought it was connected to
2 race.

3 QUESTION: Well, I understand that, but is it
4 your opinion you do have to let every 18-year-old in the
5 neighborhood vote for the board of the senior services
6 center?

7 MR. OLSON: I think that's a totally
8 different -- no, I don't.

9 QUESTION: All right. Now, once you're down
10 that road, once you're down that road, then I get to where
11 Justice Kennedy began. I'm not certain what I'm supposed
12 to assume about the characteristics of this "trust." If
13 it's really just like a trust, I don't see why you can't
14 say the beneficiaries of the trust, and only they, will
15 vote for the trustees.

16 MR. OLSON: First of all, Justice Breyer, the
17 land was put in trust, and it's not like a bank, a trust
18 in the concept of banks and trustees and beneficiaries.
19 It was a so-called public trust. The land is held by the
20 State of Hawaii for all the citizens of Hawaii. Hawaii
21 has simply decided arbitrarily to set aside 20 percent of
22 the proceeds of that property, plus taxpayer revenue on
23 behalf of people, because they're descended of certain
24 people that lived in the island in 1778.

25 That seems to me, whatever the law might be with

1 respect to 18-year-olds, as this Court has said, the right
2 to vote, and the right to vote and not being abridged the
3 right to vote on the basis of race, or color, or condition
4 of servitude, is vital to the functioning of the
5 democracy.

6 And this Court has frequently equated -- in
7 fact, the grandfather clauses are a good example, where
8 this Hawaii situation is indistinguishable, in a sense,
9 because it allows people to vote if they have an ancestor
10 that was in the islands in 1778 in the same way that
11 Oklahoma didn't impose a literacy test if you had an
12 ancestor that was permitted to vote in 1866 in Oklahoma.
13 This situation falls squarely within that limitation.

14 The word trust is an arbitrary term, and there
15 isn't really any -- there aren't any decisions from this
16 Court that say, simply because you call something a trust,
17 if the State of X decides we will provide benefits for
18 people of certain ancestry, suppose they're descendants of
19 people who were in the State of Texas when it was a
20 Republic, if that money is set aside from public funds,
21 and we will call it a trust, and therefore we will justify
22 the discrimination in the voting on the basis of the
23 discrimination in the giving, this Court --

24 QUESTION: Mr. Olson, isn't the Salyer case and
25 the Ball v. James case a useful tool for analyzing that

1 very thing? I mean, is this a special use district, or is
2 it really more like a general governmental agency?

3 MR. OLSON: It's a very good question, and the
4 respondent has relied upon that case. You will recall
5 that that case involves a water irrigation district
6 created by the landowners in that area, the funds for
7 which came from the landowners, and the landowners in that
8 very narrow, local irrigation area or water conservation
9 district were the ones that voted as to how that worked.

10 This is an agency created by the constitution of
11 the State of Hawaii. It is called a State agency by the
12 Hawaiian supreme court. The officials on this agency are
13 public officials under the definition of the law of
14 Hawaii. They give out money that belongs to all of the
15 citizens of Hawaii.

16 They perform general governmental functions like
17 education, providing benefits for economic advantage,
18 health care, and all of those things, the same sort of
19 general things that were not involved in Salyer, and in
20 fact in the Ninth Circuit, in an earlier case, the Office
21 of Hawaiian Affairs even claimed Eleventh Amendment
22 immunity on the grounds that they were, in fact, the State
23 of Hawaii, so this is -- there really is no comparison
24 with the Salyer case on the merits.

25 In addition, of course, Salyer did not create an

1 exemption for racial discrimination. It was not a case
2 involving race. It was not a case involving voting.

3 QUESTION: Well, I think Mancari deserves some
4 comment, where special provisions and preferences were
5 provided for Native Americans. Is it the case that
6 Mancari indicates that some preference can be given to
7 Native Americans, at least, by Congress?

8 MR. OLSON: What this Court, Justice O'Connor,
9 did in the Mancari case is make it very clear that it was
10 analyzing the extent to which Congress had power under the
11 Constitution to act with respect to Indian tribes as
12 quasi-sovereigns under the Constitution. The Commerce
13 Clause provides the Congress the authority to deal with
14 Indian tribes.

15 The Court, in the space of a relatively short
16 opinion, about six or seven pages of opinion focusing on
17 that particular issue, used the words Indian tribes,
18 quasi-sovereign tribes, federally recognized tribes, over
19 20 times to make the point very clearly that -- and to use
20 the language or the words of the Court in that case, the
21 preferences granted to Indians, which was a hiring
22 preference in the Bureau of Indian Affairs, not as a
23 discrete racial group, rather as members of quasi-
24 sovereign entities.

25 The preference relates to a legitimate nonracial

1 goal, because it related to tribes, and this Court --

2 QUESTION: Is it possible that the Congress
3 and/or the State could treat Hawaiians as it treats Native
4 Americans --

5 MR. OLSON: Well, in the first place --

6 QUESTION: -- under the Indian Commerce Clause?
7 Is that possible?

8 MR. OLSON: No, because the unit that we're
9 talking about, the collection of people that we're talking
10 about in the first place has never been considered or
11 perceived of as a tribe. As respondent --

12 QUESTION: Right.

13 MR. OLSON: -- states -- I just want to make
14 that point if I may. First, preliminarily, they say the
15 tribal concept simply has no place in Hawaiian history, so
16 we're talking about the possibility of extending the
17 doctrine in a context in which there's no --

18 QUESTION: Is it your view, Mr. Olson -- I
19 understand your point about Mancari involving tribes --
20 that if you had the same case as Mancari, but they
21 included within the preferred group some people who are
22 not members of a tribe, would that have compelled a
23 different result, in your view?

24 MR. OLSON: I think one would have to examine
25 the context of the case, because --

1 QUESTION: The only change in -- it's actually
2 exactly the same, except that the preferred group is
3 defined to include some Native Americans who are not
4 tribal members.

5 MR. OLSON: That seemed to be the clear import
6 of the --

7 QUESTION: I understand. Is your view --

8 MR. OLSON: Yes.

9 QUESTION: -- that if those were the facts, that
10 would be unconstitutional?

11 MR. OLSON: Yes, and it seems to be the clear
12 import of the case, and then the Court -- this Court
13 reinforced that in the Yakima Nation case by saying, the
14 unique status of Indian tribes under -- and this is a
15 partial answer to Justice O'Connor's question -- permits
16 the Federal Government, not the State government, to enact
17 legislation singling out Indians because of the tribal
18 characteristic, legislation that otherwise might be
19 constitutionally offensive.

20 QUESTION: So then --

21 QUESTION: You think it would be
22 unconstitutional for Congress to provide that casinos that
23 are otherwise impermissible in certain States can be
24 conducted by Indians who are not members of tribes?

25 MR. OLSON: I think -- well --

1 QUESTION: Suppose they passed a law that
2 said --

3 MR. OLSON: That -- of course, that is not a
4 Fifteenth Amendment case. That would have to be examined
5 under the Fourteenth Amendment.

6 QUESTION: I understand that, but we're talking
7 about --

8 MR. OLSON: And, of course --

9 QUESTION: -- discrimination on the basis of
10 race.

11 MR. OLSON: And I think that that may raise a
12 serious constitutional question under the Fourteenth
13 Amendment if it was limited to -- if the State was --

14 QUESTION: Yes.

15 MR. OLSON: -- enacted legislation --

16 QUESTION: Well, we have some that allow tribes
17 to run casinos.

18 MR. OLSON: Yes.

19 QUESTION: If that kind of legislation were
20 expanded to allow any group of American Indians to,
21 whether they're tribal or not to run a casino but nobody
22 else.

23 MR. OLSON: I'm not sure I'm understanding the
24 question. Is the -- if the --

25 QUESTION: The question's very easy.

1 MR. OLSON: It's the answer that's hard,
2 perhaps.

3 (Laughter.)

4 QUESTION: The special permission is not given
5 to Indian tribes. It's given to Indians. Any Indian can
6 run a casino.

7 MR. OLSON: I think -- I think that that would
8 be unconstitutional, because Congress' power to operate
9 with respect to Indians, as this Court has made clear over
10 and over again, derives from the Indian Commerce Clause or
11 the Indian Treaty Clause, and that has to do with the
12 status of Indian tribes, not as Indian people.

13 QUESTION: So if you had Alaska Natives, the
14 result would have to be different?

15 MR. OLSON: Well, there are -- in fact there was
16 a specific distinction between the way Alaska was treated
17 and the way Hawaii was treated when it was entered into
18 the Nation, because there were Indian tribes in Alaska, so
19 to the extent we're talking about people who were not
20 members of tribes --

21 QUESTION: Well, that may have been in the Act
22 of Admission or in the statutes, but constitutionally, as
23 I understand your answer both to Justice Scalia and
24 Justice Stevens, constitutionally the answer would have to
25 be different.

1 MR. OLSON: The answer would be the same to the
2 extent that the people in Alaska were part of a tribe, any
3 tribe.

4 QUESTION: No, but they --

5 MR. OLSON: If they were --

6 QUESTION: My question is assuming that they
7 were not organized on the same tribal scheme, the tribal
8 sovereignty scheme that the Indians of the Lower 48 States
9 were, so the result would have to be different.

10 MR. OLSON: We'd have to make -- we'd make the
11 same case there as we would here.

12 QUESTION: Yes.

13 MR. OLSON: And --

14 QUESTION: Mr. Olson, one part of it I don't
15 understand. Hawaii wasn't organized into many tribes, but
16 it did -- it was a kingdom. It was a sovereign kingdom,
17 with its language and culture, and even cuisine, and the
18 United States had a large hand in destroying that
19 sovereignty, and indeed Congress passed this Remorse
20 Resolution recognizing that the United States was in large
21 measure responsible for the destruction of the sovereignty
22 of these people.

23 So if the idea of tribal sovereignty, restoring
24 some of the dignity that was lost as a result of what this
25 Nation did, works for Native Americans, I don't understand

1 why it doesn't also work for people who were a sovereign
2 nation, who were stripped of their sovereignty, whose land
3 was taken without their consent and without any
4 compensation. The analogy seems to me quite strong.

5 MR. OLSON: Let me answer that -- there are
6 several answers to that, Justice Ginsburg. In the first
7 place, that when those events occurred, and that was in
8 the 1890's, when the Hawaii constitutional monarchy was
9 replaced with a republic and then became ceded to the
10 United States.

11 Native Hawaiians, as they are being defined in
12 this case, were less than half the population of that
13 constitutional monarchy. In other words, there were
14 people that had nothing to do with ancestry in 1778 that
15 were a part of that operation, that country and that area
16 at that time.

17 Secondly, this business about the lands being
18 taken, the land that was ceded to the United States was
19 land owned by the Government of Hawaii. It didn't leave
20 the Government of Hawaii. It was ceded back to the
21 Territory immediately, and immediately when that was done
22 it was made for the benefit of all the inhabitants of
23 Hawaii, so that the land never was taken from any
24 individuals. To the extent that land was taken --

25 QUESTION: You mean you're contradicting the

1 congressional resolution that said we were guilty? Do we
2 have to accept that -- does -- that resolution as an
3 accurate description of history?

4 MR. OLSON: Of course, and this Court --

5 QUESTION: Can't Congress make history?

6 (Laughter.)

7 MR. OLSON: Congress does make history, but
8 Congress, of course, can't change history. I'm not --
9 we're not accepting everything that's in the so-called
10 Apology Resolution. What I am saying is, it would make no
11 difference, because it would not have any rational
12 relationship between the arbitrary date established by the
13 Hawaiian Government of 1778 and the dates that those
14 events took place.

15 That's one of the reasons why I was explaining,
16 in response to Justice Stevens' question, my client has
17 ancestors that go back to 1831. He had two ancestors that
18 were in the legislature of that constitutional monarchy,
19 so to the extent we're singling out people to be victims,
20 it is not -- cannot conceivably be limited to people that
21 have relations in Hawaii in 1778, when, by the way, there
22 was no such thing as the United States.

23 QUESTION: No, but your theory is that about 85
24 percent of the population of Hawaii are the victims we're
25 talking about.

1 MR. OLSON: As a matter of fact, the --

2 QUESTION: Is that not right?

3 MR. OLSON: No. As it presently stands, the
4 number of people who are Hawaiians, or Native Hawaiians
5 are about 20 percent of the population.

6 QUESTION: So that 80 percent are the victims of
7 the discrimination we're talking about.

8 MR. OLSON: Yes. Yes, I'm sorry, I
9 misunderstood your question. That's correct.

10 QUESTION: If -- assume -- it didn't happen, but
11 assume that in 1790 the United States discovered Hawaii,
12 Cook discovered Hawaii. Could the Congress then have
13 treated with the Hawaiians under the treaty, or the
14 commerce laws?

15 MR. OLSON: Well, in fact, the United States had
16 treaties with the monarchy of Hawaii.

17 QUESTION: No, no, I'm talking about before
18 1810, before Kamehameha.

19 MR. OLSON: No, because there wasn't a tribal
20 government at the time.

21 QUESTION: So the United States is simply
22 powerful?

23 MR. OLSON: Before 18 --

24 QUESTION: Powerless. It comes into this island
25 in 1790, it can't recognize these people?

1 MR. OLSON: Well, as I understand it, between
2 1890 and 19 -- 1810 there was a civil war going on. 1810
3 is the date when Hawaii --

4 QUESTION: But -- no. What I'm trying to probe
5 is the status of these people, and so I'm putting a
6 hypothetical case of 1790, before Kamehameha. From what
7 you indicated, it seems to me Congress would have no power
8 under the Commerce Clause or the Treaty Clause to deal
9 with these people.

10 MR. OLSON: It may have had power to deal with
11 the entity. It may have had power under --

12 QUESTION: There was no entity.

13 MR. OLSON: Foreign policy powers to deal with
14 the entity, but we're talking about, and we're talking
15 about a period of time before the Fourteenth and Fifteenth
16 Amendment, which made very clear what our country would do
17 with respect to racial discriminations, and if we pick any
18 date in history after 1778, the Hawaiian population
19 consists of people that are in protected -- in the
20 benefited class here, and are not in the benefited class.

21 And I want to return to Justice O'Connor's
22 question about Indians. The respondents state at page 2
23 of their brief that Hawaiians, the Native Hawaiians and
24 Hawaiians here are historically and anthropologically
25 distinct from American Indians. That's a concession in

1 the case. It's a concession in the case that they are not
2 tribes.

3 This group of individuals, however we define
4 them, wouldn't receive recognition by the Federal
5 Government as a tribe, because they have not had a
6 substantially continuous tribal existence. They haven't
7 functioned throughout history as an autonomous tribal
8 entity. They haven't had historical political influence
9 as a tribe.

10 What we have here is a very difficult situation
11 in which an arbitrary date in history is selected out.
12 What the State of Hawaii and the United States Government
13 are saying here is that because someone is related to
14 someone who is in a part of the United States before it
15 became a part of the United States --

16 QUESTION: Let me ask a question that Justice
17 Kennedy's question prompted. Supposing today we approach
18 an island that we had previously not any political
19 relationship with, but it's populated by a group of 1,000
20 people who are just all farmers. They don't even have a
21 Government. Could we make an arrangement with that group
22 that you can become a part of the United States and in
23 exchange we give all of you and your descendants a tax
24 exemption, say, or free baseball tickets to the World
25 Series.

1 (Laughter.)

2 QUESTION: Some preference.

3 MR. OLSON: I don't think so, Justice Stevens.

4 QUESTION: You don't think --

5 MR. OLSON: I do not think so, and --

6 QUESTION: Congress would not have the power to
7 make that kind of a deal.

8 MR. OLSON: I don't see where it would come from
9 in the Constitution.

10 Secondly, what we have here is, and I'm going to
11 put back into your hypothetical what we have here, which
12 are remote descendants of the people. Now, let's move
13 forward 200 years.

14 QUESTION: Right, I'm saying, we'll give this to
15 you and all of your descendants.

16 MR. OLSON: Forever and ever and ever.

17 QUESTION: Right.

18 MR. OLSON: I don't think that that's consistent
19 at all with the Fourteenth and Fifteenth Amendment to the
20 Constitution, especially if it involved voting. If it
21 didn't involve voting, we'd only be dealing with the
22 Fourteenth Amendment to the Constitution.

23 This Court is required, with respect, if we step
24 to the Fourteenth Amendment --

25 QUESTION: And make my hypothetical saying, and

1 your descendants can vote when they're only 15 years old.
2 That would be the vote.

3 MR. OLSON: Pardon?

4 QUESTION: To get voting into it, I'd say we
5 give you, a) a tax exemption, and b) the right to have
6 your children vote when they're 14 years old, and all your
7 descendants. We could not make that --

8 MR. OLSON: I think that is a discrimination on
9 the basis of ancestry which this Court has said over and
10 over again is a discrimination on the basis of race. To
11 the extent that there's a Fourteenth Amendment issue that
12 will focus on, this Court has said racial classifications,
13 and we don't need to look into motives here, or
14 legislative history, or anything else. This is a racial
15 classification on its face.

16 QUESTION: In Justice Stevens' hypothetical and
17 my hypothetical, would the United States have power to
18 pass legislation consistent with the Fourteenth and
19 Fifteenth Amendment, and to make agreements with those
20 people?

21 MR. OLSON: I think I answered that, and I think
22 the answer is no. I don't know where the power, that
23 power would come from.

24 QUESTION: The United States is simply
25 powerless. That's a --

1 MR. OLSON: To --

2 QUESTION: Under the foreign affairs power?

3 MR. OLSON: Well, to make a distinction among
4 citizens on the basis of race in the voting booth, I think
5 that is precluded by the Fifteenth --

6 QUESTION: No, the hypothetical is, can they
7 deal with them at all? Does the United States have power
8 to deal with a people that is not organized?

9 MR. OLSON: No, I think that -- yes. I think
10 the answer is yes under the foreign policy powers of the
11 United States. Yes, they can deal with this group of
12 people. We're not talking about bringing them in and
13 making them citizens.

14 QUESTION: The Government can annex territory.
15 That was the Louisiana Purchase.

16 MR. OLSON: Of course. Of course. Let me just
17 say, and I'd like to reserve the balance of my time for
18 rebuttal, that there is nothing remotely close to a
19 compelling governmental reason here even offered by
20 respondent, except to justify, we have to have -- limit
21 people on the basis of race in the voting booth because
22 we're going to limit people on the basis of race on the
23 recipient end.

24 That is discrimination as an end justifying a
25 discriminatory means. That cannot be a compelling

1 justification. There's not remote narrow tailoring here.
2 It's obvious overclassification and underclassification.
3 It is unlimited in time, to use the words of the Adarand
4 decision, and unlimited in terms of descendants from the
5 individuals who are purportedly related to the class.

6 I will reserve the balance of my time, with the
7 Court's permission.

8 QUESTION: Very well, Mr. Olson.

9 Mr. Roberts, we'll hear from you.

10 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

11 ON BEHALF OF THE RESPONDENT

12 MR. ROBERTS: Thank you, Mr. Chief Justice, and
13 may it please the Court:

14 Petitioner was not denied the right to vote on
15 account of race. He was not permitted to vote for Office
16 of Hawaiian Affairs trustees because he is not a
17 beneficiary of the trusts they administer. That
18 beneficiary group is singled out not because of race, but
19 because of its status, its congressionally recognized
20 status as the subject of a trust relationship with the
21 United States.

22 QUESTION: Well now, just a minute. What is the
23 significance of it being a congressionally recognized
24 status?

25 MR. ROBERTS: Because it flows from the Indian

1 affairs power, and under that power Congress has the
2 authority to determine what groups should be beneficiaries
3 of the trust status, for how long, and to what extent.

4 QUESTION: So you think -- and what did Congress
5 do?

6 MR. ROBERTS: Congress has singled out Hawaiians
7 as a beneficiary of a trust relationship, just like the
8 trust relationship that is extended to American Indians --

9 QUESTION: Did Congress ratify this particular
10 statute that's being challenged here?

11 MR. ROBERTS: It hasn't ratified it. It has
12 recognized it in recent legislation. It has referred --

13 QUESTION: What does that mean, Mr. Roberts, to
14 say Congress has recognized a State statute?

15 MR. ROBERTS: Congress, in the Statehood Act,
16 delegated to the State of Hawaii the responsibility for
17 implementing the trust relationship "in such manner as the
18 constitution and laws of the State may provide."

19 One way that Hawaii chose to fulfill that
20 obligation is by establishing OHA, including this voting
21 provision. Congress has recognized the existence of OHA.
22 It gives Federal funds to OHA and says you, OHA, represent
23 and serve the interests of Hawaiians. It is a Native
24 Hawaiian organization, and therefore will get the Federal
25 funds in implementing the trust responsibility.

1 QUESTION: And this is all done under Congress'
2 power to regulate commerce with the Indian tribes?

3 MR. ROBERTS: Yes, it is. The Framers, when
4 they used the word, Indian, meant any of the Native
5 inhabitants of the new-found lands.

6 QUESTION: It doesn't say Indian, it says Indian
7 tribes.

8 QUESTION: Indian tribes.

9 QUESTION: It says Indian tribes. Did Congress
10 have power to regulate commerce with Native Americans who
11 now are no longer living on reservations --

12 MR. ROBERTS: Congress --

13 QUESTION: -- and say, you know, we have the
14 exclusive power to regulate commerce with Native
15 Americans, whether they're on reservations or not?

16 MR. ROBERTS: Two points. The answer is, their
17 power does, in fact, extend to Indians who are not members
18 of a tribe. This Court recognized that in United States
19 v. John. It recognized it in United States v. McGowan.
20 It is recognized that Congress' power continues, for
21 example, when tribal status has been terminated, continues
22 beyond that, and in fact the IRA, the Indian
23 Reorganization Act definition of an Indian includes
24 Indians who are not members of any tribe.

25 QUESTION: They remain wards of the United

1 States, and the United States --

2 MR. ROBERTS: Congress is -- Congress --

3 QUESTION: -- is the Great White Father
4 perpetually.

5 MR. ROBERTS: Your question contains, it seems,
6 an objection to Indian law jurisprudence, and that's not
7 the point. The point is, does it extend to the Native
8 Americans who happen to live on the islands of Hawaii.

9 QUESTION: The question is whether its source is
10 the tribal character of the Indians. That's the question.

11 MR. ROBERTS: Yes.

12 QUESTION: Now, the only provision in the
13 Constitution I know of that refers not to Indian tribes
14 but to Indians is the provision of the Fourteenth
15 Amendment altering the way you count citizens in order to
16 decide how many votes a State has, and it says
17 representatives shall be apportioned among the several
18 States according to their respective numbers, counting the
19 whole number of persons in each State, excluding Indians.
20 It doesn't mention tribes. Excluding Indians not taxed.

21 Now, it's pretty clear what Indians not taxed
22 meant. It meant Indians who were not in the tribes, and
23 if -- I'm quoting here from Cohen's Handbook of Federal
24 Indian Law, a standard source. Only those few Indians who
25 had severed their tribal relations and individually joined

1 non-Indian communities were considered to be subject to
2 ordinary laws in a manner that made it appropriate to
3 count them in the apportionment of direct Federal taxes,
4 or for representation in Congress.

5 It seems to me that there was a clear tradition
6 of treating Indian tribes differently from Indians who had
7 abandoned their tribal status.

8 MR. ROBERTS: The question is what tribes meant
9 in the Constitution, and tribes at the time of the Framing
10 was defined as a distinct body of people divided by family
11 or fortune or any other characteristic. That's a
12 dictionary quotation.

13 Now, Hawaiians, as singled out by Congress,
14 certainly satisfy that definition. The Framers --

15 QUESTION: But Mancari was more restrictive than
16 that, wasn't it?

17 MR. ROBERTS: I'm sorry, Your Honor.

18 QUESTION: What we said in Mancari was more
19 restrictive than that, wasn't it?

20 MR. ROBERTS: Mancari referred to federally
21 recognized tribes because that's the way the preference
22 was written in that case, but that --

23 QUESTION: But it emphasized the organizational
24 or organized character of the tribes, and -- which seems
25 to go against this great level of generality which you're

1 trying to import into it by reference to the 18th Century
2 definitions.

3 MR. ROBERTS: Well, it's not a level of
4 generality. The power rests with Congress, not the Bureau
5 of Indian Affairs that gives the stamp of approval and
6 says, this is a tribe.

7 QUESTION: Well, it rests with Congress once we
8 have identified what is meant by Indian tribe under the
9 Indian Commerce Clause, and Mancari seems to say that, as
10 Justice Scalia has suggested, that in fact the definition
11 is narrower than you are arguing for.

12 MR. ROBERTS: Well, and my point is that it
13 referred to federally recognized tribes simply because
14 that's the way the preference was written, but that
15 doesn't answer the objection that it's a race-based
16 preference. The preference also only applied to one
17 quarter Indian blood beneficiaries, so it wasn't simply
18 tribal status. It's no answer to say, we were dealing
19 with a tribe so race was off the table.

20 QUESTION: Well, it wasn't sufficient, but it
21 was necessary. Race was a necessary condition.

22 MR. ROBERTS: To qualify for the benefit, and
23 the reason it was not race-based was because -- not
24 because of tribal status per se, but because the tribe was
25 the proper subject of Congress' exercise of its Indian

1 affairs power, so --

2 QUESTION: Well, but it seems to me,
3 Mr. Roberts, that you begin by saying, now, this is not
4 race, it's a trust. If we had trust in Oklahoma for
5 people who could vote in 1910, and they could go to the
6 special school, everyone knows that the reason for that
7 would be that they were white, and it seems to me that
8 you're almost afraid of your own best argument by telling
9 us not to look at race.

10 Of course it has to do with Hawaiian ethnicity.
11 That's your whole argument, I thought --

12 MR. ROBERTS: Oh, that is --

13 QUESTION: -- and it seems to me that when you
14 tell us, oh, don't worry about it, it's a trust, that just
15 diverts our attention from the real issue in the case.

16 MR. ROBERTS: The question whether they can be
17 treated under Mancari is whether they can qualify under
18 the Constitution as an object of Congress' Indian affairs
19 power, and this Court has seen this case before. It is a
20 replay of Sandoval.

21 In Sandoval, the question was the Pueblo
22 Indians. The Court had previously said they're not Indian
23 tribes, United States v. Joseph, so when Congress tried to
24 treat with them under its Indian affairs power in the
25 admission Act for New Mexico, the objection was raised,

1 you can't. You said they're not Indian tribes.

2 And what this Court said is, when Congress deals
3 with a Native group under its Indian affairs power, it's
4 for Congress to decide that it will do so, and that
5 determination is "authorized and controlling" so long as
6 it's not arbitrary. That's the standard.

7 QUESTION: So your answer to my casino
8 hypothetical that I put to your friend would be the
9 opposite, that Congress could indeed deem every person
10 with Indian blood in his veins to be a member of an Indian
11 tribe and allow those people and only those people to
12 conduct casinos?

13 MR. ROBERTS: I think that raises a question on
14 the application of Mancari. It would not be race-based,
15 but Mancari says more than that. It says that the
16 classification has to be rationally related to the
17 fulfillment of Congress' obligation toward the Indians,
18 and that --

19 QUESTION: Well, the obligation would be the
20 same one that's alleged here, that we've treated their
21 ancestors, you know, shamefully, and we're making up for
22 it.

23 MR. ROBERTS: That wasn't the -- that's not the
24 obligation at issue here, nor was it the obligation in
25 Mancari. It was to promote self-governance, and that is

1 exactly what the OHA electoral provision does. It
2 promotes the governance of the beneficiaries in the
3 running of the trust, and makes the trust more responsive,
4 exactly the same as in Mancari.

5 In the casino hypothetical it's quite different.
6 I don't think it's enough to say you meet Mancari so long
7 as you're doing something good for the Indians. Mancari
8 is a much more focused inquiry.

9 QUESTION: Well, what if Congress had at the
10 time we acquired the Mexican concession, California, New
11 Mexico, Arizona, had set up a special trust for people who
12 were living in that territory at that time, who were
13 almost entirely Spanish-speaking. Could it do that?

14 MR. ROBERTS: I think not, Your Honor, because
15 there you would bump up against the constitutional
16 limitation to Indian tribes. By Indians the Framers meant
17 the Native inhabitants. Our obligations extend to, for
18 example, the Alaska Natives, not the Russians who were
19 there first.

20 QUESTION: Okay, now what does -- how do you
21 define Native inhabitants? Why weren't the Spanish-
22 speaking people in New Mexico Native inhabitants?

23 MR. ROBERTS: It's traced from Chief Justice
24 Marshall's opinions in cases like Worcester v. Georgia and
25 Johnson v. M'Intosh, where he recognized the basic

1 distinction between the aboriginal indigenous people and
2 the European newcomers, and that, by the way, is the only
3 purpose served by the 1778 date. That's the line that
4 it's drawing, is between the aborigines and the
5 newcomers, a distinction that --

6 QUESTION: Oh, we do have a racial distinction
7 embedded in the Constitution between aborigines and
8 European newcomers? That's in the Constitution?

9 MR. ROBERTS: It's not only in the Constitution,
10 in the Commerce With Indian Tribes, it's in the Civil War
11 amendments, the passage Your Honor quoted previously. The
12 idea that that --

13 QUESTION: Related to tribes. That was my whole
14 point previously, that the exception made in that
15 reservation was not for Indians.

16 MR. ROBERTS: And Congress has determined --

17 QUESTION: It was for Indian tribes.

18 MR. ROBERTS: And Congress has determined that
19 it can treat with Hawaiians as it treats with Indian
20 tribes.

21 This Court can review that determination under
22 Sandoval only to determine that it's arbitrary, and
23 Congress has said why it is treating Native Hawaiians in
24 the same way that it treats Indian tribes in these recent
25 legislations -- legislation. It has said, because we find

1 them to be a distinct and unique indigenous group. We
2 find --

3 QUESTION: Was that contemporaneous with the
4 recognition of the OHA?

5 MR. ROBERTS: The passage I was just referring
6 to is a much more recent 1988 legislation 10 years later,
7 but Congress has treated with Native Hawaiians
8 consistently since --

9 QUESTION: But don't we have to look at what
10 Hawaii has done, not what Congress has done? I thought we
11 were looking at a Hawaiian State statute setting up a
12 voting scheme, and I'd like to come back to that, if we
13 could.

14 MR. ROBERTS: What the Federal Government did at
15 Statehood was delegate to the State of Hawaii the
16 responsibility for implementing the Federal trust
17 relationship. It took the 1920 2000 acres and said, we're
18 giving it to you, but you've got to implement --

19 QUESTION: But it didn't say you're exempt from
20 the Fifteenth Amendment.

21 MR. ROBERTS: No, it did not.

22 QUESTION: And I suppose it can't.

23 MR. ROBERTS: No.

24 QUESTION: So the question is, does this statute
25 comply with the Fifteenth Amendment? Does this State

1 statute comply?

2 MR. ROBERTS: And --

3 QUESTION: Could we talk about that?

4 MR. ROBERTS: Under this Court's decision in
5 Yakima, where a State law is implemented pursuant to,
6 flows from, is based on Federal classification under the
7 Indian affairs power, it's examined under Mancari just
8 like a Federal legislation would be. This piece of
9 legislation, the voting provision, was enacted by Hawaii
10 to implement the responsibility.

11 QUESTION: Would it violate anything Congress
12 passed if Hawaii were to extend the vote in this trust
13 arrangement to people without the racial qualification?
14 If Hawaii opened it up, as the petitioner seeks, to other
15 voters, would it violate anything that Congress passed?

16 MR. ROBERTS: No, I don't think that in itself
17 would violate anything. The question, though -- and the
18 United States has retained the power to sue the State if
19 it breaches the trust. The question would be what the
20 trustees do.

21 QUESTION: Would it breach -- would it breach
22 the trust that has been established to extend the vote
23 to --

24 MR. ROBERTS: It would interfere --

25 QUESTION: -- Hawaiian citizens?

1 MR. ROBERTS: I don't know that it would breach
2 the trust, but it would make implementation of it more
3 difficult, for this reason. We've heard, for example, the
4 objection that the Hawaiians don't have a sovereign
5 government any more, but OHA serves many of those same
6 functions, and Congress has found this. It says, OHA
7 serves and represents Native Hawaiians, and if it were
8 open to everyone, it could no longer serve that function,
9 which it seems --

10 QUESTION: OHA is kind of an independent
11 sovereignty in the State of Hawaii?

12 MR. ROBERTS: No, it's not an independent
13 sovereignty. I didn't mean to go that far. But it does
14 serve many of the functions of representing the Native
15 group to whom this trust relationship has been extended,
16 and it will --

17 QUESTION: But it does much more than that. It
18 doesn't apply just to Native Hawaiians. It applies to all
19 of -- all Hawaiians. It has many -- correct me if I'm
20 wrong. I thought that OHA dispensed funds, and it gave
21 services to Hawaiians, as well as Native Hawaiians. Am I
22 wrong?

23 MR. ROBERTS: By Hawaiians, you mean the group
24 that can trace at least one ancestor to 1778?

25 QUESTION: Yes.

1 MR. ROBERTS: Yes that's true. It operates two
2 separate trusts.

3 QUESTION: So you're talking about the Native
4 Hawaiians in the trust, but the purposes of OHA are much
5 broader than that.

6 MR. ROBERTS: Well, there's some confusion --

7 QUESTION: And they are generally governmental
8 in character.

9 MR. ROBERTS: There's some confusion because the
10 Federal statutes use the phrase, Native Hawaiians to refer
11 to all covered by the trust relationship with one
12 ancestor, and the distinction is in the Hawaiian
13 legislation. OHA manages two separate trusts, one for the
14 benefit of the 50 percent category that was a
15 qualification imposed on it by Federal law, and the other
16 for all indigenous Hawaiians.

17 QUESTION: That I think is the problem. It
18 seems to me from reading it, am I right, that everyone who
19 has one Hawaiian ancestor at least gets to vote, and more
20 than half of those people are not Native Hawaiians. They
21 just have a distant ancestor. And so those people vote,
22 although the amount of money involved for them is only
23 about \$17 million, and the amount of money involved for
24 the others is hundreds of millions.

25 MR. ROBERTS: How does this change the

1 definition of the group to whom it's extended this trust
2 relationship? It no longer limits it to those with a 50-
3 percent blood quantum, it says, and has, since 1974.

4 QUESTION: So might this be all right if it were
5 just for the Native Hawaiians, but not all right if it
6 includes more than half the people who are really like
7 everyone in Hawaii but for the fact that they can trace
8 one ancestor back?

9 MR. ROBERTS: I think not, because Congress
10 since before OHA in 1974, defined the group that is the
11 beneficiary of the trust relationship to include those who
12 can trace one ancestor back. That's not unusual, by the
13 way. There are Indian tribes who do --

14 QUESTION: Could you also respond to Justice
15 Kennedy -- well, you ask -- I wanted him to respond to
16 your question.

17 QUESTION: We're back to where Justice O'Connor
18 brought us. This is a State scheme in which voting for a
19 State entity which has education, housing, et cetera, et
20 cetera, is not limited to one person one vote. It's
21 limited to this broad group of anyone with any Hawaiian
22 ancestor.

23 MR. ROBERTS: It does not have any general
24 governmental responsibilities. Yes, it funds programs for
25 its beneficiaries in areas like housing and education, but

1 it has no general governmental responsibilities in those
2 areas at all. Its mission is limited to Hawaiians.

3 QUESTION: Mr. Roberts, assuming that the treat
4 with the Indians power of the Federal Government includes
5 Indians generally, and not just tribes. What basis is
6 there for thinking that the Federal Government can
7 delegate that power to a State?

8 MR. ROBERTS: Oh, it's done it frequently.
9 Public Law 280 is the clearest example.

10 QUESTION: Can it delegate the power to make a
11 treaty? Could it have delegated the power to make a
12 treaty with Indian tribes to a particular State and say,
13 you make a treaty?

14 MR. ROBERTS: No, I don't think it could have,
15 but it has frequently delegated lesser responsibilities.
16 Public Law 280, the criminal law area, is the example the
17 Court's probably most familiar with. It allows States to
18 apply their criminal laws on areas where, without the
19 delegation, the States could not do so.

20 QUESTION: But the State -- that's the State
21 governing people on the reservation, at least its own
22 citizens there. That's not a matter of the State
23 prescribing what special rights these tribes will have by
24 reason of their status as tribes, or these Indians by
25 reason of their status as Indians. I don't know on what

1 basis you think that that power, if it is a congressional
2 power, can be delegated to a State.

3 MR. ROBERTS: Well, the situation in Hawaii is
4 unique, and under our Federal system, it's open to
5 Congress to say that we're going to work with the State to
6 implement this responsibility. It shouldn't be surprising
7 that of all the States Hawaii would be the example where
8 that would take place, because of the different history.
9 Alaska, there's a different situation with respect to --

10 QUESTION: Public Law 280 isn't -- doesn't
11 support you at all, I don't think. Public Law 280 just
12 says that a State can extend its existing criminal laws
13 that already apply to everybody to the Indian reservation.
14 You're saying that Congress can delegate to a State the
15 authority to fashion special rules for a particular group
16 within the State.

17 MR. ROBERTS: Well, I -- with respect, Your
18 Honor, I think Public Law 280 is a delegation of
19 responsibility to enforce those criminal laws, because the
20 State would be without power to do so in the absence of
21 the delegation.

22 QUESTION: Yes, but they're general laws.
23 They're not saying to the State, you can draw up special
24 laws to govern Indian tribes.

25 MR. ROBERTS: Well, in OHA it doesn't draw up

1 special laws. It administers the existing trust. It is
2 unusual, Justice Scalia, to have that delegation, but look
3 what the Federal Government did.

4 It took the 200,000 acres of land that it had
5 under the 1920 act and gave it to the State. That's
6 unusual, too, and if you're going to be giving the corpus
7 the land, it seems perfectly natural to say, you are going
8 to have responsibilities in administering this land for
9 the trust.

10 QUESTION: It's unusual, but it's not a
11 delegation of Federal power, and here you're saying they
12 left it to the State to decide who can vote on the basis
13 of tribal membership --

14 MR. ROBERTS: The question would be --

15 QUESTION: -- or aboriginal membership.

16 MR. ROBERTS: The question would be, under
17 Mancari, whether it's rationally related to fulfilling
18 Congress' trust obligation, and if the State strays from
19 that, it can be brought back to that standard. It's not
20 free rein. It is still Congress' responsibility, and our
21 Federal system allows Congress to say, in this unusual
22 situation, where you have a unique history, where in other
23 places we say to the States, hands off the Indian lands,
24 here we give some of the lands that we've held in trust
25 and say to the State, help us administer it.

1 In Alaska, they set up corporations under State
2 law, and that's again a different situation, a different
3 approach. Our Federal system is flexible enough to
4 accommodate approaches that are sensitive to the
5 different --

6 QUESTION: Well, yes, but presumably Hawaii
7 would not have the authority to violate the First
8 Amendment in structuring the State laws, and perhaps not
9 to violate the Fourteenth Amendment, and perhaps not to
10 violate the Fifteenth Amendment.

11 MR. ROBERTS: Because the OHA voting provision
12 implements the Federal classification based on Native
13 status, it's not race-based, and therefore doesn't violate
14 the Fifteenth Amendment.

15 Thank you.

16 QUESTION: Thank you, Mr. Roberts. Mr.
17 Kneedler, we'll hear from you.

18 ORAL ARGUMENT OF EDWIN S. KNEEDLER

19 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

20 SUPPORTING THE RESPONDENT

21 MR. KNEEDLER: Mr. Chief Justice, and may it
22 please the Court:

23 The eligibility criteria in this case arises out
24 of a determination by Congress that the United States has
25 a special relationship with the once-sovereign indigenous

1 people of Hawaii, just --

2 QUESTION: Mr. Kneedler, do I understand
3 correctly, on your view, that we cannot decide this case
4 without deciding that in fact that assumption made by
5 Congress is correct, and that the Native Hawaiians may be
6 treated as an Indian tribe within the meaning of the
7 Commerce Clause? Am I right in assuming that's --
8 underlies everything you're going to say?

9 MR. KNEEDLER: It does, but it's a very
10 important determination, because we think that Congress'
11 Indian affairs power applies in Hawaii to the indigenous
12 people, but the nonindigenous people encountered there,
13 just as it does in the other 49 States and, indeed,
14 Congress' first action with respect to Native Hawaiians
15 was in the same form that Congress has always taken with
16 respect to Native Americans, wherever they've been in the
17 United States, and that is to set aside a land base for
18 them.

19 In 1920, not long after annexation, Congress set
20 aside 200,000 acres of land, which was --

21 QUESTION: Excuse me. Was this a land base for
22 the Hawaiians to live on? Is that why this land was set
23 aside?

24 MR. KNEEDLER: Yes. There are 200,000 acres
25 that are set aside under the Hawaiian Homes Commission

1 Act, passed in 1920, explicitly pursuant to Congress'
2 Indian power, and there are 6,800 leases to Native
3 Hawaiians on those lands, and a waiting list of 30,000
4 more, which --

5 QUESTION: And only Native Hawaiians as defined
6 in this legislation live on that land?

7 MR. KNEEDLER: Only Native Hawaiians of 50
8 percent or more blood are eligible for those lands.

9 QUESTION: Can live on that land.

10 MR. KNEEDLER: But the important point about
11 that is that that manifests Congress' recognition soon
12 after annexation that Native Hawaiians in Hawaii
13 constituted a distinct community and, like Indian groups
14 elsewhere, a distinct community whose ties to the land and
15 the culture that springs from that --

16 QUESTION: Where are those lands? Are they on
17 all of the islands?

18 MR. KNEEDLER: They are scattered on all the
19 islands, according --

20 QUESTION: And are they leased only to Native
21 Hawaiians?

22 MR. KNEEDLER: Yes, they -- well, there are some
23 lands that are leased to non-Natives for revenue purposes,
24 but the purpose --

25 QUESTION: Like hotels?

1 MR. KNEEDLER: Some are agricultural leases, and
2 that sort of thing, but the -- but --

3 QUESTION: So it's not just for Hawaiians to
4 reside on.

5 MR. KNEEDLER: It's -- but it's -- the only
6 residences there would be for Native Hawaiians. The land
7 as a whole is for the benefit of Native Hawaiians, just
8 like an Indian reservation land might be leased to a
9 hotel. It doesn't mean that the land that is set aside
10 isn't for -- at the core of recognizing the Native
11 Hawaiian people.

12 QUESTION: Well, you're not saying this is run
13 like an Indian reservation.

14 MR. KNEEDLER: No --

15 QUESTION: There's no governing council.
16 There's just -- it's just --

17 MR. KNEEDLER: My -- there's nothing magic about
18 a reservation in terms of Congress' plenary Indian power.
19 Congress has tailored the way in which it has responded to
20 the Native people --

21 QUESTION: How do we extend that to people 10
22 generations later, who had 10 generations ago one Indian
23 ancestor? I mean, that might apply to everybody in the
24 room. We have no idea.

25 MR. KNEEDLER: There are many Indian tribes in

1 this country, a number that are identified in title 25 of
2 the United States Code, tribes that have been restored,
3 where tribal membership is defined in terms of
4 descendancy, lineal descendancy from the tribe that was in
5 existence at the time --

6 QUESTION: Someone where there's no tribal
7 organization, and there is no people living on the land,
8 and you just have one ancestor 10 generations ago --

9 MR. KNEEDLER: No, it's important to recognize
10 the basis for what Congress has determined in this
11 century, starting with the Indian -- or, excuse me, the
12 Hawaiian Homes Commission Act, and that is that as
13 Congress said in the resolution in 1993, the Native people
14 of Hawaii, in Hawaii right now, have an historic
15 continuity to the sovereign nation that existed at the
16 time of European contact, and has continued that, and not
17 only that, that they are distinct people, and that they
18 are determined to maintain their culture, their language,
19 and the ties to the land, and pass them on.

20 QUESTION: There are a lot of groups in this
21 country like that. There are a lot of groups in this
22 country like that.

23 MR. KNEEDLER: But the --

24 QUESTION: And do you say that when you add to
25 that one more factor, namely that they were there when --

1 first, that you can discriminate on the basis of race with
2 respect to those groups, but not the other groups who have
3 their own continuity, their own history, perhaps have been
4 aggrieved, and so forth.

5 MR. KNEEDLER: With respect, it's not just one
6 more factor. It's a fundamental factor, recognized in the
7 text of the Constitution, and established a relationship
8 between the indigenous people who were here and the
9 nonindigenous people who arrived.

10 This Court's foundational cases on Indian law
11 are based on the relationship between the period after
12 European contact and prior to European contact, and the
13 Indian Commerce Clause, which is a manifestation of
14 Congress' plenary power over Indians, is descriptive of
15 the fact that the Europeans --

16 QUESTION: You say it's a manifestation of --
17 it's the source of Congress' --

18 MR. KNEEDLER: It's not the sole source, and
19 what this Court --

20 QUESTION: What is the sole source?

21 MR. KNEEDLER: This Court -- there are a variety
22 of sources, and this Court said in Mancari that Congress'
23 power derives both explicitly and implicitly from the
24 Constitution.

25 And in Sandoval, which is an important parallel

1 to this case, the Court said that not only does Congress
2 have the explicit power under the Indian Commerce Clause
3 to regulate commerce with Indian tribes, but it has
4 been -- there has been a long executive and legislative
5 practice and long line of judicial decisions recognizing
6 the power of Congress to do what it did here to extend
7 fostering care and protection to Indians, who are the
8 descendants of those once-sovereign, completely
9 independent nations, because of the responsibility that
10 the United States bears for having eliminated their
11 sovereign government and their control over their land.

12 QUESTION: Did this suggest that had there been
13 this case, Sandoval, or these other things, suggest that
14 had there been no Indian Commerce Clause, Congress still
15 would have had plenary authority to deal with Indian
16 tribes?

17 MR. KNEEDLER: Perhaps, but I think the
18 important thing is that this is a power that recognizes --
19 that stems from or flows from the fact that there were
20 tribes, and the full powers of those tribes have been
21 eroded, but does not detract from the people, that Indian
22 communities remain distinct Indian communities.

23 QUESTION: So your answer to my casino
24 hypothetical is that you could say only Indians can run
25 casinos.

1 MR. KNEEDLER: No. I think there's an important
2 difference between the way the trust relationship has been
3 exercised by Congress over the years, which is a bilateral
4 relationship between the United States and the Indian
5 people, so giving resources and land and special benefits
6 to the Indian people is quite different from giving them
7 preferences in the outer world, and that distinction is
8 rooted in Mancari itself, where the Court said that case
9 would be different if the employment preference extended
10 to the entire Civil Service, or the country at large.

11 QUESTION: Why is that? I mean, that's --

12 MR. KNEEDLER: Because the trust --

13 QUESTION: That sounds nice, but I don't know
14 why that would have any constitutional significance. If
15 you can give them preferences, you can give them
16 preferences.

17 MR. KNEEDLER: The historic relationship has
18 been a bilateral one, and the BIA was --

19 QUESTION: It has been, but what in the
20 Constitution requires it? If you're entitled to favor
21 this group as, you know, subject to a trust responsibility
22 of yours, why would it be limited to that?

23 MR. KNEEDLER: I think this is a situation in
24 which the way in which Congress has carried out its trust
25 relationship over the years is instructive.

1 I do want to make an important --

2 QUESTION: Well, Mr. Kneedler, I think this is
3 an interesting discussion, but I'm not sure quite how it
4 answers the question before us dealing with what Hawaii
5 can do.

6 MR. KNEEDLER: Well, we think that cases such as
7 the Yakima case indicate that where a State is acting
8 within a sphere in which Congress has authorized it to
9 act, that the State is entitled to enact measures to
10 promote self-determination in the same way.

11 QUESTION: Well, but now this -- the funds
12 administered, as I understand it, also include tax dollars
13 appropriated by the Hawaii legislature.

14 MR. KNEEDLER: They do, but once --

15 QUESTION: It isn't just Federal money. I mean,
16 Hawaii as a State has set up this scheme, and if the
17 scheme were to permit voting by others, does that violate
18 anything Congress has set out?

19 MR. KNEEDLER: No. The -- Hawaii has done that,
20 but the important Federal act is the recognition of all
21 Hawaiian people as a distinct group. Once that political
22 recognition by Congress has been made, then the States we
23 think can do things that correspond to that.

24 I would like to respond to the point whether --
25 about individual Indians. In Mancari itself, one of the

1 cases the Court critically relied upon there was the Seber
2 decision, which recognized Congress' power with respect to
3 people who were not enrolled members of the tribe, and the
4 rationale there was that there is often a transition
5 period from tribal status to a fully integrated member of
6 society during which Congress can exercise its special
7 protective care. That goes back to the Kagama decision,
8 as reiterated in Mancari.

9 QUESTION: And these Hawaiians are not fully
10 integrated in Hawaiian society? I've been there, and I --

11 MR. KNEEDLER: There are variations, just as
12 there are among the Cherokee in Oklahoma. There are those
13 who live on the --

14 QUESTION: -- Cherokee -- I'm talking about
15 Hawaiians. Do you say that that rationale applies here,
16 that these people have not made the transition, that
17 they're still, you know, aboriginal in some sense, and
18 they're on their way to being fully integrated American
19 citizens, but they haven't quite made it. Is that the
20 theory?

21 MR. KNEEDLER: Congress has so determined, that
22 Native Hawaiians remain a distinct community, the phrase
23 that was used in Sandoval itself, and was used in
24 Worcester v. Georgia by Chief Justice Marshall at that
25 point, because they had distinct lands, they retained

1 their distinct culture, all the factors that the BIA has
2 historically looked --

3 QUESTION: And are you defining Native Hawaiian
4 now to mean any Hawaiian and --

5 MR. KNEEDLER: Yes, I'm sorry, the Native people
6 of Hawaii.

7 QUESTION: So 148 will do it.

8 MR. KNEEDLER: Lineal descendancy, which is a
9 measurement, yes, that a number --

10 QUESTION: 196.

11 MR. KNEEDLER: -- that other tribes use.

12 QUESTION: Congress has said that's a distinct
13 group, 19 -- if you have 195th Hawaiian blood, you're --

14 MR. KNEEDLER: What Congress said -- yes, it
15 has, as it has in a number of statutes in title 25 after
16 section 700 with respect to a lot of restored tribes.

17 QUESTION: Thank you, Mr. Kneedler.

18 MR. KNEEDLER: Thank you.

19 QUESTION: Mr. Olson, you have 4 minutes
20 remaining.

21 REBUTTAL ARGUMENT OF THEODORE B. OLSON

22 ON BEHALF OF THE PETITIONER

23 MR. OLSON: Thank you, Mr. Chief Justice.

24 The respondent and the United States Government
25 have read the Constitution differently, this Court's

1 decisions with respect to its authority over quasi-
2 sovereign Indian tribes differently, and the Federal
3 statutes that deal with Hawaiians and other minority
4 groups differently than we have read them.

5 We believe, and we think it's clear from this
6 Court's decisions, that the authority of Congress -- and
7 it is of Congress, it's not of the States, and it may only
8 be delegated in a very narrow, explicit way. That is the
9 word that was used by this Court in the Yakima Nation
10 case, only under very limited circumstances with respect
11 to the criminal laws of a particular State.

12 QUESTION: Mr. Olson, this case is a kind of a
13 special, unusual situation as presented to us, but what
14 are the ramifications of the position that you are
15 arguing? How many Federal statutes, Hawaii statutes that
16 recognize the Hawaiian Natives as a special class would be
17 affected if we were to adopt your position?

18 MR. OLSON: It is impossible for me to answer
19 that question, for this reason. Each of those statutes is
20 different. Some of them have to do with things like the
21 Smithsonian, and cultural benefits, and the study of a
22 culture. Some of them have to do with pure racial
23 preferences with respect to Government contracting. Some
24 of them are in different categories.

25 This Court would have to look at -- if this is a

1 race-based distinction, and we don't see any basis for
2 arguing that it is not a race-based --

3 QUESTION: Wait, I thought -- as far as the
4 Fifteenth Amendment is concerned, are there a lot of
5 statutes --

6 MR. OLSON: No. No.

7 QUESTION: -- that limit voting?

8 MR. OLSON: I should have made myself clear.
9 This case, as I said at the very beginning, the simplest,
10 narrowest, easiest basis upon which this case could be
11 decided is the Fifteenth Amendment. I am aware of no
12 Federal statute --

13 QUESTION: You don't really suggest that if you
14 win there won't be a lot of litigation as a result of
15 this.

16 MR. OLSON: There will be litigation. Almost
17 invariably there is whenever this Court makes a decision,
18 Justice Stevens, but --

19 (Laughter.)

20 MR. OLSON: And there was as a result of the
21 Chadha decision, and there was as a result of the Adarand
22 decision, but this Court will perform its function, or
23 lower courts will perform their function of examining
24 statutes that discriminate on the basis of race on their
25 face under the Fourteenth Amendment standard and, Justice

1 Scalia, it's correct that only the Fifteenth Amendment is
2 involved here. The -- with respect to as far as the Court
3 need to go.

4 QUESTION: The Native Alaskans, also the same
5 thing. Everything would be up for grabs.

6 MR. OLSON: Well, there is no statute of which
7 I'm aware that creates special voting privileges for
8 Native Alaskans, and there are different -- there are
9 tribes in Alaska that would possibly be treated
10 differently under these statutes.

11 It's very difficult for me to understand, for
12 example -- one of the statutes considered by this Court in
13 Adarand gave a racial privilege in the contracting area to
14 Asian Pacific Islanders. I don't know whether that
15 included Native Hawaiians or not.

16 Let me clarify one point that I think was
17 confused by both Mr. Kneedler and Mr. Roberts. According
18 to page 18 of the respondent's opposition to certiorari,
19 OHA beneficiaries are determined without regard to any
20 tribal classification, and they go on to say the tribal
21 concept has no place in the history of Hawaii.

22 That leaves them with this notion, and let me
23 close on this note. They argue that the United States
24 Government and, as a result of some intangible, unclear
25 delegation, States, may make classifications of people

1 based upon a remote ancestor who is an aboriginal person.

2 That means -- and as far as the eyes can see and
3 as far as the time might go, that people can present cards
4 showing their racial ancestry to the United States
5 Government and to the State of Hawaii and if they have an
6 aboriginal ancestor, they get in the preferred line. That
7 puts people in that category --

8 CHIEF JUSTICE REHNQUIST: Thank you. Thank you,
9 Mr. Olson.

10 MR. OLSON: Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE REHNQUIST: The case is submitted.

12 (Whereupon, at 12:02 p.m., the case in the
13 above-entitled matter was submitted.)

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HAROLD F. RICE, Petitioner v. BENJAMIN J. CAYETANO, GOVERNOR OF HAWAII

CASE NO: 98-818

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BY Jean Marie Federico

(REPORTER)