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Docket No. 187  
Indian Claims  
(Hunting and fishing rights  
under termination statutes)

ASSOCIATION OF AMERICAN LAW SCHOOLS

Committee on Supreme Court Decisions

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WASHINGTON, D. C. 20036

Area Code 202, 234-0444

MENOMINEE TRIBE OF INDIANS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Docket No. 187

*Memorandum on Case in the United States Supreme Court*

This is one of a series of memoranda on cases pending before the United States Supreme Court prepared pursuant to a program of the Association of American Law Schools, in which the American Bar Foundation is collaborating. They are being distributed to representatives of the press, radio and television for the purpose of contributing to a better public understanding of the work of the United States Supreme Court.

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Analysis prepared by:  
Professor Frederick M. Hart  
University of New Mexico  
Law School  
January 4, 1968



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MENOMINEE TRIBE OF INDIANS, Petitioner

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(On writ of certiorari to the United States Court of Claims)

Opinion below: Unreported

Related opinion: State v. Sanapaw, 21 Wis. 2d 377, 124 N.W.2d 41 (1963), cert. den.  
377 U.S. 991, reh. den. 379 U.S. 871 (No. 930 O.T. 1963)

#### SUMMARY MEMORANDUM

##### Facts

The applicability of state law to American Indians has a long and complicated history. Generally, Indians living on a reservation are not subject to state law while they are on the reservation. Tribal law governs, and tribal courts administer this law. Federal statutes, generally applicable to reservations or enacted for a particular reservation, do govern, and in some instances state law is specifically made applicable. In a very loose sense, reservations are separate sovereigns existing within the territorial limits of the United States. The special status of the reservation Indian is due to varying policies of the federal government, but it flows initially from his position as a member of a conquered society.

Indians on reservations are under a type of "guardianship" designed to protect their remaining interests. The federal government provides certain benefits and services in addition to shielding them from the effect of state supervision. On several occasions during the last 100 years, Congress has expressed a policy of "termination" designed to end the special Indian-federal government relationship.

Prior to April 30, 1961, the Menominee Tribe of Wisconsin was under federal guardianship. After that date the guardianship was terminated pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902. The Menominee reservation became a county under the organic laws of the state of Wisconsin, and the Menominees became subject to the general laws of the state of Wisconsin.

After federal supervision was terminated, the state of Wisconsin took the position that the Indians' prior treaty rights to hunt and fish on the reservation were abolished and that they were subject to state hunting and fishing regulations.



Several Menominees were prosecuted for violating the state game regulations. The trial judge ruled in the Indians' favor, but the Wisconsin Supreme Court, by a two to one vote, reversed, holding that the Termination Act "abrogated" the Indians' hunting and fishing rights. The Supreme Court of the United States refused to review this decision in 1963. (State v. Sanapaw, 21 Wis. 2d 377, 124 N.W.2d 41 (1963), cert. den. 377 U.S. 991, reh. den. 379 U.S. 871 (No. 930 O.T. 1963)).

The Tribe then filed suit in the Court of Claims seeking compensation for the loss of their hunting and fishing rights. That court refused to award damages to the Tribe on the ground that the hunting and fishing rights were not lost as a result of the Termination Act. Hence, a state court has held that the Indians have no special hunting or fishing rights, and the United States Court of Claims has held that they do.

The present case in the United States Supreme Court is to review the Court of Claims decision, but the written brief of the Tribe clearly indicates that they are in basic agreement with that decision. Apparently, their hope is for an affirmation of the Court of Claims decision, which would be an indirect reversal of the Wisconsin Supreme Court decision that had held the Menominee hunting and fishing rights had been abrogated.

#### Significance of the Case

Termination acts almost identical to that affecting the Menominee Tribe have been passed with respect to the following other tribes: Klamath Indians (Oregon), Mixed-Blood Ute Indians (Utah), Western Oregon Indians (Oregon), Alabama and Coushatta Indians (Texas), Paiute Indians (Utah), Wyandotte Indians (Oklahoma), Peoria Indians (Oklahoma), Ottawa Indians (Oklahoma), and Ponca Indians (Oklahoma). The hunting and fishing rights of these other tribes will be determined by this decision.

Although the federal government's policy toward termination has been, and is, ambivalent, it would appear that other tribes will be terminated in the future. Many of the California Indians are undergoing termination presently.

The issue is clear: whether the language used by Congress in the Act terminating federal guardianship over the Menominee Indians was intended to abrogate their traditional hunting and fishing rights and to subject the Indians to state control over hunting and fishing.

The Tribe contends that these are important rights traditionally granted to the Indians and based upon treaties between the Tribe and the federal government. Fish and game are used for food and income for the Indians. Since these rights existed prior to the Termination Act, the Tribe argues that they are not abrogated unless the Act specifically so indicates. Nothing in the Act touches upon this subject although a different version of the Act, considered but rejected by Congress, did specifically reserve these rights to the Indians.



The federal government, who is the respondent in this case, takes the position in its brief that the Court of Claims and the Wisconsin State Court each reached the correct result, but that the reasoning of both was erroneous. The government argues that there was no intent in the Termination Act to deprive the Menominees of any hunting and fishing rights conferred by treaty, but that prior treaties with the tribe did not grant an absolute immunity from regulation. The government contends that the federal government had the power to pass reasonable restrictions on hunting and fishing prior to the Termination Act and that this power passed to the State of Wisconsin under the Act.

The Association of American Indian Affairs (Washington, D.C.) submitted an amicus brief supporting the position of the Menominee Tribe, and the State of Wisconsin will also appear as amicus curiae.

If the Supreme Court affirms the Court of Claims decision on the ground that the Indians had unlimited hunting and fishing rights and that these were not abrogated by the Termination Act, this will effectively preclude the State of Wisconsin from future regulation of these rights on the reservation. If the Court reverses, it will probably remand for a determination of damages. If the Supreme Court accepts the argument of the federal government, it will affirm the Court of Claims, but also leave the Wisconsin Supreme Court decision standing.

It is also possible, because of the unusual posture of the case, i.e. the petitioning Tribe is actually arguing for affirmance of the decision below, that the court will dismiss on the ground that there is no controversy. In this event, the only recourse of the Tribe will be to appeal future convictions to the Supreme Court.