In The

Supreme Court of the United States

MIAMI NATION OF INDIANS
OF INDIANA, INC., et al.,

Petitioners,

v.

GALE NORTON, SECRETARY OF THE INTERIOR, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Department of the Interior [Department] has authority to review the status of an Indian tribe formally recognized and never terminated by Congress, in the absence of abandonment of tribal relations.

2. Whether any deference is due to the Department's interpretation of its acknowledgment regulations, 25 C.F.R. Part 83 (1982 ed.), as incorporating the tribal abandonment standard for tribes formally recognized and never terminated by Congress.

PARTIES TO THE PROCEEDING

Petitioners are the Miami Nation of Indians of Indiana, Inc., also known as the Miami Nation of Indiana and the Miami Indians of Indiana, and Paul Strack, in his capacity as Chief of the Miami Nation of Indians of the State of Indiana, Inc.

Respondents are the United States Department of the Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research, United States of America, and Gale A. Norton, in her capacity as Secretary of the Department of the Interior.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, reference is made to the corporate disclosure statement by Petitioners in their principal brief in the Seventh Circuit Court of Appeals and dated January 12, 2001. That statement remains current.

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The Department's final agency action in this matter appears at 57 Fed. Reg. 27312 (June 18, 1992). The District Court entered final judgment in an opinion published at 112 F. Supp.2d 742 (N.D. Ind. 2000) and granted partial summary judgment in decisions published at 832 F. Supp. 253 (N.D. Ind. 1993) and 887 F. Supp. 1158 (N.D. Ind. 1995). The Seventh Circuit Court of Appeals' judgment and decision are published at 255 F.3d 342 (7th Cir. 2001).

JURISDICTIONAL STATEMENT

On September 6, 2001, the Seventh Circuit Court of Appeals entered its order denying the petition for rehearing in this matter. This petition for certiorari is timely filed under Supreme Court Rule 13(1) & (3) and this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. Art. I, sec. 8, cl. 3, United States Constitution:

> The Congress shall have power . . .
>
> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

2. The Treaty of June 5, 1854, with the Miami, 10 Stat. 1093, is set out in full as Appendix C attached hereto.

3. 25 U.S.C. § 2:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and all matters arising out of Indian relations.

4. 25 U.S.C. § 9:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

5. 25 C.F.R. Part 83 (1982 ed.) is set out in full as Appendix D attached hereto.

STATEMENT OF THE CASE

A. Background

The aboriginal Miami Indians signed a treaty with the United States in 1854, 10 Stat. 1093, which, among other things, recognized those Miami who remained in Indiana [Tribe] as a separate entity from those Miami who were removed to Oklahoma. *Wau-Pe-Man-Qua, alias Mary Strack v. Aldrich*, 28 F. 489 (D. Ind. 1886). Tribal members in Indiana occupied patented or reserved land obtained under earlier federal treaties and remained in the State of

Indiana with the State's permission. I.A.1.44-.55.[1] The approximately 4,700 modern day members of the Tribe are lineal descendants of those Indiana Miami separately recognized in 1854. Proposed Finding Against Federal Acknowledgment of Miami Nation of Indians of State of Indiana, Inc. [Proposed Finding], 55 Fed. Reg. 29423. The contemporary political organization of the Tribe traces to historical times as well. I.A.1.22. The Tribe has been consistently identified from historical times to modern times as an American Indian entity by Federal, State, and local officials. Proposed Finding, 55 Fed. Reg. 29423.

The Department of the Interior acknowledged the Tribe's status as federally recognized from 1854 until 1897.[2] In the latter year, the Department of Justice issued

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[1] All fact citations herein are to the administrative record developed by the Department in its deliberations on the Tribe's status under its acknowledgment regulations, 25 C.F.R. Part 83 (1982 ed.). This is the same administrative record reviewed by the courts below.

[2] Theoretically, the universe of Indian tribes recognized by Congress should be the same as that acknowledged by the Department of the Interior, inasmuch as the Department cannot undo an act of Congress. However, the Department has consistently used the term acknowledgment rather than recognition, suggesting, as the Court of Appeals held, that some formally recognized tribes may not be acknowledged as such by the Department. *See* 25 C.F.R. § 83.3 (1982 ed.); 25 C.F.R. § 83.3 (2000 ed.); Appendix A at 11. For consistency's sake, the terms are used in the same manner here: recognition to refer to a formal act of Congress establishing a government to government relationship with an Indian tribe, and acknowledgment to refer to the agency's acceptance of such status. However, use of these terms should not be taken as an admission that such a distinction is legally permissible. Indeed, a primary basis for the Tribe's petition for a writ of certiorari is

an opinion, rendered in response to the Tribe's request for assistance in setting aside local taxation of treaty allotted lands, that the Tribe could not be considered subject to the federal trust responsibility in light of the allotment of tribal lands and the grant of citizenship to tribal members. 25 Land Decisions 426 (GPO 1898) [Van Devanter Opinion]. Based on this opinion, the Department of the Interior immediately withdrew its acknowledgment of the Tribe as federally recognized, effectively terminating the Tribe. SR-IX.E.3 002; I.A.1.71. Later, the Department admitted that the Van Devanter decision was erroneous and that the Tribe was "inappropriately terminated administratively in 1897 . . . " S.R.IX.E.3 002.[3] Since 1897, the Department has refused to acknowledge the Tribe, even though the Department admits that the Congress has not terminated the Tribe. Proposed Finding, 55 Fed. Reg. at 29425.

In 1978, the Department promulgated regulations governing the acknowledgment of Indian tribes. 25 C.F.R. Part 83 (1982 ed.). As authority for these regulations, the Department relies upon its general delegation of authority over Indian affairs from Congress, 25 U.S.C. §§ 2 & 9. *Id.* The acknowledgment regulations require a detailed examination of a petitioning Indian group's community, political leadership, and descent from an historical tribe

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its contention that such a distinction conflicts with this Court's decisions and expressions of Congress.

[3] The Department of the Interior administers relations between the United States and federally recognized tribes. 25 U.S.C. §§ 2, 9. Thus, the Department's refusal to acknowledge a tribe as federally recognized deprives that tribe of all the programs and services provided to federally recognized tribes, thereby effectively terminating that tribe. *See* 25 U.S.C. § 479a-1.

from the time of first sustained white contact until modern times. *Id.*, § 83.7. The regulations make no reference to or accommodation for tribes explicitly recognized by Congress but not acknowledged by the Department. There is no act of Congress authorizing these specific regulations or authorizing the Department to re-examine the status of federally recognized tribes.

B. Proceedings Below

The Tribe submitted a petition under the acknowledgment regulations in 1984, seeking to re-establish its federal acknowledgment. The Tribe maintained that, because of its formal recognition by Congress, a different substantive standard must be applied from that imposed by the regulations on other non-federally recognized tribes. The Tribe proposed to the Department that it apply a standard first articulated by this Court in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866) – that is, that recognized Indian tribes retain that status unless terminated by Congress or "voluntary abandonment of their tribal organization" by the tribe. *The Kansas Indians* at 757. The Department explicitly rejected this tribal abandonment standard and subjected the Tribe to the full rigors of the acknowledgment regulations. I.B.1.29-30.

In its 1992 Final Determination on the Tribe's petition under the acknowledgment regulations, the Department concluded that the Tribe met all the mandatory criteria of those regulations, except that the Tribe's evidence showed insufficient intensity and breadth of community interaction and too low level political authority since the 1940's. Final Determination, 57 Fed. Reg. 27312 (June 18,

1992). As a result, the Department declined to acknowledge the Tribe under its regulations, even though the staff had observed that the Tribe had been "inappropriately terminated administratively in 1897, but have continued to maintain some degree of tribal characteristics." SR-IX.E.3 002.

In 1994, the Department revised its acknowledgment regulations and, for the first time, distinguished between previously acknowledged tribes and other non-federally recognized tribes. Public comments at the time proposed that, as to previously recognized tribes, the regulations provide that the tribe be automatically acknowledged unless the Government could demonstrate that the group had abandoned tribal relations voluntarily. The Department once again explicitly rejected this tribal abandonment standard for previously recognized tribes. Instead, the Department shortened the time depth requirement for previously acknowledged tribes and adopted a "streamlined demonstration" of the same criteria applicable to other petitioning groups. 59 Fed. Reg. 9280, 9282 (February 25, 1994).

Also in 1994, Congress enacted the Federally Recognized Indian Tribe List Act which requires that the Department annually publish a list of all federally recognized tribes. In the findings preceding the act, Congress declared that a "tribe which has been recognized in one of these manners [act of Congress or administratively] may not be terminated except by an Act of Congress . . . " Pub. L. 103-545, § 103(4), 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 479a.) The committee report on the bill explained the purpose of this act as follows:

> While the Department clearly has a role in extending recognition to previously unrecognized tribes [citation to acknowledgment regulations omitted], it does not have the authority to "derecognize" a tribe. **However, the Department has shown a disturbing tendency in this direction. Twice this Congress, the Bureau of Indian Affairs (BIA) has capriciously and improperly withdrawn federal recognition from a native group or leader. . . . This growing and disturbing trend prompted the introduction of H.R. 4180. . . .**
>
> **The Committee cannot stress enough its conclusion that the Department may not terminate the federally-recognized status of an Indian tribe absent an Act of Congress. Congress has never delegated that authority to the Department or acquiesced in such a termination.**
>
> (emphasis added.)

H.Rep. No. 103-781, reprinted in 1994 U.S. Code Cong. and Admin. News 3768, at 3769, 3770.

In this litigation, the Department for the first time interpreted its 1978 acknowledgment regulations as incorporating the tribal abandonment standard for previously recognized tribes, even though the regulations make no reference to either previous recognition or tribal abandonment. The Department did so despite its explicit refusal to apply that standard to the Tribe and to adopt that standard in the 1994 revisions to the regulations. Whether the courts need defer to this new interpretation of the acknowledgment regulations by the Department (and, hence, whether the appropriate standard was applied to the already recognized Tribe) was vigorously

disputed by the parties at all stages of this litigation. In the end, both the District Court and the Court of Appeals deferred to the Department's interpretation of the regulations in this regard. 255 F.3d 342, 350 (7th Cir. 2001) [Appendix A]; 887 F. Supp. 1158, 1170 (N.D. Ind. 1995) [Appendix B].

The Northern District of Indiana, South Bend Division, had jurisdiction over this matter under 28 U.S.C. §§ 1331, 1361, 2201 and 2202. The Seventh Circuit Court of Appeals had jurisdiction over the appeal under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT AND CONGRESS' PLAINLY EXPRESSED VIEW THAT ONLY CONGRESS CAN TERMINATE A FEDERALLY RECOGNIZED INDIAN TRIBE.

At the heart of this controversy is the extent of the Department's authority, if any, to re-examine the tribal status of a tribe formally recognized by Congress and never terminated. The Department insists that recognition by Congress is not the determinative hallmark of an on-going relationship between the United States and an Indian tribe; rather, according to the Department, the determinative hallmark is the maintenance of continuous tribal relations by the tribe. The Department determines the latter by application of its acknowledgment regulations, which the Department now interprets as having incorporated the tribal abandonment standard for previously acknowledged tribes.

The Court of Appeals accepted the Department's ad hoc interpretation of its regulations. In its most telling passage, the Court of Appeals reasoned that the 1978 acknowledgment regulations authorize the Department to look behind federal recognition of a tribe: "[the regulation] implies that a tribe can indeed cease to be recognized by failing to satisfy the regulation's criteria." Appendix A at 11. In short, by simply subjecting a recognized tribe to its acknowledgment regulations and finding the tribe's evidence lacking in some regard, the Department asserts the authority to terminate a federally recognized tribe for all practical purposes. This is precisely what happened to the Tribe.[4]

The Congress was understandably disturbed by this claimed authority by the Department and sought to check it in 1994. Congress mandated that the Department maintain a list of federally recognized tribes for the purpose of

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[4] The Tribe has suffered this fate twice in its history at the hands of the Department of the Interior. First, the Department purported to terminate the Tribe administratively in 1897 when it withdrew acknowledgment based upon the 1897 Van Devanter opinion. The Tribe challenged this admittedly "inappropriate" action by the agency [*see* SR.I.X.E.3 002] in proceedings below, but the District Court ruled that this claim was barred by statute of limitations. 832 F. Supp. 253. The Court of Appeals did not reach this issue and, for that reason, the Tribe does not present it for review here. Second, the Department once again purported to back-handedly terminate the Tribe's status in 1992 by application of its acknowledgment regulations as described above. The Tribe's challenge to this agency decision is clearly timely, was addressed by the Court of Appeals, and is the basis for this petition for a writ of certiorari.

insulating such tribes against re-examination of their status by the Department. *See* 25 U.S.C. § 479a; H.Rep. No. 103-781, reprinted in 1994 U.S. Code Cong. and Admin. News 3768. In doing so, Congress asserted its constitutional prerogative to manage Indian affairs and explicitly observed that the Department cannot terminate a federally recognized tribe; Congress has not delegated that authority so only Congress can do so. Pub. L. 103-545, § 103.

Congress' observation on this score is solidly based in long-standing authority of this Court. Summarizing a long line of Supreme Court cases beginning with *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), this Court concluded in 1911:

> Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indians shall cease.

Tiger v. Western Investment Co., 221 U.S. 286, 315 (1911); *accord United States v. Nice*, 241 U.S. 591, 598 (1916); *The Kansas Indians*, 72 U.S. at 755-57; *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 410 (1866). This is not to say that federal recognition continues without any regard to the tribe's continuing status as such. However, as this Court concluded in *The Kansas Indians*, it does so unless one of two events occurs: termination of the relationship by Congress or abandonment of tribal relations by the tribe. *Id.*

By establishing a baseline of federally recognized tribes in 1994, Congress presumably limited the Department's opportunity to re-examine the status of a federally recognized tribe. At a minimum, some process would be due in the event the Department were to omit a federally recognized tribe from its annual list as a prelude to reconsideration of the particular tribe's status. However, such limitation in the future depends solely upon the Department's forbearance, at least as the Court of Appeals interprets the regulations.[5] Were the Department to omit a previously listed tribe from its list of federally recognized tribes, the Department could under authority of the Court of Appeals' decision here subject that tribe to

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[5] Arguably, another act of Congress enacted months before the Federally Recognized Tribes List Act of 1994 precludes the Department from merely dropping a recognized tribe from its list for the purpose of re-examining tribal status or any other purpose. The Congress has prohibited any agency from adopting any regulation or making any decision that treats one federally recognized tribe differently from other federally recognized tribes. Pub. L. 103-263, § 5(b), 108 Stat. 709, codified at 25 U.S.C. § 476(f). At the same time, Congress set aside any regulation or administrative decision in existence as of May 31, 1994, and that treated one federally recognized tribe differently from others. *Id.*, 25 U.S.C. § 476(g). The Tribe asserted a claim here under 25 U.S.C. § 476(g), but the District Court failed to distinguish federal recognition from federal acknowledgment and held that, because the Department does not acknowledge the Tribe, the Tribe is not federally recognized within the meaning of the statute. 112 F. Supp.2d 742, 761-62. Of course, under this construction of section 476(f) and (g), the Department can deprive a tribe of the intended statutory protection by simply dropping the tribe from its annual list. The Court of Appeals did not reach this issue, though, and it is not the subject of this petition for certiorari.

its acknowledgment regulations and could find, as it did with the Tribe, that its evidence is insufficient in some respect.

Of course, the Department has omitted from all lists of federally recognized tribes some tribes, like the Tribe here, that have been formally recognized by Congress but are no longer acknowledged by the Department. Under the Court of Appeals' holding, the Department can simply apply its acknowledgment regulations to such tribes with no inquiry under the tribal abandonment standard and decree the tribes no longer acknowledged. Such administrative action would for all practical purposes constitute the de-recognition decried by Congress.

It is unclear how many tribes are in such a position. There appears to be no other documented instance of termination by administrative fiat, as there was here in 1897. However, there are other tribes that, for whatever reason, simply fell by the wayside although recognized at one point in history by Congress. The 1994 revisions to the acknowledgement regulations clearly contemplate such instances but, because of the lengthy time involved in the processing of petitions, the issue is only now coming to the fore.[6] In fact, the Department first directly

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[6] In a recent General Accounting Office [GAO], the GAO identified the length of time involved in processing petitions under the acknowledgment regulations as a substantial weakness in the administrative acknowledgment process. *Indian Issues: Improvements Needed in Tribal Recognition Process* (GPO 2001, GAO Rep. No. 02-49), at 14. Of the ten (10) petitioners currently ready for review of their documents, six (6) have been awaiting administrative review for five years or more. Once administrative review begins, the process takes a

wrestled with this problem in its 2001 decision on the Chinook petition. There, for the first time, the Department applied the tribal abandonment standard to a previously recognized tribe and concluded that the tribe should be acknowledged. 66 Fed. Reg. 1690 (January 9, 2001). This decision was challenged by a third party and is currently before the Interior Board of Indian Appeals for review.

Clearly, the Department's current interpretation of its acknowledgment regulations, which interpretation was adopted by the Court of Appeals, represents a serious incursion into Congress' prerogative of determining whether and when to terminate its relationship with Indian tribes. It also results in grave injustice to the Tribe and any other tribe that may be subjected to the Court of Appeals' interpretation of the Department's authority. The Court of Appeals' decision merits this Court's review to preserve the sanctity of the federal relationship with Indian tribes.

2. THE COURT OF APPEALS' DECISION SHOULD BE VACATED AND REMANDED FOR RECONSIDERATION IN LIGHT OF THIS COURT'S INTERVENING DECISION IN *UNITED STATES V. MEAD CORP.*

The level of deference due to the Department's interpretation of its regulations has been vigorously disputed throughout this litigation. Citing *Chevron, U.S.A., Inc. v.*

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minimum of two years to complete. *Id.* at 15-16. As a result, petitioners are only now coming to a point in the process to challenge the 1994 regulations as applied to previously acknowledged tribes.

Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the District Court held that, even though there was no evidence that the Secretary specifically considered the inclusion of the tribal abandonment standard in the 1978 regulations, the court owed deference to the Department's interpretation of the regulations as having incorporated that standard. Appendix B at 12. The Court of Appeals likewise adopted wholesale the Department's interpretation of its regulation, even though it acknowledged that the Department ignored the distinction between recognition and abandonment in its 1978 regulations. The Court of Appeals did so without citing any authority regarding the level of deference due under the circumstances. Appendix A at 11-12.

Three days after the Court of Appeals' decision here, the Supreme Court announced its decision in *United States v. Mead Corp.*, 121 S. Ct. 2164 (June 18, 2001). In *Mead Corp.*, this Court made clear that *Chevron* deference is not necessarily due to agency interpretation of regulations; rather, the level of deference owed depends upon a number of factors, including the persuasiveness of the agency's reasoning. *Id.* at 2173. In so holding, the Court returned to the more flexible approach to deference found in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), reserving full *Chevron* deference for those instances where Congress expressly delegated rule making authority to the agency and the agency made the decision following notice and comment. *Id.* at 2172, 2179, describing the "new rule" (J. Scalia, dissenting.)

The Seventh Circuit clearly understands the *Mead Corp.* decision as representing a clarification of the *Chevron* deference rule. *American Federation of Government*

Employees, et al. v. Rumsfeld, 262 F.3d 649, 656 (7th Cir. 2001); *see also United States Freightways Corp. v. Commissioner*, 2001 WL 1356392 (Nov. 6, 2001): "Both the informality of this interpretation and the context in which it has arisen persuade us that full Chevron deference is not appropriate here. Mead expressly disapproved of the exercise of such deference for the customs regulations that were at issue there, in part because of the bootstrapping that could otherwise occur." Indeed, this Court has already vacated and remanded one judgment to the Seventh Circuit for reconsideration in light of *Mead Corp. See Matz v. Household International Tax Reduction Investment Plan*, 265 F.3d 572 (7th Cir. 2001), *on remand*.

The deference extended by the lower courts to the Department's interpretation of its regulations as incorporating the tribal abandonment standard, an interpretation adopted for the first time in this litigation, was clearly a significant factor in the Court of Appeals' analysis. As this Court and the Congress have indicated, the Department lacks authority to terminate a federally recognized tribe. Only an act of Congress or abandonment of tribal relations can accomplish such. In its 1992 decision on the Tribe's petition and in its 1994 revisions to the acknowledgment regulations, the Department explicitly rejected the tribal abandonment standard as necessary or appropriate. As this litigation has proceeded, though, the Department has come to the view that it did, after all, apply the tribal abandonment standard, that standard being the same as the acknowledgment regulations. This is precisely the kind of agency interpretation to which very little deference is now due. These circumstances

require that the judgment below be vacated and the matter remanded for reconsideration in light of *United States v. Mead Corp, supra.*[7]

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[7] In an alternative holding, the Court of Appeals indicated that the Department's failure to apply the tribal abandonment standard was "harmless error" in light of the Tribe's abandonment of tribal relations. Appendix A at 12. The basis for the court's conclusion in this regard is baffling, to say the least. In its petition for rehearing, the Tribe argued that the Government had misstated the record to suggest to the court that the Tribe had disappeared. The Tribe referred the Court of Appeals to numerous references in the administrative record that state, to the contrary, that the Tribe has maintained tribal characteristics, albeit at an insufficient level in the Department's view to meet the acknowledgment regulations. SR-IX.E.3 002. In its response to the Tribe's petition for rehearing, the Government denied having asserted that the Tribe has disappeared. Thus, there is no basis in the record for the Court of Appeals' conclusion that the Tribe had ceased to exist. These differing factual inferences highlight the importance of determining the appropriate level of deference due to the Department's newfound interpretation of its regulations.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted, or, in the alternative, the judgment vacated and remanded to the Seventh Circuit Court of Appeals for reconsideration in light of *United States v. Mead, supra.*

Respectfully submitted,

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Appendix