

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: EVERETT R. RHOADES, DIRECTOR OF THE INDIAN  
HEALTH SERVICE, ET AL., Petitioners v. GROVER  
VIGIL, ET AL.

CASE NO: 91-1833

PLACE: Washington, D.C.

DATE: Wednesday, March 3, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EVERETT R. RHOADES, :

4 DIRECTOR OF THE INDIAN HEALTH :

5 SERVICE, ET AL., :

6 Petitioners :

7 v. : No. 91-1833

8 GROVER VIGIL, ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, March 3, 1992

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 11:05 a.m.

15 APPEARANCES:

16 EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor  
17 General, Department of Justice, Washington, D.C.; on  
18 behalf of the Petitioners.

19 JOEL R. JASPERSE, ESQ., Gallup, New Mexico; on behalf of  
20 the Respondents.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in number 91-1833, Michael Lincoln v. Grover Vigil or  
5 Vigil. Spectators are reminded not to talk while you're  
6 in the courtroom.

7 Mr. Kneedler, you may proceed.

8 ORAL ARGUMENT OF EDWIN S. KNEEDLER

9 ON BEHALF OF THE PETITIONERS

10 MR. KNEEDLER: Thank you, Mr. Chief Justice, and  
11 may it please the Court:

12 Respondents brought this suit to challenge a  
13 1985 decision by the Indian Health Service to redirect the  
14 work of a group of its employees from a regional to a  
15 national effort to promote the availability of diagnostic  
16 and related services for handicapped Indian children.

17 The employees' work was funded by a lump sum  
18 appropriation from Congress for the Indian Health Service  
19 and its 12,000 employees, 50 hospitals, 150 health  
20 centers, and 300 health clinics. The funds were  
21 authorized by the Snyder Act, the comprehensive statute  
22 that authorizes Indian appropriations generally, and by  
23 the Indian Health Services Improvement Act which from time  
24 to time has provided supplemental funds to address  
25 specific areas of Congress' concern.

1           This case presents two questions. First,  
2 whether judicial review under the Administrative Procedure  
3 Act of the -- of an agency's allocation of funds from one  
4 concededly authorized purpose to another is barred because  
5 it is committed to agency discretion by law. And second,  
6 whether formal rule-making procedures, consisting of a  
7 published notice in the Federal Register and opportunity  
8 for comment, is required before the Indian Health Service  
9 could redirect its resources in the manner that  
10 respondents challenge.

11           We submit that the answer to both questions is  
12 no, or that the court of appeals erred on both questions.  
13 On the first, the court of appeals acknowledged that the  
14 Snyder Act and the Indian Health Service Act do not  
15 provide manageable standards for a court to apply in  
16 reviewing the Indian Health Service's action here. Nor  
17 does the Lump Sum Appropriations Statute furnish any such  
18 law. It's simply, as is typical of such statutes, a lump  
19 sum for all of the authorized activities of the  
20 statutes -- or of the agency under the statutes that  
21 authorize its basic functions.

22           The court of appeals instead concluded that  
23 certain statements in the legislative history of the Lump  
24 Sum Appropriations Statute furnished a basis for judicial  
25 review. In our view that is clearly wrong. Statements in

1 legislative are simply not law for a court to apply within  
2 the meaning of this Court's APA jurisprudence. Only  
3 statutory texts enacted by Congress is law for a court to  
4 apply.

5 QUESTION: You -- you have a text here which is,  
6 you know, a certain amount of money. And you don't -- it  
7 doesn't -- you don't know what that money's supposed to be  
8 used for, and this legislative history clarifies what it's  
9 to be used for. Why is that any different from a piece of  
10 legislative history that clarifies the meaning of a  
11 prohibition? It's totally ambiguous. You'd think the  
12 agency can take a number of different views of what it  
13 means. If you find it clarified in the legislative  
14 history, that's what it means. Is that --

15 MR. KNEEDLER: That's -- that's not the purpose  
16 for which the court of appeals used the language in this  
17 case. It did not focus on language in the Lump Sum  
18 Appropriations statute itself and then say that the  
19 legislative history helped to clarify the statutory text.  
20 The court really used the legislative history as a  
21 substitute for the statutory text.

22 The statutory text here simply authorizes the  
23 agency to expend the funds for purposes authorized by  
24 the -- by the Snyder Act as -- those functions transferred  
25 to the Indian Health Service. It's then necessary to look

1 to the Snyder Act or the Indian Health -- Indian Health  
2 statute to look for any law to apply.

3 And the -- the Snyder Act, for example, and the  
4 court of appeals, again, didn't find anything in the text  
5 of the -- of the Snyder Act or the Indian Health Care  
6 Improvement Act that would furnish law to apply in this  
7 case. The Snyder Act, as this Court pointed out in Morton  
8 v. Ruiz, is deliberately comprehensive. It was enacted in  
9 response to the -- the time when points of order were  
10 raised against Indian appropriations because there was no  
11 authorizing statute.

12 QUESTION: Well I suppose those acts would --  
13 would provide law to apply for some questions that might  
14 arise under them.

15 MR. KNEEDLER: Yes. If -- if the claim were  
16 that the -- that the Indian Health Service were -- were --

17 QUESTION: They were providing help for  
18 non-Indians.

19 MR. KNEEDLER: Exactly. But there -- I don't  
20 there can be any question here that the reallocation or  
21 redirection of the work that the Indian Health Service  
22 made in this case was authorized by the statute. It  
23 simply redirected the employees' work from a regional --  
24 regionally focused program to a national program, to  
25 assure available services for Indian children. There's --



1 I think that's unquestionably within the broad language of  
2 the -- of the Snyder Act.

3 QUESTION: Well, to that extent there's law to  
4 apply here.

5 MR. KNEEDLER: Right, but -- but --

6 QUESTION: Whether -- whether you can go to a  
7 national program.

8 MR. KNEEDLER: No, I -- I think not.

9 Respondents have not contended that the -- that the --  
10 use -- utilizing the employees -- what was going to be  
11 done here, essentially -- let me just back up for a  
12 minute.

13 The employees under this Indian children's  
14 program in -- or project in -- in the Southwest was really  
15 set up as a pilot project. It wasn't even integrated into  
16 the local Indian health care delivery system. It was  
17 operated out of headquarters as a pilot project to really  
18 investigate what -- what might be done in what was thought  
19 to be perhaps an under utilized area.

20 But the -- but the ultimate point was to develop  
21 data and approaches for a nationwide program. And so  
22 when -- when the Indian Health Service redirected the  
23 activities of the employees, the thought was that rather  
24 than have these employees do monthly consultations --  
25 consultative visits with individual children, it would be

1 better to try to develop local responsibility for the  
2 Indian children from local programs and have these  
3 employees use their expertise to go to other Indian Health  
4 Service areas around the country to help them develop the  
5 local expertise.

6 But I don't think there's -- there can be any  
7 question and I don't understand respondents' to claim that  
8 the utilization of the employees for this nationwide  
9 effort is somehow beyond the -- the scope of what the  
10 Snyder Act or the Indian Health Care Act would authorize.

11 QUESTION: Well, do you think that the  
12 discretion provided under these acts is any greater than,  
13 for example, the discretion given to -- was it the  
14 Department of Transportation in the State Farm case?

15 MR. KNEEDLER: Well in -- in State --

16 QUESTION: To just provide motor vehicle  
17 standards that met the need for motor vehicle safety.

18 MR. KNEEDLER: Well, there there were specific  
19 statutory requirements that had to be satisfied, and there  
20 wasn't -- there was law --

21 QUESTION: They were pretty broad. I just -- I  
22 just wonder how you distinguish them.

23 MR. KNEEDLER: Well, in -- in the State Farm  
24 case there were -- there were actually quite stringent  
25 requirements that the agency had to satisfy before it

1     could promulgate a motor vehicles standards. There was --  
2     there were certain criteria at certain levels of safety  
3     that had to be satisfied that gave -- that gave a court  
4     law to apply.

5             Here the -- again, the Snyder Act was intended  
6     to cover essentially every possible activity that the BIA  
7     and now the Indian Health Service might engage in, so that  
8     there could be no question of a point of order when funds  
9     were appropriated to cover those funds. And --

10            QUESTION: But, Mr. Kneedler, suppose you had a  
11     statute that -- that authorizes an agency -- instructs an  
12     agency to pro -- and this is an instruction to -- to  
13     expend the funds as well -- to prohibit those activities  
14     that are harmful to the environment. And the legislative  
15     history, the committee reports of both Houses, say we  
16     anticipate that this will include prohibition of, and then  
17     fill it something, you know dumping -- by -- by chemical  
18     companies.

19            You think that legislative history would not  
20     be -- would not be taken into account by this Court in --  
21     in -- in determining whether the agency had authority to,  
22     or -- or had to prohibit that dumping by chemical  
23     companies?

24            MR. KNEEDLER: It might be taken into --

25            QUESTION: I'm sure it --

1           MR. KNEEDLER: It might be taken into account in  
2    construing the term harmful, I guess is the statutory --  
3    the operative word there.

4           QUESTION: Well, and the operative word here  
5    is -- is purposes authorized by these other statutes.  
6    What purposes in particular? Well, here's one.

7           MR. KNEEDLER: Well, the -- the Snyder Act, for  
8    example, broadly appropriates funds for the benefit --  
9    directs the BIA to -- to supervise the expenditure of  
10   funds that Congress may from time to time appropriate for  
11   the benefit, care, and assistance of Indians throughout  
12   the United States for a variety of services, as relevant  
13   here "relief of distress" and "conservation of Indians."

14           Now, again, if the claim here were this is  
15   not -- this money is not being spent for the relief of  
16   distress or conservation of the health of Indians or for  
17   any of the other purposes in the act, that would be law to  
18   be apply. But our point is that in -- in choosing among  
19   the concededly authorized purposes, there's no -- there is  
20   no law to apply in the text or legislative history of the  
21   Snyder Act or the Indian Health Care Improvements Act that  
22   would help a court to decide that question. Now --

23           QUESTION: Could you -- could you imagine a case  
24   in which the legislative history would contain an  
25   indication of congressionally ordered priorities so that



1 the legislative history would somehow indicate that the  
2 first priority in the Snyder Act is for disabled children?

3 MR. KNEEDLER: I -- I can imagine that sort of  
4 legislative history, but I think in some respects that's  
5 very much like the American Hospital Association Case this  
6 Court had several terms back where there -- where there  
7 was legislative history about the -- the expectations.  
8 And the way the Court thought the National Labor Relations  
9 Board --

10 QUESTION: And -- is that -- and is that law to  
11 apply if the agency ignores the funding obligation?

12 MR. KNEEDLER: Not -- not unless --

13 QUESTION: The funding priority?

14 MR. KNEEDLER: Not unless that legislative  
15 history is tied to something in statutory texts that  
16 mandates that result. I think this is very much like the  
17 D.C. Circuit's decision in the UAW case versus Donovan of  
18 some years back, where the -- the court pointed out that  
19 legislative history of -- of expectations in the way that  
20 Congress expected that expected that funds may be expended  
21 are simply expectations, they aren't legally binding  
22 requirements.

23 That's not to say they don't furnish  
24 protections, because congressional oversight in the  
25 appropriations process is -- is often a very useful one.

1 And, in fact, it's in many respects the most productive  
2 and -- and appropriate one for the overseeing of broad  
3 legislative programs. Courts are not generally suited to  
4 determining -- to second-guessing an agency's ordering of  
5 its priorities on spending.

6 QUESTION: Well, so -- so long as the spending  
7 is authorized by one of three statutory mandates, there  
8 can be no review as to how the agency allocates the  
9 fundings among those three.

10 MR. KNEEDLER: Unless Congress has -- unless  
11 Congress has provided further guidance about how the court  
12 is to order its priorities. It's instructive in this  
13 regard --

14 QUESTION: And can it provide that guidance in  
15 legislative history?

16 MR. KNEEDLER: I think not unless it's tied to  
17 specific statutory texts. The expectations are ones that  
18 Congress might enforce, as it were, in oversight hearings  
19 in subsequent years, which is the tradition give and take  
20 between an agency and its -- and its authorizing and  
21 appropriations committee.

22 QUESTION: Well let me pose this to you.  
23 Suppose the BIA established a -- a health care program for  
24 Indians with displaced children -- with displaced hips,  
25 and then it decided later to terminate that because it

1 understood that Indian children with displaced hill --  
2 hips would be served for their health needs by a State  
3 agency.

4 MR. KNEEDLER: Right.

5 QUESTION: And let's suppose that -- that  
6 assumption is factually incorrect, so they've cut off the  
7 services based on an incorrect factual assumption. Is  
8 there no law to apply? Is that unreviewable for abuse of  
9 discretion?

10 MR. KNEEDLER: It is -- it is unreviewable, yes.  
11 Because -- first of all, I think -- there are reasons, I  
12 think, why that's not apt to become a major problem, but  
13 let me explain why that's so.

14 The availability of other services is simply one  
15 of the many criteria that the -- in this case the Indian  
16 Health Service might take into account in reallocating  
17 resources. It -- it's also possible that there would be  
18 some -- that there would be other uses of the funds that  
19 would simply -- as -- as needed as the funds might seem  
20 for one service, might seem more useful for another  
21 service.

22 It's important to recognize that the Indian --

23 QUESTION: Well, Justice O'Connor can defend her  
24 own hypothetical if she wants to, I suppose, but I'd like  
25 to have an answer to it. Suppose that this is the reason

1     that State funding duplicates this program and that reason  
2     is wrong.

3             MR. KNEEDLER:   If that reason is wrong --

4             QUESTION:   Is factually unsound --

5             MR. KNEEDLER:   If that reason -- if that reason  
6     proves to be wrong, I think what would happen is that  
7     would be brought to the -- brought to the attention of the  
8     Indian Health Service and --

9             QUESTION:   Well, my question is, is there law to  
10    apply? Can there be judicial review and judicial  
11    correction of that -- of that agency decision?

12            MR. KNEEDLER:   There's not -- there's not law  
13    to -- because even if there's a factual error, that does  
14    not mean there's law to apply. The agent -- the -- this  
15    is - our position is --

16            QUESTION:   Is it arbitrary and unreasonable?  
17    Could it -- could you make out a case that it's arbitrary  
18    and unreasonable --

19            MR. KNEEDLER:   Well --

20            QUESTION:   That there was -- there was clear  
21    evidence that the State program did not provide the -- the  
22    care and the agency just ignored clear evidence.

23            MR. KNEEDLER:   Well, that -- that would be the  
24    sort of claim that would be made if it were arbitrary and  
25    capricious --



1 QUESTION: Well --

2 MR. KNEEDLER: But our position is that review  
3 would be precluded of that. When review is precluded,  
4 that conclusion presumes that there will be occasions --  
5 there could be occasions when there would be mistakes of  
6 that -- of that type made.

7 QUESTION: And review is precluded, again,  
8 because there's no law to apply.

9 MR. KNEEDLER: Yes. Because -- because it --  
10 well, the phrase no law to apply is a phrase that this  
11 Court has developed for applying what is -- what is really  
12 different statutory language under the APA, which is  
13 whether the agency action is committed to agency  
14 discretion by law. That's the ultimate touchstone. And  
15 in the sort of example that -- that you're describing, the  
16 conclusion would be that Congress has committed the  
17 allocation of resources in a whole variety of  
18 circumstances to the -- to the discretion of the Indian  
19 Health Service.

20 In part from necessity, because if courts were  
21 going to get in the business of second guessing every  
22 decision of resource allocation, whether to purchase  
23 equipment for one hospital and not another, whether to  
24 reassign a doctor from one health clinic to another, even  
25 whether a patient should get one particular type of care

1 or another, and -- and base that on whether there was --  
2 whether there was perhaps a factual error, or what could  
3 be claimed to be a factual error underlying the agency's  
4 decision, then the -- the Indian Health Service could be  
5 hamstrung in the -- in the delivery of health services.

6 QUESTION: Mr. Kneedler, suppose -- here's  
7 how -- it says for expenses necessary to carry out the act  
8 of August 15, 1954, blah, blah, blah, that's how the  
9 appropriations reads. Suppose the -- the committee,  
10 both -- the Appropriations Committees in both Houses,  
11 there's language in the report that says we anticipate  
12 that some of this money will go to this particular  
13 schooling program.

14 It is later contended that that schooling  
15 program is not an authorized program on which the  
16 appropriations can be expended; that question comes up in  
17 a lawsuit. You mean that -- that committee legislative  
18 history would not be used by the Government to  
19 establish --

20 MR. KNEEDLER: No, I'm not saying that  
21 legislative history can't be used to construe a statutory  
22 term. My point is that it can't --

23 QUESTION: Well, that's what they're doing here.  
24 They're -- they're saying this shows the expense is  
25 necessary to carry out, they anticipated it, this is one

1 of the things to be carried out.

2 MR. KNEEDLER: But -- but the respondents'  
3 argument in the court of appeals decision here is not tied  
4 to any language in the Lump Sum Appropriation or the  
5 Snyder Act or the Indian Health Care Improvements Act  
6 that's being construed with the assistance of that  
7 language. In fact, the court of appeals, again,  
8 specifically said it's difficult to find any manageable  
9 standards within the -- within the Indian Health Care  
10 Improvement Act or the Snyder Act. There's no statutory  
11 text in either one that says this -- this function might  
12 be preferred over that one.

13 QUESTION: The text in the Appropriations Act;  
14 expenses necessary to carry out the act of August 5, 1954.  
15 It's clear in the Appropriations Committee that one of the  
16 things they thought necessary was this program. Why isn't  
17 that statutory language --

18 MR. KNEEDLER: Well, expenses necessary is  
19 standard language in an appropriations statute. And if --  
20 and if that language was thought to incorporate every  
21 representation that is made to an appropriations  
22 committee, frankly, I think that would revolutionize the  
23 way in which -- in which agencies and Congress itself and  
24 GAO have traditionally regarded the appropriations --

25 QUESTION: Well, I know. I mean you say that in

1 your brief. You say well, it's just puffing; it's not  
2 unusual for congressional committee members to attempt to  
3 influence the expenditure of general appropriations by way  
4 of statements in committee reports, as though they don't  
5 do that in other contexts. How do you identify the one  
6 from the other.

7 MR. KNEEDLER: They -- again, I guess I'm  
8 repeating myself, but here the claim is -- the claim is  
9 not that -- that there is some -- they have not pointed to  
10 language -- respondents have not pointed to language in  
11 the Snyder Act or in the Indian Health Care Improvement  
12 Act and says this is the provision that it violates.  
13 These -- the national program is unquestionably authorized  
14 by both statutes, and the only question is in choosing  
15 among authorized functions, whether courts have -- whether  
16 that matter is committed to agency discretion. And that's  
17 not --

18 QUESTION: Do you have another basis for  
19 reversal?

20 MR. KNEEDLER: Yes, we do. The other -- the  
21 second issue in the case concerns the court of appeals  
22 requirement that the Indian Health Service resort to  
23 notice and comment rule-making procedures before it could  
24 implement the decision to redirect the funds in this case.

25 The court of appeals announced a rule that



1 notice and comment requirements are necessary anytime the  
2 Government cuts --

3 QUESTION: But before -- before you get there,  
4 did the court below reject the proposition about  
5 unreviewability?

6 MR. KNEEDLER: Yes, it did.

7 QUESTION: So we -- we must address that here.

8 MR. KNEEDLER: Yes. Might -- now I suppose the  
9 Court could choose to address the notice and comment  
10 first, because the court of appeals did not go on and  
11 reach the merits of whether the decision was arbitrary and  
12 capricious, it simply held it was subject to review, but  
13 held that it wouldn't reach the merits because of the  
14 notice and comment point which it viewed in the manner of  
15 a threshold issue.

16 QUESTION: So we at least need to address the  
17 notice and comment issue.

18 MR. KNEEDLER: Yes. Yes, that's correct. And  
19 the court of the appeals held that notice and comment is  
20 required anytime the Government cuts back on  
21 congressionally created and funded benefits for Indians,  
22 even if the Indians have no entitlement to those benefits.  
23 There is, in our view, no basis for that new requirement.  
24 It conflicts with Vermont Yankee, which bars courts from  
25 imposing additional procedural requirements on agencies

1 that are not required by law.

2 And significantly, also, it fails to respect  
3 that -- the judgment of Congress when Congress thought  
4 that input from Indians was necessary in the formulation  
5 of Indian health programs. In 1980 -- in the 1988  
6 amendments to the Indian Health Care Program that we  
7 mention in footnote 36 of our brief, Congress specifically  
8 addressed this problem in the context of facilities,  
9 permanent facilities, and it said that whenever the Indian  
10 Health Service is contemplating constructing, renovating,  
11 or closing a facility, it must consult with the tribe  
12 concerned before it does that and, in fact, in the case of  
13 closing a facility must notify Congress.

14 Congress -- significantly, Congress did not  
15 impose any such requirement of consultation with respect  
16 to services under the statutory provisions that we have  
17 here, services as opposed to --

18 QUESTION: Mr. Kneedler, does the APA definition  
19 of rule include policy statements? Is it a -- is the  
20 decision to terminate this project possibly a rule under  
21 that definition?

22 MR. KNEEDLER: Right. That's -- that is the  
23 ground that -- that's the rationale that the district  
24 court applied.

25 QUESTION: Uh-hum.

1           MR. KNEEDLER: The court -- the court of appeals  
2 announced this broader rule that it thought came from this  
3 Court's decision in Morton v. Ruiz, which we -- which we  
4 believe was -- was, first of all, an overreading of Morton  
5 v. Ruiz and did not take into account subsequent  
6 developments, on that point Vermont Yankee, and also the  
7 notion that an agency has to -- can only administer a  
8 program like this through legislative rules, we think is  
9 inconsistent with Bell Aerospace which allows an agency  
10 some discretion.

11           But on the APA point on whether this constitutes  
12 a rule --

13           QUESTION: Uh-hum.

14           MR. KNEEDLER: We -- we think that it -- that it  
15 clearly does not. The decision to reallocate these  
16 resources was a self-contained decision. It was -- yes,  
17 it was communicated verbally and, yes, it had some future  
18 consequences, but that does not convert it into a rule.

19           QUESTION: But it's been -- it's been  
20 interpreted broadly to cover statements issued by an  
21 agency to advise the public prospectively of the manner in  
22 which an agency proposes to exercise a discretionary  
23 power.

24           MR. KNEEDLER: But it -- in a way that has  
25 future legal consequences is what -- is what really

1 characterizes a rule. We don't believe that Congress,  
2 when it enacted the statutory definition of a rule,  
3 intended to depart fundamentally from the -- from the core  
4 of what a rule is. A rule -- another word for rule is a  
5 regulation, something that has -- that has binding effect  
6 or at least legal force to it, that -- that guides, in a  
7 legal manner, the future exercise of discretion.

8 QUESTION: But it's been -- it's been  
9 interpreted by the Attorney General's commentary as  
10 including general statements of policy.

11 MR. KNEEDLER: It does include general  
12 statements of policy. But policy in a sense that the  
13 statement itself has an abiding future effect. In this  
14 case the -- in this case there really was no --

15 QUESTION: Well, it'll have an effect all right,  
16 there won't be a program available.

17 MR. KNEEDLER: No. Well first -- first of all,  
18 there is a program. All the -- all the -- the children in  
19 these service areas will continue to be serviced by the  
20 national program. It's just that the -- that all Indian  
21 children throughout the country will get the same  
22 services, rather than the regional program -- children in  
23 this one region getting something different.

24 But it has a practical consequence, we don't  
25 deny that. But in order to be a rule, the statement



1     itself, the statement has to have a continuing future  
2     legal effect. And here the decision to reallocate --

3             QUESTION: How about rules of agency  
4     organization, which are referred to in the APA?

5             MR. KNEEDLER: Well --

6             QUESTION: How does -- how does a reorganization  
7     of the agency have a future legally binding effect on any  
8     outside individual?

9             MR. KNEEDLER: Well, it -- it would -- it would  
10    assign in a formal way. I mean formality has a lot to do  
11    with what's a rule. It would assign in a formal way where  
12    various statutory responsibilities are to be assigned  
13    within the agency, which assistant secretary is  
14    responsible for which programs, so that one can look and  
15    see who has the authority to exercise legal power,  
16    statutory power delegated from the Secretary, and where  
17    various programs will reside. And that has a lot to do  
18    with -- with the way in which governmental authority is  
19    exercised.

20            But here -- at bottom, what happened here was  
21    nothing more than a -- than the sort of directive that a  
22    superior may give to a -- to an employee saying instead of  
23    doing this type of work, confining your work to a regional  
24    program, starting tomorrow your job description is  
25    somewhat different, you're being assigned to new -- to new

1 responsibilities.

2 That decision was consummated at that time and  
3 it was communicated verbally in a variety of ways, one of  
4 which was a memorandum to health service units contained  
5 at page 80 of the joint appendix. But the fact that the  
6 statement was communicated or that the decision was  
7 communicated in a statement didn't mean that the statement  
8 itself had any future legal consequences.

9 QUESTION: Does the conclusion that you draw or  
10 don't want us to draw depend on the context? For example,  
11 if we were dealing here with a -- an agency action which  
12 was preceded by a whole body of what everybody agrees  
13 would be rules about how the agency ought to allocate its  
14 money and so on, then perhaps your argument would have  
15 great force. You would say well this is just trivial,  
16 this is basically just a reassignment of people.

17 But where there is not such a body of -- of  
18 rules in existence, this has far greater significance,  
19 i.e. it determines whether there is going to be a certain  
20 kind of program or not. Is that kind of contextual  
21 contrast a legitimate thing to take into consideration?

22 MR. KNEEDLER: Well, it might be a relevant  
23 factor. I mean, the fact of the matter is it's difficult  
24 to come up with any one principle that will solve all  
25 places. But we do think that formality and continuing

1 legal effect are really the two central hallmarks of what a  
2 rule is, both in ordinary meaning and the special sense in  
3 which it -- in which it's used.

4 So even in the situation you're talking about  
5 where a decision might be made to -- to engage in a  
6 certain program, that doesn't convert it into a rule. I  
7 think that the Court's decision in Overton Park is very  
8 instructive as a parallel to this case. There the Court  
9 specifically held that the Department of Transportation's  
10 decision to fund a particular program out of its  
11 appropriated funds was not a rule. And this is, in our  
12 view, directly parallel to that.

13 QUESTION: Mr. Kneedler, isn't there an  
14 exception anyway? Even if it were a rule, isn't there an  
15 except for rules related -- to notice and comment rule  
16 making for rules relating to benefits?

17 MR. KNEEDLER: There is -- there is an  
18 exception. The Department of Health and Human Services,  
19 like most agencies, has agreed to follow notice and  
20 comment procedures --

21 QUESTION: I see.

22 MR. KNEEDLER: -- For that. There may be some  
23 question of whether these direct services are -- are  
24 benefits --

25 QUESTION: Uh-hum.

1 MR. KNEEDLER: -- Within the meaning of that  
2 exception or whether it just means cash transfers. But in  
3 any event, we haven't relied on that exception here  
4 because it's -- it's been -- it's been waived.

5 I'd like to reserve the balance of my time.

6 QUESTION: Mr. Kneedler, on a small point,  
7 there -- the court below ordered publication.

8 MR. KNEEDLER: Yes.

9 QUESTION: And is that question before us?

10 MR. KNEEDLER: In order for there to be  
11 publication, it would -- the decision here would have to  
12 be a rule, so our argument that it's not a rule subsumes  
13 both the publication requirement and the notice and  
14 comment requirement.

15 QUESTION: Uh-hum.

16 QUESTION: Very well, Mr. Kneedler.

17 Mr. Jasperse, we'll hear from you. Is that a  
18 correct pronunciation of your name?

19 ORAL ARGUMENT OF JOEL R. JASPERSE

20 ON BEHALF OF THE RESPONDENTS

21 MR. JASPERSE: Jasperse, thank you. Mr. Chief  
22 Justice and may it please the Court:

23 The lower courts were correct in requiring  
24 notice and comment in this case, and to understand why  
25 it's critical that you understand how the program was



1 implemented in the first place and how it was operated.

2 This program, the Indian Children's Program, was  
3 implemented in a direct response to the Indian Health Care  
4 Improvement Act, which was passed in 1976. That act was  
5 passed to provide supplemental funding for Indian  
6 programs, supplemental to the Snyder Act.

7 Title II of the Indian Health Care Improvement  
8 Act specifically authorizes funding for known unmet Indian  
9 health needs and specifically authorizes funding for  
10 therapeutic and residential treatment centers. It was in  
11 response to that language in this act that the agency  
12 implemented this Indian Children's Program.

13 QUESTION: Did it engage in rule making when it  
14 instituted the program?

15 MR. JASPERSE: It did not, Your Honor.  
16 Initially, the agency envisioned a \$3.5 million facility.  
17 That was never funded. They initially chose to center  
18 that facility near Albuquerque for a number of reasons,  
19 primarily because the large Indian population which  
20 then-Director Emery Johnson described as half of --  
21 roughly half of the Indian population residing in the  
22 States of New Mexico and Arizona.

23 The Bureau of Indian Affairs did not --

24 QUESTION: About roughly half of the Indian  
25 population residing in New Mexico and Arizona resided in

1 the Albuquerque area.

2 MR. JASPERSE: No, Your Honor, in those two  
3 States. Those were his words, his characterization of the  
4 Indian population at that time.

5 QUESTION: Half the Indian population in the  
6 United States resides in Arizona and New Mexico.

7 MR. JASPERSE: Those were his words, Your Honor.

8 The Bureau of Indian Affairs did not support the  
9 center. One of the reasons was they did not feel that an  
10 inpatient center like this would meet their mandate, under  
11 a separate act relating to special education, to provide  
12 services in the least restrictive environment.

13 So what happened was the Indian Children's  
14 Program was formulated anyway by the -- the Indian Health  
15 Service, by going ahead and forming specialized teams.  
16 They felt that the staff, the specialized staff that was  
17 needed to provide these services was going to be needed  
18 regardless of whether they had a brick and mortar  
19 facility.

20 The team was -- was formed in 1978. It was  
21 centered in Albuquerque and it proceeded to go out into  
22 nearby Indian communities to provide various services,  
23 primarily diagnostic and treatment services. To its  
24 credit, the Indian Health Service recognized that there  
25 was a critical need for diagnostic and treatment services.

1 They realized that observers felt that this situation was  
2 one comparable to the national situation 35 years before,  
3 at the time of the Second World War.

4 Eventually a memorandum of agreement was signed  
5 by the two agencies. They agreed to try out this concept  
6 of working together to provide these services. And in  
7 1979, the fall of 1979, the Bureau of Indian Affairs did  
8 join this effort.

9 QUESTION: Mr. Jasperse, you claim rule making  
10 was necessary to terminate the program. You say it  
11 wasn't -- it wasn't applied to begin the program either.  
12 I assume it would have been necessary to begin the program  
13 too, wouldn't it?

14 MR. JASPERSE: Our position, Your Honor, is that  
15 when -- when the agency is implementing law like this,  
16 establishing services, that they should have undergone  
17 notice and comment before getting to establish --

18 QUESTION: Before -- to establish it. And if  
19 they had decided not to establish it -- since the APA  
20 defines agency action to include agency inaction, if they  
21 had not established the program, they would have also have  
22 to had rule making in order not to establish the program,  
23 wouldn't they?

24 MR. JASPERSE: I don't believe so, if they were  
25 not going to --

1 QUESTION: Well, read the APA; agency action  
2 includes inaction. Any decision not to have the program  
3 would require rule making, just as a decision to have it  
4 would require rule making and, as you say, a decision to  
5 terminate it would require rule making.

6 MR. JASPERSE: We certainly agree.

7 QUESTION: We're going to have a lot of rule  
8 making out there.

9 MR. JASPERSE: I can't concede that inaction  
10 requires rule making. They're not -- they're not taking  
11 anything -- they're not taking any action prospectively  
12 there that's of a generalized nature --

13 QUESTION: Oh.

14 MR. JASPERSE: -- That implements a policy --

15 QUESTION: The decision not to spend money on  
16 this program in the first place is a decision that has  
17 future effect; as you say, it's going to deprive these  
18 people of the money. And the decision not to have it  
19 under the APA is just as much a decision as the decision  
20 to have it, so you would need -- you would need rule  
21 making endlessly for all programs you begin, for all  
22 programs you end, and for all programs you don't begin.  
23 I -- you know, I don't know where the end is.

24 MR. JASPERSE: Well, we -- we believe very  
25 strongly in this case that where the agency did, in fact,



1 undertake this operation and do so in response to the  
2 statute, as well as its Federal Trust responsibility to  
3 Indian people; that when they, over time, operated this  
4 program, provided these kind of services, established  
5 eligibility rules that set out what services were to be --  
6 to be provided and who was to receive them; that when they  
7 went ahead and disestablished that program, that that --

8 QUESTION: Who's they?

9 MR. JASPERSE: The agency. The agency --

10 QUESTION: Which agency?

11 MR. JASPERSE: The Indian Health Service. This  
12 was a joint effort, but only the Indian Health Service  
13 made this particular decision. In fact, the Bureau of  
14 Indian Affairs was -- did not even receive notice until  
15 they received the actual termination letter that the  
16 agency -- the Indian Health Service sent out.

17 What happened during this time is that the  
18 eligibility criteria that were adopted by the agency were  
19 applied. And, basically, those eligibility criteria were  
20 such that only children in certain areas of the Southwest  
21 were to receive those services and only children who were  
22 within certain -- a certain age range, birth to age 21,  
23 and who were handicapped, were to receive these services.

24 And so these teams traveled out into the Indian  
25 communities, into reservation areas, areas that were

1 remote, that were rural, that were isolated and oftentimes  
2 small, and provided these diagnostic and treatment  
3 services.

4           What's also important to understand is that  
5 throughout the operation of this program every year in  
6 testimony to the congressional committees regarding  
7 appropriations, the agency continuously told the agency,  
8 this is a critical program for these children, it's a  
9 successful program, we are providing these specific  
10 diagnostic and treatment services to them, certain  
11 children are eligible for these services and we want  
12 continued funding for this program.

13           And Congress appears to have responded favorably  
14 to these requests. They received the information in a  
15 favorable light and we think there was -- this showed  
16 intent by the Congress, through its appropriations  
17 committee, to continue this program in the form that the  
18 agency then did.

19           In October 1984, officials in the Rockville,  
20 Maryland Headquarters East portion of the Indian Health  
21 Service began urging that this program be changed, that  
22 the -- the form that it was in at that point, which was a  
23 regional program, be changed to a national scope program  
24 that would provide consulting and training.

25           Sometime in 1985 -- the record is not clear as

1 to exactly when this decision was made, but sometime in  
2 1985 the decision was made to eliminate the Indian  
3 Children's Program as a direct service program. This  
4 termination decision was announced in a letter in August  
5 of 1985. This termination letter, single letter, is the  
6 only explanation that the agency provided or that gives us  
7 any information as to what it was doing and why it was  
8 doing this.

9 One of our arguments here in terms of the  
10 arbitrary and capricious argument is that a single letter  
11 that simply tells what they were doing without any  
12 explanation is not -- not sufficient to provide us with a  
13 reasoned explanation of its action.

14 QUESTION: What about all the other people on  
15 whom money was not being spent? Were they also entitled  
16 to an explanation of why money was not being spent on  
17 them? I mean you're not the only people. There you're  
18 joining the vast majority of the citizens on whom this  
19 money is not being spent. What -- what is the reason for  
20 your special entitlement to a notice and comment rule  
21 making on this point?

22 MR. JASPERSE: We believe that notice and  
23 comment is afforded, first, because this was a rule, a  
24 legislative rule under the APA.

25 QUESTION: Well, but --

1 MR. JASPERSE: Second --

2 QUESTION: Okay. .

3 MR. JASPERSE: Second -- Your Honor, there are  
4 four reasons why we --

5 QUESTION: The first one applies to everybody  
6 else. I'm trying to figure out why everybody else isn't  
7 entitled to it. What's the -- what are the other three.

8 MR. JASPERSE: Okay. The others, Your Honor,  
9 are that there is an -- under the Indian Trust  
10 responsibility, there is a specific duty to deal fairly.  
11 We think if that -- that language, which was stated by  
12 this Court in Morton v. Ruiz, is to mean anything --

13 QUESTION: Uh-hum.

14 MR. JASPERSE: -- Is not simply an empty phrase  
15 that this Court used, that that at least means fairness to  
16 these children.

17 QUESTION: Uh-hum.

18 MR. JASPERSE: And fairness here, in this  
19 context, means some kind of procedural protection.

20 QUESTION: Well Mr. Jasperse, in the case, I  
21 forget what the name was, I think it's Cherokee, we  
22 decided two or three -- we said the concept of the Indian  
23 Trust responsibility is basically a responsibility for  
24 land, not any general duty of heightened fair dealing with  
25 Indians.



1 MR. JASPERSE: There is clearly a specific  
2 fiduciary duty when -- when it comes to land, Your Honor.  
3 However, this -- this Court -- and the Government doesn't  
4 dispute this, that there is a general overriding trust  
5 responsibility that the Government has. What they're --  
6 that they are --

7 QUESTION: That should -- that should make the  
8 standards of review under the Administrative Procedure Act  
9 different when Indians are parties plaintiff than when  
10 other people are parties plaintiff?

11 MR. JASPERSE: Not -- not -- I'm not arguing  
12 that point under the APA. The APA -- the notice and  
13 comment here in this case can stand regardless of whether  
14 it involved Indian people or not, with this type of  
15 action. What I'm arguing here as a second basis for  
16 affirming the notice and comment is that the overriding  
17 trust responsibility ---

18 QUESTION: Indians are entitled to notice and  
19 comment even though non-Indians in precisely the same  
20 situation would not be. Is that what you're arguing?

21 MR. JASPERSE: No. I'm arguing that in this  
22 particular context the APA would afford them notice and  
23 comment regardless of whether they were Indian people.  
24 But in addition to that, this duty to deal fairly must  
25 mean something --

1           QUESTION: Well, but I think you're simply  
2 reading that much too broadly from our cases. I don't  
3 think our cases have said there is any general duty to  
4 deal in a specially fair way with Indians, as opposed to  
5 other citizens, unless you're talking about the  
6 interpretation of a treaty or the duty to deal with trust  
7 lands.

8           MR. JASPERSE: Let me address your question by  
9 referring to Morton v. Ruiz. In that case you also had  
10 Indian people. In that case there were -- it was a Snyder  
11 Act program similar to this one. It wasn't specifically  
12 required by statute, it was funded under Lump Sum, there  
13 weren't specific eligibility rules required by the -- by  
14 the statute.

15           In that case this Court said that the -- because  
16 there is an overriding duty of trust under this general  
17 trust responsibility, that the continued expectation, the  
18 legitimate expectation of those general assistance  
19 recipients in that case, could not be extinguished unless  
20 there was notice and comment.

21           QUESTION: Well, I suggest that you take a look  
22 at our opinion in Cherokee Nation where we say, "The trust  
23 responsibility is implicated only where the Indian  
24 property is at stake."

25           QUESTION: Mr. Jasperse, I thought that the APA

1     itself exempted it from notice and comment. Even if you  
2     assume that the letter in -- at issue was a rule -- and  
3     I'm not sure it was, but if you assume that, it exempts  
4     general statements of policy from any notice and comment  
5     requirement. And at best you would consider the letter  
6     just a statement of policy, wouldn't you?

7             MR. JASPERSE: Well, we -- we would -- we would  
8     submit that even if it was a general statement of  
9     policy --

10            QUESTION: Uh-hum.

11            MR. JASPERSE: -- That that presumes it was at  
12     least a rule in the first place, and so that it comes  
13     within the purview of the Administrative Procedure Act.  
14     And a statement of general policy must at least be  
15     published in the Federal Register, and this is --

16            QUESTION: But no notice and comment required.

17            MR. JASPERSE: That's correct, Your Honor. But  
18     it would at least have to be published in the Federal  
19     Register which would give publication notice, and that is  
20     one of the independent grounds on which the district court  
21     did rule in favor of the children's suit under the APA.

22            And so the -- the point is it doesn't really  
23     make any difference for the children whether or not this  
24     was a legislative rule requiring notice and comment under  
25     section 553 or whether it was a statement of general

1 policy requiring Federal Register publication under  
2 section 552, either way we win. The Government's argument  
3 is that this is an action that -- that's not a rule at all  
4 and so doesn't come within the APA.

5 QUESTION: You -- you don't win if it isn't a  
6 rule.

7 MR. JASPERSE: That's correct. It must be a  
8 rule. And our argument here is that this was clearly  
9 prospective in nature, it was generalized in nature, it  
10 applied to all of these children. And it -- and it  
11 prescribed policy. This was a change that the agency made  
12 from following one course of action to a very different  
13 course of action.

14 That change was a change in terms of how it  
15 was -- how it was deciding to implement its reading of the  
16 Indian Health Care Improvement Act, the specific  
17 therapeutic and treatment centers provision in the act.  
18 And so when they make a change in their reading of the law  
19 and change their whole program as a result of that, that's  
20 at least a statement of general -- general policy. And  
21 it's -- and it's certainly a rule.

22 QUESTION: Mr. Jasperse, if I may turn to the  
23 "law to apply" aspect of this for a moment. Some agencies  
24 have as their function disbursing money, as these agencies  
25 have as a large part of theirs, or disbursing benefits.



1 Other agencies are enforcement agencies principally and  
2 don't give out much money.

3 In a case called Heckler v. Chaney we decided  
4 that there was no law to apply, to basis for a cause of  
5 action against an agency asserting that it had to exert  
6 its enforcement priorities in this manner rather than in  
7 another manner. We said there are lot of different  
8 manners it can use; it's up to the agency to decide where  
9 to devote its limited enforcement resources.

10 Now, why doesn't that principle carry over very  
11 well to -- to an agency that's in the disbursement of  
12 benefits business? To the same extent, there really is no  
13 law to apply.

14 MR. JASPERSE: Well, we would argue that the  
15 Heckler v. Chaney type of nonenforcement decision was  
16 really one that was not primarily a resource-type  
17 allocation decision, but a decision whether to take a  
18 specific type of action that it could under the statute.  
19 This --

20 QUESTION: Well, only because the agency has  
21 limited enforcement resources, just as these agencies have  
22 limited distribution resources. It has to put it one  
23 place or another place, and it decided to do it in places  
24 that the plaintiffs didn't like. The same thing's  
25 happening here.

1           MR. JASPERSE: Well, I think -- I think in this  
2 kind of a situation this Court has -- has answered that by  
3 saying that when there are limited -- limited funds, and  
4 you're going to change a program from what it was doing  
5 before and when you're going to extinguish an expectation  
6 that the services that were there before, that you have to  
7 at least give the people the kind of notice so that they  
8 know what's happening. And that's the notice and comment  
9 requirement that comes in under Morton v. Ruiz.

10           And even if there insufficient funds and  
11 their -- and the agency has to do this reallocation, it  
12 has to be done in such a way that it's fair to the  
13 children. And it's not fair to the children, given this  
14 overriding trust responsibility to deal fairly with them,  
15 if -- if the agency simply abruptly stops the services  
16 here.

17           I would add that it's -- it seems illogical and  
18 totally incomprehensible that when the agency has a  
19 specific mandate under the Snyder Act, a mandatory  
20 requirement that it act with respect to Indians to  
21 conserve health, that they not at least, when they're --  
22 when they're abruptly terminating these services, to give  
23 them notice.

24           Notice, just as a matter of general common  
25 sense, would have been proper here, and something that

1 would have assisted them in maintaining their health. It  
2 might be similar when we get -- those -- those of us here  
3 who are covered by private health insurance, we would  
4 be -- feel very unfairly treated if -- if the coverer  
5 simply dropped the -- the coverage that we have without  
6 telling us, or changed a provision in the coverage without  
7 telling us.

8 If the children had known ahead of time, if they  
9 had been given notice, they could have at least have  
10 attempted to locate and find those alternative services  
11 that the Government says was readily available, to make  
12 some sort of a transition. Without that transition, they  
13 fell into -- fell between the cracks; there was a gap of  
14 time.

15 And the record is very clear on that point, that  
16 loss of services to these type of children harms them.  
17 The type of treatment services that they need you cannot  
18 accumulate. And so loss of services over even a couple of  
19 months was detrimental to their health.

20 What the Government is really asking this Court  
21 to do here in its argument that there is no law to apply,  
22 is to -- is to write a blank check. We have relied on, in  
23 this case, all of the Indian health care law that there  
24 is. If there is no law to apply here under the Snyder Act  
25 and the Indian Health Care Improvement Act and the Indian

1 Health Service Manual and so on, no Indian people will  
2 ever be able to obtain judicial review. It will be  
3 completely foreclosed. We don't --

4 QUESTION: Could I -- could I ask you -- suppose  
5 we disagree with you -- suppose we -- suppose we say  
6 that -- that there is no need for notice or comment; is  
7 the case over?

8 MR. JASPERSE: No, Your Honor, the case is not  
9 over. The -- both lower courts --

10 QUESTION: But let's assume we agree with you  
11 that -- that there is -- that that is not committed to  
12 agency discretion, but that there's no need, when the  
13 agency did what it did, for -- to give notice or comment.

14 MR. JASPERSE: If there's no -- no notice and  
15 comment requirement and it's that this is not totally a  
16 matter of agency discretion, the case is not over. It  
17 would -- would require remand to the district court --

18 QUESTION: To decide whether it was arbitrary  
19 and capricious, or what?

20 MR. JASPERSE: Yes, Your Honor, yes. And in --  
21 with respect to the arbitrary and capricious argument --

22 QUESTION: Because the court didn't reach that,  
23 did it?

24 MR. JASPERSE: No, it did not. It -- it found  
25 that all that was necessary here -- because there were



1 procedural violations, that it wasn't about to go further  
2 and make a merits ruling.

3 QUESTION: On the other hand, if we -- if we say  
4 that it's committed to agency discretion, there is no need  
5 to reach the notice and comment issue, is there?

6 MR. JASPERSE: We think if -- if it's -- if  
7 it's committed to agency discretion, that that -- that all  
8 that goes to is -- is the review on the merits itself,  
9 whether it was arbitrary and capricious or contrary to  
10 law.

11 QUESTION: Uh-huh.

12 MR. JASPERSE: The procedural violations claims  
13 are still there and there is separate law to apply to  
14 those. And that separate law is, of course, section 552  
15 and section 553. So that you would have to rule both that  
16 there is no -- there was no rule here, so that there was  
17 neither 552 Federal publication or notice and comment  
18 under 553, and you would have to rule that this is totally  
19 and completely discretionary, that there is simply no law  
20 of any kind to apply here to this action. In order for it  
21 to go --

22 QUESTION: Indeed, I suppose you would argue  
23 that if there is no law to apply, there is all the more  
24 need for the notice and comment procedures that the law  
25 requires. Because of the agency having a free hand and

1 not being controllable by the courts, there's all the more  
2 reason for insisting that it listen to the public as the  
3 law requires it to do, right?

4 MR. JASPERSE: Yes, Your Honor. It's -- there  
5 it's crucial that -- that the courts be available to small  
6 disenfranchised minorities such as these children were.

7 QUESTION: That is if -- if it's a rule. We  
8 would have to -- we would have to agree that it's a rule  
9 before there's notice and comment.

10 MR. JASPERSE: Right, right. It must be a rule  
11 to get Federal Register publication and it must be a rule  
12 to get --

13 QUESTION: Well, do we have to -- well, go  
14 ahead.

15 QUESTION: Mr. Jasperse, just a couple of  
16 questions. This involves a termination, but let's assume  
17 that the agency simply reduced the number of employees,  
18 would that be a rule?

19 MR. JASPERSE: It -- it would depend on the  
20 reason that they reduced the employees.

21 QUESTION: Let's say we just -- they decided to  
22 deploy them to Phoenix.

23 MR. JASPERSE: That -- that would not be a rule.  
24 There's no prescription of law in that kind of a  
25 situation. However, if they were to decide to redeploy

1 the staff to meet a specific statutory requirement, to  
2 meet -- meet the mandate of their law in some specific  
3 way, then they would be implementing the statute and that  
4 would be prescription of law, and that --

5 QUESTION: Let's -- well, let me understand  
6 that. If you reduced the staff by 50 percent, that's not  
7 a rule.

8 MR. JASPERSE: It -- again, it depends on  
9 whether you're doing that simply as a matter of agency  
10 management or whether you're doing that because the law  
11 requires something --

12 QUESTION: Let's say we want to use these --  
13 this 50 percent to develop a national program.

14 MR. JASPERSE: In that case, that's -- that --  
15 that would be prescription of law. You're implementing a  
16 statute there, and that would be a rule that requires --  
17 that would be a rule in that instance.

18 We believe that judicial review is appropriate  
19 in this case both because this action was arbitrary and  
20 capricious, the program changed its course of conduct, it  
21 changed its policy without any explanation. Again, all we  
22 have is a single letter that says what they were going to  
23 do, but did not provide any explanation.

24 They also made this decision without  
25 justifying -- making an unjustified factual assumption

1 that there would be readily available alternative  
2 services. That the children have made a clear showing --  
3 and, in fact, the district court found that the children's  
4 allegations in this regard were essentially un rebutted.  
5 And the agency must, in order to make this decision in a  
6 manner that is not arbitrary and capricious, do so in a  
7 way that's adequately informed, that considers all the  
8 relevant factors and provides a reasoned explanation.

9 And finally, we are asserting, of course, that  
10 this action was directly contrary to the law, particularly  
11 the Snyder Act -- this goes directly contrary to its  
12 requirement that the agency take actions which conserve  
13 health -- and also the Indian Health Care Improvement Act  
14 requirement that they maintain and improve and try to  
15 achieve the highest possible health status for these  
16 children.

17 I would like to close and -- and I think  
18 particularly with respect to law, law to apply, it's  
19 perhaps fitting to remember the words of the Gospel of  
20 Matthew where Jesus says "Suffer the little children to  
21 come unto me." I would ask that you do no less, don't  
22 close the courthouse doors on these kids. Please at least  
23 afford them judicial review. Thank you.

24 QUESTION: Thank you, Mr. Jasperse.

25 Mr. Kneedler, you have 4 minutes remaining.



1 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

2 ON BEHALF OF THE PETITIONERS

3 MR. KNEEDLER: There are a couple points I  
4 wanted to make on each of the issues. First, on the  
5 notice and comment issue, on the question of -- of  
6 individualized notice which counsel for respondents  
7 mentioned, it's important to bear in mind that the Indian  
8 Health Service was not the primary provider of care in  
9 these circumstances. It was always a backup or secondary  
10 consultative role that IHS personnel were performing.

11 The children involved had primary care givers  
12 and the Indian Health Service did give individualized  
13 notice to the primary care givers and held community  
14 meetings to assist them in developing alternative  
15 resources, which was the sort of approach appropriate to  
16 the circumstances.

17 In addition, notice and comment is not well  
18 suited to obtaining the input of the Indian people in a  
19 circumstance such as this. But neither Congress nor the  
20 Indian Health Service has been indifferent to the need to  
21 get input, but they've chosen a different way, which  
22 was -- which was a system of consultation with the tribes  
23 concerned.

24 I've mentioned the -- the consultation with  
25 tribes that Congress required for facility alterations in

1 the 1988 amendments which are in 25 USC 1631, but in  
2 addition the amicus brief of six tribes in this case cites  
3 several documents which describe the Indian Health  
4 Service's broader system of consultation through a  
5 national health board, through health boards at the local  
6 level for the various clinics, and consultations with the  
7 tribes concerned about the delivery of services on their  
8 reservations.

9 That is the form of consultation and input that  
10 is appropriate to the circumstances. It's also  
11 appropriate to the Indian Health Service's mission, which  
12 is one from a public health perspective, not one of  
13 individual entitlement to -- to medical services, but a  
14 public health service which requires them to look at the  
15 big picture and mortality rates and where -- where  
16 services are needed in the main.

17 On the question of what's committed to agency --  
18 that this is committed to agency --

19 QUESTION: Mr. Kneedler, can I ask you one --

20 MR. KNEEDLER: Yes.

21 QUESTION: -- One very brief question. I  
22 understand that this is not a rule under your view. Is it  
23 agency action?

24 MR. KNEEDLER: Yes, I think it's agency action,  
25 but it's a self-contained decision with no lasting

1 consequences in itself.

2 On the question of committed to --

3 QUESTION: You don't agree at all agency action  
4 is divided into rules and orders, that there's some --

5 MR. KNEEDLER: We do not. That there's a large  
6 category --

7 QUESTION: Third category that we don't know  
8 what they are.

9 MR. KNEEDLER: Informal action, yes, I think  
10 that's necessarily so, or -- or agencies would be  
11 hamstrung.

12 On the question of committed to agency  
13 discretion, it's -- I want to emphasize again several  
14 points. One, the statements in the committee reports have  
15 long been -- on Appropriations Acts have long been  
16 understood by the GAO, I think by Congress itself, and by  
17 executive agencies, not to be intended to create binding  
18 legal obligations. And to change that understanding of  
19 those sorts of exchanges in the appropriations process  
20 would, in GAO's view and the executive branch's view,  
21 change that process radically.

22 Also, on the question of what is -- when  
23 something is committed to agency discretion by law, it's  
24 important to bear in mind that whether there's law to  
25 apply is just one way of getting at that question. There

1 are other factors in -- that this Court has recognized,  
2 including whether the issue is one that's traditionally  
3 been regarded as committed to agency discretion, which the  
4 allocation of appropriated funds is.

5 And also whether there would be unduly  
6 disruptive consequences of allowing judicial review, and  
7 for the reasons I've described there clearly would be  
8 here, because it would subject numerous myriad decisions  
9 of the Indian Health Service and the administration of  
10 this vast program to the potential for judicial review on  
11 basis of facts or disagreement about the ordering of  
12 priorities.

13 Which brings me to the last point on that, and  
14 that is directly tied to Heckler v. Chaney, as Justice  
15 Scalia mentioned, that this is a case going to the core of  
16 the allocation of scarce agency resources among the  
17 various demands on the agency's time and energy, and that  
18 is, again, necessarily something committed to agency  
19 discretion.

20 Thank you.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
22 Kneedler. The case is submitted.

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

25



## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

EVERETT R. Rhodes V. GROVER VIGIL

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BY Ann Marie Federico

(REPORTER)