

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

CAPTION: ALASKA, Petitioner v. NATIVE VILLAGE OF VENETIE  
TRIBAL GOVERNMENT, ET AL.

CASE NO: No. 96-1577

PLACE: Washington, D.C.

DATE: Monday, December 10, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALASKA, :

4 Petitioner :

5 v. : No. 96-1577

6 NATIVE VILLAGE OF VENETIE :

7 TRIBAL GOVERNMENT, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, December 10, 1997

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

14 APPEARANCES:

15 JOHN G. ROBERTS, ESQ., Washington, D.C.; on behalf of  
16 the Petitioner.

17 HEATHER R. KENDALL, ESQ., Anchorage, Alaska; on behalf of  
18 the Respondents.

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

2 (11:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 96-1577, Alaska v. The Native Village of, is  
5 it Venetie?

6 MR. ROBERTS: Venetie.

7 CHIEF JUSTICE REHNQUIST: Venetie. How do they  
8 get that out of V-e-n-e-t-i-e?

9 May I ask counsel for respondent, is the correct  
10 pronunciation of the Native Village of Venetie?

11 MS. KENDALL: Venetie.

12 CHIEF JUSTICE REHNQUIST: Venetie. Thank you.

13 Mr. Roberts.

14 ORAL ARGUMENT OF JOHN G. ROBERTS

15 ON BEHALF OF THE PETITIONER

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

18 In 1971 Congress settled Native Alaskan land  
19 claims by passing the Alaska Native Claims Settlement Act.  
20 That act revoked all reservations in Alaska save one, and  
21 extinguished all claims based on aboriginal title.

22 In exchange, it conveyed to State-chartered  
23 corporations owned by individual Native shareholders \$1  
24 billion and 44 million acres of land in fee simple, land  
25 which because a freely alienable asset of the corporations

1 to do with as they see fit.

2 The Ninth Circuit nonetheless held that the  
3 settlement lands at issue in this case were Indian  
4 country, a jurisdictional concept epitomized by the  
5 reservation and characterized by land held in trust or  
6 otherwise controlled by the Federal Government.

7 QUESTION: Mr. Roberts, why do you suppose  
8 Congress didn't just mention somewhere in this settlement  
9 act section 1151's dependent Indian community notion? I  
10 mean, it would have been so easy --

11 MR. ROBERTS: Well, it's often the case that --

12 QUESTION: -- to include a little phrase there  
13 somewhere about that. Why do you think that didn't  
14 happen?

15 MR. ROBERTS: I think because Congress in 1971  
16 had no reason to suppose that there was any such Indian  
17 country in Alaska. That had been the nearly uniform  
18 decision of Alaskan courts that had looked at the  
19 question, and at the time, yes, there were a handful of  
20 reservations that were --

21 QUESTION: There were some reservations.

22 MR. ROBERTS: There were reservations, and they  
23 were revoked, so to the extent there was Indian country  
24 that they would be aware of, they took action very  
25 expressly to extinguish it.

1 QUESTION: But most of the land that was  
2 conveyed was not Indian country under the then-prevailing  
3 jurisprudence.

4 MR. ROBERTS: That's correct and, in fact, it  
5 was not Indian country under the accepted concept as it  
6 had developed in the lower 48.

7 QUESTION: I have some -- I have another just  
8 kind of basic question here that you can help me with.  
9 What is sought here by the Venetie Village is the ability  
10 to levy a certain kind of tax, in this instance on  
11 construction of a school building.

12 Now, can the village be incorporated, if you  
13 will, as a municipality under Alaska law so that the  
14 village would have all the powers of any incorporated  
15 municipality in Alaska?

16 MR. ROBERTS: Yes, and in fact many --

17 QUESTION: Has it done so, to your knowledge?

18 MR. ROBERTS: Venetie has not done so.

19 QUESTION: But it could.

20 MR. ROBERTS: It could, yes.

21 QUESTION: Now, if it did that, could it impose  
22 taxes like any other municipality in Alaska?

23 MR. ROBERTS: It would have the same authority.  
24 there is, in fact, a restriction in the Alaska  
25 constitution that says the only local entities who may tax

1 are cities and boroughs. That's one reason the Indian  
2 country determination is so important, because in the  
3 absence of Indian country that constitutional provision  
4 would apply, and in --

5 QUESTION: Well, how does it apply? Would it  
6 prevent this village from becoming --

7 MR. ROBERTS: No. If it were --

8 QUESTION: -- a municipality?

9 MR. ROBERTS: -- incorporated as a borough --

10 QUESTION: Yes.

11 MR. ROBERTS: -- or as a city it would be  
12 eligible. If it were not --

13 QUESTION: And then it would have taxing powers.

14 MR. ROBERTS: It would have the same taxing  
15 powers as other villages.

16 QUESTION: Yes.

17 MR. ROBERTS: There may -- I think there are  
18 other restrictions.

19 QUESTION: As other municipalities.

20 MR. ROBERTS: Other municipalities.

21 QUESTION: Yes.

22 MR. ROBERTS: I think there are restrictions on  
23 the extent to which they can tax, but their powers would  
24 be the same. Now --

25 QUESTION: Can you give us an example of what



1 other comparable population villages can do, non-Indian  
2 villages, in the way of taxing power, because it would be  
3 kind of an academic exercise to bring this case all the  
4 way here if their claim to this tax didn't depend on their  
5 sovereignty claim, unlike other cities or villages.

6 MR. ROBERTS: Well, we think their authority to  
7 tax does depend on their sovereignty.

8 Now, of course, the question that was decided  
9 below, and the question on which this Court granted  
10 certiorari, was not directly the validity or nonvalidity  
11 of the tax. It was -- the case is here in an  
12 interlocutory posture. It's the ruling on Indian country,  
13 which is very pertinent in assessing whether or not the  
14 tax is valid. That was the way the case has been  
15 litigated throughout, and the question that was presented.

16 QUESTION: But it's useful to know, and I  
17 certainly would like to know what that means. The label,  
18 Indian country, apparently, if it's proper, would allow  
19 this tax, so what else is gained by having the label,  
20 Indian country?

21 MR. ROBERTS: Oh, it has broad jurisdictional  
22 significance. If land is Indian country, we start with  
23 the presumption that tribal and Federal jurisdiction  
24 controls, and that State jurisdiction is generally  
25 displaced. If land is not Indian country, State

1 jurisdiction applies as it does in other areas, so it has  
2 significance not only with respect to taxes but to  
3 environmental regulation, hunting and fishing, gaming  
4 regulation, health and safety regulation, a broad range of  
5 day-to-day regulation. It answers the basic question, who  
6 is in charge?

7 If it's Indian country, characterized throughout  
8 the country by the reservation, you know that the tribal  
9 government has sovereign authority and the Federal  
10 Government also has sovereign authority. If it's not  
11 Indian country, State law applies as it does generally  
12 throughout.

13 QUESTION: At least some of the friends of the  
14 court told us not to worry because in fact Alaska, even if  
15 this village is Indian country, can regulate hunting and  
16 fishing, and that actually there would not be these large  
17 consequences.

18 MR. ROBERTS: Well, I think that's -- certainly  
19 on a case-by-case basis whether a particular regulation  
20 can be applied in Indian country or not is a determination  
21 that would have to be made on the particular facts, but if  
22 you take a case like New Mexico v. the Mescalero Tribe,  
23 there the Court held that State gaming laws did not apply  
24 in that Indian country.

25 QUESTION: Gaming. You mean game and fish laws.

1 MR. ROBERTS: Yes. Yes, hunting --

2 QUESTION: Now we talk about gaming as referring  
3 to gambling.

4 MR. ROBERTS: I appreciate that. Yes, I --  
5 hunting and fishing, but, of course, the same with respect  
6 to gambling, and the reason you have that is because the  
7 normal State rules do not apply in Indian country.

8 QUESTION: Might gaming be a big matter that's  
9 up for grabs here?

10 MR. ROBERTS: Hunting and fishing --

11 QUESTION: Gaming in Justice O'Connor's sense.

12 MR. ROBERTS: Hunting and fishing is. Gaming,  
13 it could be, although it doesn't look like an attractive  
14 location for a big casino.

15 (Laughter.)

16 MR. ROBERTS: But other basic elements like  
17 environmental regulation, what type of development can  
18 take place, the broad question of State regulation, a  
19 determination of whether it's Indian country establishes  
20 who, at least as an initial matter, is in charge.

21 QUESTION: But it is true, isn't it, that no  
22 matter -- if we mix it up and get it all wrong, Congress  
23 can always straighten it all out, either way.

24 MR. ROBERTS: Well, yes. Congress has plenary  
25 authority over Indian country, and we think when it

1 exercised authority in ANCSA to settle aboriginal claims,  
2 it took a course of action fundamentally inconsistent with  
3 Indian country. The reservation is the prototypical --

4 QUESTION: Well, you say they have plenary power  
5 over Indian country. Suppose this Court were to say it  
6 isn't Indian country, what power does Congress have then?

7 MR. ROBERTS: Well, then it has the power it has  
8 over other lands, because the key fact of ANCSA is that  
9 these settlement lands were given away free and clear, in  
10 fee simple. They were made freely alienable property of  
11 the corporations to which they were given. The Federal  
12 Government did not retain control. That is the defining  
13 characteristic that makes it clear that this is not Indian  
14 country.

15 This is not -- the test that this Court has  
16 articulated is that Indian country is land set apart for  
17 the use of the Indians as such, under the superintendence  
18 of the Federal Government. These lands were not set aside  
19 for anyone's use. They were given -- we're done with it,  
20 free and clear. The corporations can do with them as they  
21 see fit, and have. They've transferred the lands, they've  
22 sold the lands, developed it in different ways.

23 QUESTION: But of course the statute did settle  
24 a huge dispute over aboriginal title, didn't it? It put  
25 an end to that whole controversy of who owned the lands.



1 MR. ROBERTS: Yes, and --

2 QUESTION: So you can make sense out of the  
3 statute even if you don't think it went quite as far as  
4 you think it did.

5 MR. ROBERTS: Well, we think that it -- in  
6 giving the lands away free and clear Congress intended  
7 somehow to also set them aside --

8 QUESTION: Well, they gave them away in exchange  
9 for a total surrender of any aboriginal claims.

10 MR. ROBERTS: Yes.

11 QUESTION: So it's not exactly a -- totally --  
12 you know, not a total gift.

13 MR. ROBERTS: Oh, no, it wasn't a -- it wasn't a  
14 gift at all, but my point was they retained no control  
15 over the land, and in every case in which this Court has  
16 found Indian country the lands have either been within the  
17 boundaries of a reservation, or otherwise subject to  
18 Federal control.

19 This would be the first instance in which the  
20 Court has found Indian country where the Federal  
21 Government retained no control, and if you think about it,  
22 the concept of Indian country is inconsistent with the  
23 relinquishment of control, under the superintendence of  
24 the Federal Government, how --

25 QUESTION: If I could just ask you right there,

1 it's your view, I take it, that if you have an area of  
2 land that is an absolutely typical reservation, absolutely  
3 typical in every way, but somebody used the word colony  
4 instead of the word reservation, then it would fall within  
5 (b) and not (a). It would fall within --

6 MR. ROBERTS: That, of course, is McGowan.

7 QUESTION: Yes, all right, so that's precise.  
8 And then you look at 618(a), which revokes the  
9 reservation.

10 MR. ROBERTS: Yes.

11 QUESTION: And you say, although they didn't use  
12 the word, dependent community, they must have intended to  
13 revoke that, took.

14 MR. ROBERTS: Well, yes, but not simply because  
15 they revoked the reservations but because, for example,

16 QUESTION: For that and other reasons.

17 MR. ROBERTS: Other reasons.

18 QUESTION: All right. But now, whatever those  
19 other reasons are, that and other reasons, however strong  
20 they get you to your conclusion in (a), why don't they  
21 force the opposite conclusion because of (b), where a  
22 reservation goes back, revokes all the privileges it might  
23 have gotten under this act, gives the land back to the  
24 tribe, and behaves in respect to the tribe exactly as it  
25 behaved before the act, with land in trust?

1 MR. ROBERTS: You're referring to the  
2 reconveyance --

3 QUESTION: Yes, they reconvey.

4 MR. ROBERTS: The reconveyance of the land --

5 QUESTION: What they do is they say, okay, what  
6 we're going to do is, we're going to give up everything we  
7 have under this act, we're going to take the land just as  
8 it was, call it a reservation, even, behave exactly the  
9 same way in respect to it, take it in, funnel it back, and  
10 now what we have after these two events is just what we  
11 had before.

12 MR. ROBERTS: The reason is that the decision to  
13 create Indian country is up to Congress. It's not up, as  
14 in this case, to the two ANCSA corporations that received  
15 the land under --

16 QUESTION: I agree, but my question really is,  
17 if you're reading (a) non -- (a) and other things  
18 nonliterally because, indeed, the purpose must be the  
19 same, since reservation, colony, who cares, why wouldn't  
20 you read (b) the same way? You see -- why wouldn't you  
21 also read somewhat nonliterally the giving back --

22 MR. ROBERTS: Oh --

23 QUESTION: -- and therefore, just as when you  
24 take it away, of course --

25 QUESTION: Well, the Federal --

1 MR. ROBERTS: Because --  
2 QUESTION: Did the Federal Government give this  
3 back?  
4 MR. ROBERTS: No, and that's --  
5 QUESTION: No, the --  
6 QUESTION: No. The corporation did.  
7 MR. ROBERTS: That's the critical point.  
8 QUESTION: Yes.  
9 MR. ROBERTS: And it is also the clearest  
10 evidence that the Federal Government had relinquished its  
11 control and had no control over the decision of the ANCSA  
12 corporations that received the lands that used to be the  
13 Venetie Reservation. They elected of their own free will  
14 to turn it back, 6 years later, to the tribal government.  
15 That is not the act of the Federal Government establishing  
16 Indian country, and, of course, it doesn't incorporate any  
17 notion of retained Federal control. It's a unilateral --  
18 QUESTION: Did -- it seems to me you should not  
19 concede that it created the status quo ante, because the  
20 status quo ante was that the Government owned those lands.  
21 MR. ROBERTS: Well, that's right, as did the  
22 reservation --  
23 QUESTION: And there's no way -- and they tried  
24 to get it back to the Government, didn't they? They tried  
25 to get the Interior Department to --



1 MR. ROBERTS: What they did --

2 QUESTION: -- to accept it in trust for the  
3 Indians, and the Interior Department refused.

4 MR. ROBERTS: Because it would have been, they  
5 explained, inconsistent with ANCSA. They actually --

6 QUESTION: So isn't the really crucial point  
7 that there is no control? I mean, I suppose that within  
8 the meaning of the formula that we used that you've been  
9 quoting, the validly-set-aside-subject-to-  
10 superintendence, and so on, that I suppose if the statute  
11 had said, and if any of this land is reconveyed by these  
12 corporations to the tribes that originally owned them,  
13 they will be subject to the same superintendence which we  
14 have traditionally been able to exercise. I suppose --

15 MR. ROBERTS: Well, they could --

16 QUESTION: -- there would be a fair argument  
17 then to say, okay, it has reverted to Indian country  
18 status, but that's not the case here.

19 MR. ROBERTS: It's not the case. The Government  
20 doesn't retain control, and the Government didn't  
21 participate in the process. This was a particular finding  
22 by the district court and also by the Department of  
23 Interior in its opinion on this subject, that this was a  
24 unilateral act of the corporations not approved and not  
25 joined in in any way by the Government. It doesn't

1 reestablish Federal control that existed when the  
2 reservation was in place.

3 And it's not just the revocation of the  
4 reservation that makes it clear that ANCSA is inconsistent  
5 with Indian country. There are other provisions  
6 throughout. Congress said that it wanted to settle claims  
7 without creating -- without adding to the categories of  
8 property entitled to special tax privileges. Indian  
9 country is entitled to special tax privileges. It's  
10 generally exempt from State taxes. Congress --

11 QUESTION: Mr. Roberts, would you just explain  
12 to me what benefit a tribe would have, then, from making  
13 the 1618(b) election, where they don't get any money, and  
14 they just -- just give us the reservation that we had  
15 before?

16 MR. ROBERTS: Well, they get a lot more land.  
17 There are two ways that Venetie could have elected to  
18 receive benefits under the act the way most other villages  
19 did, which gives -- has a formula based on population that  
20 says you get so many acres or, under 1618(b), they could  
21 take title to the former reservation and get the 1.8  
22 million acres, and they get both the surface and the  
23 subsurface.

24 If they'd elected the other option they would  
25 have title just to the surface, and the regional

1 corporation under ANCSA would have title to the  
2 subsurface, so they got a great deal more by pursuing that  
3 option and, as was explained by the Department of the  
4 Interior, when they refused to take the land back in  
5 trust, that this was simply another way to calculate your  
6 benefits. It is not a way, as the Ninth Circuit viewed  
7 it, to opt out of the act, and it doesn't have a  
8 consequence of reestablishing Indian country.

9 Now, Venetie wanted to avoid this from the  
10 beginning. When ANCSA was being deliberated they had a  
11 proposal, let us keep the reservation. It was not  
12 enacted. The only reservation that was kept was  
13 Metlakatla, which was a special historical situation, and  
14 then, as indicated, in 1978, I believe, they came back and  
15 said, all right, we've got this land. We want you, the  
16 Government, to take it back and hold it in trust, and the  
17 Interior Department refused. They said that would be  
18 inconsistent with ANCSA.

19 QUESTION: Mr. Roberts, is there any other  
20 Indian country where the land in question is owned by the  
21 Indians and not held in trust by the Government?

22 MR. ROBERTS: The answer is yes and no. Yes, in  
23 a technical sense. Sandoval, which involved the Pueblos.  
24 The Pueblos owned the land in fee.

25 However, in the beginning, when the United

1 States took jurisdiction from the King of Spain, that  
2 title has been circumscribed. The statute specified that  
3 that land was under the absolute jurisdiction and control  
4 of the Congress of the United States, so while they  
5 technically have fee title, Congress retains control, and  
6 that's the critical element in the establishment of Indian  
7 country.

8 I'm aware of no other case, no case where the  
9 Government doesn't have control over the land, which is  
10 necessary if they're going to assume the obligation of  
11 superintendence with the displacement of State authority,  
12 and that's why the Court has emphasized that it's critical  
13 to focus on the intent of Congress.

14 When Indian country is established, the most  
15 typical way is by establishing a reservation providing for  
16 allotments. Congress specifically designates the area  
17 that's to be covered. That is also true with respect to  
18 the only two cases outside of the reservation or allotment  
19 categories where this Court has found Indian country,  
20 Sandoval and McGowan.

21 In Sandoval, the Court, this Court did not  
22 consider a range of factors to see if they added up to  
23 some abstract concept of Indian country. Congress said in  
24 the statute, this land is Indian country, land owned by  
25 the Pueblos, and so, too, in McGowan, the colony case that



1 Justice Breyer was mentioning. There, Congress set it up  
2 owned by the Federal Government, in trust for specific  
3 Indians from throughout Nevada.

4 The respondents would shift to a much more  
5 amorphous and more expansive concept of Indian country.  
6 They ask whether the area has a uniquely Indian character,  
7 whether it is a distinctly Indian community. They don't  
8 quite bring themselves to adopt the Ninth Circuit's test,  
9 which is six factors to be weighed in an amorphous way to  
10 come to that conclusion.

11 Those tests, that approach would effectively  
12 shift the responsibility for defining and designating  
13 Indian country from Congress to the courts.

14 QUESTION: Is there a third possibility? Is  
15 there any way that Congress at this point could designate  
16 certain areas as a reservation?

17 MR. ROBERTS: Well, the areas that would be  
18 likely candidates, I suppose, have been given away as part  
19 of the settlement.

20 QUESTION: Right. They're subject -- and  
21 they're subject, presumably, on your theory to State  
22 jurisdiction. Can Congress take that back?

23 MR. ROBERTS: Not, probably, without paying the  
24 landowners in the first place, because it's privately held  
25 land.

1 QUESTION: Well, let's assume the landowners  
2 were willing. As against the State, could Congress take  
3 that back?

4 MR. ROBERTS: I think they --

5 QUESTION: And impose reservation status. I --

6 MR. ROBERTS: -- could if -- again, that was  
7 the issue in Sandoval. Could Congress designate this area  
8 as Indian country.

9 QUESTION: Well, could Congress -- supposing --  
10 take the case of Ohio, which was the case argued before,  
11 after Ohio is admitted to the Union, can Congress take  
12 back a part of Ohio and say, this is federally controlled  
13 now?

14 MR. ROBERTS: No. I think as with respect to  
15 the private landowners they would have to do that by  
16 arrangement with the State if the State agreed to it, and  
17 if compensation --

18 QUESTION: But where the landowner is the tribe,  
19 or the village, not the State, then what power would  
20 Congress have in the future to treat it differently?

21 MR. ROBERTS: I still think the State's rights  
22 with respect to jurisdiction over what is -- once it's no  
23 longer Indian country, regular State land, would prevent  
24 Congress from --

25 QUESTION: No, no, it isn't State land any more.

1 My --

2 MR. ROBERTS: Well, it is --

3 QUESTION: My question relates to land which is  
4 now owned, surface and subsurface, by the Village of  
5 Venetie.

6 MR. ROBERTS: Well, it's State --

7 QUESTION: Can Congress decide subsequently, by  
8 congressional enactment, we want to treat this as a  
9 reservation or as Indian country?

10 MR. ROBERTS: I think --

11 QUESTION: Even though they had a different  
12 decision originally.

13 MR. ROBERTS: I think not. When I said, State  
14 land, I didn't mean State-owned land, but land over which  
15 the State exercises jurisdiction. It had not been reserved  
16 from State jurisdiction, not public lands. It's private  
17 land, like land anyone else would own, and I think that  
18 the Federal Government doesn't have --

19 QUESTION: Well, I'm not sure the answer is  
20 self-evident to that. I wouldn't have thought that was an  
21 easy thing to answer.

22 Under your approach, is there any Indian country  
23 in Alaska at all, following the enactment of this ANCSA  
24 law?

25 MR. ROBERTS: Only the Metlakatla Reservation.

1 QUESTION: There is the one reservation, but  
2 that's a reservation. It isn't Indian country. It's a  
3 reservation under a different subsection.

4 MR. ROBERTS: Yes, and that is --

5 QUESTION: I'm asking you whether, under your  
6 theory, there is any Indian country left in Alaska.

7 MR. ROBERTS: No, and that is not at all  
8 inconsistent with the history of Alaska up to that point.  
9 Most of the cases that have addressed the question have  
10 said that there isn't Indian country in Alaska in the  
11 first place.

12 QUESTION: Is your principal argument based on  
13 the fact that there's no community, or that there's no  
14 dependent community, because that's the phrase.

15 MR. ROBERTS: It is the phrase, and we agree  
16 with the Department of Interior, which has concluded that  
17 that is the term of art. It's a term of art as the  
18 revisers to 18 U.S.C. 1151(b) said meant to codify this  
19 Court's decisions in Sandoval and McGowan. That's what we  
20 think it means.

21 QUESTION: Mr. Roberts, you mentioned the  
22 Department of Interior. We don't have -- that has -- the  
23 report didn't become an official report, or the 1993  
24 report.

25 MR. ROBERTS: Oh, it --

1 QUESTION: Do we have a -- any statement in this  
2 case of the current views of the United States?

3 MR. ROBERTS: Well, not -- I think the current  
4 view of the United States is in the 1993 opinion, which  
5 has not been withdrawn. It is as final as any of these  
6 opinions get. It is not final in the sense it can always  
7 be revoked, but it hasn't been withdrawn in any way. It's  
8 been under review for almost 5 years now, but hasn't been  
9 withdrawn. It represents the last statement of --

10 QUESTION: Well, it's never been issued, either.  
11 I mean, it just was put in limbo.

12 MR. ROBERTS: It was signed by the Acting  
13 Secretary. It hasn't been published.

14 QUESTION: No, it hasn't.

15 MR. ROBERTS: It hasn't been published, but it  
16 is the final statement of the agency charged with the  
17 responsibility for implementing ANCSA, charged with  
18 responsibility for Indian affairs in general, and charged  
19 with responsibility for --

20 QUESTION: Yes, but I don't see how you can give  
21 any weight to that, when the Department of Interior and  
22 the BIA has never let it be published, and it's just  
23 sitting there. I mean, it makes interesting reading. You  
24 can understand it's logic, but I don't know that we're  
25 entitled to --



1 MR. ROBERTS: Well, it's --

2 QUESTION: -- give any weight to it at all.

3 QUESTION: It's like Marbury v. Madison.

4 MR. ROBERTS: Well, I think it's entitled to  
5 significant weight for a variety of reasons. It hasn't  
6 been included in the published volumes of Solicitor  
7 opinions, but it's been signed by the Acting -- was signed  
8 by the Acting Secretary. It represents, as far as we  
9 know -- it hasn't been withdrawn -- the views of the  
10 agency charged with responsibility in this area.

11 It's also consistent with prior Department of  
12 the Interior interpretations both, for example, when  
13 Venetie brought the lands back and said, take it in trust,  
14 Interior said no, we can't. Later, it had an oil and gas  
15 lease it wanted to have approved, and Interior said,  
16 basically, we're not in the business of approving things  
17 now. You're on your own.

18 That was the departure from prior Indian policy  
19 that ANCSA represented. In the lower 48, the history had  
20 been, in settling Native land claims in conflict with  
21 white settlers, setting the Natives apart on reservations,  
22 which also had the effect of setting them apart from the  
23 State government.

24 Alaska provided an opportunity for a fresh  
25 start, and Congress seized it in ANCSA. It said, we are

1 not going to set this land aside for your use under our  
2 superintendence. It's -- to settle these claims, these  
3 serious claims, this is your land, and you can do with it  
4 as you see fit.

5 The ANCSA set the Natives free to manage their  
6 own property without the Federal Government looking over  
7 their shoulder, subject, like all property owners in  
8 Alaska are, to State law, but not subject to any Federal  
9 superintendence, and that's what makes the settlement  
10 lands incapable of constituting Indian country, because  
11 Indian country --

12 QUESTION: Mr. Roberts, this is the first time  
13 that I participated in a case involving tribal lands where  
14 we haven't heard from the United States, and I thought  
15 that that was extraordinary, but maybe they sometimes  
16 appear and sometimes don't.

17 MR. ROBERTS: Well, obviously it would be  
18 speculation, but we do have a thorough exposition of the  
19 Department of the Interior's views, which hasn't been  
20 withdrawn, and I do note that in the three other cases so  
21 far this term where the Solicitor General has appeared, it  
22 has been on the side of the Indians. The fact that he  
23 hasn't appeared in this case suggests to me that he didn't  
24 think that that position could be taken.

25 I'd like to reserve the remainder of my time for

1 rebuttal.

2 QUESTION: Very well, Mr. Roberts.

3 Ms. Kendall, we'll hear from you.

4 ORAL ARGUMENT OF HEATHER R. KENDALL

5 ON BEHALF OF THE RESPONDENTS

6 MS. KENDALL: Mr. Chief Justice and may it  
7 please the Court:

8 Venetie was Indian country in 1971, and nothing  
9 in ANCSA changed that. The petitioner here argues  
10 otherwise. The question here is not whether Congress  
11 created Indian country in 1971, but whether Congress  
12 clearly terminated Venetie's existing Indian country  
13 status, and we submit that it did not, for nothing in  
14 ANCSA refers to Indian country, to dependent Indian  
15 communities, or even cites to the Indian country statute.

16 QUESTION: Well, Ms. Kendall, I thought Venetie  
17 had a reservation actually, originally.

18 MS. KENDALL: Yes, it did, Your Honor.

19 QUESTION: It was a reservation. It wasn't what  
20 we would call Indian country. It fell under a different  
21 subsection. It was a reservation.

22 MS. KENDALL: That is correct.

23 QUESTION: And I thought that the statute that  
24 was passed did abolish the reservation.

25 MS. KENDALL: Your Honor, 1151(b) includes three

1 categories of Indian country, reservations, dependent  
2 Indian communities, and allotments, and although it is  
3 true that ANCSA eliminated Venetie's reservation status --

4 QUESTION: Right.

5 MS. KENDALL: -- as a basis for Indian  
6 country --

7 QUESTION: Right.

8 MS. KENDALL: -- under 1151(b), ANCSA expressly  
9 left in place Indian country in the form of over 10,000  
10 Native allotments under section 1617, and Native  
11 allotments are per se Indian country under 1151(c), so  
12 Congress clearly did not abolish all forms of Indian  
13 country through that particular provision.

14 1618(a) must be read in context with 1618(b).  
15 1618's revocation of the Venetie Reservation was done to  
16 be able to convey full fee title of those very same lands  
17 to the Venetie Tribe under 1618(b).

18 QUESTION: Ms. Kendall, what do you do with  
19 section 1601(b), in which ANCSA said that it's purpose was  
20 to convey the land to the Indian people with maximum  
21 participation by Natives in decisions affecting their  
22 rights and property without establishing any permanently  
23 racially defined institutions, rights, privileges, or  
24 obligations, and without creating a reservation system or  
25 lengthy wardship or trusteeship?

1 MS. KENDALL: Yes, Justice Scalia. That  
2 particular provision speaks to the creation of a wardship,  
3 but it doesn't speak to the ongoing relationship that  
4 existed, and it is true that Congress, through that  
5 particular provision, announced in its policy that it was  
6 going to adopt a new approach to Indian affairs through  
7 ANCSA, and that was one that would disavow the reservation  
8 system.

9 The reservation system is one in which the  
10 Federal Government owns the lands, and has ultimate  
11 control over the decisions with respect to development of  
12 those lands. Keep in mind at the time that ANCSA was  
13 passed the average income of Alaska Natives was less than  
14 \$1,200 per year. They lived in dire poverty, and it was  
15 viewed to be necessary to be able to develop some kind of  
16 economic vehicle to help the Native people come into the  
17 mainstream, economic mainstream. That was the purpose, to  
18 get the villages out from underneath the Bureau of Indian  
19 Affairs' control.

20 Oftentimes on reservations, when resources are  
21 developed, the money goes into a trust fund for the Native  
22 beneficiaries, and they never see that money.

23 QUESTION: Well, you say to get them out of  
24 their control. That's the whole definition of what's  
25 Indian country, whether they're within the control,



1 wardship, and trusteeship of the Government.

2 MS. KENDALL: I disagree.

3 QUESTION: It's quite in -- it seems to me  
4 incompatible to say that you want to get them out of the  
5 control and yet you still want it to be Indian country.

6 MS. KENDALL: Your Honor, section 16 -- I mean,  
7 1151(b), the category that covers the Indian communities,  
8 that particular category does not turn on lands being in  
9 Federal ownership. It turns on a community that is under  
10 the protection and guardianship of the Federal Government,  
11 and that's what we have today with respect to Venetie.

12 QUESTION: Dependency. Dependency to the  
13 Federal Government, which is what you're just telling me  
14 they were trying to eliminate.

15 MS. KENDALL: Not the dependency, the BIA  
16 control over development issues of their land. The  
17 dependency relationship stayed intact and in fact was  
18 confirmed by the Congress in the 1994 federally recognized  
19 Tribal List Act, where Congress expressly reaffirmed its  
20 ongoing relationship to all federally recognized tribes,  
21 including Venetie, and that fact fundamentally undermines  
22 all of petitioner's arguments, because from that flows two  
23 important points, the first that the continuing  
24 guardianship means that Congress as a trustee cannot  
25 terminate something as important as rights that Venetie

1     possessed before 1971 without expressly saying so.

2             Second, the guardianship relationship goes to  
3     two of the important components necessary to establish  
4     Venetie's character as a dependent Indian community. You  
5     need both a tribe that's under Federal protection, and you  
6     need an area that is occupied by a dependent -- by a tribe  
7     under Federal guardianship.

8             QUESTION: Does that -- the dependent community  
9     status remain if the tribe moves to a different area, so  
10    they bring that Indian country designation to a new area  
11    if they choose to move?

12            MS. KENDALL: It's not our position, Justice  
13    Kennedy, that a tribe can unilaterally create Indian  
14    country, but if a -- the Federal Government treats with  
15    and recognizes and deals with a particular Indian  
16    community as Indian country, as being under its Federal  
17    guardianship and protection, then that area has been found  
18    to be a dependent Indian community.

19            QUESTION: Ms. Kendall --

20            QUESTION: So you -- so -- just to follow  
21    this -- so you do submit that there is a territorial  
22    aspect to the jurisdiction that's in question here.

23            MS. KENDALL: I agree, Your Honor, that 1151  
24    focuses on land and on territory, areas that are occupied,  
25    but 1151(b) --

1 QUESTION: And this is necessarily part of the  
2 dependent Indian --

3 MS. KENDALL: Indian community --

4 QUESTION: -- community definition.

5 MS. KENDALL: That's correct, Your Honor, that  
6 Congress --

7 QUESTION: And yet that seems somewhat  
8 inconsistent with the theory of the act, which was to  
9 change territorial designation.

10 MS. KENDALL: It did not change territorial  
11 designation. What it -- Congress did do was it  
12 extinguished aboriginal claims. Those claims were based  
13 upon much broader areas than what, in fact, the villages  
14 did receive, and in Venetie's case, although petitioner  
15 suggests that they received something less, what they  
16 received was their full fee title to the very lands that  
17 they had occupied prior, and that had been set aside for  
18 them prior to 1971. Nothing changed except for a change  
19 in title.

20 QUESTION: Well, do you say that the Federal  
21 Government recognizes Venetie as a tribe and -- and it  
22 offers some accompanying benefits to the tribe. Now, do  
23 those facts alone mean that the land is Indian country,  
24 the land we're talking about here?

25 MS. KENDALL: No, I do not think that Federal

1 recognition in just services is sufficient. Federal  
2 recognition does supply the dependent relationship that's  
3 necessary for the tribal relationship.

4 QUESTION: Well, what else is it that you say is  
5 necessary to create Indian country here, other than the  
6 fact that the Federal Government recognizes the tribe and  
7 offers these --

8 MS. KENDALL: They likewise have to --

9 QUESTION: -- aids and benefits?

10 MS. KENDALL: -- treat the area that the tribe  
11 occupies as being an area that is the residence of tribal  
12 Indians under Federal protection, and that is present with  
13 Venetie. Although petitioner argues that there are no  
14 controls over these particular lands, there are certainly  
15 many Federal protections. ANCSA through section 6 --

16 QUESTION: What if the corporation, which is the  
17 one that conveyed the land back to the -- to Venetie  
18 Village, what if the corporation had sold some land to  
19 some non-Indians before it did that. What about that  
20 land?

21 MS. KENDALL: Well, I would submit --

22 QUESTION: What would that be?

23 MS. KENDALL: That would be a fact that is not  
24 present here, but --

25 QUESTION: Right.

1 MS. KENDALL: -- I would submit that that,  
2 depending on the nature of the case and the facts involved  
3 there, that that would likely not qualify as Indian  
4 country, but here, where you have a case like Venetie,  
5 who owns the total, the land base that it occupied prior  
6 to --

7 QUESTION: Well, but is the touchstone  
8 congressional intent? Is that what we look at?

9 MS. KENDALL: Congressional intent, yes.

10 QUESTION: Isn't that the touchstone here?

11 MS. KENDALL: That is true.

12 QUESTION: Whether there's Indian country?

13 MS. KENDALL: That is true.

14 QUESTION: And here, Congress provided that the  
15 land title would go to these State-chartered corporations,  
16 not to Venetie. That happened later. When the  
17 corporation then conveyed land to Venetie and didn't pay  
18 the fees and was dissolved. Now, isn't that the way it  
19 happened?

20 MS. KENDALL: If I may, Your Honor, Congress  
21 fully knew that it was conveying the lands to the Venetie  
22 residents even if it was doing so through the corporation.

23 QUESTION: Gee, I thought it -- I thought what  
24 was done was that pursuant to the congressional act the  
25 lands were conveyed to these State-chartered corporations,



1 not only in the Venetie area but other areas in Alaska.

2 MS. KENDALL: Under the act, it was the villages  
3 that were found eligible and entitled to receive lands.  
4 Only after the villages were found entitled by the  
5 Secretary to receive lands, then were the corporations  
6 established to hold and manage those lands for and on  
7 behalf of the villages.

8 QUESTION: Was title conveyed to the  
9 corporations?

10 MS. KENDALL: Yes, they were.

11 QUESTION: Yes.

12 MS. KENDALL: But if I can direct your attention  
13 to 1618(b) in our brief, in appendix 63a, that provision  
14 says --

15 QUESTION: Where again is that, Ms --

16 MS. KENDALL: 63a in our appendix.

17 QUESTION: Thank you.

18 MS. KENDALL: If you look up on the top of the  
19 page at 63a, it says, estates in any reserve set aside for  
20 the use or benefit of its stockholders or members --

21 QUESTION: I'm having trouble seeing this.

22 QUESTION: I can't --

23 QUESTION: We're having --

24 MS. KENDALL: 63a of the appendix.

25 QUESTION: That's what I'm looking at.

1 QUESTION: At the top of the page?

2 MS. KENDALL: 63a.

3 QUESTION: Oh, estates. I thought you said  
4 States.

5 MS. KENDALL: Excuse me.

6 QUESTION: I think that's the problem.

7 QUESTION: Yes.

8 MS. KENDALL: Estates in any reserve set aside  
9 for the use or benefit of its stockholders or members  
10 prior to December 18, 1971.

11 Now, one more provision, if you will, please, on  
12 page 105a of our appendix. That is provision 1641(b)(3).  
13 If you go down towards, lower than the middle of the  
14 paragraph, it says, again, estates in a reserve as such  
15 reserve existed on December 18, 1971, which was set aside  
16 for the use or benefit of the stockholders or members of  
17 such corporation before December 18, 1971.

18 Now, I think the only fair reading of those two  
19 provisions is that Congress clearly understood that the  
20 very lands that they were conveying to a corporation were  
21 the same lands that had been conveyed and are set aside  
22 for the Venetie residence before that date. All that was  
23 occurring here was a change in title to the corporations  
24 which were identical to the tribal residence.

25 QUESTION: Well, but wasn't something more

1 accomplished, and that was, once the title had changed, as  
2 I understand it there was no limitation on what the then  
3 titleholder could do. As you answered, I think, Justice  
4 O'Connor, the titleholder could have conveyed it to me, in  
5 which case it would no longer, as you've conceded, been  
6 Indian country.

7 Now, isn't it true that the titleholder had  
8 completely free rein once title was received?

9 MS. KENDALL: The titleholder does have free  
10 rein in terms of the alienability aspect of the land, but  
11 until those lands leave Indian ownership they are treated  
12 by Congress as being under Federal protections for  
13 purposes against State taxation, against foreclosure,  
14 against a judgment, creditors, against even the  
15 involuntary dissolution --

16 QUESTION: All right. Let --

17 MS. KENDALL: -- of the corporations.

18 QUESTION: Let me go back to, I think an earlier  
19 point, and that is, I had been reading the requirement of  
20 subsection (b), or I'm reading subsection (b) as intending  
21 to codify that definition of the Indian country which has  
22 been referred to already.

23 I -- we used it in Citizen Band Potawatomi, but  
24 I think it goes back to 1914, the definition validly set  
25 apart for the use of Indians as such under superintendence

1 of the Government, and the difficulty that I'm having with  
2 your position, if I am correct that these should be read  
3 in the light of that traditional definition, is that even  
4 conceding that there may have been some protection  
5 provided on a continuing basis, the fact that the land was  
6 so readily alienable, unconditionally alienable, seems to  
7 me to be inconsistent with the superintendence requirement  
8 which I am assuming is part of (b).

9 Am I right that it is inconsistent with the  
10 superintendence requirement, and am I right that (b)  
11 should be read in the light of this traditional  
12 definition?

13 MS. KENDALL: No. If I can take the (b)  
14 question first, what you refer to, a reference to land  
15 set-aside under superintendence of Indians, that  
16 particular term has been used in the context primarily of  
17 cases that examine lands that are or continue to be held  
18 in Federal ownership or trust status. That hasn't been  
19 the touchstone for determining cases that have been  
20 treated as Indian country, for instance in the Sandoval  
21 case.

22 QUESTION: If that's a valid way to read (b) --  
23 I guess you're telling me it's not a valid way to read --

24 MS. KENDALL: I'm saying that under the  
25 statutory test it's not one of the requirements based on

1 just a plain reading --

2 QUESTION: It's not an express requirement, is  
3 that --

4 MS. KENDALL: It's not express requirement.

5 QUESTION: Is that right?

6 QUESTION: But if it was intended to codify the  
7 language we've used in our cases, then it would include  
8 superintendence. Are you saying it wasn't intended to  
9 codify the language in our cases?

10 MS. KENDALL: No, it was, and I am saying that  
11 superintendence is an important element, and let me just  
12 back up and say, alienability does not eliminate Federal  
13 superintendence.

14 Petitioner was wrong in saying Sandoval in the  
15 Pueblo lands were subject to, or didn't have any  
16 restrictions other than those imposed by Congress.  
17 Sandoval's lands, I mean, the Pueblo lands are alienable,  
18 as this Court held in 1987 in the case, Mountain States  
19 Telephone Company v. Pueblo Santa Ana. In that case, this  
20 Court upheld the alienability of the Pueblo lands, so  
21 alienability in and of itself is not sufficient to --

22 QUESTION: To buy the Pueblo without the consent  
23 of the United States?

24 MS. KENDALL: That's correct, without the  
25 consent of the United States.



1 QUESTION: Now, what does the superintendence  
2 consist of, then? If superintendence does not imply a  
3 right to preclude alienation, what does the  
4 superintendence consist of traditionally, and what does it  
5 consist of in this case?

6 MS. KENDALL: The key to understanding  
7 superintendence is that the Federal Government retains its  
8 plenary authority to enact protective legislation over  
9 Indian lands. That's superintendence, and that is present  
10 in spades here, because Congress has retained the  
11 authority to enact protective legislation over ANCSA lands  
12 and has repeatedly come back, in the course of over 29  
13 amendments, to strengthen the nature and --

14 QUESTION: Excuse me. What -- it can -- can it  
15 enact legislation pertaining to those lands any more --  
16 any more -- what should I say, intrusively than it can  
17 legislation pertaining to State lands?

18 MS. KENDALL: Absolutely, Your Honor.

19 QUESTION: It can displace State law --

20 MS. KENDALL: Yes, it can.

21 QUESTION: -- despite what's said in the act,  
22 that --

23 MS. KENDALL: Yes, it can, Your Honor. Congress  
24 has plenary authority over Indian affairs, and based upon  
25 that plenary authority --

1 QUESTION: Oh, but Indian land, as well as  
2 Indian affairs?

3 MS. KENDALL: Indian land.

4 QUESTION: I mean, what's bothering me is, what  
5 does fee ownership mean, then?

6 MS. KENDALL: Fee ownership means that Congress  
7 has allowed Natives to make a determination for themselves  
8 when and if to alienate their lands, but until that land  
9 is out, removed out of Native ownership, it continues to  
10 retain the protections that Federal Government has imposed  
11 upon them.

12 QUESTION: Protections and restrictions? In  
13 other words --

14 MS. KENDALL: And --

15 QUESTION: In other words, are the holders, the  
16 Native Alaskan holders, or the tribal holders of that  
17 land, subject to restrictions on what they can do with it  
18 while they keep it which would not be restrictions  
19 imposable upon a non-Native owner?

20 MS. KENDALL: They are not subject to  
21 restrictions. They are subject to protections, and  
22 Federal protections that have protected those lands from  
23 loss to third parties and to the State.

24 QUESTION: But doesn't superintendence imply  
25 control as well, perhaps, as protection?

1 MS. KENDALL: I don't believe so, Justice  
2 Souter. Again, superintendence refers to Congress'  
3 retained plenary authority to enact protective legislation  
4 over the lands. It does not refer to control, and there  
5 is nothing in section 1151(b) that has that requirement.

6 QUESTION: Well, that's certainly not the  
7 ordinary meaning of superintendence. You know, you say --  
8 you're equating it kind of with protections, the -- but  
9 superintendence means some sort of a -- some sort of  
10 supervision, which, of course, doesn't perhaps solve the  
11 problem very well. It means something more than just  
12 protecting, it seems to me. It's just a kind of a  
13 dependent situation on the part of the people who are  
14 being superintended.

15 MS. KENDALL: Well, that is true and, in fact,  
16 that's what we have here. Venetie is a federally  
17 recognized tribe. It is in a politically dependent  
18 relationship with the Federal Government, and the Federal  
19 Government has emphasized its authority to enact  
20 legislation pertaining to Venetie's lands.

21 QUESTION: How is it in a politically dependent  
22 relationship? What does the Federal Government do with  
23 regard to the inhabitants of Venetie that it could not do  
24 with respect to the inhabitants of Peoria?

25 MS. KENDALL: Very much, Your Honor. Federal

1 recognition refers to the fact --

2 QUESTION: I mean, aside from giving benefits,  
3 of course.

4 MS. KENDALL: It refers to the fact that the  
5 Federal Government has recognized the Venetie tribal  
6 government as being a tribal government, one that has all  
7 inherent powers that have not been expressly terminated by  
8 Congress.

9 QUESTION: I was talking about dependence. In  
10 what ways are -- is Venetie dependent upon the Federal  
11 Government, subservient to the Federal Government to a  
12 degree that the citizens of Peoria are not?

13 MS. KENDALL: The Venetie as a federally  
14 recognized tribe is dependent because it can depend on  
15 the Federal Government to protect its interests.

16 QUESTION: That just means it gets benefits that  
17 Peoria don't get.

18 MS. KENDALL: It's much, much more than that.

19 QUESTION: But that's not dependency.

20 MS. KENDALL: It has all the privileges and  
21 immunities as federally recognized tribes.

22 QUESTION: Well, but haven't -- hasn't this  
23 Court found in some circumstances that there is a  
24 federally recognized tribe that no longer has a  
25 reservation or is Indian country? You can have a

1 federally recognized tribe without either of those things,  
2 and the members of the tribe can continue to receive  
3 benefits, isn't that true?

4 MS. KENDALL: That's -- that is true, and  
5 that --

6 QUESTION: So it isn't -- I don't think that  
7 answers the question.

8 While I have you interrupted, is it possible  
9 that Venetie Village could seek status as a municipality  
10 under Alaska law?

11 MS. KENDALL: It could do so if it were to  
12 choose to do so, but that would be --

13 QUESTION: Yes, and if it did, would it have  
14 certain taxing powers like every other municipality in  
15 Alaska?

16 MS. KENDALL: It would indeed.

17 QUESTION: Yes.

18 MS. KENDALL: But that would be an act of  
19 assimilation. Venetie is a federally recognized tribe,  
20 and it has been governing its own community and its own  
21 affairs since time immemorial.

22 QUESTION: Well, by becoming a municipality  
23 under State law would it give up control, or wouldn't it  
24 continue to exercise control?

25 MS. KENDALL: It would give up its culture. It



1 would be assimilated into the State, and it would for --  
2 it would relinquish -- it would be forced to relinquish  
3 its viable Native governing entity that it has utilized,  
4 and is an entity that has been recognized by the Federal  
5 Government as existing, and that is entitled to all the  
6 same benefits and protections as other federally  
7 recognized tribes.

8 A municipal government is not one that is  
9 necessarily compatible with decisionmaking of tribal  
10 governments. The Venetie people make their decisions by  
11 consensus, by looking to their tribal elders, by sitting  
12 down together and conferring upon the problems.

13 A municipal government has a code that's 300  
14 pages long, that they have to nominate people to sit on  
15 the board, and it's a totally alien form of government.  
16 The Venetie tribal government is one that has been  
17 recognized by the United States.

18 QUESTION: May I interrupt you. I can  
19 understand your point about the -- from the point of view  
20 of the tribe, a vast difference between being part of the  
21 State government at a municipal level and being an  
22 independent tribe, but would you help me on this one  
23 point.

24 if you're correct that when they terminated the  
25 reservation they remained Indian country and therefore

1 have all the prerogatives of running their own affairs,  
2 what is the significant difference between that and still  
3 being a reservation? In other words, what did Congress  
4 accomplish by making this change in status?

5 MS. KENDALL: None, Your Honor. What they  
6 accomplished was conveyance of faulty title to the Venetie  
7 residents. What Venetie had prior to then was  
8 unrecognized title. They possessed -- this reservation  
9 had been set aside for their exclusive use and benefit,  
10 but this reservation, as the secretarial reservation, was  
11 not one that had recognized title, so their aboriginal  
12 title was still unprotected.

13 What Congress accomplished was to recognize  
14 their aboriginal title and vest full fee in the tribe  
15 itself.

16 QUESTION: Could they not have done that and  
17 allowed the reservation to survive?

18 MS. KENDALL: And allow -- and that -- well,  
19 what they did is, they allowed Indian country to survive  
20 as --

21 QUESTION: No, but could they not have  
22 accomplished all the other objectives and not terminated  
23 the reservation?

24 MS. KENDALL: They could have made a policy  
25 choice not to revoke reservations, but it was --

1           QUESTION: You see, the thing that runs through  
2 my mind, and it may not be correct, that they must have  
3 had a reason for terminating the reservation. It seems to  
4 me whatever that reason was might equally apply to their  
5 decision that you should not retain Indian country status.

6           MS. KENDALL: Well, Your Honor, again I think  
7 that within the legislative history, to the extent that  
8 you want to look there, what you will find is a lot of  
9 discussion about how the reservation system was viewed as  
10 being a failure by both the Congress and the Indians  
11 themselves.

12           The Indians did not want to be under a system in  
13 which the Bureau of Indian Affairs was to make day-to-day  
14 decisions over how to run their lives. They wanted to be  
15 able to make those decisions for themselves.

16           The act itself was passed during -- as the era  
17 of self-determination without termination, the current  
18 policy period of which we still are in, and this era of  
19 self-determination without termination, Congress has  
20 enacted other statutes like ANCSA, like the Indian Self-  
21 Determination Act, in which they are basically telling the  
22 tribes, take control of the BIA. We're going to dismantle  
23 it all together, and you control the BIA. You provide  
24 whatever governing services that the BIA otherwise did,  
25 but we will not consider that as a termination of your

1 tribal status.

2 QUESTION: Well, in respect to that, I'm  
3 thinking just possibly that whatever reason they had for  
4 revoking reservation status might equally well have  
5 applied to whether -- Indian -- dependent Indian  
6 community, just as Justice Stevens said.

7 But now I want to explore the possibility that  
8 whatever reason they had for giving back the land to the  
9 tribe is sufficient to give back the dependent status, and  
10 in respect to that -- that's under (b). You see where --  
11 are you following?

12 MS. KENDALL: Mm-hmm.

13 QUESTION: All right. In respect to that, I  
14 want to know what particular differences there are  
15 between -- in respect to superintendency, dependence, or  
16 all those things relevant to making a bit of land a  
17 reservation or a dependent community. I want to know how  
18 that changed between the time before (a) went into effect,  
19 before ANCSA went into effect, and the time after the  
20 corporation took the title and gave it back to the tribe,  
21 i.e., the status quo.

22 Is there zero change, or is there some change?

23 MS. KENDALL: One change.

24 QUESTION: What?

25 MS. KENDALL: There's only one change, and that

1 is that the lands are not held in trust by the Federal  
2 Government, but that is not a requirement under 1151(b).

3 QUESTION: But as far as superintendency, or --

4 MS. KENDALL: No change.

5 QUESTION: Practically, as well as theoretical.  
6 Practically.

7 MS. KENDALL: No, change, absolutely no change.

8 QUESTION: There is no change whatsoever.

9 MS. KENDALL: The guardianship role, Federal  
10 protections, everything still --

11 QUESTION: And in terms of whether they run a  
12 school, or send letters, or -- any practical thing.

13 MS. KENDALL: It's the Federal Government and  
14 the Indian tribe, the Venetie Indian Tribe that does all  
15 that, that carries out governmental functions within its  
16 community. It did before, and it has continued to do so  
17 afterwards.

18 Your Honors --

19 QUESTION: Ms. Kendall, could I -- look on page  
20 17a of your appendix. I asked you earlier about 1601(b),  
21 and you -- which says, without establishing any permanent  
22 racially defined institutions, rights, privileges, or any  
23 lengthy wardship, and you explained that by saying, well,  
24 that just says we weren't creating any. It doesn't say  
25 they were not preserving any.



1           But turn the page and look at 18a, subsection  
2     (c), which is sort of a proviso, you know, what isn't  
3     changed. No provision of this chapter shall replace or  
4     diminish.

5           You would expect to be in there, you know, any  
6     dependency status of any Indian tribes. It has nothing  
7     like that. it says, shall diminish any right, privilege,  
8     or obligation of Natives, as citizens of the United  
9     States, or as of -- or of Alaska, or relieve, replace, or  
10    diminish obligation of the State of Alaska to protect the  
11    rights or welfare of the Natives as citizens of the United  
12    States and Alaska.

13          The whole thing just reeks with the very  
14    opposite philosophy from the one that you're espousing,  
15    that the Government wanted to preserve Native identity.

16          MS. KENDALL: What you don't find here is  
17    language of termination. You find nothing that says, we  
18    are terminating your rights as Indian people or federally  
19    recognized tribes. There is nothing here in that language  
20    that says that. What you see here is language that  
21    says --

22          QUESTION: -- thought it would have been in this  
23    preservation provision if it was intended to be preserved.

24          MS. KENDALL: It doesn't need to be in  
25    preservation. The statutory --

1 QUESTION: It doesn't need to be. It doesn't  
2 need to be.

3 MS. KENDALL: The requirement is that  
4 termination must be by clear and express language of  
5 congressional intent, and that's not what you find in  
6 ANCSA.

7 QUESTION: It doesn't need to be there, but one  
8 would expect to find it there.

9 MS. KENDALL: Let me ask you, Your Honor --

10 QUESTION: Ms. Kendall, you don't ask questions  
11 of the Court.

12 MS. KENDALL: Excuse me.

13 (Laughter.)

14 MS. KENDALL: Let me --

15 (Laughter.)

16 QUESTION: The Ninth Circuit ruling is quite  
17 broad. We have at least one of your friends that tells  
18 us, this should be restricted to the -- what, is it six  
19 tribes that are like the Venetie, the -- who made the  
20 1618(b) election, and it doesn't -- the coverage of the  
21 entire ANCSA, is that what you call the legislation,  
22 that's wrong. One of the briefs took that position. What  
23 is your view on that?

24 MS. KENDALL: My view is that to the extent that  
25 they have similar facts to Venetie I think that they

1 probably have the stronger claim, because of the express  
2 language in the statute that I pointed out that says lands  
3 set aside for the corporation.

4 As Justice O'Connor said in Sac and Fox, Indian  
5 country consists of lands that had been set aside by any  
6 means for the benefit of Indians under Federal protection.

7 QUESTION: But you are saying that whether it's  
8 1618(a) or (b), your argument is it's still all -- it all  
9 can be Indian country.

10 MS. KENDALL: It -- well, it would depend on the  
11 facts of the particular community, I would submit, and  
12 in -- as far as Venetie is going, evidence was presented  
13 at trial by both sides of the case, and the district court  
14 found, based upon these uncontested findings, that Venetie  
15 was a dependent Indian community as of 1971, and nothing  
16 in ANCSA changed that, and we ask this Court not to read  
17 into ANCSA's silence an intent that was not there.  
18 Congress, in passing that statute, attempted to construct  
19 a fair and honorable settlement, and it would not be fair  
20 or honorable to read into the statute --

21 QUESTION: Thank you, Ms. Kendall.

22 Mr. Roberts, you have 5 minutes remaining.

23 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

24 ON BEHALF OF THE PETITIONER

25 MR. ROBERTS: Thank you, Your Honor.

1 Respondents' position confuses the question of  
2 tribal status and the question of Indian country. They  
3 are two separate questions.

4 The Department of Interior made that clear in  
5 1993 when it published for the first time the list of  
6 federally recognized tribes in Alaska. It said inclusion  
7 on the list does not resolve the scope of powers of any  
8 particular tribe over land and nonmembers, and it  
9 footnoted the Solicitor opinion that we have referenced in  
10 our briefs.

11 Nothing about the State's position calls into  
12 question Venetie's status as a tribe.

13 QUESTION: How could it footnote that if it  
14 wasn't published? That's not very useful, is it?

15 MR. ROBERTS: It's not technically been  
16 published in the collected volumes, but it's not a secret.  
17 It's been made public.

18 QUESTION: I see, sort of been smuggled out.

19 (Laughter.)

20 MR. ROBERTS: Not smuggled, but certainly made  
21 public.

22 The respondent has said that nothing changed  
23 when they transferred the lands to the reservation. Look  
24 at what changed. When it was a reservation, the Federal  
25 Government had control over the land. It owned it.

1     Afterward, when the corporations had unilaterally  
2     reconveyed it to the tribe, the Federal Government had no  
3     ownership and no control, a significant change.

4             Second, when the reservation was set up, it was  
5     set up by the Federal Government, set apart for the use of  
6     the Indians under Federal superintendence. This action of  
7     reconveying to the tribe was not an action of the federal  
8     Government at all, nor was it approved by the Federal  
9     Government. Finally, when it was a reservation --

10            QUESTION: But it was anticipated by it. You  
11     can certainly say that.

12            MR. ROBERTS: Oh, Your Honor, I don't think  
13     there was any reason to anticipate that the ANCSA  
14     corporations would reconvey the land and dissolve, not at  
15     all. Congress viewed the corporations as central to their  
16     structure, and the notion that they would dissolve and  
17     reconvey the land was not anticipated.

18            It was anticipated that they would, because the  
19     land was freely alienable, sell it, develop it, swap it,  
20     as ANCSA corporations have done.

21            Finally there was, when it was a reservation,  
22     pervasive Federal superintendence. Now, under the new  
23     system, where the land had been transferred back, there is  
24     no Federal superintendence in the sense there is in a  
25     reservation, the viewing the community as a dependent



1 community that needs Federal supervision and  
2 superintendence.

3 QUESTION: It remains a recognized tribe.

4 MR. ROBERTS: Absolutely, and nothing in the  
5 State's position is inconsistent with that. The issue is  
6 simply jurisdiction over the land and nonmembers.

7 QUESTION: Superintendence being -- what do you  
8 pin that last statement on, there's now no  
9 superintendence, before there was?

10 MR. ROBERTS: Well, if you look at it in two  
11 ways, either -- the most significant one is control over  
12 the decisions. If the tribe wants to sell the land  
13 tomorrow, develop it in a particular way, the Federal  
14 Government has no say about that, as it did when it was a  
15 reservation.

16 In fact, when the tribe in 1980 submitted an oil  
17 and gas lease for Department of Interior approval, the  
18 Department of Interior said, we're not in that business  
19 any more. It's your land to manage according to your own  
20 lights.

21 QUESTION: Do you agree that dependency means,  
22 dependent on the Government for protection of your tribal  
23 status?

24 MR. ROBERTS: Well, again, we think it is a part  
25 of the term of art. It means, dependent Indian community

1 means, a community like the community in Sandoval, like  
2 the community in McGowan, and we don't think it can be  
3 parsed any more finely than that. It's also --

4 QUESTION: Could the Federal Government come  
5 along today, pass a -- could Congress pass a statute and  
6 say today, binding upon this tribe, saying you shall take  
7 no muskrat upon your land?

8 MR. ROBERTS: No, I don't think so, Your Honor,  
9 because that would be inconsistent with ANCSA, which gave  
10 to them jurisdiction and control over the land.

11 The State could, because it is land subject to  
12 State jurisdiction, like everyone else's land. If it were  
13 Indian country, the State couldn't, and then either tribal  
14 or Federal regulations of hunting and fishing would  
15 control.

16 Now, with respect to the activities, that  
17 superintendence is going to be viewed more broadly, keep  
18 in mind that this case arose because the State was  
19 building a school in Venetie. I think my friend  
20 mentioned that that was a Federal and tribal function.  
21 The State provides the education. The State has provided  
22 health care services. The State has provided electricity  
23 and water, public utilities.

24 I don't think the Indian country determination  
25 hinges on who provides more services. It hinges on the

1 intent of Congress, and Congress' intent in ANCSA was to  
2 convey this land free and clear, not to retain control,  
3 not to continue to exercise superintendence in the terms  
4 it's been used in this Court's Indian country cases.

5 Thank you.

6 CHIEF JUSTICE REHNQUIST: Thank you,  
7 Mr. Roberts.

8 The case is submitted.

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

Alderson Reporting Company, Inc., hereby certifies that the  
attached pages represents an accurate transcription of electronic  
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The United States in the Matter of:

ALASKA, Petitioner v. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT,  
ET AL.

CASE NO: 96-1577

and that these attached pages constitutes the original transcript of  
the proceedings for the records of the court.

BY Don Mari Fedirko-----

(REPORTER)