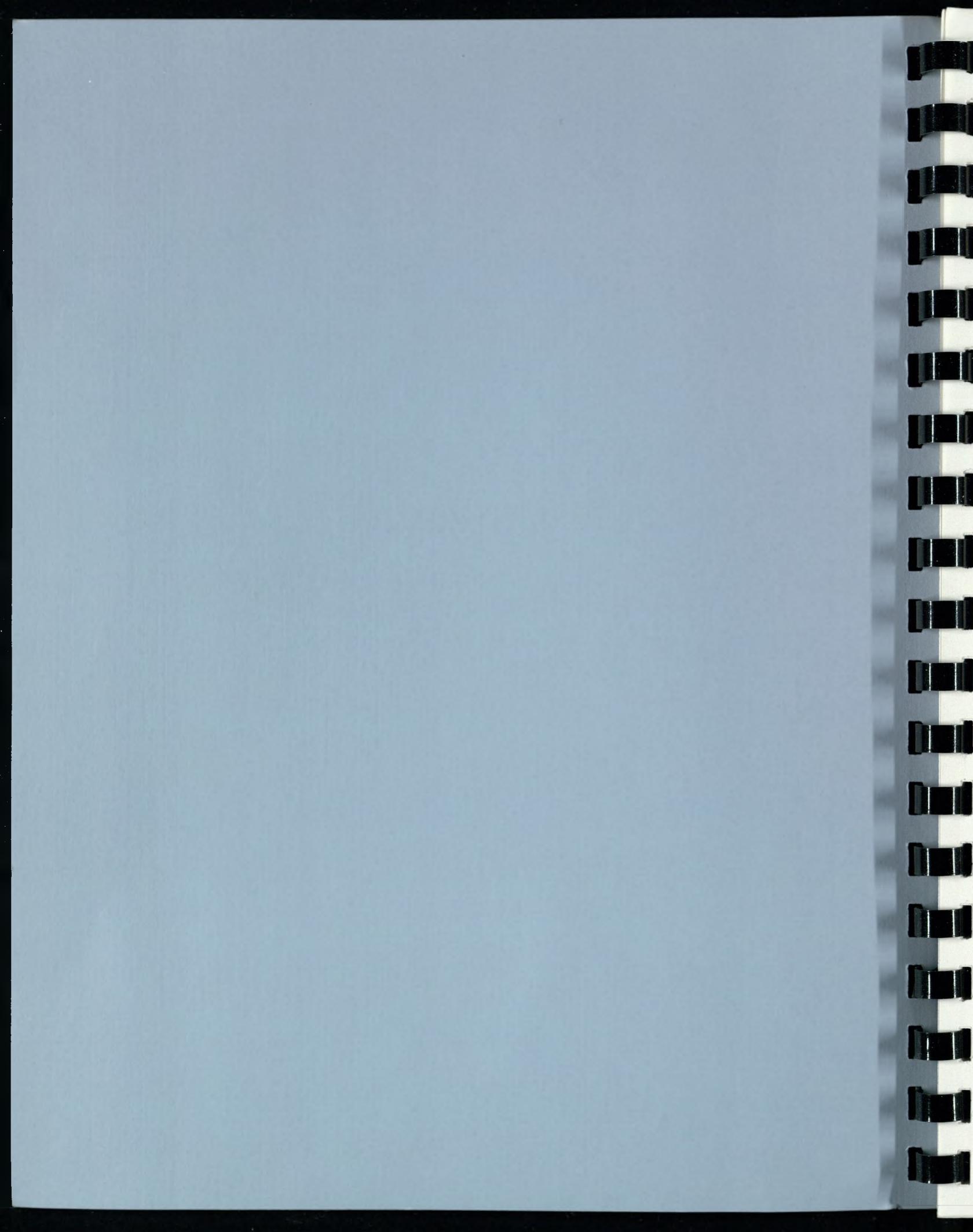


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VOLUME VII
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TRANSCRIPT OF PROCEEDINGS
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ANCHORAGE, ALASKA



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Anchorage, March 6, 7, 8, 9, 1984
U.S. National Policy: Week 2, Session 3

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An Athabaskan elder who was involved as an early proponent
of a land settlement to preserve Native rights.

14 -----

15 *The Menominee Tribe was at one time terminated as a federally
16 recognized Indian Tribe and the period of "restoration" was
a movement to restore the rights and recognition of the tribe
as a tribe.

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(MARCH 7, 1984)

(TAPE 25, SIDE A)

MR. BERGER: Well, shall we get underway?

(LONG PAUSE)

MR. BERGER: Well, since we adjourned yesterday, we have been joined now today by Professor Ted Chamberlin of the University of Toronto, who is seated next to Joe Jorgensen. Ted is from Toronto and a professor of English, served as an advisor to the Minister of Indian Affairs and Northern Development in Canada and was advisory to the Mackenzie Valley Pipeline Inquiry and is the author of "Harrowing of Eden," a book about relations between the white people and Native people in North America. And we'll reach you later on today or tomorrow, Ted.

This morning I think we will ask Tito Naranjo to lead off and then we will ask Tim Coulter to follow and then Ralph Lerner and we'll carry on from there. And remember what Tim Coulter told us yesterday, we're to interrupt him whenever we get the urge, even during his initial presentation.

So, Tito, if you would carry on now then?

MR. NARANJO: Well, yesterday I decided that I should use some paradoxical intent. Paradoxical intent works like... okay, so... While I was talking, I sweated a bunch and rather than fighting the sweating, I'm supposed to use this approach. I'm supposed to say to myself, "Well, here's the thing to do. Put on a big show. Sweat so much that you flood the whole place, you know?" Okay, instead of trying not to do it, do it some more, you know, and so I use paradoxical intent. But in case that doesn't work, I've got some tissue paper.

(LAUGHTER)

MR. NARANJO: I was talking about



1 Pueblos yesterday, Pueblos by comparison with Native peoples up
2 here, and I guess what I was trying to say was that Pueblo people
3 have a longstanding tradition of religion, longstanding tradition
4 of dealing with government, 440 years. And this 440 years has
5 kind of meant layering upon layering of governments... the Spanish
6 government, the Mexican government and the American government
7 for about 84 years only. So the Pueblos really dealt with the
8 Spanish much longer than the Americans. They dealt with the
9 Spanish for some 300 years and so now are dealing with the
10 Americans of late, the U.S. government. And this is very interest-
11 ing because out of that begins to come some kinds of questions
12 of how does it relate to the Alaska Native situation?

13 I can't answer that because I don't know how it relates.
14 I know that it contrasts, you know, and I know that there's some
15 kinds of things that stand out, at least in my mind. In my mind
16 the kinds of things that stand out is that first of all, people
17 really fight for the kinds of things that... the values that are
18 meaningful to them and the Pueblos, in 1680, were told not to
19 practice their religion by Spanish priests. And in 1680, these
20 peaceful people, the Pueblos... nonaggressive, nonwarring, fought
21 the Spanish, drove them out. The first message was kill the
22 priests and they had never done warring but when the message for
23 war went out to save the religion, first of all... which was a
24 religious revolt, the people said, "Kill the priests because
25 they are the ones who are really undoing us." So they killed
the priests, they drove out the Spanish for 12 years. The Spanish
came back and reconquered.

After the Spanish came back, they said, "No more slavery
for the Pueblo Indians." They said, "You can have some land."
The beginnings of the reservation systems were instituted by
Spanish governments. But they suffered 100 years of slavery and
religious prosecution before they came across and fought a revolt
and had their way, and I think that maybe that talks about survival



1 because the next step is that the Pueblos cannot see themselves
2 surviving without the land.

3 Last night I was reading Ernest Schuski, and Ernest
4 Schuski was saying to be sovereign is to have authority over the
5 land. As I read that sentence, I thought, "Gee whiz, Ernest Schuski
6 wrote a book in favor of the Indians and he seems to be empathetic
7 with the Indians." But it's not that way. To be sovereign is to
8 have authority over the land. That's far from the truth.

9 Let me tell you a story. Every year I cut a Christmas
10 tree and this Christmas tree, we put it in the house because it's
11 American tradition, because we are also American culture. After
12 my Christmas tree is done and used, all the Pueblos take their
13 Christmas trees back to the river, back to a running stream it
14 has to be. So at one point in time, the game warden came up and
15 as I was throwing my tree in the water, he said, "You're cluttering
16 up the river. You know, I could fine you for doing this." And
17 I wasn't about to give him Pueblo philosophy, you know, so I
18 took my tree out of the water, put it back in my pickup, carried
19 it to my own piece of land and threw it back into the creek.
20 Well, the evergreen, the Douglas fir, is a... one of the Pueblo
21 deities, believe it or not, and this is what shocks American
22 people, you know. And they think, "What crazy thinking," you
23 know. But the Douglas fir, in the Pueblo way, along with the
24 rain is involved in a cycle of life with man and this sentence
25 really rubs me wrong because we have no authority over the land.

I think that we only exist because we are a part and
we are in partnership with the land. The Douglas fir, the rain
that comes, where we came from underneath the lake, this sort
of thing... where we return to, this is all integrated and we
cannot live without this kind of integration. And we have no
authority over the land. It doesn't belong to us. We only come
from it, from its womb. We go back into its womb and we share
life with... The Pueblo philosophy really is seeking life and



1 seeking life is talking about very many symbolic meanings of what
2 the land is all about, what life is all about, what the Douglas
3 fir is all about. And I think the rest of Schuski's sentence is
4 okay.

4 This importance of land base is part of the feelings
5 Native Americans have about tribal sovereignty and I think nowa-
6 days, we never thought about sovereignty. As a matter of fact, we
7 never thought... you know, we always had governments, but we
8 didn't think in terms of sovereignty in the sense that we now
9 define it. I think that we only were here because we were meant
10 to be here. Without this important integration between the land
11 and ourselves, between ourselves and the Douglas fir, between
ourselves and the cycle of rain that comes... because when the
Douglas fir... The spirit is...

12 As a matter of fact, on taking a tree, the symbolic
13 act of pulling breath of spirit from the tree is done and when
14 it's left in the river, that's done again. This kind of integra-
15 tion is hard for people to understand who aren't from that frame
16 of thinking. This code that we carry in our head... I was talk-
17 ing with Dorik and we were talking about... He was asking me a
18 question but it just occurs to me that Indians are described as
19 dominantly right-brain people. Americans have a way of saying
20 things, you know, and they are left-brain people, you know,
21 analytical and we're... they used to say we were best for
22 manual dexterity, you know, and nowadays they've elevated it
23 one more and they said we're right-brain dominant while they're
24 left-brain dominant. Well, they've made things in their own
25 image. For example, technology, and they've also made computers
that are left-brain. What strikes me is that American culture
is a left-brain culture and, you know, specialization in every-
thing. You just can't seem... I mean, American culture just
can't seem to stick to some kind of essence with regard to a
... maybe a spiritual life that, if there are 200 Native Americans,



1 200 Native Americans will have a different philosophy. But I
2 think the one thread that runs through all of these philosophies
3 is that the spiritual essence of connection with the land is
4 really important. It's the essence, it's the core of life. Water
5 and air, and if you think in terms of this left-brain culture and
6 into the future, it seems to me that one of these days when
7 Americans... American culture...

8 I'm also part of that, by the way, but I'm also... I
9 live in two worlds. One of these days when the space ships go
10 off and come back, I wouldn't be surprised if Americans, wanting
11 two basic things, water and oxygen, may come to the reservation
12 and ask for oxygen because that may be one of the last places
13 where trees grow and that may be one of the last places where
14 water comes out of the ground, you know.

15 It's becoming apparent in New Mexico, as you're driving
16 through this Espinola Valley where connection upon connection of
17 people are beginning to grow towns. The only vacant places are
18 Indian reservations and I think that as populations grow, you
19 know, this kind of sacredness, this symbol of the land, is still
20 being defined. It's being defined that, you know, it's... Taos
21 Pueblo yearly on December the second through January has a quite
22 season, a time when the earth rests, a time when the earth is
23 not violated, a time when people do not drive cars, a time when
24 there is communication with the earth and this getting back to
25 the real essence of where all life comes from as we know it now.
And I think that this is important in that... I don't know, I
guess one last sentence in closing is that the left-brain culture
is messing around with the genetic code, you know. It may be
also true in the future when the genetic code is on-leaded so
much that this left-brain culture may come back and begin to
borrow the real code from people who maybe felt, "Well, you
know, the earth is really important, the ground is really impor-
tant, it's worth fighting for." And it just seems to me that no

1 matter how it's defined because... That problem with the Alaska
2 Natives and the land is too difficult. I have no solutions. All
3 I talk about is the Pueblos way of seeing things. Maybe, by
4 contrast you know, they've persisted, their government, their
5 religion, their philosophy. It's done so for 440 years and it's
6 pretty much intact and the message that I get very strongly is
7 that if a people consider something as sacred as the land as
8 the earth, I think that people will fight for it and preserve it
9 and I don't know how. But, you know, that's maybe the story of
10 means and ends, I don't know.

11 That's all.

12 MR. BERGER: Well, thank you
13 very much. I think that we... I described earlier, I said to
14 Mr. Lerner and Mr. Chamberlin that they were the people repre-
15 senting the humanities and philosophy here, but I think that
16 we've reached the people representing the humanities and philoso-
17 phy already.

18 Are there any questions or observations before we pass
19 on?

20 Ada Deer?

21 MS. DEER: Yes, one short
22 comment. My first trip to the Southwest was in 1966. I was a
23 much younger social worker then and I remember what one official
24 from the Bureau of Indian Affairs told me. I told them that I
25 was very excited to come down and see the Pueblo people and learn
more about the culture and the ways and the traditions. I should
say, at that time I was an employee of the Bureau of Indian Affairs
and they sent me on a training trip. For several months, I
travelled around the country and got to meet many different types
of Indians and to stay in the general area.

At any rate, this official announced to me that it was
only a matter of time before the Pueblo culture crumbled, and I
said, "Well, that may be your perception but I don't think that's



1 right." Now, this was before I went down there and I share this
2 with you to add emphasis to the persistence and the longevity
3 of the Pueblo people and culture. I'm sure that Pueblos will be
4 in existence long after the bureaucracies.

5 MR. BERGER: I was wondering,
6 Ralph Johnson, whether you, speaking as a law professor, want to
7 make any observation about the definition of sovereignty that Mr.
8 Naranjo rejected and then the one that he found more acceptable?

9 MR. JOHNSON: Well, I think that
10 his observation is a terribly important one. There is a miscal-
11 culated and misunderstood notion in the non-Indian society that
12 sovereignty either is or is not. And I get this among my lawyer
13 friends, as well, that, "How can Indian tribes be sovereign
14 because, after all, you know... the United States, they don't
15 engage in treaties with the Soviet Union or whatever," and you
16 have to explain to them that sovereignty is a variable thing. It
17 runs on a scale from one to 100, and much of it depends upon how
18 the people believe in it but even legally it is a highly variable
19 thing. States are partially sovereign, they're partially subject
20 to the control of the United States in certain things. Indian
21 tribes... some Indian tribes are very sovereign, they have many
22 attributes of sovereignty and some do not. And I think that Tito
23 Naranjo's point that sovereignty is also in the hearts and souls
24 of the people is a terribly important observation. It's a
25 dimensionally important thing to realize.

MR. BERGER: Well, Tim Coulter,
I think we've come to you at last.

MR. COULTER: One of the themes
that continues to come up is this conflict or dichotomy between
what the law is and what the law is thought to be and what is in
the hearts and minds of the people. And that's very much like the
dichotomy between the bureaucracies and the cultures of indigenous
peoples. And one of the underlying themes here seems to be, and I



1 think it's a very important one, that somehow the bureaucracies
2 and the laws are not likely to, in the end, overcome or overwhelm
3 the desires and the vital growth of Native communities and Native
4 peoples.

5 There's so many examples of that that I don't even want
6 to start. I'll mention a few as I go along. I'm a member of
7 the Potawatomi Nation, originally comes from right up where
8 Ada Deer is from, moved all over the place though. I really
9 grew up in Oklahoma. My office is called the Indian Law Resource
10 Center and it's a public interest-type of law office that
11 handles cases in behalf of Indian governments, Indian peoples,
12 around the United States but also in Central and South America,
13 occasionally in Canada. We've ended up doing a good deal of work
14 related to land claim matters. We're very much involved in
15 nearly all the cases that Joe Jorgensen mentioned yesterday, the
16 Western Shoshone case, the Seminoles in Florida, the Black Hills
17 case, the Six Nations Confederacy in New York state. We represent
18 the Hopi traditional leaders in Arizona and so on. They're all
19 involved in this same kind of struggle that the Native people
20 here are involved in. The similarities are... Well, I have to
21 say the similarities are, of course, very great. It really
22 shouldn't be very surprising to us that the similarities are
23 great.

24 But I think that we should also not be surprised that
25 the similarities are tremendous between this effort, this struggle
here, and what's going on in Central and South America. The basic
underlying problem of the protection of indigenous cultures,
indigenous resource rights, the right of Native people to live as
they wish to live in the face of other governments that have dif-
ferent designs on those resources, a different view of development
and the future of humankind is a story that's essentially the same
here just as it is in Guatemala or Nicaragua or Paraguay or
Brazil. The particulars may be different but the story is



1 essentially the same. It's a question of human rights, it's a
2 question of moral rights, but it's also a question of law and we
3 can deal with it that way.

4 I don't make an apology for being a lawyer. That's what
5 I can offer and I think that the law is such an immense part of
6 the problem that I think lawyers have a very special job to do in
7 trying to unravel it and demystify it.

8 Well, I think that what is going on here is tremendously
9 momentous for a number of reasons, because of the scope of the
10 problem, because of the tremendous... nature of the resource
11 problem, the tremendous amount of land that's involved and the
12 tremendous number of Native communities involved. And you've
13 also embarked on a project that is tremendous, one beginning
14 from the ground up, as I understand it, which is the process
15 that Ada Deer has mentioned as being the one that's most likely
16 to succeed, and I can only second that. It seems that every
17 effort that begins in that fashion has a kind of vitality that
18 the legal problems and the people in Washington are not able to
19 stem, and the fact that this commission will be conducting
20 hearings in the villages and grounding its work in the views
21 and the aspirations of the people is its greatest strength, I'm
22 sure.

23 But if you're going to do a productive, useful job of
24 evaluating ANCSA, and if you're going to come up with useful
25 alternatives and useful strategies for dealing with the impending
disaster... I realize I'm making some assumptions here but they're
assumptions I think that are widely held... If you're going to do
a good job of that, I think it's going to be necessary to come
to grips straight on with some overwhelming legal facts. The
facts are that, as you know really, in the United States the law
says that Congress has plenary power to do essentially as it
wishes with Indian property, to do as it wishes with regard to
Indian affairs, and that would apply, as well in general, to



1 Native Alaskan property and affairs. There may be some slight
2 distinctions and differences, but in general, this plenary power
3 doctrine, the view that the United States Congress can do as it
4 wishes, is an overwhelming legal fact. It, in essence, denies
5 that Native people have the same constitutional rights and
6 constitutional freedoms from government action that everyone else
7 does. The doctrines suggest that Congress does not have to abide
8 by the same limitations on its power when it deals with Native
9 people that it must abide by when it deals with all others. In
10 other words, Native people just don't have the same constitutional
11 rights that everyone else does.

12 As part of that plenary power doctrine, there is the
13 more specific doctrine that Congress has the power unilaterally,
14 without the consent of anyone, to extinguish Native property
15 rights without just compensation, without due process of law and
16 without regard for the public purpose. Now, the Fifth Amendment
17 of the constitution, I don't mean to be giving you a primer here
18 if it's not needed, but everyone else, including illegal aliens
19 in the United States, is protected by the Fifth Amendment of
20 the United States constitution. Their property rights, including
21 their possessory rights, cannot be disturbed by Congress without
22 due process of law. That means fair procedures, a chance to go
23 to court... Can't be disturbed without just compensation, payment
24 of fair market value. And Congress can't even do that unless
25 it's done for a public purpose. Well, none of those restrictions
apply to most Native property rights. It's said that for certain
Indian lands that are guaranteed in a certain way by a treaty
or an act of Congress that it may be necessary for Congress to
pay just compensation, but still, the other provisions of the
Fifth Amendment are not said to apply... the restriction that it
be for a public purpose, the requirements of due process of law.

Now, the upshot, as I already mentioned, is that Native
consent to the extinguishment of property rights is thus irrelevant.



1 It doesn't matter whether Native peoples, indigenous peoples, agree
2 to give up their land rights or not. Congress can do essentially
3 as it wishes. So although consent is legally irrelevant when it
4 comes to extinguishing Native property rights, it isn't... it isn't
5 morally irrelevant, it isn't ethically irrelevant and it's not
6 politically irrelevant. Congress may exercise its power to
7 extinguish Native title without regard for Native consent but we've
8 found over and over again that the question of justice, the question
9 of morality, ever comes forward. It never seems to die.

10 The Black Hills case is an example. Congress just took
11 the Black Hills, terribly unjust, but the Black Hills claim is
12 no more dead now, a hundred and some odd years after the taking
13 of the Black Hills, then it was the day after Congress did that
14 even though Congress has done quite a number of things to try
15 to put that claim to rest. The Indian Claims Commission proceed-
16 ings, the offer of a hundred some odd million dollars to pay for
17 the Black Hills hasn't anymore settled that claim than when they
18 took it to begin with because everyone knows that that's not a
19 just and moral settlement of that claim. So even though there
20 are these overwhelming legal facts, the... the continuance of the
21 moral and ethical claims are tremendously important.

22 And that's what I think is involved here, the refusal
23 of Native people to simply accept that Congress has the last word
24 when it comes to disposing of Native people's property rights.
25 That just doesn't sit, it's not regarded as just, it's not regarded
as right and, as a result, the claim doesn't go away, the problem
doesn't go away and it's going to continue until there is some
just and some proper resolution of it.

What I'm trying to get at, and I'll go into more detail,
is that a just and proper resolution of Native claims, Native
land rights, is not likely to occur unless the law is changed.
It seems to me that ANCSA was passed in a setting where the power
of Congress to do as it wished with Native land rights was



1 unquestioned, was essentially unquestioned. Native leaders were
2 confronted with the proposition that Congress could, at will
3 without any regard to their consent, simply extinguish their land
4 rights with nothing. And so ANCSA was, I think, regarded by many
5 as the best that could be done under those circumstances.

6 It reminded me of the Menominee termination matter where
7 the appearance of consent can only be understood in light of the
8 overwhelming legal and political facts of that time, which were
9 facts that in my view amount to a type of legal duress. Countless
10 claims have been supposedly settled under these circumstances,
11 settled in a setting under conditions which suggest, if they
12 don't outright prove, that a just settlement is not taking place
13 and that, quite the contrary, something is being imposed on the
14 Native people.

15 And I think the corollary or the... to continue to
16 reason from this proposition, suggests that we're not likely,
17 you're not likely, to come up with a useful resolution of this
18 problem here. You're not likely to find a satisfactory settle-
19 ment of the question of Native property rights unless and until
20 that can be done under proper legal circumstances in a setting
21 that's perceived by Native people and perceived by the world as
22 fair and just, and that isn't going to take place as long as it
23 is conceded that Congress can do as it wishes, as long as it's
24 conceded and understood that Congress has unilateral power to
25 extinguish Native property rights at will without regard for
26 constitutional restrictions.

27 I've already mentioned that this is exactly the kind
28 of thing that happened in the Indian Claims Commission cases
29 where a process was started in the Indian Claims Commission to
30 supposedly hopefully resolve Native claims forever. But the
31 claims commission perverted the mandate of the Claims Commission
32 Act, they rather deliberately refused to carry out their mandate
33 in a manner that was fair and just, they permitted claims to be



1 prosecuted that they knew to be fraudulent and... That's not
2 rhetoric. They absolutely knew, in many cases, that the lawyers
3 before them did not represent the entities that they claimed to
4 represent. We even had transcripts of the judges saying, "We
5 know that this entity has a government sitting somewhere and
6 they're not here." They, nevertheless, adjudicated those claims.
7 They permitted the Black Hills claim to be adjudicated, knowing
8 that the largest of the Souix tribes had fired that lawyer for
9 the express purpose of getting out of that claim.

10 The result of that kind of fraudulent and essentially
11 illegal procedure has been that those claims are not settled.
12 The Indian Claims Commission can enter judgment, Congress can
13 appropriate the money, Congress can even mail out the little
14 green checks and nobody thinks it's settled. They've wasted
15 their time. It was a useless gesture except that they've wasted
16 a lot of money and in many cases I'm afraid that they've muddied
17 the waters so badly that it's going to take a long time to unravel
18 it.

19 Well, again I'm making some assumptions that are not
20 really mine to make but I've had to make them. I think that ANCSA
21 shares many of those same problems. It was an attempt to settle
22 something that's not going to be regarded for much longer as
23 very fair, if it ever was regarded as fair and proper. The
24 result is that the question is not likely to die.

25 I wanted to offer a few remarks about how this situation
came about. Why is it that we have this legal situation that is
so critical? The problem, I think, is this, that originally, at
least in the Lower 48, relations between Indian peoples, Indian
governments and others, that is, the European powers and the
United States, those relations were governed, for the most part,
by treaty. It was the treaties which established the relationship
and defined the respective powers and obligations of the Indian
government and the United States government or the government of



1 Great Britain, France, Spain, the Netherlands, whatever country
 2 was involved. But after the formation of the United States, the
 3 United States constitution was adopted and the United States
 4 constitution defined the relationships between the states and
 5 the federal government, it defined relationships between United
 6 States citizens and their government and their governments, but it
 7 did not say anything about the relationship between Indian govern-
 8 ments or Alaska Native governments, for that matter, and the
 9 United States. There was nothing in the United States constitution
 10 to take the place of or substitute for the treaty defined relation-
 11 ship. And so, as the treaty relationship began to break down and
 12 eventually was abandoned, we had a situation, we still have a
 13 situation, where there is no law, there is substantially no legal
 14 definition of the relationship between Indian governments, Native
 15 governments, and the United States government. Nothing was sub-
 16 stituted for international law which originally defined and
 17 governed that relationship. The U.S. constitution says only
 18 that Congress shall regulate commerce with the Indian tribes.
 19 Well, that does not, despite what so many people have said...
 20 That does not say anything about the legal relationship between
 21 Indian governments and the United States government. It's simply
 22 one of Congress' enumerated powers.

23 And so we came to a... what I think is best understood
 24 as a legal vacuum. The United States government was in a position
 25 to do as it wished. It could arrogate to itself whatever power it
 wished to take because there was no formal legal restriction or
 definition of what Congress'... of what the United States govern-
 ment's relationship was and is to Native peoples.

There was an additional reason for this state of lawless-
 ness, or this legal vacuum, and that is that John Marshall, very
 early on in the case of MacIntosh... John Marshall decided that
 some questions, certain kinds of questions, would not be decided
 by the United States courts, and in MacIntosh... I think it's well



1 to reread that because I really disagree with the summary that
2 was given in Dr. Jorgensen's paper. He decided that the doctrine
3 of discovery did not give title to the United States, did not
4 affect the Indian title to land at all. He also looked at the
5 doctrine of conquest and determined that the international legal
6 doctrine of conquest didn't do anything to affect Native title
7 to lands because, for one thing, the United States seldom conquered
8 or exercised a right of conquest with regard to Indian or Native
9 lands, certainly up here utterly irrelevant. I mean, there wasn't
10 so much as a skirmish, much less any sort of conquest.

11 But Marshall was quick to point out that the doctrine
12 of discovery gave no right at all to the discovering nation where
13 the lands were already inhabited. What he did decide, though,
14 was that the United States government had behaved... had behaved
15 as though the United States held some underlying right to the land
16 even though all of the right to the land was, in fact, vested in
17 the original owners, the original occupants. He pointed out that
18 the United States had patented away millions of acres of land
19 which had never yet been acquired from the Native owners which were
20 still entirely in the occupation of their original Native owners.

21 And what he said was, under these circumstances the
22 courts will not interfere. What he was saying was that, in that
23 setting, the courts will not declare what Congress has done and
24 what the rest of the government has done to be illegal. He set
25 aside this area and said, in this area we're going to stay out
of it. The courts are not going to enforce legal rights. He had
already reviewed all of the applicable law and determined that
that had no effect on the Indian right to the land. And what he
came up with is what is now called, in modern-day terms, the
political question doctrine. He said that this kind of issue
is not going to be decided by the courts. We're going to leave
that to Congress and the executive branch, and that line of think-
ing has gone on ever since so that the courts have not interfered



1 when Congress has exercised this extraordinary power to do as it
2 wished with Indian resources, to extinguish Indian title without
due process and so on.

3 Well, that contributed very much to this legal vacuum.
4 Now the courts were out of the picture almost entirely when it
5 came to governing or putting restrictions on what Congress does
6 to Native peoples. We finally got to the point that, in the
7 Teaton case in 1955, the supreme court, in a really mixed up
8 decision, said, as we know, that Congress can extinguish Indian
land rights without due process or compensation.

9 The idea of trusteeship was gradually substituted for
10 the legal rights that were now missing. The concept which grew
11 out of practically nothing that the United States was somehow
12 the trustee for Indian peoples and Native peoples came to be a
13 surrogate for or a substitute for actual enforceable legal rights.
14 It was said that... it was underlying title that the United
15 States had claimed to have. And you have to bear in mind it was
16 nothing more than a claim. I mean, the United States never
17 acquired any land rights as against Indians by any tenet of
18 international law. When the United States claims the Pine Ridge
19 Reservation, claims to own the underlying title, they didn't
20 acquire it through any legal means at all. There's no legal
21 doctrine whatever that gave them that title. They simply claimed
22 to have it... just made the bare assertion, and the courts have
23 never interefered, and so the United States is said to have trust
24 title to practically all Indian land, including land up here
25 as I understand it.

26 Sure... Yeah, and would you please? I've talked too
27 long already. I have more to say but I'd rather discuss.

28 MR. BERGER: Russell Jim?

29 MR. JIM: Thank you, Tim. The
30 question I have is in regard to the Boldt decision, and some
31 feel... I have been advised at some time, one point or another



1 and in reference to your... in your reference to the court system
2 not interfering, someone of my learned friends has said the foot-
3 notes of the Boldt decision by the supreme court suggests to the
4 legislative body how to circumvent some of the aborigines' rights
5 and titles, especially in regard to the fishing rights. Would
6 you comment on that?

6 MR. COULTER: I sure would. The
7 trouble with all of these cases where there seem to be Indian
8 victories is that they cannot, as a rule... there's some exceptions,
9 but they cannot, in general, survive adverse congressional action.
10 Just... what, two weeks ago, the supreme court in the... I believe
11 it's called the Walton case, involving the... the Cheyenne River
12 Reservation, the question was whether a certain act of Congress
13 had diminished the Cheyenne River Sioux Reservation. That is,
14 made it smaller, made it no longer part of the reservation, taken
15 it out of Indian jurisdiction. Congress... I mean, the supreme
16 court, fortunately, decided that the reservation had not been
17 diminished because it was not Congress' intent to do so. Con-
18 gress had not meant to make that reservation smaller and so
19 Indian jurisdiction still existed in that part of the reservation,
20 the supreme court decided. But there's a footnote in that
21 decision that is really very chilling, and the footnote says
22 that Congress most certainly could do that if it wanted to, that
23 the case of Lone Wolf versus Hitchcock makes it clear that, if
24 the Congress chooses to abrogate a treaty, if Congress chooses
25 to do away with Indian jurisdiction over a particular area of
land, or even over all land, Congress can do so without Indian
consent. Now, this is a decision came down... what, two weeks
ago, saying that Congress enjoys essentially unfettered power
to unilaterally do away with Indian jurisdiction over land set
aside in a treaty as a reservation, and that doctrine, this
idea that Congress can change treaties, that Congress can uni-
laterally, at its whim, invade Indian rights, do away with them



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(TAPE 25, SIDE B)

MR. COULTER: -- completely, is devastating. It's in Martinez, as well, for no reason that I could see. Justice Marshall, writing in Martinez, went out of his way... It wasn't even relevant in the case but he went out of his way in there to say Congress could, of course, terminate these Indian governments if they want to and do away with them altogether. Just like that. That's the supreme court just a few years ago in Martinez. They seem to be very fond of reaffirming this limitless power to just do away with Indian rights.

And so, you see, you can get decisions like the Boldt decision, that are decisions to enforce a treaty that is recognized and acknowledged by the United States government, but if the United States government chooses to change that, end it, do away with it... there are very few limits on that power. There's very little that can be done to stop that. Under the existing law, under the Lone Wolf doctrine, Congress can even abrogate a treaty at will without compensation, without restriction. Everybody is trying to put an end to that. I mean, we're trying to make it so that can't happen. We're trying to make little in-roads so there will be some limits on what Congress can do and there've been little gains made. In Delaware versus Weeks, the supreme court says, "Well, we will... we will take a look at acts of Congress and we will consider whether or not it's within Congress' power," but all they said was, "We're going to look and see if this is consistent with Congress' unique obligation to Indians." What's that? Believe me, I wouldn't... I mean, I don't care to have my rights hanging on that kind of a thread where we're talking about the existence of Indian governments, the right of the Yakima Nation to exist, the rights like the fishing rights, land rights, governmental rights of all sorts.

A much longer answer than you probably had in mind, but such a good point.



1 MR. JIM: Oh, yeah, I appreciate
2 this and I think the... one of the points being is that the judicial
3 system seems to be acting in a legislative manner as far as human
4 rights go that is morally wrong.

5 If I may at this point refer back to the plenary power
6 of Congress and the term competency, it is a vicious cycle that
7 we are into when they determine that I am incompetent and so,
8 therefore, can remain a ward of the government. But as soon as
9 I become competent, then I should have my land put into fee simple
10 and assimilate into the mainstream of society and become a tax-
11 payer. Every five years, the superintendent of a tribe must
12 ask the Secretary of the Interior to renew a treaty, continue on
13 with a treaty of a tribe, and just this last year, Secretary of
14 the Interior approved that the Yakima can remain a treaty tribe
15 and remain a recognized tribe for another five years, which is
16 scary. But the instance I can use on the Yakima was an individual
17 inherited 40 acres from some relatives. He was an enrolled
18 Yakima. The land, at one time or another, was put into fee
19 simple but then returned back to trust with the purchase of it
20 by him and the IRS came and said, "Now you must be taxed, and
21 also, this land was not meant initially for cattle-raising but you
22 are putting cattle on there now and so we can tax the land and
23 the cattle." We had to go to court and declare that he was
24 incompetent, he was an incompetent person and, therefore, a
25 ward of the government and so the IRS had to back away, eventually,
to make a story short.

Now, this vicious cycle that we are in, as long as I
am incompetent... but this term that they have, incompetency,
ward of the government, can be utilized along with the plenary
power of Congress every five years, that they can turn you loose...
as you say, extinguish your rights.

MR. COULTER: Well, what you
really mean is that... is that you must continue to insist that



1 you're incompetent because your only choice is that otherwise
2 they're going to come and tax your land, otherwise they're going
3 to turn loose the state on you, the jurisdiction will change and
4 so on. I mean, it's a terrible choice and you --

MR. JIM: They speak as --

5 MR. COULTER: -- That's what
6 I mean that trusteeship is substituted for real rights. Why
7 isn't it understood that you and other Indian nations and people
8 have a right to be free from taxation, particularly where you have
9 treaty agreements? Why isn't it understood that you have a right
10 to govern your affairs without state and federal interference?
11 I mean, those would be real rights, they appear to be rights in
12 the treaties, but yet you have to buy into this whole insane
13 trusteeship and go around declaring yourself to be incompetent
14 as though you were a lunatic in order to protect what should be
15 real, enforceable rights.

16 The same thing's starting up here now. You get this
17 same business. I mean, how on earth did the United States ever
18 get any right to do anything with Native land up here? Did they
19 get it from the Russians? Heck no, the Russians didn't have it.
20 The old doctrine of international law is in latin "namo dot quod
21 non hobit" and the only reason for giving you that is to show
22 how old it is. It means nobody can give what they don't have.
23 The Russians didn't have any right or title to this land, and
24 so they couldn't give any of it to the United States. In fact,
25 they didn't even pretend to. The United States just arrogantly
claimed to have it. It was a simple assumption of a right that
didn't exist, of a power that didn't exist.

MR. JIM: They were supposed to
have bought it back from the Russians for 7.2 million dollars?

MR. COULTER: Well, at most,
the United States got whatever Russia had, okay? Right? At
most, maybe they didn't even have that. I'm not sure I'm willing



1 to concede that, but at most, the United States acquired only
2 what Russia had and to then... assume that somehow the United
3 States owns the underlying title to land that they'd never lived
4 on... they'd never conquered anybody, they didn't discover it,
5 they didn't buy it, nobody ever gave it to them, sold it to them,
6 anything of the sort, is outlandish. And the only reason that
7 exists is because of what I was describing, this lawlessness,
8 this legal vacuum where people have forgotten that originally
9 international law was to govern those relations. Once interna-
10 tional law was out of the picture, the United States did as it
11 wished. And it's not legal. I mean, there's no reason to buy
12 into this... I think it's only fair to call it lawlessness. You
13 buy into an essentially lawless system.

14 MR. JIM: Perhaps the assump-
15 tion comes from the assistance given by the Russians back when
16 the United States was fighting the British. Then, I guess, there
17 was a right of way for a telegraph... telegraph line or something
18 here that the Russians had, so...

19 Thank you for your...

20 MR. BERGER: Tim, just before
21 you carry on... Did you want to ask something, Kim Gottschalk?

22 MR. GOTTSCHALK: Yes, I would
23 like to address a question to Mr. Coulter. But first of all,
24 I'd just like to, for a point of clarification, the recent case
25 that came down that he was talking about is Solom versus Bartlett,
and not Walton, the supreme court case.

You made the comment that no useful resolution is going
to come about of the problems under ANCSA unless the proper legal
circumstances exist and that will not happen as long as it is
conceded that Congress, basically, has plenary power. I appre-
ciate the comments you're making and I think they're very
interesting and stimulating. Nevertheless, as an attorney, I
find that you must deal with the real world. The real world is



1 that there's a deadline of 1991. I think if there's any safe
2 assumption, it is that there is not going to be a wholesale
3 change in the view, the legal view, of Congress' power over
4 Indian affairs by 1991. Where does that leave the people who
5 are under ANCSA? You're saying there just isn't going to be a
6 resolution until that is changed. I'm saying that, in my opinion,
7 the underlying legal rationale is not going to change by 1991.
8 There will not be a decision from the supreme court by 1991 that
9 Congress no longer has plenary power and cannot do what it has
10 done for the history of this country. Given that reality, what
11 is your suggestion for a resolution? And I might also point out,
12 I know you're displeased with the trustee relationship. I think
13 it's a mixed bag, there's no doubt about that. There are
14 definitely some bad points about it. However, as I see it, it
15 has been used historically as a vehicle for precisely many of
16 the problems that are presently faced by the Alaska Natives
17 under ANCSA, namely protection from state taxation, protection
18 from alienation of their land. So if what you're going to do is
19 throw out all the legal doctrines of the past that have accomplished
20 the good purposes as well as brought the bad along with it, what
21 do you propose to take its place and how is this going to be put
22 in place in time to stave off whatever is potentially going to
23 happen in 1991?

19 MR. COULTER: Well, first of
20 all, I don't accept your idea of reality. You're just asking me
21 to cave in and accept what Congress has done and the very thing
22 I'm saying is that I don't accept it, I don't accept it in regard
23 to the clients that I have and I don't think Alaska Natives are
24 going to accept it. That's the kind of practicality that I think
25 has lead us to where we are.

24 MR. GOTTSCHALK: No, you're
25 misinterpreting my question. My question is not that you might
not have a totally legitimate point that all this should be



1 fought, the idea of plenary power, et cetera, et cetera. I'm not
2 contesting that in the least. I'm saying I'm making a prediction
3 based on my past experience that in the next seven years that
4 will not come about. Okay? I think it's something that maybe
5 should be argued for and maybe in the long run will succeed.
6 That remains to be seen. I think people here are faced with a
7 practical deadline. That is the point of practicality I'm
8 talking about, not the practicality of ultimately putting the
9 whole idea of Indian relations with the federal government on a
10 sounder basis. I put that to one side.

11 MR. COULTER: Well, I don't
12 think you have to solve all of these legal problems in order to
13 get anywhere. I didn't say that. What I'm trying to suggest
14 is not that this whole body of law has to be changed by 1991.
15 What I am suggesting is that an ultimate resolution is not likely
16 to occur until that is done. Between now and 1991, people should
17 do what they can. But I'm trying to suggest I think that it's
18 foolish to try to do something practical, to use your words, with-
19 out doing something to get at the underlying problem. If we're
20 practical between now and 1991 and do not look at the underlying
21 problem, there won't be anything useful accomplished. The next
22 generation... you know, the children of these people here, are
23 going to be doing the same thing over again and will have an
24 ongoing claim. You've got to come... I think people have got to
25 get at the underlying problem. The underlying problem is not
that bill, it's not that act, it's not ANCSA. The underlying
problem is the... is the so-called, or is the supposedly legal
relationship between the United States and Native people. That's
what needs to be changed and if it takes until the year 2000 or
the year 3000, I don't care. I think it has to be changed. It
probably will be changed and I'm not near as pessimistic as you.
There's been tremendous progress in changing these doctrines just
in the past couple of years.



1 MR. GOTTSCHALK: Okay, well...
2 If you're saying it might come about in the year 3000, I would
3 characterize that as modestly pessimistic.

(LAUGHTER)

4 MR. GOTTSCHALK: So, maybe to
5 avoid any --

6 MR. COULTER: I'm just saying
7 it doesn't matter how long it takes. If it's the right thing
8 to do, then that's what I would suggest working toward.

9 MR. GOTTSCHALK: I certainly
10 agree that you work towards whatever is the right thing to do,
11 no matter how long it takes. I disagree with the proposition
12 that things don't become more difficult as circumstances change.
13 If nothing is done by 1991 and if stocks become alienable and
14 76 percent of Native stock is held by non-Indians five years after
15 that point, you've created a situation which makes an ultimate
16 resolution even more difficult. So I guess maybe the best way
17 to put my question to you is, let's agree with you that you work
18 for the long-term situation, whether it comes about as you said
19 by the year 2000 or the year 3000... My question to you is, given
20 the fact that you don't like the underlying assumptions, never-
21 theless, what do you specifically do to meet the specific
22 problems of ANCSA by 1991?

23 MR. COULTER: Yeah... I mean...
24 Let's be very clear. I never said don't do anything. I mean,
25 those are only your words. I mean, this idea that I have to
either accept my views and change everything by 1991, you must
not have been listening.

MR. GOTTSCHALK: No, I didn't
say that. I didn't --

MR. COULTER: Yes, you did.

MR. GOTTSCHALK: -- say that you
said don't do anything. I said, what are you suggesting? What



1 do you want to --

2 MR. COULTER: Well, I just want --

3 MR. GOTTSCHALK: -- do? I'm
4 asking.

5 MR. COULTER: -- it to be clear
6 that you're not putting words in my mouth.

7 MR. BERGER: Excuse me, Tim.
8 I think that that question has now been stated sufficiently and
9 if you want to deal with it in the course of your presentation,
10 I think we'll leave that to you.

11 Just before you go on, Tim, might I just ask Ralph
12 Johnson to pick up a loose end here. Russell Jim asked about the
13 footnotes in the... I think he said the supreme court's decision
14 in the Boldt case and did they suggest it was possible, using
15 congressional plenary power, to nullify the Boldt case?

16 MR. JOHNSON: Yes, that's true.
17 That is in the footnote. It's also... It's simply another
18 expression of what Tim Coulter is talking about concerning the
19 plenary power of Congress. I'd like to come back to a couple of
20 practical factors, though, that are involved in the Boldt decision
21 which make it extremely unlikely that such an action would occur
22 in the real world. And that is that, one, by the judicial
23 decision providing the Indians with one-half, 50 percent, of the
24 harvestable catch of salmon in the Washington waters, the courts
25 put a quantity to the amount of fish that the Indians were
entitled to so if Congress tried to waive that treaty right,
they now have to deal with a dollar quantity, a value which
economists can determine what that's worth. That's terribly
expensive and Congress probably, in any political sense, is not
going to do that because that would only benefit a few, four
or five thousand commercial fishermen in the state of Washington,
primarily, and some sportsmen. It would not benefit the United
States generally, so that politically it is not a very attractive



1 thing for Congress to do to appropriate hundreds and hundreds of
2 millions of dollars to buy out the Indians' fishing rights.
3 Before the Boldt decision, they could have done so probably
4 without paying the Indians at least very much because the Indians'
right had not been quantified.

5 The other aspect of it is that, while the Indian
6 fishing rights controversy preoccupies the commercial and sports
7 fishermen, more the sports... steelheaders in the state of
8 Washington, than it should, it is a local question and Congress
9 has indicated many times it's not really very interested in the
10 ... the fishing interests of the steelheaders of the state of
11 Washington. Our local Congress people are very concerned about
12 that but Congress is concerned about a lot of other things, and
13 so I suspect that in the real political world, that Congress will
14 not exercise its plenary power. I'm not being optimistic about
it, I think that's being quite realistic... that they will not
exercise their plenary power to change the result of the Boldt
decision.

15 MR. BERGER: Tim, before you
16 carry on, I might say that, as you've been talking, I've written
17 down a number of questions and I think David Case and Ralph
18 Johnson and others have done so and we'll return to those later.
I think you're provoking --

19 MR. COULTER: Kim's question
was a good one and --

20 MR. BERGER: It was --

21 MR. COULTER: -- if voices are
22 raised, it's only with enthusiasm and with no lack of respect.
23 I... His question is so good that I did just want to make clear
what, exactly, we were talking about.

24 The question of what to do between now and 1991 is
25 really not mine to answer so I don't want to be too presumptive
but there are some suggestions that I would make, suggestions like



1 this. I didn't really mean to go this far, but since I'm asked,
2 one approach would be to not attack the existing... This is not
3 my suggestion, this is the alternative I reject... One alterna-
4 tive would be to simply sidestep, disregard, don't worry about
5 these basic legal problems and just go back to Congress and try
6 to get some amendments passed, go back to Congress with hat in
7 hand and say, "We didn't get a good enough deal. We wish that
8 Congress, in its sovereign benevolence, would do something nicer
9 for us than what it just did."

10 It seems to me that that's not likely to be very good in
11 the long run because the next generation... and it might even be
12 the same generation one or two years later, is going to say,
13 "That wasn't right either because we never had the chance, we never
14 had the opportunity to assert and get for our own Native people
15 what properly belonged to us," and they're going to say, "We
16 were denied our basic, fundamental rights. We were only permitted
17 to go to Congress and ask for another handout," and that will
18 never be seen as just. I think, instead, a more viable alternative
19 is to establish what does, indeed, rightfully, justfully, morally
20 belong to Alaskan Native peoples and insist upon that as a
21 matter of right, not simply as something that Congress in its
22 whim or Congress in its sovereign graciousness will grant the
23 Native peoples.

24 You have to do what you can between now and 1991 to
25 avoid bad consequences of the law as it now stands, but I think
a strategy of going to Congress and whining for a better handout
is not likely to result in the better kind of resolution. Better,
I think, to come to grips with the underlying problem and try
to demand a change in the basic legal relationship. Not to say
there shouldn't be interim accommodations to do something between
now and 1991 to stave off the worse consequences. But don't, in
the course of doing that, buy into the continuation of what is
fundamentally a lawless and unfair and unjust system.



1 I think to go beyond that is a little silly. I'm not
2 an expert on ANCSA. I'm certainly not an Alaskan Native. That's
3 what the people here need to decide, exactly what they want to do
4 and not for me, really. Did I get at what you were asking about?

5 MR. BERGER: Carry on from
6 where you were when Russell Jim asked his question.

7 MR. COULTER: Well, I was really
8 ... I was really very close... I mean, the questions... As
9 usual, the questions were right on point and I've pretty well
10 brought out the other things that I had meant to say. But I
11 can't help but conclude by making a few more remarks.

12 The observation that has occurred to me, and Ada Deer
13 has reminded me of it, the Black Hills case reminded me of it,
14 and that is this, that ultimately the law does not define and
15 determine what Native rights are. It seems, in the long run, just
16 the other way around. I mean, if Ada Deer had ever believed that
17 the law defined and limited what the right of the Menominee people
18 was, there would never have been a restoration act. Quite the
19 contrary. It was the just, moral, ethical claim of the Menominee
20 people which came from the people, up from the bottom, and the
21 law changed. And I have been tremendously excited by this com-
22 mission and by the whole... well, movement of Alaska Native people
23 to review ANCSA because it seems to be just exactly that sort of
24 thing, coming from the village level up. It is of immense
25 proportions and the prospect that Native people can, by asserting
their proper, just, moral, natural rights, that I think the
Alaska Native people can change the law. You will define what
the law is, you will eventually define what your rights are, and
you will define what the law is and not the other way around.
And so, Alaska Native people are going to find themselves, I
think, in a leadership position in changing the law that affects
Indian people, Native people in the Lower 48 and, in fact,
throughout the Americas. This same problem, as has been mentioned,



1 exists in Mexico, Guatemala, Nicaragua, everywhere right on down
2 the way and the U.N. working group on indigenous populations is
3 going to be considering this very subject this summer in August.
4 They've set aside their annual session this August to look at
5 land rights. And, of course, the key issue is do these dominant
6 governments, do the colonizing settler regimes, if you will,
7 actually have the right to take and dispose of and govern indigenous
8 people's land rights where there's been no free cession, no
9 consented arrangement? That's the issue. It's an international,
10 in fact worldwide issue, and I see nothing as exciting as this
11 development here that's going to make that issue a real one and
12 that shows real prospect for making some fantastic progress on
13 these things.

14 So I'm very excited, very pleased, to see all of this
15 and, truthfully, very optimistic.

16 MR. BERGER: I wonder, just
17 before... Might I, as chairman, take advantage of that position
18 to ask a question that perhaps Joe, Joe Jorgensen, and others
19 might like to comment on. In Canada, we study the U.S. history
20 of the U.S. constitution and, of course, our notions of Native
21 rights in Canada, as they are discussed in the courts, are,
22 to a great extent, derived from the thesis propounded by Chief
23 Justice John Marshall, and Johnson and MacIntosh and Worster
24 versus Georgia and so on. But Tim said something that I thought
25 was... that hadn't occurred to me. He said that in the U.S.
constitution you set out the position of the federal government,
the relation of the citizens of the U.S. to the federal government,
you set out the position of the governments of the states, you
set out the position of citizens in relation to the state govern-
ments, but you did not include the Native governments in the
constitution. No reference is made to them, there is simply a
disposition of jurisdiction over Indians in the commerce clause.
Nothing further was said, and Tim left a clear implication that

1 that was an historic and... omission who's implications are still
2 with us. I think he left... he indicated that Native governments
3 preceded any others and certainly along with governments of the
4 states and of the... even the tenuous federal arrangements that
5 you had under the Articles of Confederation, you only had a federal
6 government, as such it was that pre-existed the constitution by
7 eight or nine years, whatever it was.

8 That's... I just wondered if you, Ralph Johnson or
9 David Case, or any of the others had any observations to make on
10 that?

11 David Case?

12 MR. CASE: Well, I think that's
13 essentially true. That's one of the things about Tim's remarks
14 that I identified with intellectually. I think that the United
15 States constitution basically ignores the status of Native
16 American people within the context of U.S. federalism, and it
17 sets up this... this one that's hard to believe that a clause,
18 a few words, can completely define the relationships of any two
19 peoples to each other. But what has, I think, happened is that
20 the U.S. supreme court has taken that clause and defined out a
21 relationship that is plagued by all of the disadvantages that
22 Tim and others have layed out here.

23 I guess my question, and I don't mean to change your
24 question, but is to Tim and others who have had some experience
25 with this, what, specifically... I mean, what sort of, without
revealing any tactical secrets, what kinds of approaches do you
envision as being viable to change that situation, the law, the
rights of Native American people?

MR. COULTER: Oh, there're a
lot of things. You see, in the Seminole case a few years ago,
I was representing one of the Seminole entities that had fought
to stop this fraudulent claim in the Indian Claims Commission
and we sued the Indian Claims Commission, saying that the claims

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1 commission was in violation of the Claims Commission Act and the
2 United States constitution because they were adjudicating title
3 to my clients' land, the actual homes that they were living in,
4 without due process, notice, opportunity to be heard or anything.
5 I was... my clients were thrown out of court by a three-judge
6 federal court that said, "I'm sorry but you Seminoles are Indians
7 and if the United States government wants to confiscate your
8 property without due process, notice, opportunity to be heard
9 or anything, they can jolly well do it. Case dismissed." all
10 the way to the supreme court. I tried to argue that, "Gee, I
11 thought the Fifth Amendment applied to everybody," and I argued
12 that the Teaton decision did not, in fact, establish that Congress
13 could take Indian land. I mean, there was only timber involved in
14 the Teaton case... made lots of arguments that, after all,
15 Indian people should have at least the same constitutional rights
16 that other people do, should have other rights as well, but at
17 least the same basic rights as others.

18 And at that time, and that was about 1979, there was
19 not one single law review article, and I mean not one, not even
20 a law review article that said that that was so or ought to be so.
21 There wasn't any judge's decision anywhere that said that Indian
22 property ought to be protected against theft by United States
23 action. There wasn't even a learned speech anywhere that suggested
24 that. We were standing up there in front of the judge, in fact
25 three judges in the D.C. circuit, and they were saying, "Well,
you know, Teaton said this. Why do you think you're right?"
"Well, we're just right, Your Honor." I couldn't point to anybody
that agreed with us and that was horrible.

And we backed off and said, "Well, we're going to get...
we're going to lay a foundation. We're going to get those law
review articles written. We're going to get people who'll stand
up with us, people who'll file friend of the court briefs. We're
going to get churches, we're going to get the bar associations,



1 we're going to get the community, we're going to get everybody
2 moving along with us. We're going to start talking to Congress,
3 maybe we can get a joint resolution out of Congress. Maybe we
4 can even get a committee report that suggests that possibly
5 Congress can't steal Indian lands." You know, it seemed so
6 outrageous that, at that time, this was just a few years ago,
7 there was absolutely nothing. A U.S. Congressional Reference
8 Service report absolutely concluded, in a technical study done
9 for the Senate Select Committee, that Congress did have the
10 absolute right to take Indian land without compensation. We wanted
11 to change that report so the next time they write that thing it
12 will come out the other way and say, "Well, maybe there's a
13 constitutional problem," and it's working. We now have... Oh,
14 I don't know, there's six or eight good law review articles
15 now that come out on our side, in just this short space of years.
16 There are resolutions by the major Indian organizations that take
17 the clear position. Now, that's self-serving, I grant you, but
18 a few years ago even that didn't exist. The lawyers were all
19 telling the Indian people that the trust responsibility was the
20 only thing they had to worry about, and just trust in the federal
21 government. Don't worry about any legal rights.

22 Well, now that's beginning to change and if we have to
23 go back to court again, and which I don't recommend because I think
24 Kim is right, the court's don't change overnight, especially this
25 supreme court. I don't expect them to rule in our favor any time
soon. In fact, I would do everything I could to keep these
cases out of court for the time being. In the meantime, we're
developing a body of thought, a body of learned, legal scholar-
ship that is going to support a better understanding next time.
And we did, we got a decision out of the Second Circuit... In
fact, the Native American Rights Fund was on the case in the
Oneida decision. That judge... Well, the judge that wrote the
decision wrote a whole different theory of Indian land title than



1 what's been coming down lately. He reverted back to the John
2 Marshall approach. He decided that discovery did not give the
3 United States title, only gave the United States to acquire the
4 land from the Indians if they could, and the decision cited a
5 law review article written by one of my staff lawyers.

6 These little things begin to add up. By the way, he
7 had written it before he was on my staff. It wasn't --

(LAUGHTER)

8 MR. COULTER: No, honestly, it
9 was not a setup, but... And he was not involved in that case,
10 either, so it was... It was just what it was supposed to be, a
11 scholarly article the court relied on and came out with a good
12 decision. And little by little, this stuff is going to add up.
13 And it begins to add up faster than you think. I mean, the Teaton
14 decision only came down in 1955. It didn't really exist before
15 that, the supreme court made it up.

16 So this is what we need. I mean, now suppose this
17 commission concluded that those legal doctrines were wrong and
18 included that in its report. That would be another blow against
19 the empire, and so it will be. I mean, everybody, everywhere,
20 has to work against these things and we'll win. And I think
21 that's how. There will be no great slaying of the dragon. I
22 don't expect to see anybody arguing that decision in the supreme
23 court. I think it will probably wither away, rot away, before
24 the supreme court ever decides to overthrow it.

25 A few years ago, again, we all worked together, Native
American Rights Fund, lots of other lawyers, too, to beat that
Eastern Indian Land Claims Settlement Bill which would have
extinguished Indian land claims, again without due process, fair
market compensation. For the first time, we all came out and
said, "That would be unconstitutional. Shouldn't do that," and
we won. It died in the committee and Barry Goldwater and Senator
Cohen from Maine were up there saying, "I think there's serious



1 constitutional problems about this," and just two years before,
2 they were all gung-ho exactly the other way, saying there was
no constitutional problem of doing that.

3 So that's how I think it'll happen.

4 MR. BERGER: Just... Could I
5 utter a thought because I think we're going to be discussing what
6 Tim has said for some time and when we come to Ralph Lerner, which
7 may not be for some time, perhaps I could ask him to reflect on
8 something that occurred to me while Tim was speaking. That is,
9 in North America, this is so in Canada as well as the United
10 States, I think it's so in Western Europe, a philosophy known as
11 conservatism, I'm not altogether certain that that's what it is
12 but it's certainly widely discussed in academic journals and is
13 said to prevail in the counsels of the president and others,
14 and one of its tenets, as I understand it, and this may be really
15 philosophical, small L liberalism from another century, but one
16 of its tenets is that the powers of government should be limited
17 and Mr. Lerner might, perhaps when we reach him, be able to
18 indicate whether or not that affords a philosophical foundation
19 among others for what Tim has been telling us this morning when
20 he has urged that the illegitimacy of the foundations for the
21 claim by Congress that it has the power to take Indian land
without compensation... I should think that, from the point of
view of philosophical conservatism, that would be a primary
limitation on the powers of any government. That is, it should
not have the power to take a citizen's property or the property
of a distinct people within the state. It should not have the
power to take their property without compensation.

22 David, you had a question and then Joe Jorgensen
23 because I had cut Joe off earlier.

24 MR. CASE: Well, briefly, we've
25 heard in other forums, actually, discussions of the utility of
international forums as mechanisms to pursue these kinds of changes

1 and in Canada there has been recently a constitutional reform of
2 some sort that remains to be seen how effective that is.

3 Can you comment on the likelihood, availability, of
4 international or constitutional reforms with respect to changing
5 the kinds of legal doctrines that you mentioned?

6 MR. COULTER: Well, I think it
7 can be useful. You take the, by comparison, the effort to over-
8 come the doctrine of legal racial segregation, the doctrine that
9 it was all right to have segregated schools and segregated public
10 facilities. Well, when blacks set out on their long, long legal
11 struggle to get rid of the separate but equal doctrine, one of
12 the things they did was go to the United Nations with a petition
13 saying that the racial segregation that existed in the United
14 States was a violation of their fundamental human rights, which
15 it most certainly was. And, you know, that was not some group
16 of crazies, that was the NAACP that went to the U.N. with that
17 petition and it was just part... And you have to understand, it
18 was just part of an overall effort to change an unjust legal
19 doctrine.

20 It gets public attention, it gets world attention, it
21 causes government officials and citizens of other countries to
22 focus their attention on the United States. They write letters,
23 they ask questions, chat about it over cocktails with the U.S.
24 ambassador, the U.N. ambassador writes back... I mean, the U.S.
25 ambassador writes back and says, "How am I going to answer these
people," and the correspondence is available under the Freedom of
Information Act. The State Department then has to compose
replies and they have to ask the Interior Department, "By the
way, do we take Indian land without due process?" Of course,
the answer is yes and they have to come up with some explanation
for that.

The overall process is very healthy because the State
Department, for one thing, is a lot smarter than the Interior



1 Department, and they have a whole lot more pride. They hate to
2 have to answer that this is true.

3 We did manage to get the U.S. government's response to
4 our human rights complaint. We did raise these issues in the
5 U.N. Human Rights Commission and the U.S. had to answer and, of
6 course, it's very difficult to say that a supreme court decision
7 doesn't exist, so they did. They had to admit, "Yes, our law
8 does provide that the federal government can take Indian land
9 without due process," and they just said, "Well, but we don't
10 do it much." You know, it was that kind of thing.

11 I think that's extremely healthy. I mean, we need to
12 answer back now that, "Oh, yes you do. How about ANCSA?" You
13 know, there's a nice example. But, of course, I can't say that.
14 I mean, it would have to be... If anybody's going to say something
15 like that it should be Alaska Native people.

16 So, to... I need to stop giving such long answers but
17 it's part of an overall strategy. It tends to develop political,
18 international, moral support and that's always essential when
19 you're trying to build a movement, when you're trying to make
20 change. And we get a lot more understanding, frankly, elsewhere
21 than we do in U.S. official circles. And I don't mean... There
22 are people out there who would like to manipulate these
23 questions and use them for purely political purposes to embarrass
24 the United States. You have to watch that, you know. You don't
25 want to get too involved with that kind of silly politics but
that is... that is not the name of the game and pressing these
issues as human rights issues can be very important.

I mean, let's face it. The law of the United States is
racially discriminatory. A certain race of people is denied basic
rights that everyone else has. Now, that's just bare-faced in
violation of basic international human rights law and we can take
advantage of that to say, "Well, let's change it. The United
States should change its law and deal more fairly with Native



1 peoples." And once again, this is the best case going. I mean,
2 by a long shot, by a hundred or a thousand times, this is the best
3 and strongest case there is to dramatize that issue.

MR. BERGER: ANCSA.

MR. COULTER: ANCSA is, right.

MR. BERGER: Well, can we
4 turn back to one of the best cases going, David Case, and David,
5 could I ask you... just before we get --
6

MR. CASE: I deny the character-
7 ization.
8

(LAUGHTER)

MR. BERGER: I see, well, Tim
9 disagreed with what he understood was Joe Jorgensen's characteriza-
10 tion of Johnson and MacIntosh, Chief Justice Marshall's rationale
11 and do you have... without suggesting Joe was in a particular
12 corner and Tim in another, but do you agree that Tim has fairly
13 characterized Chief Justice Marshall's rationale for working
14 through to the conclusion he did in that case?

MR. JORGENSEN: Well, I'm not
15 sure if Tim has contradicted himself in what he just said about
16 Justice Marshall and sort of getting back to being successful
17 and getting back to Marshall's characterization of Native property
18 rights and I think it's probably there's an ambiguity, really, in
19 that decision as to exactly what Marshall meant. There's...
20 You know, there's language in the decision that says... that
21 alludes to conquest as a source of... of rights upon which, once
22 they descend, the people upon which they descend are... cannot
23 controvert those rights. And I guess I tend to agree with Tim's
24 earlier characterization of the Marshall decision, and that is --

(TAPE 26, SIDE A)

MR. JORGENSEN: -- that it does
24 not grant or affirm, as a matter of domestic United States law,
25 any title, any property... complete property interest in aboriginal



1 lands in the United States, but it sets up a kind of a divided
2 property interest, if you will, or contingent interest that
3 the United States has in Indian property and it is simply the
4 right to acquire Native lands, presumably with the consent of
5 the Native people. And that, of course, is the doctrine.

6 Well, the consent by purchase, a just war... which,
7 those are very difficult to define, or abandonment --

8 MR. BERGER: (INDISCERNIBLE)
9 define them, don't they?

10 MR. JORGENSEN: Yeah, that's
11 the problem. So I think that that's the Marshall... what my
12 understanding of Marshall's doctrine is just that, that it does
13 not establish as a matter of domestic law a absolute right to
14 land that permits the United States to take it or have already
15 taken it simply because these adverturers of Europe landed on the
16 shore, and Marshall rejects that doctrine that discovery gave
17 complete title to the discoverer.

18 One more point, interestingly enough that doctrine that
19 Marshall rejected is the very doctrine that is applied in Australia
20 and Australian aboriginals, because of the domestic law in Aus-
21 tralia, coming from the British Empire without a revolution to
22 intervene, denies Native property at all. There is no aboriginal
23 title in Australia at this point in time and...

24 I'm rambling here, but I want to get back... One point,
25 I guess, I want to make and that is that I have often wondered if
26 we in the United States are not at sort of at the end of the
27 development of these doctrines of Indian law and I, too, am
28 beginning to question how... maybe I'm beginning to question
29 whereas Tim has already gone past that point... how useful these
30 doctrines are when it comes to advocating Native positions because
31 we're beginning to see constitutional reforms in places like
32 Canada and Australia that seem to... they're very nascent beginning
33 we don't really know how far they're going to go. But they seem



1 to offer broader vistas and a more fair adjustment of relationships
2 between peoples and... than do the domestic doctrines of Indian
law in the United States.

3 Well, I'm not sure if I've answered your question or
4 just really used it.

5 MR. BERGER: Just before we come
6 back to Joe, could I ask Ralph Johnson, do you want to comment
on the Chief Justice Marshall --

7 MR. JOHNSON: No, I can't im-
8 prove upon David Case's and Tim Coulter's analysis. One point
9 to make is that that case was designed to protect Indians, in a
10 sense, from the encroachment by non-Indian hucksters and charla-
11 tans who were trying to get at Indians lands. So, in a sense,
at that point it was a protective device.

12 I'd like to speak to a larger question, really. That is,
13 it seems to me that the underlying perception that Tito Naranjo
14 has spoken to, Tim Coulter and many others, is that we are not
15 approaching a final solution for the Indians, and that is the
16 final solution being the assimilation and disappearance of
17 Indians and that, if you want to characterize the problem in the
18 United States with regard to constitutional policy, legal policy,
19 whatever, is the underlying assumption, and that is the Indian
20 problem will go away because Indians will disappear. They won't
21 disappear. We hope to God they don't, as other groups will not
22 disappear. We should have, we ought to have, we will have a
23 society that accommodates many diverse cultures and viewpoints.
24 When that assumption disappears, then we will begin to think about
25 constitutional doctrine that does what Tim Coulter is saying, it
lives on, it accommodates people's real interests, the Indians'
real interests, in continuing forever as long as they please to
continue. And it's that perception, it seems to me, that under-
lies the whole works and should be... I couldn't do any more than
just heartily endorse Tim Coulter's position and Tim Gottschalk's.



1 Both of them have very strong validity and should be pursued.

2 MR. BERGER: Joe Jorgensen and
3 then Rosita Worl. Forgive me, I just thought we would exhaust
4 those things and then return to you.

5 MR. JORGENSEN: Well, it's
6 what I wanted to talk about, anyway.

7 Following the Menominee restoration act... It took a
8 few years, but in 1978, Congress decided that there should be
9 some means by which tribes that were not recognized, Indian people
10 who were not recognized, could be recognized. So it goes by a
11 number of names, status clarification, federal recognition,
12 federal acknowledgement and so forth, but monies were made avail-
13 able by Congress to the Bureau of Indian Affairs and Indian
14 peoples who wished to be recognized, hence be... come avail...
15 make available to them federal benefits, particularly such things
16 as the Self-determination Act, the Child Welfare Act and so forth,
17 were allowed to conduct research to demonstrate that they, in fact,
18 were Indians, that they were a tribe and they should be recognized
19 and should be considered for incorporation under the benefits
20 provided by the federal government.

21 One group, the Lower Muskogee Creek Indians of Georgia,
22 went through the process of doing research on itself and then
23 making a case to the Bureau of Indian Affairs that, in fact, that
24 they were a tribe. They'd been intact since well before 1830
25 and that they were due to be recognized as a tribe and to receive
benefits. The Bureau of Indian Affairs evaluated this case that
was made to them. They said, "First, you don't demonstrate your
genealogy. Second, you don't demonstrate that you're Indians.
Third, you don't demonstrate that you've been intact here for
the past 150 years and, finally, we're not going to acknowledge
you." And their reply was, "It was rather difficult for us to
demonstrate that we were Indians on any state rolls because it's
against the law in the state of Georgia, and was until the 1970s
or so, to identify yourself as an Indian." That came from the

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1 Indian Removal Act and from President Jackson's refusal to uphold
2 the decisions made in the Cherokee cases.

3 So the response... The question that was posed to the
4 Lower Muskogee Creek was, "What are you going to do?" They said,
5 "Well, look. We're Indians, we're a tribe, we've been here for
6 hundreds of years, we intend to stay here and no decision they
7 make in any way will influence our religious practices, it won't
8 in any way influence the way in which we conduct ourselves as a
9 tribe, and it won't in any way influence how we view ourselves
10 towards others and other tribes with which we participate." The
11 point is only this, that it's not going to go away, the idea of
12 a tribe, the idea that people who have lived together and share
13 things in common together will continue together. They're there
14 and they'll be there, that these people, too, who've now been
15 working through the federal acknowledgement process, and there
16 are many, there have been seven or eight tribes that have been
17 recognized in the past five or six years... will become part of
18 I think a movement that has already begun to not only recognize
19 them as tribes but, of course, to get land back for them.

20 So, ANCSA is... The worries about ANCSA and movements
21 to do something about it can, perhaps, join with a much, much
22 larger movement throughout all of North America that has these
23 very serious constitutional implications.

24 Finally, the last point is that... I hate to say it
25 but I don't think we're in disagreement about the impaired rights
that are defined by... by Justice Marshall. When I read the case,
it was clear that he wasn't going to take on land already patented
in fee. But he recognized there was a problem in those patents.
It was also very unclear as to what would be done with land
beyond the areas already occupied, or occupied by Indians, and
it was at a time, of course, when the United States was just
expanding and still didn't have much of the Southwest. It was
still not in its ownership so that a number of questions that have



1 been raised about Indian land rights... actually have been raised
2 since this decision was passed, of the impaired right, did look
3 to me as if the claim by the federal government is that only it
4 can purchase the land from Indians and they were protected in
5 their occupancy and use until such time as the government decided
6 to buy it.

6 MR. BERGER: Rosita Worl?

6 MRS. WORL: My question might
7 have been answered when I went outside to put money in my parking
8 meter. I guess the law goes on.

9 Just an anthropological observation and a footnote,
10 just from the discussion here between the lawyers it's really
11 easy to see why Indians see that their fate lies in the hands of
12 lawyers most often. The anthropological footnote is that the
13 Tlingits rejected the principle of discovery and, as a matter of
14 fact, the other thing that they did, and I think this is what
15 Tito has really pointed out, is that Indian people have utilized
16 Western institutions to protect themselves, and in the Tlingit
17 case, they... in rejecting the principle of discovery, still
18 went to Congress. They hired a lawyer. Okay, this is in 1867,
19 they hired a lawyer and they said through their lawyer, "If...
20 If anyone is going to purchase Alaska, then we or the Tlingits
21 or the Native people must be the ones who are going to sell,"
22 and so they said, "You have paid your seven million dollars to
23 the wrong people. It should be paid to the Native people,
24 themselves." Well, anyway, they weren't too successful but they
25 did make that effort.

21 But the thing that I want to point out is that Native
22 people have utilized Western institutions to protect themselves.
23 And, you know, I think Tito really demonstrated to us how they
24 can deal with Western institutions that come in.

25 I think that Native people are going to be caught up
in running back to Congress trying to protect themselves, you



1 know, in this 1991 issue. And so it might be that they will be
2 caught up with these smaller issues which are really not smaller
3 issues, you know, in terms of land alienation and the nonenroll-
4 ment of Native children into the tribes or corporations or what-
ever we may call them.

5 The question that I have is, you know, while I don't
6 think Native people are abandoning, you know, the larger ideas,
7 the ideals of justice, they are caught up in protecting themselves
8 and so most of the time it's in... they act in response to these
9 immediate concerns that they have, such as 1991. And I'm
10 intrigued, you know, by the idea. I guess I've also, as a
11 scientist, have accepted, you know, what's happened under the
12 principle of discovery but I'm intrigued with the idea that per-
13 haps that the United States didn't have... or, this lawlessness,
that the taking of land without any national principles. Just
the basic question I have is, who's doing anything about it right
now?

14 MR. COULTER: Oh, a lot of
15 people are doing things about it. That's really the basic thrust
16 of the Black Hills claim matter, the Shoshone matter, there are
17 lots of them that Joe Jorgensen mentioned. You see, I think
18 there's just a distinct difference between the position you're
19 in if you're asking for a better handout as compared to the posi-
20 tion you're in if you're saying that you, Alaska Native people,
21 have been treated fundamentally wrongly. Because in the latter
22 situation, you're demanding what is rightfully yours. In the
23 first situation, you're simply asking for something by grace,
24 and I think there's always a limit. People are just not willing
25 to listen to somebody coming around constantly asking for another
handout. It reminds you of the person on the street that you
see every day, always wants another quarter, and it's not a
demand made as of right, and it just seems unfortunate to me
that Native people in the Lower 48, all over, constantly find



1 themselves lead along, usually by lawyers, in a position of asking
2 for a handout rather than demanding what is rightfully theirs and,
3 in fact, ought to be lawfully theirs.

4 Fortunately, we're seeing more and more of the effort
5 to get back what's right. I mean, the Black Hills case is like
6 that. The Souix people are in a position of saying they have a
7 just and moral claims to the Hills, not simply asking for something
8 in addition to what Congress has already given us. And they're
9 being listened to because, of course, they're right. You're
10 right, and that matters, it really matters. And it's just a
11 shame not to exploit that and build on that. I mean, the
12 Menominees were right. They were doing it. They weren't...

13 I don't know if I'm getting at what you're saying or
14 what you're asking about, but that's a quick reaction, anyway.

15 MRS. WORL: I thought it was
16 just a lawyer's response. (LAUGHTER) No, I mean, I'm just...
17 I just wondered if there was anyone, any body, such as your
18 institution, your organization, that was, you know, really pur-
19 suing it in a methodical, in a well-defined --

20 MR. COULTER: Well, I mean, I
21 could brag about my office. I mean, we do that all the time.
22 You know, take the Hopi matter. We could be practical and admit
23 that, "Well, we're not going to get all that Hopi land back and
24 we might as well take the five million dollars," but the Hopis
25 don't seem to want to be practical. I mean, that land isn't
going anywhere and neither are the Hopis and they're just going
to sit it out and it just doesn't matter if it takes a hundred
years or 200 years, they're going to do it. We're trying to
help them manage that because they're in a position where, like
many others, they could be destroyed, you know, if they're not
terribly careful.

One of the things that wreck, that will permanently
destroy an otherwise just and powerful claim, and that is free,

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1 voluntary acceptance of some settlement. That is devastating.
2 If you honestly, freely, voluntarily accept a resolution of it,
3 very few people are going to let you come back a generation later
4 and reopen the books. In other words, consent will do it. The
5 claim won't go on forever if there really is consent to a settle-
6 ment and the terrible thing about, say, the Indian Claims Commis-
7 sion is this appearance that there may have been consent to

8 And, of course, that's the most potentially devastating
9 thing about ANCSA, the suggestion and the popular belief that
10 Native people here consented to it. Because that does, that will
11 put an end to the basic underlying moral claim. That's why I
12 asked Ada Deer to talk about that question in relation to the
13 Menominee restoration, because somebody had just thrown it to
14 me a week or so earlier that, well, the Menominees had consented.
15 Well, we found out they didn't.

16 So, yes. I mean, my office works with... Well, heavens,
17 the Western Shoshones, the Seminoles, Hopis, Souix, Six Nations
18 and more. But I don't mean by that to brag about it. There are
19 lots of lawyers and others out there working. But I think you're
20 wrong to put too much emphasis on organizations and lawyers be-
21 cause if it was up to the lawyers, you'd all be dead, really.
22 The lawyers have been guilty... Even Congress said a century
23 ago that they had to put a stop to the godless robbery, and that's
24 a quote, being practiced by lawyers on Indian people. It is just
25 awful. Very seldom do the Native people, themselves, make that
kind of gross mistake. The Souix were very explicit. They
wanted the Black Hills back and it was the lawyers that went in
and filed a claim for money, instead. It was not a mistake by
the Souix, they made no mistake at all. And so it goes. And
now I'm finding out that the same was true up here.

The Native people up here were not... did not do the



1 things that "Readers Digest" would have us believe as regard
2 voluntary acceptance of ANCSA.

3 I think the beauty of all this, and it wasn't lawyers
4 that pressed the Menominee restoration. So it goes. Most of
5 what's good about the survival of Indian people is what the
6 people do in spite of their lawyers, contrary to what their
7 lawyers might have lead them to do. The Western Shoshones have
8 done nothing if not struggle to overcome the perfidy of the
9 lawyers that have claimed to represent them. So... don't get
10 overwhelmed by this idea that lawyers have got to handle all this.
11 It isn't so. I mean, I can see from the nodding heads around here
12 that the people have known these fundamental things much more
13 clearly than the lawyers ever have. Lord, if we'd left the...
14 I mean, you see what the state of the law is. But the people
15 knew better.

16 MR. BERGER: Russell Jim and
17 then Kim Gottschalk.

18 MR. JIM: Thank you. I find
19 this very enlightening. I hope the next two comments doesn't
20 create any controversy, or perhaps it is not criticism, but it
21 surrounds the basic human rights, and this right that has tried
22 to be created by the indigenous people of the North American
23 continent and, perhaps, throughout the world. And a lot of it
24 seems to center around race. But were you to segregate bathrooms
25 in the United States and say, "Okay, this bathroom is for
Indians," you'd have many indigenous people saying, "Well, it's
about time."

And the other comment would be in regard to the Boldt
decision again, this reference to the court giving the tribes
50 percent of the fish. You have many Indians, many indigenous
people, specifically in the Pacific Northwest, that are saying,
"Mr. Boldt gave away 50 percent of our fish." Now, that has
large implications internationalwise and I'm hoping some of the



1 questions such as Rosita's, here, will be answered next week and
2 I'm sure Mr. Doug Sanders is competent to do so. And the World
3 Council of Indigenous People is one body of people that is working
4 towards the creation of indigenous rights, be they unconstitutional
5 in the United States of America or not. But it seems that the
6 United States of America insidiously has a policy of assimilation
7 of indigenous people throughout the world and I'm sure it's going
8 to be addressed next week and I'm glad to hear Mr. Coulter refer
9 to the international basis and concerns and I agree that this...
10 this forum, here, is a very important forum and I'm hoping my
11 contribution and all our contributions will be heard throughout
12 the world.

13 I thank you.

14 MR. BERGER: Thank you, Mr.

15 Jim. Kim Gottschalk?

16 MR. GOTTSCHALK: Yes, I just
17 wanted to reiterate a couple of statements that were made about
18 being careful of your attorneys. I don't think that can be
19 overemphasized and I think a little background on how the Indian
20 Claims Commission worked probably is enlightening.

21 Namely, as I understand it, the Indian Claims Commission
22 does not have authority to... or, did not have authority to
23 adjudicate questions of title. What would happen is, there were
24 arrangements in the statute for attorneys' fees to come out of
25 the settlements. To get an award, you had to show that some
Indian property rights had been taken and so there was an incentive
for the attorneys to look back over history and find actions that
constituted a taking, therefore giving the tribe a right to money
and the attorneys a right... a way of collecting their fees. And
so there was a built-in incentive in that act for attorneys to
find, in many cases, or to interpret historical facts contrary to
the best interests of their client. And I think whenever impor-
tant Indian issues are at issue, you have to be careful that what



1 possible interests your attorneys have and make sure that they're
2 both going in the same direction, because in many cases they're
3 finding, when you look back with a more objective view, that there
4 was nothing... For example, in the case of the Western Shoshones
5 there was no evidence that the United States had, in fact, taken
6 those rights.

7 And an interesting question is raised as to if, in fact,
8 nothing did happen to take those rights, does the fact that the
9 attorneys stipulated that something did happen to take those
10 rights constitute a taking by a forum that had no power to do it?
11 Maybe some of those claims still exist even after the claims were
12 paid.

13 But it is true, be careful of your lawyers and make sure
14 that they don't have an incentive to accomplish something that's
15 not in your own best interests.

16 MR. BERGER: Rosita Worl.

17 MRS. WORL: I didn't mean, first
18 of all, to put lawyers on defense, and also I would suggest that
19 Indian people have, you know, through their history, you know,
20 really have arrived at that state where we understand the impor-
21 tance of lawyers and their positions, and I think that's probably
22 why Indian people are sending a lot of their own people to law
23 school now.

24 MR. BERGER: Do you want to add
25 anything, Tim, before we move on?

MR. COULTER: No, I'm content.
I think people have made some marvelous observations.

MR. BERGER: Well, Rosita Worl,
you did want to add something.

MRS. WORL: Yes, I... I'm...
You know, I was thinking about this earlier and perhaps now I
can raise it as a question.

The... And I think, again, Tito's discussion really



1 brings it out, the differences between Indian law and Western
2 law. And again, this is how I understand it, not being a legal
3 theorist but being an anthropologist and understanding, at least,
4 Indian law and have made some attempt, at least, to look at
5 Western law and I don't know that that's been... the reverse has
6 been done where we have legal theorists looking at Indian law.

7 But, again, you know, I guess if there is a thread
8 that runs through all American Indian and Eskimo groups, there is
9 this recognition of this spiritual relationship between people
10 and animals, that animals and the earth have spirits. And so
11 Indian laws regulate that interrelationship that tells us, you
12 know, what they should do and what they can't do. But in Western
13 law, Western law does not seem to accept this kind of relation-
14 ship and Western law seems to regulate interaction between human
15 beings, between humans and property, and so for Indian people,
16 what they have done is to go to Western religions and, again,
17 the protection of freedom of religion, has protected themselves
18 in their religious beliefs in those domains.

19 But sometimes there's a restriction where Western
20 religion does not accept, you know, the religious... the relation-
21 ship between animals and human beings and... I mean, I think a
22 good example is the subsistence law, the state subsistence law
23 here in the state, which basically gives priority to subsistence
24 use whenever an allocation has to be made and a limit. Subsistence
25 use takes priority. So even though there are many instances in
which subsistence involves a religious activity, it was clear
that in the subsistence law, Native people couldn't include this
religion aspect in the regulations and I think the closest they
got to it was defining this religious relationship in the sub-
sistence law as customary and traditional taking. And maybe...
I mean, maybe I could get some of the lawyers here to comment on
just, you know, what they have observed in Western law and in,
you know, protecting that kind of relationship.



1 MR. BERGER: Tim Coulter?

2 MR. COULTER: Well, I'm afraid

3 I can't offer very much that's useful other than to point out
4 that Western legal concepts, both in terms of domestic law of
5 various nations and in terms of international law, just does a
6 terrible job of dealing with that relationship and protecting
7 those interests. It... I mean, you said it, it just does not
8 take into account those things. In fact, there's been some
9 exploration of that problem as a theological, metaphysical
10 matter in that somewhat famous Law Review article, "Should Trees
11 Have Standing?" He's really wrong about that. It's not a ques-
12 tion of whether trees should have standing to bring a lawsuit.
13 The question is whether the trees and... you know, it's just a
14 manner of speaking. What he meant was, should the animals...
15 should the... Well, I don't know how you think, but the various
16 life forms, including the waters and so on, should they have
17 legal rights and should their relationships with people and with
18 other institutions be a proper subject for the law to deal with?
19 And, really, Western law just does not come to grips with that
20 and it's probably going to be Native people who force that upon
21 the consciousness of the Western world, anyway. When there was
22 a first meeting at the United Nations in Geneva back in 1977,
23 the chiefs of the Hotomashone, or Six Nations Confederacy, used
24 their opportunity to speak, as they said, on behalf of the
25 four-legged ones and the winged ones, as they say, because they
were rather upset that they weren't there, that no one... You
know, they were talking about human rights and that seemed kind
of twisted or a little strange to them, and so rather than just
talk about their rights as Native people, they spoke for those
that weren't going to be heard.

And that was just a little effort to try to open that
up. You know, most of the people who heard that thought, "Well,
how quaint." You know, "Isn't that neat how these Indian people



1 think?" So you have to kind of shrug and hope that they'll wake
2 up a little. But, it's starting to happen.

3 Other than that, I can't make any further observation.
4 I mean, the law... It's terrible on that.

5 MR. BERGER: David Case or
6 Ralph Johnson, do you want to say something? That was Christopher
7 Hughes' article, I think that you mentioned, wasn't it? In
8 any event, carry on.

9 MR. COULTER: Stone... Stone.

10 MR. JOHNSON: My comment --

11 MR. BERGER: Stone.

12 MR. JOHNSON: -- There is a
13 body of cases that speaks to the question of Indian rights to
14 exercise religious practices which are in violation of either
15 state law or tribal law of a particular tribe, or federal law.
16 Some of the most wel... more well-known ones involve the use of
17 the peyote button and those cases have generally come down on
18 the side of saying that even though the use of peyote may be
19 in violation of California state law or Navaho tribal law or
20 whatever, that the peyote, Peyotus (ph), may continue to use it
21 because it is a central part of their religious exercise. In
22 other words, the religion... It is not peripheral, it is not
23 marginal, it's a central part of the religious exercise. The
24 question has arisen in two cases at least in the last three or
25 four years with regard to some of the Pueblos which believe that
a mountain or an area in New Mexico or Arizona is sacred, that
mountain or area is held by the Forest Service and is used by a
ski area, and the Pueblo wanted to stop the use as a ski area or
limit it in some way because it violated their religious precepts
and you have a conflict there between the constitution's
establishment clause, that is the clause of the constitution that
says that the federal government shall never allocate particular
resources, land or money for the support of one religion. And the



1 establishment clause would then seem to say you cannot designate
2 these mountains for the Pueblos religion because to do so is using
3 federal assets for the support of one particular religion. On
4 the other side, you have the contradictory counter veiling
5 legal doctrine that says that everybody is entitled to freedom
6 of religious exercise, and the Indians are entitled... or, the
7 Pueblos are entitled to free religious exercise, so you have a
8 clash between those two principles.

9 The determination of that clash comes down to a balancing
10 by the court as to whether the place, the mountain or the peyote
11 is central to the religion that is to be exercised. And I must
12 say that the results are not always happy because you frequently
13 have a Christian or Judeo-Christian person, a person of that
14 culture, anyway, who is making a decision about Indian religious
15 practices and may not understand the depth of feeling that the
16 Indian tribe has about that particular religious thing.

17 I'm always struck by the fact that, in the United States,
18 there is no major Christian... maybe except the Mormon Temple,
19 no major Christian place where it's terribly important, that
20 I'm always reminded, what if Christ had been crucified in Kansas
21 on a little hill? Would we find some way to designate that as
22 a religious... the allocation of federal funds and so forth,
23 protect that? I suspect that constitutional doctrine would
24 accommodate that change. If you look at what happens in Jerusalem,
25 you find that the Moslems feel that Muhammad ascended from a
26 rock in Jerusalem, you find that the Jews feel that is the central
27 holy place and you find that the Christians feel that that's the
28 central holy place. And the place is worth hundreds of lives,
29 thousands of lives. All the time, people shoot each other all
30 the time to get control of Jerusalem but we won't have any such
31 Judeo-Christian places in the United States and so it's difficult
32 for the dominant culture to understand that animals, that places,
33 that mountains, that trees have true religious significance. I



1 think that's a perception that has to be changed, like Tim was
2 talking about.

3 MR. COULTER: Wish I had said
4 that.

5 MR. BERGER: Yes, I wish you
6 had, too.

(LAUGHTER)

7 MR. BERGER: Might I be per-
8 mitted to remind you, and Ralph Johnson mentioned this yesterday,
9 there's a... a real advance in the law of Native rights in the
10 United States and, if I may say so in Canada, as well, during
11 just this last decade. And in Canada as well as in the U.S.,
12 there were no law professors teaching Native rights until the
13 '70s. Nobody thought Native people had any rights that were
14 worth studying. Now there are courses, there are law professors,
15 and these doctrines through law review articles, as Tim Coulter
16 mentioned, and by other means find their way into the judgments
17 of courts and the understanding of the public.

18 I think I can illustrate that all of this does make an
19 impact by referring to what Russell Jim said yesterday, that the
20 Yakima Indians had, just in very recent years, obtained an
21 acknowledgment that a sacred mountain of theirs should be restored
22 to them. Tito Naranjo referred to the restoration of a sacred
23 lake to the Pueblos in just the last few years and the Australian
24 delegation who will be coming here next week will no doubt tell
25 us about what happened there I think just a few months ago.
Ayers Rock, a sacred place for the aboriginal people of Australia
and occupying the dead center of the continent, the government of
Australia has now declared that it is going to restore Ayers Rock,
which is really a kind of a mountain, I think, to the aboriginal
people of Australia.

So the point that Tim Coulter was making, it seems to
me, can be demonstrated in events that we all have heard about



1 just these last couple of days and which those of us, like Ralph
2 Johnson and I, who go back to the '60s and even, God forbid, to
3 the '50s, when we turn back can see this movement, in law, in
4 politics, in political philosophy.

5 And that brings me, I think, to Ralph Lerner from the
6 University of Chicago who's a professor of philosophy there. And,
7 Mr. Lerner, we would like to hear from you now and we're all yours.

8 MR. LERNER: Your introduction
9 compels me to make a series of disclaimers. I am not and have
10 never been a professor of philosophy. I am not and never have
11 been a lawyer, and I am not and never have been an Indian expert.

12 In addition, there's the complication that Mr. Chamberlin
13 and I have been charged with the crushing burden of representing
14 the humanities and all their glory and I won't speak for him, but
15 I feel my vertebrae collapsing under all this weight.

16 What I've done... I've been interested in certain aspects
17 of early national policy toward the Indians. I was interested in
18 it as a white man's question, and thought about it. I did some
19 homework some years ago on that matter. I've read the papers
20 that were commissioned for this conference and I tried to pay
21 attention as closely as I can to the things that were said here.
22 I think my position is rather different from a number of sentiments
23 and assertions that were made here, but probably the best way to
24 enter into that would not be to say, "Well, I disagree with X
25 about that, I disagree with Y about the other thing," because
we'll just have assertions sort of passing one another in the night
and it won't make any difference. But rather, to suggest another
way of looking at it, and to the extent --

(LOUD CONTINUING NOISE
INTERRUPTS)

MR. LERNER: -- to the extent that
I say some things that will strike you as contentious or dubious
or even dead wrong, I fully expect that you will not have lost

1 your tongues and that you'll speak up. And, like Mr. Coulter, I
2 don't incline toward the soliloquy though I'm perfectly prepared
3 to indulge in it. But I think it would probably be better if we
4 just opened it up this way.

5 Now, reading the things that have been distributed and
6 reflecting on the paper that Ms. Fienup-Riordan had written for
7 the earlier session, I'm inclined to think that the question
8 that's stirring people most, and to which they find it extremely
9 difficult to give an answer, is the question, what's an Indian?
10 It's a very hard question to answer and, of course, has nothing
11 to do with whether it's quarter blood patrilineally or some other
12 way. I mean, that kind of mechanical resolution has almost no-
13 thing to do with what's stirring people, with what accounts for
14 the depth of feeling and the passion and the terrible worry that
15 comes through all these remarks.

16 You see it in that first paper where the author speaks
17 of it as a... in terms of the dichotomy between full participation
18 in the society and self-sufficiency, suggesting a kind of clear
19 division that, in fact, simplifies life rather than mirrors it.
20 Another point that she mentions there has to do with what I
21 would call... I think she uses the term a couple of times, pride.
22 That's connected with a sense of separateness, that these people
23 are somehow different, distinct, have the... somehow have a fate
24 or a destiny of their own. But in soliciting this, she gives
25 there, quoting some testimony from 1968 and suggesting a whole
list of things that Indians... Is it permit... Is it permissible
for me just to say Indians and as a kind of code word for Indians,
Eskimos, Aleuts and so forth and so on?

MR. BERGER: Yes, certainly.

MR. LERNER: Okay. If it's
not permissible, I --

(COMMENTS FROM AUDIENCE)

MR. LERNER: But I'm not talking



1 about Alaska Natives simply.

2 UNIDENTIFIED: We've got lawyers
3 around, you better watch out.

4 UNIDENTIFIED: Indigenous people.

5 MR. LERNER: Indigenous people.

6 Or Natives, is that okay? Is Natives all right or does that
7 smack too much of the British Empire?

8 (LAUGHTER)

9 MR. LERNER: Natives is simpler
10 I mean, I would prefer to use an Anglo-Saxon word to a Latin word,
11 under the circumstances.

12 MR. BERGER: Well, I --

13 MR. LERNER: Okay, it's shorter.

14 Okay, Natives.

15 MR. BERGER: I'll leave it up
16 to you.

17 (LAUGHTER)

18 MR. LERNER: Okay, though I
19 suspect some of the people who were here for as long as anyone
20 knows in Alaska may have come over from Asia, who knows? No?

21 UNIDENTIFIED: No.

22 MR. LERNER: No, wrong.

23 MRS. WORL: Maybe... Maybe I
24 can give you --

25 MR. LERNER: Please.

26 MRS. WORL: -- at least a
27 Native perspective. I think if you look at the names of all
28 Native peoples, the names for themselves, it usually means real
29 human beings as opposed to others.

30 MR. BERGER: I think the only
31 absolutely safe designation might be indigenous peoples, as some-
32 one in the audience suggested, but I think if you say Native
33 people --



1 UNIDENTIFIED: Or aboriginal.
2 MR. BERGER: Or aboriginal people.
3 MR. JIM: Just one brief comment,
4 also --

5 (LAUGHTER)
6 MR. LERNER: This is going to
7 be a long afternoon, beginning this morning.

8 (LAUGHTER)
9 MR. JIM: When you attempt to
10 say arrivals from... then you are following a theory that is
11 controversial about the bridge.

12 MR. LERNER: I raised it as a
13 question, right. I have no --

14 MR. JIM: Okay.
15 MR. LERNER: -- I have no
16 evidence.

17 MR. JIM: And you will find
18 many indigenous people of the Lower 48 and here that are saying
19 we did not come over on the bridge, we were here. Again, in
20 the relationship to the rights of trees, rocks, and whatever.
21 We were made from this earth here and perhaps went that way.
22 And now, you're coming back.

23 MR. LERNER: Fine. Okay.
24 (APPLAUSE FROM AUDIENCE)
25 MR. LERNER: It seems to me
that common sense and decency requires that every man and woman
be called by the name by which he or she wishes to be called.
You want to be called indigenous peoples, that's all right. It
just makes my speech a little longer. Okay.

26 (LAUGHTER)
27 MR. LERNER: So there is a
28 sense of separateness and specialness that seems to be connected
29 and a pride in that, but, as I said referring to that excerpt from



1 the testimony in '68, there were other things that were wished
2 for as well, and the author... I won't say fudges, but leaves open
3 the question whether those other things were ranked in any par-
4 ticular fashion.

5 It seemed that, among other things, the indigenous
6 people wanted to have prosperity. They wanted to have an equal
7 opportunity in the larger society around them. They wanted to
8 have liberty from governmental supervision and harassment.
9 They wanted to have a voice in things that concerned themselves
10 and, though this has not come up much in our oral discussions
11 today and yesterday, it certainly was prominent to me in reading
12 the paper and its account of earlier records, there was a desire --

(TAPE 26, SIDE B)

11 MR. LERNER: -- for higher expect-
12 tations for themselves and especially for the children. So these
13 are... these are large objectives.

14 What renders the thing especially interesting, though,
15 to me at any rate, and problematic is the way in which these
16 indigenous peoples express their ambivalence towards the things
17 that white society can offer and the things that come along with
18 having to deal with white society. I'll just call whites whites,
19 even though there are many kinds.

(LAUGHTER)

18 MR. LERNER: Well, but you see,
19 that's the other side of it.

20 (INDISCERNIBLE COMMENTS FROM
21 AUDIENCE)

22 MR. LERNER: No, not only...
23 Well, yes, but I'm speaking of... I mean, the corresponding side
24 of the white effort to reduce a great heterogeneity into one
25 lump, okay? And not care or notice differences that are signifi-
cant to those people is reciprocated on the other side by a great
lumping of the others, and we just call them whites. Okay.

1 But I won't worry about that part of it.

2 I was speaking of this ambivalence... The white world
3 carries with it all kinds of comforts, all kinds of conveniences.
4 The whites also are the bearers of subsidies and grants. They've
5 got the money. This isn't a new thing, it's an old thing. I
6 speak with full awareness of what I don't know about anthropology
7 or about the Algonquian peoples and so on. Somewhere along the
8 line there, somebody noticed that it was better to have an iron
9 pot if you were going to be on the move from time to time than
10 an earthenware one. Somewhere along the line, somebody noticed
11 that you might have a better chance to capture game if you had a
12 flintlock. So there was a great deal of adoption and a great...
13 I would even say lust, for a certain kind of white goods. I'm
14 not talking about trinkets now and stuff like that. I mean things
15 that have to do with living, living at all.

16 So there's this mixture of attraction and repulsion.
17 Somewhere along the line, some Indians in the East must have
18 noticed that in adopting the white man's technology, they were
19 at the same time liberating and enslaving themselves. Once you
20 switch from bows and arrows made out of local materials or
21 available in easy trading from wherever it is you get it, the
22 flintlocks, you need powder, you need lead, you need replacement
23 parts... You're now beholden and you're beholden in a way that
24 really essentially incapacitates you from living the way you used
25 to live. So you're confronted then with something that is both
a seduction and a corruption.

Reading these things, it comes up in a variety of ways.
There's a sort of summary statement in Riordan's paper about
what's been the result since ANCSA was set in motion. Well,
certain things have happened. Health services have been much
improved, yes. The economic level of a variety of peoples has
markedly been raised. But there's the same amount or more, it
wasn't clear to me, of drunkenness, drug addiction, and you don't



1 have to travel far, one block from the nice hotel that they've
2 put us up at is Fourth Street, or whatever it's called, and you
3 see the flotsam and jetsam of any city.

4 It wasn't clear, in reading these papers or in hearing
5 the accounts in the testimony, whether these people were happier
6 and, indeed, it wasn't clear what would constitute happiness for
7 these people. They're very much betwixt and between.

8 Another thing, and connected with this whole business of
9 ... I've got to say, what is an Indian, what is an Aleut, what is
10 a this, what is a that... The special effort that these sundry
11 aboriginal people... aboriginal people are making to maintain
12 their identity isn't clear to me. What's indispensable and
13 what's desirable? And I'm not saying that this is a result of
14 a confusion in these people's minds. I think it's a question to
15 which there are no easy answers, and not facing the question
16 doesn't make it easier to find out what would be a satisfactory
17 answer to this or that particular individual or group of individu-
18 als. There's language, there's religion, there are customs,
19 there's this thing that some people in papers call culture,
20 there's land.

21 Most of the talk around here has been about the land.
22 Obviously, it's not just real estate. I mean, that's been brought
23 out again and again... Mr. Naranjo's remarks and others. It's not
24 just turf, it's a certain kind of connection between some area
25 in that whole body of meanings and significances that people
impart to it, their way of seeing it, their way of looking at it
that may be connected as much with the very words they use as
with their customs and so on, that the language carries something
of that. And I suppose, in a way... I mean, no one has said much
about it or at all... I may have missed it... One wonders will
the children or the children's children speak the language? Or
will they speak it the way they could learn German or French
or Spanish in high school, you know, something they could pass an

1 exam for.

2 Now, I venture to say, and this may strike you as
3 bizarre, I don't think that this problem which is a, I believe,
4 a critical problem and maybe the most fundamental problem that
5 you have, is a peculiarly Indian or Aleut or Eskimo problem. I
6 don't think there's anything special about your being the people
7 that you are that makes this problem especially accute and trouble-
8 some. And I could give you some examples, rather bizarre examples
9 thinking of sitting in Alaska here, of... just from my own obser-
10 vation.

11 First, let me say... with no... no hint of... of any
12 suggestion that I would want to embarrass anyone. Just looking
13 at the people here, indigenous people, descendents of indigenous
14 people, one is impressed by how betwixt and between people are.
15 The dress, the language, straddling two worlds, as Mr. Naranjo
16 said, a part of two worlds. I'll give some examples to show
17 that there's nothing peculiar about this... your local manifesta-
18 tion of this problem.

19 Going through the Negev, in southern Israel, these
20 black woolen tents out on this... in this utterly desolate land-
21 scape, a woman herding goats, camels and what have you. Parked
22 next to the black tent, a pickup truck. That's your Bedoin...
23 travels freely in wartime and in peacetime between land claimed
24 by Israel and the land claimed by Egypt. It makes no difference.
25 His herds go where they go. When he comes into town on Thursday
morning in Beersheba, he's trading whatever he's trading, goats,
women, whatever, in the traditional manner. But he'll be wearing
a Seiko watch, or what purports to be a Seiko watch, digital.
And he's got a truck. Where is he?

Chicago is a large Indian city but it is also a city
with a large population of Appalachian people. They're very much
betwixt and between.

MR. BERGER: Chicago is a large



1 Indian city?

2 MR. LERNER: It has a large
3 population of Indians.

4 MR. BERGER: Oh, I see. Yes.
5 Sorry.

6 MR. LERNER: Up in Uptown.
7 These Appalachian people have another world from which they have
8 been dislocated or which they've voluntarily or involuntarily
9 left, are temporarily in the big city. Well, I don't know if
10 they've relocated at all. Relocated suggests that you've found
11 a location. One has a sense of their transience though they
12 may live there for many years.

13 You can go to New York, in Brooklyn, and see an area of
14 town called Williamsburg, and it's filled, tens of thousands of
15 people, who wear late 17th early 18th century Polish costumes.
16 They're carrying attache cases, they're completely plugged into,
17 as they say, the world of micro processors and so on, yet they
18 speak another language, they have another "culture", they have
19 another religion... They're betwixt and between and they take
20 extraordinary efforts, with a high degree of success so far, at
21 maintaining their children in traditional ways. They're called
22 Hasidim.

23 Chicago is also a city with a sizeable proportion of
24 Lithuanians who still believe there is a Lithuania, not with-
25 standing the convenient agreement between Russia and Germany
that gave it away. They try to preserve the language, they
dance Lithuanian dances, they wear Lithuanian costumes, and
there's a Lithuanian newspaper. Will their children's children
be Lithuanian? There's not land here. There's the idea of the
land.

And then I'm glad that finally today somebody mentioned
blacks. They've got their own special problems, but who, in a
way, share this perhaps more accute in the case of those who've

1 become, are middle class blacks and move simultaneously in the
2 world of whites and affluence.

3 So I mention all this only out of my own observations
4 of people who I think bear the burden that the indigenous peoples
5 here bear, and I think with equal difficulty and embarrassment
6 and uncertainty and misgiving. But, of course, there is a special
7 side to the indigenous people's problem and that has to do with
8 the complications that are owing to the very peculiar history
9 that existed between... I'll speak loosely now... Reds and whites
10 in American history and Mr. Chamberlin can speak for the continent
11 if he wants. I'll just talk about the U.S. a little bit.

12 Listen, it's noon... Do you want me to continue?
13 Because this is a natural break...

14 MR. BERGER: That's excellent
15 then. Might I just make one observation before we break, and
16 no doubt you're getting to this. There is a feeling, I think,
17 among non-Native Alaskans and it can be found everywhere on the
18 continent, that Alaska Natives are just another minority with
19 their own particular history, but that that history must inevitably
20 lead to integration, if not assimilation, with the dominant white,
21 middle class, essentially Anglo idea of what people are and how
22 they spend their lives and what language they speak, and what
23 society is all about... The notion being that, like the Ukrainians
24 and the Irish and the Lithuanians, they will inevitably ascend the
25 ladder of class and education and that that is what they ought to
aspire to. In that sense... And I think that's a view widely
held, but I think it is one rejected by Native Americans and
Native Canadians and Alaska Natives, and it is one that confounds
some of our notions of liberal democracy and the views that I
think are taught in the classroom throughout the continent and
creates, I think, some confusion, is the right word, in the
minds of the majority of Americans and Canadians about the
appropriate place of Native people in the scheme of things.



1 Well, forgive me for that... for mentioning that, but
2 you may come to it and others among you may come to it because I
3 have no doubt that Mr. Lerner has thus far given us much to discuss
4 this afternoon and we expect to have even more.

5 Could we adjourn then and come back at 1:15? Let's aim
6 for 1:15, would that be all right?

(HEARING RECESSED)

(HEARING RESUMED)

7 MR. BERGER: Well, I think we're
8 all assembled again, so we can turn to Professor Lerner again.
9 I don't think your cheering section has returned altogether, but
10 we'll insist that you carry on anyway.

11 MR. LERNER: I don't think it
12 was a cheering section. It was more like a Greek choir, a
13 chorus.

14 MR. BERGER: Well, they were
15 good-humored anyway.

16 MR. LERNER: Right.

17 Maybe I should simply state as... I don't know if it's
18 as pithly as I can but anyway more briefly than I did, the main
19 point I tried to bring up in my earlier remarks under the general
20 question, what is an Indian... that I thought that that was a
21 question here that was stirring. I gave examples that might
22 have struck you as bizarre, though somebody came up just a few
23 minutes ago to give the testimony of one who is descended from
24 Lithuanians, that there is, indeed, something to it. I have it
25 on the hearsay of my older son that there are old believers in
a place called Ninilchik, if I haven't got it all wet, who
somehow manage to adhere to their ways, and Mr. Naranjo spoke
in what I thought was an especially revealing manner of more than
accidental combination of preservation of Pueblo identity and
no electricity. I think, if I didn't mistake him, he meant to
suggest that they were related in some fashion.



1 But just in a more general way I would say that... I
2 mean, the whole way in which we speak about these things or
3 don't speak about them while thinking about them always, is
4 very different from the way in which your grandparents and mine
5 would have dealt with this issue. They didn't speak or think
6 of culture, belief systems, ideologies and all the other debris
7 of fancy terminology. They simply lived their lives and it
8 wasn't problematic.

9 You can say you can't go home again, that's another
10 matter. But looking at this magazine of Inuit 383, "Inuit
11 Arctic Policy Review," many things could be said about these
12 resolutions and their inherent self-contradictoriness. But
13 perhaps it's just enough to say that, in this article by Phillip
14 Laretson (ph), the Canadian organizers are praised for having
15 organized things perfectly and there were full houses each
16 evening at the local Nakasook (ph) school for performances
17 ranging from drum and throat songs to Eskimo country and western
18 and rock. That speaks volumes.

19 I ended up last time saying that the... for all those
20 aspects of what I'm loosely calling here Red-white relations
21 that are analagous to things that happened to other peoples,
22 in many places of the world and even today, or especially today,
23 there are special circumstances, it seems to me, that give
24 extraordinary poignancy and complexity to these indigenous
25 people's problems, because there's a special history, and I'll
speak now of Indians and the United States government.

 In a variety of ways, there's been some notice or
mention of the peculiar difficulty that whites seem to have had
in thinking about Indians. Most of the things that I've read
in the papers here or seem to have heard in the discussion suggest
that the thing to know about it was that it was exploitative,
unfeeling, at best, misguided. I want to add to that picture
because to the extent that I think we try to go back to the roots



1 of that history or its earliest stages, the way in which Mr.
2 Coulter and others suggested we might, we can get a kind of
3 clarity about things that the present build-up of litigation
4 and complicated papers and position papers and posturings and
5 all that prevent us from seeing. We can see them more clearly
6 if we go back to the origins, and in a number of respects, one
7 sees there what one can find again today. It's still hanging
8 around.

9 I want to suggest that there was a terrific moral
10 ambiguity in the white stance towards the Indians, and that
11 in the case of the most thoughtful and best white leaders,
12 that moral ambiguity was conscious and present to their minds.
13 The large and pressing necessity of any white leader who was
14 elected popularly, whether you're speaking about colonial
15 officials or federal officials and state officials under the
16 Articles of Confederation or under the United States constitution,
17 the first and foremost necessity was to get land. That was in
18 no way negotiable. They were going to get the land.

19 The question was how, under what conditions and what
20 kind of procedures, and they thought... and also at what speed
21 because there was a powerful national interest in not simply
22 saying to the population in effect, "Go get it, every man for
23 himself." There was a great interest in controlling the speed
24 and character of Western expansion, a great white interest in it.
25 But given that leading necessity as the whites saw it, there
was another consideration and, as I said, I believe that the
best and most thoughtful white leaders understood also that this
was a question of national character that, say, what would be...
what kind of a character would this people, the white American
people, the Anglo-Americans, if you will... what kind of a
character would they have, how they dealt with the Indians would
reflect powerfully upon that character. Now, whether this was a
vain conceit on the part of the Anglo-Americans that they were

1 better than other people or that they ought to be better than
2 other people is another matter. But they thought that they
3 had something to live up to.

4 The kinds of questions that we're talking about here
5 at these meetings are simply not publicly raisable in most parts
6 of the world. I think that's a massive fact, not just because
7 the ruling authorities would put their thumb on it but because
8 there is no public concensus that one ought to deal with people
9 who are in a weaker position than yourself in a way that isn't
10 simply an expression of force. This is not an argument that can
11 be dealt with in terms of Spanish law in Spain under their
12 most Christian majesties, Ferdinand and Isabella, and it's not
13 a law that can be raised under the law... under the rules of
14 the Romanoffs or their Bolshevik successors in discussing the
15 problems of minorities in Central Asia. I found it rather naive,
16 and not charmingly naive, that somebody at this conference
17 wondered about Soviet authorities not permitting... Circumpolar
18 has a big gap in it. There's a large arch of that polar region
19 that isn't there at this conference that would not be... Inuit
20 from Siberia would not be able to take part in the conference
21 because there were concerns about "political undertones" at the
22 conference. And then somebody says he really is at a loss to
23 understand the paranoia that prevents the Soviet government from
24 allowing participation in a kind of cultural exchange. It's
25 not paranoia at all. The Russians are on the verge of becoming
a minority in their own country. Those aren't questions that can
be raised there.

We raise them here because of certain peculiarities
in American law, in American experience, and, if you will, in
American hypocracy that make these questions always on the agenda,
even when they're being grossly violated. For example, holding
black men in chattel bondage. Nobody pretended that black men
weren't men, and I'd venture to say that nobody in America thought



1 that the Indians were men because Vittoria or Las Casas or the
2 Pope said so. These were not authorities for Americans, certainly
not the Pope in New England.

3 So it's an issue of national character here that say
4 what kind of a people would the Americans appear to be to a world
5 precisely because of the differences between those Anglo-Americans
6 and these Indians. And it's a difference that turns on this
7 massive fact, that the Indians that these Anglo-American settlers
8 were confronting in Eastern North America were extremely vulnerable.
9 When I say vulnerable, I don't mean that they weren't dangerous
10 to white people, they were. But they were vulnerable in ways
11 that made it a very uneven match, and not just because of the
12 technology. Some of that vulnerability is reenacted before our
13 very eyes in the lives of people whom we see and in the lives
14 of their children.

15 The Inuits, getting together an assertion of their
16 cultural integrity, don't find it unseemly, superfluous to have
17 rock and roll. Rock and roll is everywhere.

18 Well, let's move now to some of the things that have
19 been said about those relations, and there's been certain use of
20 words that I find extremely problematic, and I don't speak as a
21 lawyer because I'm not a lawyer. But a word of very great
22 moment and significance has been used and I believe in ways that
23 are more likely to be misleading than helpful. One such word is
24 sovereignty. I don't believe that it is or has ever been a
25 question of Indian sovereignty. The Indians were not regarded,
either by the British colonizers... the British imperial power,
the privy council, or by the Continental Congress or by the
Congress of the United States, as sovereign, political entities.
The Indians were not the same as France or Spain. That they
treated with them, that they used the language of treaty is a
fact, but what treating means is not so obvious.

Treat means to deal with someone. Some people in the 18th



1 century objected to using the very term treaty because of that
2 ambiguity, that it gave Indians the notions that they were, indeed,
3 a separate, sovereign people. That wasn't the case, whatever the
4 the Indians might think. But on the other hand, the Indians were
5 not in the position, say, of French people who were living in the
6 Louisiana Territory when the United States bought that through
7 treaty with Napoleon. They weren't in the position of Spaniards
8 living in Spanish Florida when the United States got that, because
9 when those land transfers were effected, those people simply came
10 directly, plainly under the control of the United States government.
11 They were persons to whom the constitution reached... in no more
12 complicated a fashion than it reached any other white person
13 living within the confines of the United States.

14 So the Indians are something in between foreign nations,
15 relations with whom would fall under the... responsibility of
16 whoever at that time was the predecessor of Secretary Brezinski,
17 and people who were simply part of the whole American population.
18 The American constitution provided separately for Indians because
19 the Americans had no right to convert Indians into American
20 citizens, whether they regarded it as a boon or... whether it's
21 a promotion or a demotion doesn't matter. The fact is that
22 the American government had no authority to rule the Indians
23 directly while they were those separate peoples.

24 On the other hand, the Indians were not in a position
25 to treat themselves as a separate nation, entitled to have foreign
relations with the king of England or the king of Spain or
wherever, even while situated within the political boundaries of
the United States. The boundaries all fell within one government
and you had people within it. These were not foreign enclaves in
the sense that they could be... that they could conduct their
own foreign policy... make war or not, as the case suited them.

Now, it's this quite anomalous, bizarre situation that
leads to the embarrassments and the complications and the ingenuity



1 and the contradictions and the hemming and hawing that has been
2 the sum total of "Indian law" under the constitution.

3 Now, several times Johnson v. MacIntosh has been men-
4 tioned, along with other important cases settled by the Marshall
5 court, Worster v. Georgia and Cherokee Nation. In one sense,
6 they're very simple... they're gross acts of injustice... have
7 been committed and there's an effort to try to find a remedy.
8 You don't have to go to college to know that there's something
9 really wrong in the incidents that lead to that litigation, but
10 how to deal with it? The fact that you've got a question doesn't
11 mean that you've got an answer, and yet the law requires that,
12 if there's been a wrong, there's got to be a remedy.

13 This is what Marshall is struggling with, and he comes
14 up with this strange thing about Indians as being domestic
15 dependent nations within the boundaries of the United States.
16 That states I think with tolerable clarity some of the problem
17 and some of the actual situation. They are domestic nations.
18 They are within the United States. They can't go off their own
19 way. They can't, for example, vote to annex themselves to
20 another principality. They're dependent. Yes, they have
21 to live within the broad limits of American policy. If the
22 United States goes to war, they can't proclaim themselves neutral.
23 They can't serve as Switzerland within the boundaries of the
24 United States.

25 But on the other hand, they're not simply for the United
States to do with whatever it pleases. He's struggling with that
kind of problem. The United States, for example, cannot, if I
read Marshall correctly, just take away their land. It has to
deal with them in some way.

Those treaties, by the way, those early treaties, did
not have to be and weren't ratified by the Senate the way it does
under its treaty power. Washington raised that question in 1790.
"I've got an Indian treaty here. Do you need... What's your



1 opinion?" Remember, everything has to be worked out from
2 scratch or square one. "What'll I do with Indian treaties? Do
3 I submit them to the Senate?" The Senate says, "No, you don't
4 have to submit it."

5 Now... I think it was Mr. Coulter or Mr. Case who
6 mentioned the business about the right of discovery and so on.
7 In Johnson and MacIntosh, Marshall goes over the various kinds
8 of claims that European imperial powers made to the title to
9 Indian land. He tells about the discovery thing and he ridicules
10 it. By that token, you could have floated by on your ship and
11 passed someplace and declared for the king of Spain or whatever,
12 to the South Seas and that's it. Well, I mean, he reduces it
13 to absurdity.

14 Conquest is another matter, but what right does the
15 national government have? Right, he says, of preemption. It was
16 a right that the national government inherited from the other...
17 from the European powers before. These were an arrangement...

(TAPE 27, SIDE A)

18 MR. LERNER: These were arrange-
19 ments whereby one nation, claiming the territory occupied by
20 Indians, established the exclusiveness of its claim in reference
21 to other European powers so you didn't have battles over the
22 same turf. If Spain claimed area X, that meant the English
23 shouldn't poach there, or the French, or the Portugese, and
24 likewise. So it was a system of reciprocity to avoid having
25 what happened anyway, wars among the colonial powers for that
territory. It meant that if that claim... if that right of
preemption could be sustained, that the Indians living on any
given territory, when they wished to transfer title, could only
transfer to one European power. They couldn't bargain for the
best deal. If it was English... If it was an English territory,
they could only sell if they wished to sell, when they wished
to sell, but only to Englishmen... to the English government, and



1 so forth... British government, I should say, and likewise for
2 the French and the Spanish and so on. That's the great right.

3 But Indians are not sovereign, and, indeed, I'm...
4 I'm sure of this, one of the few things I'm sure of... The
5 text of the constitution does not have the word sovereignty in
6 it.

Correct me, please.

MR. BERGER: David Case.

7 MR. CASE: It doesn't have the
8 word sovereignty in it, I wasn't going to challenge that. I
9 think it would be useful for us to understand what we all mean,
10 maybe, and particularly what you mean though by sovereignty. I
11 have the feeling that you are including in this word some ideas
12 that I don't include in it necessarily. It sounds like it's an
13 absolute term, in other words that it means a certain only one
14 kind of political power, or one scope of political power, that
15 is of a foreign nation, essentially. I mean, this kind of sover-
16 eignty that France and Russia and the United States and so forth
17 exercise.

18 MR. LERNER: I'll say what I
19 mean. This won't do if one were dealing with international law
20 because it's too crude, but what I mean by it is this. Humanly
21 speaking... okay, I'm leaving God out of this, okay... for the
22 moment --

MR. CASE: Good.

23 MR. LERNER: Humanly speaking,
24 who has the last word.

25 MR. CASE: Right. Well, that
takes me to my point regarding the constitution and sovereignty.
There's nothing in it specifically but I think there are some
hints. The fact the United States controls, regulates commerce
with foreign nations among the Indian tribes and with the states --

MR. LERNER: No, among the

1 several states and with the Indian tribes.

2 MR. CASE: With the Indian
3 tribes... but with the foreign nations and among the several
4 states and with the Indian tribes, says to me, implies to me,
5 some kind of political relationship between the United States as
6 a government and these various other entities as governments or
7 political units of some kind. I think the argument is certainly
8 there that there is an implicit political relationship that is
9 embodied in the commerce clause, and in those very... in those
10 prepositional phrases... and I think that has to...

11 Well, I think that there is something in the constitu-
12 tion that addresses the question of sovereignty. Now, to say
13 that a community is a domestic dependent nation, I think... agree
14 with you. It says all those things, it says it is within the
15 boundaries of the United States... not because they want to be
16 within the boundaries of the United States but because, in fact,
17 the United States is able, by military force essentially, to
18 maintain its boundaries.

19 MR. LERNER: Well, let's face
20 it, the United States came to the Indians, the Indians didn't
21 come to the United States.

22 MR. CASE: And dependent in
23 ways that... I think we can talk about political dependency,
24 we can also talk about social dependency, but the point is that
25 they are also, legally at least in the doctrine, nations which,
again, has a political content and I don't think we have to
talk in terms of sovereignty being an absolute sovereignty.
That is a matter of complete independence in order for it to
have some content and validity. Now --

MR. LERNER: Excuse me, what's
the language of the commerce clause? To regulate commerce with
foreign nations among the several states and --

MR. CASE: With the Indian tribes



1 MR. LERNER: -- with the
2 Indian tribes, okay.

3 MR. CASE: Okay. So, I mean,
4 there's a tendency and we found this in some of the other earlier
5 meetings to talk about sovereignty in sort of absolute terms,
6 you know, as though we were talking about Libya when we were
7 talking about Native sovereignty. And I questioned that
8 characterization of sovereignty as being an absolute term. It is
9 a buzz word, unfortunately, and it has... sets off bells in people's
10 heads that makes it very difficult to think about it, I think.
11 But maybe self-rule or something like that would be --

12 MR. LERNER: Well, then --

13 MR. CASE: -- more neutral.

14 MR. LERNER: -- we're dealing
15 with something else because you might... I mean, I didn't say
16 where I thought sovereignty resided under the constitution of
17 the United States, and maybe you don't want to know what I think
18 about it anyway because whether I think it's in one place or
19 another won't either make it so or not make it so. But I agree
20 with you, Mr. Case, that people mean a lot of different things
21 by the same words and to the extent that they're used and,
22 you know, people may not realize that they're dealing with
23 clipped coinage here and think that they're passing out good
24 money.

25 I... I'm reluctant to get into another, you know,
I mean, to add to the legal list of glossing of legal texts,
of which we've had so much. The commerce clause is not the
only place where Indians are mentioned in the constitution.

Indians not taxed... I recall some such phrase, and
of course, the commerce clause speaks first and foremost of
commerce. It says commerce. The political relations among
several states are dealt with in other places of the constitu-
tion. Colorado and New Mexico can't make a little deal for



1 themselves enlarging the one, diminishing the other, splitting
2 off, taking care of the Colorado River by themselves because
3 it suits them without Congress having some say-so about this.
4 So political relations are dealt with in other places as far as
5 the states are concerned, and if one assumes great attention and
6 care devoted to the language of the constitution by those who
7 wrote it or who gave it its final style and form, that maybe
8 there would be some reason to wonder whether the commerce clause
9 is simply dealing with political entities and their political
10 relations. I don't want to get into that. I can't say. I don't
11 know that I can even make a persuasive case one way or the
12 other about that so I wouldn't pretend.

13 But there is this thing about sovereignty in the con-
14 stitution. We have to remind ourselves that there's a long
15 history among the whites about where that sovereignty is located.
16 It was a history that ended up with many more corpses than all
17 the Indian wars rolled up in one. One day of the war from 1861
18 to 1865 produced more corpses than all the wars between the whites
19 and the reds. South Carolina was not a sovereign state and even
20 though you might go down South and hear people talk about the
21 sovereign state of X and the sovereign state of Y, 'tain't so.
22 On the other hand, it's not clear under the constitution, at
23 least it's not clear to me, that the federal government is given
24 a blank check to do anything it bloody-well chooses. It's a
25 constitution of limited powers and what isn't granted is allegedly
reserved to the states or to the people, according to Amendment
Ten. And according to the preamble, it says, "We the people..."
They seem to be the ones who are giving and taking, sharing and
redistributing, so maybe they're the sovereign. It's arguable.

I really don't want to dwell on this because I don't
think... I mean, aside from serving as some kind of caution
against using words that have enormous freight, immense consequen-
ces and that are more likely to be misunderstood than understood,



1 more likely to raise people's hackles, than to give them the
2 confidence that this is a line of inquiry that one might go into
3 without leading to terrible results, beyond warning against that,
4 I don't want to really dwell on sovereignty unless... Of course,
I'm not forbidding anyone else from dwelling on it.

5 MR. BERGER: Mr. Chamberlin?

6 MR. CHAMBERLIN: Could I just
make one point?

7 MR. LERNER: Please.

8 MR. BERGER: Could you use the
mike?

9 MR. CHAMBERLIN: Just one point.

10 In raising the issue of sovereignty, sovereignty originally
11 referred to the British tradition of dealing with... treating with
the Indian people. Certainly the most informed discussion of
12 British practice in the 18th and 19th century was that written
13 by Duncan Campbell Scott in 1914, just as he took over the
14 deputy superintendency of Indian affairs in Canada, and he
15 specifically described the British practice of treating with
Indians as treating as with a sovereign power. So whatever the
16 case in the clauses in the constitution, it was Scott's view,
17 quite specifically, that the British position was to acknowledge
the sovereignty of the Indian tribes.

18 MR. LERNER: Okay... Good...

19 But when the negotiators at the Treaty of Paris of 1781, and
20 this, of course, was before... I mean, before the treaty was
signed... worked over the problem of settling the... what we
21 call the Revolutionary War. There was no place in there for
22 the Indians. The Indians were, so to speak, forgotten by their
23 allies, the other high contracting powers, a cause of considerable
24 bitterness to those Indians in the East who had not only depended
on the British, but fought for them.

25 MR. CHAMBERLIN: Let... I mean,



1 that can be looked on as a sin of omission on the part of the
2 European powers. It doesn't necessarily mean that there was no
3 sovereignty residing in those Indian tribes. What I'm saying is
4 that it certainly was the view of one of the most experienced
5 inheritors of a British tradition, Duncan Campbell Scott, who was
6 superintendent for 20 years, from 1913 to 1932, that the British
7 tradition involved an acknowledgment of the sovereignty of the
8 Indian tribes.

9 MR. LERNER: So that when Sir
10 William Johnson negotiated with various tribes of the Iroquois
11 Confederacy and so on, he was dealing with --

12 MR. CHAMBERLIN: Scott's comment
13 comes right immediately following a discussion of Johnson, yes.

14 MR. LERNER: Okay. Fine.

15 All that may be so, and, of course, it wouldn't be the
16 only aspect of British policy that was overturned by the American
17 revolutionaries.

18 MR. CHAMBERLIN: No, the language
19 of the amendment to the Indian Appropriations Act of 1871 seems
20 to refer, if only obliquely, to that tradition.

21 MR. LERNER: Yeah. Well, that...
22 Again, that may very well be, and there's the contemporary under-
23 standing and practice having to do with the ratification of
24 treaties that the Senate gave in 1790.

25 One of the things, and I speak as someone at the
margins of this thing... I said at the beginning, I'm not a
lawyer and I'm not an Indian expert. One of the things that
struck me is how difficult this record, insofar as I'm familiar
with it, how difficult it is to extract from this record anything
that is more than a probable case. It's a rare day that you get
a probable case. I don't believe that there's a demonstration
in the lot, one way or the other. You have more or less probable
cases.



1 Let me continue, if I may, because I'd be happy to leave
2 sovereignty because I think it's a cul-de-sac and ask the
3 question, if not sovereignty, then what? Is one simply reduced
4 to the general proposition that might makes right?

5 I would argue that the American language is the language
6 of rights and that's language that's been used here by all kinds
7 of people. But except for one mention by Mr. Coulter at the end
8 of his remarks this morning, I haven't heard anyone speak of the
9 grounds of those rights. What do they rest on? People have
10 talked about group rights, there's been talk about the ideology
11 of non-Indians, of non-Native peoples, but... And of the Protestant
12 ethic and so on. Those are not, I believe, the grounds on which
13 American rights are founded. The rights that the Americans thought
14 they relied on, that they relied on in declaring independence,
15 that they relied on in establishing the constitution, were rights
16 that they believed, quaintly enough, to rest on nature, whatever
17 they meant by nature. Again, I have to emphasize that the basis
18 of American rights was not what Las Casas or... or a Jesuit
19 theologian had to say about it. They thought that there were
20 laws of nature and of nature's God, and that the rights that they
21 enjoyed and that were indispensable for their life were grounded
22 on those natural rights.

23 The thing that creates special difficulty, and especially
24 with things having to do with ANCSA and so on, is that those
25 rights were understood by the framers of the constitution, by the
founders of the American government and by their predecessors
among the Anglo-Americans to be rights inhering in individuals.
They did not speak of group rights, though those individuals
might be grouped in any number of ways. The rights that Baptists
enjoyed or sought to enjoy in Virginia under an Episcopalian-
established church, were rights that they sought for themselves
as individuals though they acted collectively. It was the right
of a man to worship God his way and without supporting a church



1 that he neither adhered to nor maybe even respected. It was the
2 right to enjoy his property, to take that deer which he hunted
3 down eat it and not to have to take... not to have hunted it and
4 have it taken away from him. It was the right to enjoy his
5 liberty.

6 So we're talking about rights of person, we're talking
7 about rights of property, we're talking about rights of conscience
8 that were held to be inalienable. You couldn't give it away and
9 it couldn't be taken from you. Those were rights that it was
10 said inhered in us as individuals.

11 Now, the Indian claims, or more generally the Native
12 people's claims, as far as I understand them from what I've read
13 and what I've heard here, are presented as emphatically a claim
14 of group rights and, indeed, if I haven't mistaken what has been
15 said and how it's been said, that claim is even, from time to
16 time, disdainful of individual rights, regarding them as somehow
17 subversive of group rights or of the enjoyment of group rights.
18 I'm in no position, I have no authority, I have no right to advise
19 you about how you ought to take care of your business. Maybe
20 three-fourths of the problems that Native peoples have had is
21 that they've had all these other people telling them how to take
22 care of their own business. I only make this little comment,
23 I find it strange and in some peculiar way self-defeating that
24 Native peoples should eschew, should reject, give the back of the
25 hand to, that very special protection that American law affords
to protect individuals in the things that come closest to them.

That protection can be rejected as culture-bound,
as left-handed brain or anything you want, but the fundamental
fact, it seems to me, is that you are living under the constitu-
tion of the United States, that you go to a white man's court
and white man's law, and that the protection that you seek can
only be had that way. Of course, one will get supportive resolu-
tions from the United Nations. Who has any problems in the U.N.



1 condemning the violation of human rights of another country? It's
2 fair game. It's composed only of the holy and the pure when
3 dealing with all places outside their boundaries. But there's
4 no way in which those resolutions or even "laws", if they were
5 passed, could be enforceable in an American court. There's no
6 political way in which that's going to come about. It's analagous
7 to the kind of restraint that Chief Justice Marshall exercised
8 in dealing with what was a very shady, problematic would be a
9 kind and gentle word to use, history of white claims over Indians.
10 He said... and I think this hasn't been mentioned in the various
11 discussions of Johnson or the other Indian cases... It wasn't
12 for a court constituted under the sovereign to question the acts
13 of that sovereign. Political questions... The political questions
14 doctrine is an act of self-preservation on the part of the
15 judiciary. Those five, seven, nine... whatever the composition
16 of the supreme court was at the time... those men are not going
17 to get off the bench, run down to Georgia and grab someone by the
18 scruff of his neck and throw him off. They depend on the only
19 power to enforce the law that there is, which is under the
20 executive as authorized by the legislature.

21 If one wants to make points that we are sinners and that
22 we dealt wrongly and that one wants... that one ought to express
23 contrition for misgivings, compassion for the weak and the
24 vulnerable and so on, that's okay. But you can't end it with
25 a thus sayeth... it is so ordered, the way a court ends it's
26 decisions. Even the... Even the very limited order that the
27 court handed down in Cherokee didn't travel out of Washington.
28 Everybody knows the well-known statement of Marshall... sorry,
29 of Jackson... John Marshall has made his decision, now let him
30 enforce it.

UNIDENTIFIED: (INDISCERNIBLE)

MR. LERNER: Apocryphal... but
do you know what? True, he doesn't have to have said it. Not



1 everything that's a matter of historical record is ipso facto
2 false. It's true or... I mean, it's as true as if we had a
3 piece of paper in which he said, "Today, I said to someone... X."
4 That's the fact. That doesn't mean one has to agree with it. That
5 doesn't mean one has to simply reconcile oneself to it. But it's
6 a fact that you have to take into your own accounting of what to
7 do and how to do it.

8 I'll just close with a remark about Alaska, on which
9 I'm almost an expert, having been here getting close to 48 hours.
10 There might be something possible in Alaska that certainly wasn't
11 possible in New York state, not very possible in Georgia, and
12 maybe not really possible anywhere else in the Lower 48 states.
13 First of all, you're talking about an immense amount of land which,
14 in some sense, you have. I don't know if you can establish
15 enclaves unto yourselves, or whether those kids who have cassette
16 recorders would want to live there, but it's a large enough body
17 of land to make possible some kind of accommodation, some kind of
18 creative accommodation among your own desires, your own conflict-
19 ing desires, to satisfy your pride in what your parents were,
20 your hopes for what your children might be, and still have some
21 kind of protection that you can seek only in one place, from
22 that government that has... that is committed, however imperfectly,
23 to the protection of individual rights. I think that takes
24 imagination, and it's an imagination that's going to have to
25 come, not from lawyers though lawyers might be called in at a
late stage, but from your own understanding of how you want to
live and what you want to be.

I think that's about it.

MR. BERGER: Well, thank you
very much, Mr. Lerner. I said that you were a professor of
philosophy. I think I'm right in saying that you are a professor
of political philosophy at the University of Chicago.

MR. LERNER: No, I haven't



1 reached that stage, that status. No, I teach social sciences.

2 MR. BERGER: I see. Well,
3 that's still a marvelous thing to be doing.

4 Could I, as chairman, perhaps raise the first question,
5 working kind of backwards through your remarks, and you...
6 Coming from a small country next door, that is, Canada, where
7 we watch and wonder in fascination what goes on in the United
8 States and have learned to live with the hyperbole with which
9 Americans usually describe themselves and their institutions,
10 you used a phrase that we're used to hearing from spokesmen for
11 America. You said that the Bill of Rights constitutes that
12 very special protection that American law affords.

13 It seems to me that the provisions in the Bill of Rights
14 were derived from Anglo-Saxon law and having... Those same measures
15 have been incorporated for decades in Canadian law through the
16 legal force of what we call the common law. They haven't been
17 codified in our constitution. That was, in fact, done in 1982
18 and Canada wrote a new constitution and we did something that
19 I'm sure alarms political scientists. We took the guarantees in
20 the Bill of Rights, which were enacted in the heyday of ideas of
21 individual liberty in the 18th century, and they are all in the
22 constitution and entrenched in what we call a Charter of Rights,
23 but in addition in Canada, and I'm just raising this because you
24 might want to consider whether this may or may not be a departure
25 from... and a departure of significance and perhaps one to be
deplored, but nevertheless, a departure from the political
thinking that inspired and still inspires the U.S. constitution.
But, in addition to the protection afforded those individual
rights, and it is that very special protection that American
law affords and which many other countries have afforded their
people... But, in addition, in our constitution we provided that
the English-speaking minority in the province of Quebec should...
It has always had a certain right under our constitution since



1 1867 to denominational schools and to public funds that go to
2 ... to French-speaking people for denominational schools. It's
3 a group right that goes back to 1867, if we're going to use the
4 expression group rights. It went to Catholics in 1867. In 1982,
5 the burden of French... carrying French-Canadian culture had
6 shifted, or at least the principal focus of it was language, and
7 so there are minority language education rights for English-
8 speaking Canadians in Quebec and minority education language
9 rights for French-speaking people in all the other provinces where
10 they are a minority. And those reflect, in a way, the rights for
11 Protestants and Catholics that were written into the constitution
12 back in 1867. They are now for English- and French-speaking
13 persons.

14 We also provided that there is a provision that says
15 the rights of the aboriginal peoples of Canada, Indians, Inuit
16 and Metis, are hereby recognized and confirmed, I think that's
17 the expression. And then there is a provision that defines
18 the aboriginal peoples of Canada as the Indians, the Inuit and
19 the Metis.

20 UNIDENTIFIED: Does it define
21 their rights?

22 MR. BERGER: No. I was coming
23 to that. That's a subject that will not be exhausted for some
24 considerable time. But there is also a provision in the consti-
25 tution that says at regular intervals the prime minister of
Canada and the premiers of the provinces, equivalent to the
governors of the states but they are much more powerful figures
because, under the parliamentary system, they... an agreement
by a premier representing his province to amend the constitution
is tantamount to the legislature agreeing so that the meetings
of first ministers of the prime minister and the premiers may
actually reach accord on amendments to the constitution... But
there is a provision that says at regular intervals the first



1 ministers, the prime minister and the premiers, must meet with
2 the representatives of the aboriginal people to work out some
3 kind of definition of these rights. And the first of these
4 meetings was held last year. The second is being held this week
5 in Canada and is being televised to the whole country, from
6 gavel to gavel or whatever the expression is.

7 There is also a provision that may offend some political
8 philosophers but it is an interesting provision that says that
9 ... that Canada's... nothing in the constitution is to deny
10 Canada's multicultural heritage. Now, that's more a symbolic
11 provision than anything else, although one never knows what, in
12 decades to come, it's impact might be.

13 MR. LERNER: Is that the
14 language, nothing is to deny?

15 MR. BERGER: The multicultural
16 heritage... No, it's not a reference to language but to the
17 multitude of peoples who have immigrated to Canada in recent
18 years and where the... It is an attempt to affirm their right
19 to continue to pursue their own cultural traditions to the extent
20 that that is appropriate, and I use that word appropriate as a
21 neutral word.

22 There's another provision that, while we're on the
23 subject, that may be of interest to you and that is a provision
24 that says that...

25 MR. LERNER: Excuse me... Because
this is all new to me, the language says that that multicultural
heritage is not to be denied to the extent that it is appropriate?

MR. BERGER: No, I'm sorry.
I'm not reflecting the language --

MR. LERNER: Oh.

MR. BERGER: -- accurately and
I'm trying to think of the specific words. But it is a symbolic
affirmation of Canada's multicultural heritage. It is actually in

1 ... It isn't a preamble. It might have... The preamble contains
2 references to God and so on, but this provision is included there
3 and it is designed to affirm the cultural... the right to pursue
4 a distinctive cultural identity for those who are not English
5 or French, who are the... regarded as the founding peoples and
6 are not aboriginal peoples, who are otherwise identified in the
7 constitution.

8 So, I'm not... Forgive me, I'm not trying to make this
9 into a long lecture but I've always been fascinated by the
10 direction that we took in our working out new constitutional
11 arrangements in 1982, and we had the advantage of such, it may
12 be thought to be and he has resigned now, so we can say we had
13 the advantage of a prime minister who is regarded as a political
14 philosopher. I'm not saying whether he's a good one or a bad one,
15 but he came to office with that reputation, having written
16 extensively on all of these questions.

17 Well, anyway, that's a footnote to that, and you might
18 now or later wish to comment on it and whether or not this is the
19 wave of the future or a kind of aberration that all others should
20 be warned against.

21 Please go on, sir.

22 MR. LERNER: As I said, much
23 of that was new to me. I had heard that you had made a...
24 somehow re... somehow given a new and higher status to whatever
25 had served as a Bill of Rights before. Of course, you know, the
people who made the constitution of the United States didn't
think it needed a Bill of Rights. They thought it had been...
it was, itself, a Bill of Rights. There was a concession to
anti-federalist opinion, but... I mean, I don't know whether
that's a model for other peoples. I suppose by the principles
of the declaration, there's a right of peoples to institute
governments as shall seem fit to them as best to secure their
liberties, and maybe that makes sense.



1 MR. BERGER: But, it's nature's
2 God... offered a new revelation that was not available to the
3 founding fathers --

4 MR. LERNER: Well, I haven't --
5 MR. BERGER: -- I shouldn't
6 put it that way.

7 MR. LERNER: Let me assure you
8 that a prophesy has departed from Israel and I have no private...
9 private pipeline to the Divine Will or intention... I see no
10 more than anyone else and probably a good deal less.

11 There is... It would be fortuitous in the extreme for
12 the constitution of the United States, given its presupposition
13 that what is not granted... what is not granted is reserved to
14 the people or the states, for it to say that we're not going to
15 come down heavily upon... or, that we're going to be especially
16 solicitous of the multicultural heritage of the people. America
17 was a much more diverse population, I suspect, in 1787 than
18 the colonial... than the Canadians were in terms of points of
19 national origin and so on, if we're talking about the European
20 settlers.

21 The whole business of group rights raises the question
22 ... and maybe you in Canada will ultimately have to face it and
23 maybe not even very far down the pike... what's a group? Which
24 groups? Who's the authentic spokesman for this group? It
25 makes the question, who's the authentic spokesman for the
Menominee, look like small potatoes. That's... That's very
troublesome. And, of course, the notion that you're affirming
rights that aren't specified, you know, leads to the question
why... I mean, what does it mean, how do those rights differ
from the rights enjoyed by other Canadians, and so on. Hard
to know.

The supreme court, at least under the constitution,
hasn't had difficulties saying all sorts of things can't be done



1 even though they might be claimed to be rights. I mean, for
2 example, the right to practice polygamy has been held to be out
3 of the question. I don't know... I mean, the court then thought
4 it was grossly immoral, though one might say one of the most
5 moral men who ever lived was, himself, a polygamist... Abraham.
6 You know, I mean, it's not obvious that it's... But they had
7 their reasons and they did it.

8 The business with group rights really raises a hornet's
9 nest here and their definition, their enforcement, these are
10 the other group rights, but, for example, are the group rights of
11 blacks in the city of Chicago as distinguished from Hispanic-
12 speaking people in the city of Chicago... okay?... as distinguished
13 from Poles? I mean, you have infinite fragmentation possible
14 there, especially if those rights are seen in practice to press
15 against one another.

16 I hear that, this morning on the radio, in talking
17 about some moose reserve out here and the rights of those who
18 want to watch moose, the rights of those who want to fish around
19 where the moose are, those who just want to leave the moose alone
20 ... I mean, how can one constitutionally embody all these things?
21 This is the stuff of political legislation, negotiation, dealing
22 ... yeah, that dirty stuff, dealing. I don't know how they can
23 be secured in any meaningful way.

24 If you're talking about individuals, you've got some-
25 thing there, though even there, as I suggested, it isn't without
its problems.

MR. BERGER: Could I just...

Well, before --

MR. LERNER: But that's not to
say what the Canadians ought to do for themselves.

MR. BERGER: No, no. I...
There's one other feature of this that... See, your institutions
were, in many ways, derived from British institutions and I think



1 the founding fathers were... were quite prepared to admit that.

2 MR. LERNER: They took pride
3 in it.

4 MR. BERGER: Yes, and our
5 institutions in Canada were largely shaped by the British
6 traditions and, to some extent, by the French traditions. But
7 those are both... at least they were, at the relevant times,
8 homogenous states with essentially populations of one race speaking
9 one language. In fact, one had an established religion and the
10 others... the other, France, it's religion wasn't established but
11 it... just about everybody was Catholic. Then here we are on a
12 new continent. We try to transplant these institutions and there
13 are indigenous people here with their own institutions.

14 Canada may belatedly have tried to address that in its
15 ... that condition in its constitution of 1982. What Professor
16 Johnson and Mr. Jim and Tim Coulter and David Case were talking
17 about this morning is the... What they've been talking about this
18 morning is the way in which American law tried to come to grips
19 with this state of affairs, and not in a way that's altogether
20 satisfactory to all concerned.

21 One other thing I'd like just... and I mention this
22 for the benefit of everybody else at the table in case they
23 decide to comment on it later in the week... In Canada the...
24 an all-party committee of the Canadian parliament, we have three
25 national parties, and a committee representing all parties
handed in a report to parliament last year called the Penner
Report in which they urged, and this had the unanimous agreement
of representatives of all parties, it isn't the formal policy of
any party and certainly not of the government, but Ted Chamberlin
may take the matter farther than I've been able to because there
may have been recent developments I'm unaware of, but in it it
was urged that we recognize in Canada that the Indian governments
are a third order of government, the federal government, provincial



1 governments, Indian governments, which may or may not be imple-
2 mented by the government but it is an interesting... an interesting
3 culmination to the flow of events over a little more than a
4 decade. And it will be interesting to see where it leads.

4 Yes, Ralph Johnson?

5 MR. JOHNSON: Well, I might add
6 one supplement or footnote or disagreement, I'm not quite sure
7 what it is.

7 The United States constitution does not explicitly
8 identify Indians except, so far as I know, in the two instances
9 that you mentioned, but it's also true that the constitution
10 essentially left Indians out of the equation. This has been
11 demonstrated by the fact or example that Indian governments are
12 not constrained by the Bill of Rights of the constitution of
13 the United States. They are now, since 1968, constrained by the
14 Indian Civil Rights Act, but before that time and even now, if
15 a tribal government or a tribal court takes some action that
16 contravenes what is otherwise thought to be a constitutional
17 principle, they cannot be brought up short or cannot be challenged
18 in any federal forum for violation of the constitution. The
19 constitution does not apply to an Indian tribe because Indians
20 were not parties to the formation of the constitution.

18 But beyond that, what happened was that, because Indians
19 were left out of the constitution, the courts then evolved a
20 whole concept of dealing with Indian tribes as groups, and here's
21 where I would at least qualify what I understood you to say, and
22 that is that, whereas the constitution was built around the idea
23 of individual rights, as far as the development of a body of --

(TAPE 27, SIDE B)

23 MR. JOHNSON: -- jurisprudence
24 is concerned, it evolved that we... that the court dealt with
25 Indian tribes as groups. I came across this recently doing
research on the question of the Equal Protection Clause of the



1 federal constitution. The Equal Protection Clause generally
2 provides that Congress cannot pass a law that treats one group
3 differently than the other... than another group based upon race
4 or religion or ethnic origin. You cannot, for example, say that
5 whites can do something that blacks can't do or that blacks can
6 do something that whites can't do or Chicanos or whatever. You
7 can, though, and Congress has, in Title 25 of the U.S. Code, has
8 hundreds, I guess thousands, of pages of the United States Code
9 that deals with Indians and the question really didn't come up
10 until the 1960s in some important U.S. supreme court cases about
11 the constitutionality of that kind of legislation. Can you
12 legislate about Indians?

13 Well, the court resolved that by first recognizing that
14 there are thousands of pages on the books that deal with Indians
15 so it must be constitutional. You have to figure out some way to
16 rationalize this. The answer was that... which, I might add, is
17 the way courts frequently decide cases. They viscerally decide
18 how to decide them and then figure out the legal paraphernalia.
19 But the answer given by the court was that... was that we were
20 dealing not with Indians as a race, but with Indian tribes as
21 political entities. And that's the key to the proposition that
22 Congress... or, that the supreme court, through 150 years of
23 cases, has decided that Indian tribes are, indeed, political
24 entities, that Congress has the power to deal with those political
25 entities, and that legislation identifying those entities or
people who are participants in them is a legitimate exercise of
congressional power. So that, in this body of jurisprudence,
there has been a recognition of the right in the power to deal
with Indians as groups.

It's always intrigued me why that is not true, for
example, with blacks. You look at the trust responsibility. There
is a national federal trust responsibility toward Indians. There
is no trust responsibility towards blacks, Chicanos or Swedes,



1 Germans, whatever. It's only with regard to Indians. And there
2 are some interesting reasons for that, much too involved to go
3 into sort of philosophically here, but one of the major reasons
4 with regard to others than blacks, you can say they came here
5 sort of voluntarily and they chose to submit themselves to the
6 Bill of Rights and the U.S. constitution. That's not true of the
7 blacks. They were taken away from the land that they owned and
8 brought here forcibly and placed in a situation very different
9 from Indians. With Indians, the non-Indian community came here...
10 the whites essentially came here and took the Indian lands and
11 it was essentially a rising out of that taking Indian land that
12 caused the creation of a trust relationship and caused the crea-
13 tion of this need to deal with Indians as political entities.
14 There's a whole mix of things there that has caused the federal
15 government, both the courts and Congress, to deal with Indians
16 as groups, as political entities.

17 MR. LERNER: May I say a word
18 with respect to that?

19 I wouldn't pretend that... from the little that I have
20 seen or have hearsay account of latter day Indian law in the
21 courts or, you know, the Indian Claims Commission or whatever,
22 that that's a body of law that is satisfactory, intelligible,
23 coherent, predictable, or anything else. I think we see the
24 full flowering of confusion and uncertainty, embarrassment and
25 dogma let loose, whatever happens, happens. It's really like
what the kids used to talk about in the '60s, even more like
happenings than anything else.

26 The 14th Amendment, to which you allude, does not pro-
27 tect groups in its language. It says no person shall be deprived
28 of such-and-such because of race, creed or whatever. That there
29 may be class action cases is obvious from the fact that it must
30 be the fattest part of all constitutional litigation. But the
31 protection of individuals. It's because you, as a black, or a



1 Swede, or whatever, were deprived of the equal protection of the
2 laws that you may seek a remedy. There's some kind of extrapola-
tion that goes from that.

3 As far as what I took to be your question and the way
4 you answered it, why weren't groups other than Indians regarded
5 as falling under a special federal trusteeship or responsibility,
6 doesn't that argue, you suggest, for a special political status
7 of Indians? I'm not sure. There was another group that had
8 special status toward which the federal government was held...
9 held itself to have a special responsibility, and that was the
10 freedman. There was a Freedman's Bureau, with the general under-
11 standing that people who had been raised in bondage and treated in
12 a way so as most to unfit them to be capable of self-government
13 ought to be protected from all the predators that would surround
14 them and undo them and frustrate the intention of the law. But
15 that's a sad story all its own. But blacks were, for a short time,
16 under special protection because it was understood that they, too,
17 were especially vulnerable and needed to be cared for in some way.

18 MR. BERGER: There's a...

19 Could I just add a footnote to what I said --

20 MR. LERNER: There may have
21 been another point there that I missed but... I'm sorry if I
22 haven't --

23 MR. BERGER: Could I just add
24 a footnote to what I said earlier? You were talking about identi-
25 fying groups. Under the Canadian constitution, the groups are
identified as the English-speaking minority in Quebec, the
French-speaking minorities in the English-speaking provinces and
aboriginal peoples. There are no group rights conferred on any
other peoples. The only other rights conferred or acknowledged
are individual rights in the same manner as the U.S. Bill of
Rights acknowledges those rights. The other provisions are
dividing up powers and all this sort of thing.



1 MR. LERNER: These group
2 rights are really terribly thorny. I mean, one thinks of Amish.
3 They have special... I mean, the United States is such an immense
4 patchwork of a whole variety of conceivable groups, some not even
5 conceivable but nonetheless there. Thanks to Xeroxing, cheap
6 paper and availability of lawyers, there will be no shortage in
7 the foreseeable future of groups rising to claim their rights
8 and trying to seek through litigation what they can't get through
9 the electoral and the legislative process.

10 Now, I'm not saying that the rights of individuals
11 ought to be contingent on their being able to form a majority.
12 That's one of the points under the Bill of Rights, that you
13 shouldn't mess around with people just because they're weak, just
14 because they're few. Maybe those are the people toward whom one
15 ought to be especially solicitous because you're enlarged by
16 dealing largely with people who can't help themselves effectively.
17 That's another thing. But it's always a difficult matter when
18 you're on the receiving end, when you're the claimant, when
19 you're the petitioner. What one court gives, another may take
20 away.

21 MR. BERGER: Just... Joe
22 Jorgensen and then David Case, but just before we leave this,
23 or at least before I leave it, there are group rights and group
24 rights. We're all aware of the acknowledged rights of old age
25 pensioners to receive money under statute. There are class
actions that may be brought on behalf of groups such as the
handicapped or this and that sort of thing. But when we're talking
about group rights for purposes of this discussion, it seems to
me we're talking what we might call minority rights, rights of
minority peoples. And in Canada, as I say, their right to
certain religious practices is enshrined, their right to public
funds and facilities for the propagation from one generation to
the next of their language and is a vehicle... the vehicle for



1 education is enshrined in the rights of aboriginal peoples. Not
2 identified... those rights aren't identified... are said to be
3 enshrined so that when we're talking about groups, we're talking
4 about, it seems to me, minority peoples. That's the interest in
5 the largest sense as seen appropriate to be promoted and preserved.

6 So, forgive me for taking up some time, but these are
7 fascinating questions and they seem to me to go very much to the
8 very foundation of what we're talking about. Well, Joe and then
9 David and then Rosita.

10 MR. JORGENSEN: Ralph Johnson
11 beat me to it, I think a very important point, about the way in
12 which federal government has dealt with Indian tribes and the
13 body of law that has emerged around those dealings.

14 My understanding in the laws... the rules of judicial
15 construction as it relates to Indian law is that the reserve right
16 doctrine becomes very important. That's to say that a treaty
17 reserves to Indians all of those rights by tribe that were not
18 taken away from them, either by treaty or subsequent legislation.

19 Now, going back to the Northwest Ordinance of 1787, I
20 think it's crucial that much of that language was carried over
21 in the... in spirit at least, in the Cherokee cases.

22 UNIDENTIFIED: Are you speaking
23 of the ordinance or --

24 MR. JORGENSEN: The ordinance,
25 itself.

UNIDENTIFIED: '87.

MR. JORGENSEN: Of '87, 1787,
where it points out that Indians, in their life and liberty,
shall be protected and they should conduct their lives as they
directed, that their property shall not be taken from them. It
is theirs. That from time to time, just wars may be waged against
them but even then their lives and property shall be protected
at the conclusion of such wars and the like... That, beginning



1 with this, it's very clear that Indian tribes are recognized as
2 something like a sovereign, that they are groups with which you
3 deal who own property, who have political cognizance, who will
4 direct their own affairs, but who may be destroyed by might in
a just war. I think only theologians talk about just wars.

5 In the Cherokee cases... what's his name, Walther excluded,
6 I don't think he came up with a just war, but he did talk about
7 them, too, didn't he? Michal Walther... That throughout the body
8 of law that's developed, Indian tribes have recognized the
9 sovereignty they want to have, the government has responded by
10 recognizing the sovereignty that is there. It's clearly limited,
11 that sovereignty. And the rights that they seek are the rights
12 of sovereigns that have not been taken away from them. Many
13 of those have not been acted upon and I think that was an impor-
14 tant point in Ralph Johnson's presentation yesterday. But as
15 the law unfolds, rights that have not been taken away are reserved
16 and they're now being acted upon little by little in new ways, and
17 that the sovereignty of the 1990s may be much, much more than
18 the sovereignty of the 1970s. I think that's the way things are
19 moving now.

20 The fact that Native people of North America relinquished
21 their property against their will, had their population in the
22 United States alone reduced from two million to 230,000 later
23 at around the turn of the century, that their resources, their
24 land base, was reduced from two billion acres to 32 million
25 acres through treaties, suggests we were always dealing with these
limited sovereigns and now the limited sovereigns are acting upon
rights and reserved rights that they have.

MR. BERGER: Professor Lerner?

Yes, go ahead.

MR. LERNER: If you say that
Indians are a special case under the constitution, I have no
problem with that. If you could say something like sovereignty



1 meaning something like sovereignty, and that appeared... that
2 emphasis appeared always in print and in speech, I might also
3 live with that. The problem is that that qualification, the
4 highly qualified character of that, is more likely to engender
5 false hopes than anything else. It is still the white man's
6 court which will pass on these things. You may be right that
7 what Indians enjoy in the way of self-governments, self-determina-
8 tion, will be much greater in the 1990s than it is now. But then
9 we can talk about something that's cognizable under the laws and
10 concepts of the constitution. Then we're talking about another
11 matter, we're talking about self-government or self-determination.
12 So even that carries a fair amount of freight with it, too. Are
13 we talking about the self-determination of Slovenian people under
14 the Austro-Hungarian empire? About the linguistic rights of
15 people under that empire? There were seven or eight, I forget
16 now, officially recognized languages. There was constant litiga-
17 tion to extend it to another and yet another. Oh, that's another
18 story.

15 MR. JORGENSEN: Yes, I agree.

16 MR. LERNER: But it shows that
17 these problems can be approached in a variety of ways without
18 raising a kind of expectation and a kind of bogeyman, a kind of
19 spectre that somebody referred to earlier, whether it was in
20 conjunction with the steelhead fishermen or whatever, that simply
21 freezes discussion, freezes thought and narrows the heart.

20 MR. BERGER: David Case.

21 MR. CASE: Well, you may have
22 explained a good deal to me in what you just said. Strange, the
23 seat you're sitting in, I wonder if it's anything to do with
24 the position of the table? It always seems to be... the last
25 couple of meetings it's been the chair that has been occupied
by the person who has most focused the issues, I think.

MR. LERNER: I only mindlessly



1 followed the nameplate.

(LAUGHTER)

2
3 MR. CASE: I don't think it
was intentional.

4 MR. LERNER: Whether there's
5 design in someone else's mind, I can't say.

6 MR. CASE: And I... But it'll
7 help me to focus the issues a bit if I, I'm not sure if this is
8 a good idea... but I guess you agree that there are such things
as group rights in the United States --

9 MR. LERNER: No, I don't agree
to that --

10 MR. CASE: Oh, okay.

11 MR. LERNER: -- if you mean
under the law.

12 MR. CASE: No, no. I mean in
13 fact and under the law, in the sense that Ralph Johnson has
14 talked about the rights of Native Americans as political groups
15 under the common law, the domestic common law of the United
States.

16 MR. LERNER: I don't know what
17 the domestic common law with respect to groups is.

18 MR. CASE: No, no, with respect
to Native Americans. They're... It's fairly clear, I think.
19 Maybe you don't agree then that there's no such thing as a group
20 with rights as a group under the laws of the United States.

21 MR. LERNER: Let me try to put
it as plainly as I can.

22 MR. CASE: Please do.

23 MR. LERNER: I think it's to the
24 immense advantage of aboriginal peoples, for anyone else who's
vulnerable to tyrannical majoritarianism, to locate his or her
25 rights within the mainstream of the legal protection of the land



1 so that those who would deny those rights must, in the course of
2 doing so, render questionable their own enjoyment of their
3 rights.

MR. CASE: Okay --

4 MR. LERNER: We have an enormous
5 and enormously valuable heritage and I don't think it should be
6 discounted because it proceeds on certain ways of thinking that
7 are utterly alien, or largely alien, to Indians and others.

8 MR. CASE: Okay. Is it fair
9 to say that you would view the existence or the exercise or the
10 assertion of group rights as a risky, bad, some sort of... you'd
11 attach some kind of a negative value to that, either for the people
12 who assert those rights or for the nation as a whole?

MR. LERNER: All of the above.

13 MR. CASE: Okay, good.
14 Then I think that very clearly sort of sets, in my mind
15 anyway, the question of a group versus individual rights and what
16 is the place, if any, of these rights, collective versus individual
17 rights, within this... within the American nation. And I don't
18 purport to have an answer to that question, maybe even a position
19 but I think it's important to realize that that is an issue.

MR. LERNER: Right.

20 MR. CASE: And you seem to be
21 very firm and... fervent in your view of it as an issue.

22 MR. LERNER: The Indian is a
23 human being, like everyone else, and we have a law that protects
24 human beings, residents of the United States. It doesn't say
25 no citizen shall be deprived of thus and so, it says no person
shall.

MR. CASE: Mm-hm, mm-hm.

26 MR. LERNER: I don't see why
it's a diminution of one's Indianness, or one's Aleutness, or...
Eskimeness, to say, "Yes, I'm that, too." It's been said. It's



1 been said in this room. "I'm that, too."

2 MR. CASE: Right, okay --

3 MR. LERNER: These are --

4 MR. CASE: -- I understand.

5 MR. LERNER: -- important aspects.

6 MR. CASE: No, I understand
7 what you're saying and perhaps in the next couple of days we'll
8 have a chance to go further into the question. I think it's
9 important, an important question, as to whether the rights of a
10 group as a group are as important and protect other things... other
11 interests that are not really protected... afforded to individuals
12 who happen to be members of that group.

13 I had another point but... I mean, if you're following
14 up on this, maybe it would be better to let Kim --

15 MR. BERGER: You make your point
16 because I think Rosita comes before --

17 MR. CASE: Okay. The other
18 point, about... just historically in... I guess I would take some
19 issue with and just put this on the table, and that is to the
20 origin of the policies of the United States or of the legal
21 position of Native Americans. It seems to me, and I... you know,
22 it just is my view, I guess... that it is perhaps the product
23 of well-intentioned and the best of the white leadership that
24 has resulted in some policies that favor or as you characterize
25 the vulnerable people. But I think it also should be remembered
that these Native American people were not always so vulnerable
and that, in history, the white people, when they came to the shores
of this country, were the vulnerable ones. And it has always
seemed to me that that vulnerability of the white people was one
of the reasons we developed a history of treaty-making, because
the white people needed the Native Americans to survive, or at
least their nonopposition, so that they would be able to survive
as... in their isolated colonies and later with the French and the

1 Indian wars between France and England in which the Indians were
2 the allies of both sides, their military ability, the Native
3 American military ability, was crucial to the outcome of that
4 war. And that's... This history seems to me to be a history of
5 groups of people that are behaving very much like independent
6 nations. And to me, is something of a background of the history
7 of treaty-making that brings into the consciousness of the courts
8 and the common law in America a sense of Native Americans as
9 having inherent political powers of self-government, and which I
10 would characterize as sovereignty but that seems to say too much
11 in some senses to some folks. But at least let it go at that,
12 that there is an early recognition and dealing because of these
13 military realities of the white people and the Indian people as
14 separate political entities.

15
16 MR. LERNER: The self-governments
17 or the right of self-governments that you speak of is not
18 necessarily... I don't see any necessary logical dependence on the
19 notion that you're dealing with utterly separate political
20 entities. It's enough to know that Indians aren't simply falling
21 right under the... you know, the usual terms of the constitution.
22 They are something other than, say... They're self-governments
23 is other than, say, the powers of home rule, of Cook County or
24 the city of Chicago, right? Cook County or the city of Chicago
25 are creatures of the Illinois General Assembly.

MR. CASE: Yeah, right, sure.

MR. LERNER: Indians'... I
mean, Indians' existence, their corporateness, is not something
that can, notwithstanding all the bad things we heard about BIA,
it simply can't just be... you know, concocted, you know... in
a simply arbitrary way or done away with by a stroke of a state
legislature.

MR. CASE: No, and again --

MR. LERNER: And to that extent,



1 you look. Is there another level on which you could have self-
2 governance that operates, not at the state level but, you know --

3 MR. CASE: Well --

4 MR. LERNER: -- with some kind
5 of federal --

6 MR. CASE: -- I mean, this is
7 a bit simplistic, but let me just suggest that the commerce
8 clause sort of lays this out in outline form with all of these
9 prepositional phrases. I mean, there are three political levels
10 that the commerce clause discusses, foreign nations, Indian tribes
11 and states. And I think that that is of some significance.
12 John Marshall thought it was of some significance that the Indian
13 tribes were within the commerce clause and that they were treated
14 separately from both states and foreign nations, which implies
15 to me that there's a separate political existence there. I would
16 say political existence, maybe you would take issue with that.

17 Okay, that's fine. That's all I really had to say.
18 Thank you.

19 MR. BERGER: Rosita Worl?

20 MRS. WORL: Yes, I'd just like
21 to shift it to another... back to a point that you made when you
22 first started talking, and that was, your... I guess it's a
23 problem for you in your understanding or at least your perception
24 of indigenous people being betwixt and between and, you'll have
25 to forgive me because I don't always understand these English
sayings, but as I understand it, I'm assuming that you're thinking
that there is this movement between two points and that indigenous
people are between them.

MR. LERNER: A foot... a foot
in two worlds.

MRS. WORL: Okay, a foot in
two worlds.

MR. LERNER: That's what I mean.



1 MRS. WORL: Okay, and you seem
2 to have a problem with that. My understanding of social science,
3 at least the social science that I've studied, recognizes that
4 cultural systems, indeed, are dynamic, that they do change, that
5 they are not static. However, there seems to be a general assump-
6 tion that this doesn't apply to Native American studies, to
7 Native American societies, and it is a problem that has posed
8 tremendous difficulties for Native American societies.

9 I at one time did an exhibit at the Peabody Museum
10 at Harvard and I was trying to really show the dynam... the
11 dynamic change that goes on and change that could occur but yet
12 core values, the social organization, belief systems, that could
13 still be retained in spite of the adoption of new technology,
14 and so I did a potlatch scene. And on one side I had a traditional
15 potlatch where the young man was going to assume his position to
16 be the next chief and they all had traditional clothing on. On
17 the other side I had people dressed just like myself. In fact,
18 several of the molds were made from my face because also there
19 seems to be a perception about what Native Americans should
20 look like.

21 So I did this in exhibit --

22 MR. LERNER: (INDISCERNIBLE)
23 notes, you know, what a Native American ought to look like.

24 MRS. WORL: Right. Anyway, I
25 did the potlatch scene. We're all wearing traditional clo... I
mean, we're all wearing contemporary clothing, and the same sort
of things were going on in the traditional ceremony as had been
going on in the one that was supposed to depict a late 1800 one.

The people just could not understand what was going on
in that modern contemporary scene and after I left school, it
was dismantled. But it is a problem that poses a lot of problems
for Native Americans. The adoption of new technology, such as
you seem to have some problem with, the Inuit girl listening to



1 rock and roll. The adoption of new technology does not necessarily
2 mean that these values or that social organizations, traditional
3 social organizations, will necessarily change. And I think I can
4 understand, you know, when we look at American society, when
5 farmers adopted the new technology and we saw that there was,
6 indeed, changes in their social organization. The larger family,
7 extended families, began to break up and then there were... you
8 know, along with the industrial revolution, there was this move-
9 ment of families all over the United States.

10 For Indians, Native Americans, this does not necessarily
11 apply wholesale. I mean, there are Indian values and... that
12 allow them to maintain that kind of cohesiveness, that group
13 interaction. Just because Eskimos are now using snowmachines
14 doesn't mean that they don't go out and hunt in groups or that
15 they don't share. So I'm saying that it is possible for new
16 technology to be adopted. It is possible for me to sit here
17 and speak English and still yet maintain a core value system and
18 a social organization that is still very basically Tlingit, in
19 my instance Tlingit.

20 MR. LERNER: May I say a word
21 to that?

22 Right. I thought some of the examples I gave were
23 exactly in that point. I tried to bring out... Some of those
24 instances I gave, ranging around... you know, where... situations
25 that had come to mind out of my own observation. I presented
those as examples where people, with great deliberateness, with
great effort, were able to maintain what they define for them-
selves as critical to their... you fill in the blank... ness.
You understand what I'm saying? Whatever it is, their Lithuanian-
ness... you know, their Jewishness, their Bedoinness... That they
had done that, it was possible. But it was out of an awareness
of what powerful forces had to be contended with.

I don't... I'm not saying it's fated, once you let in



1 the first beta max, it all goes down the tubes. I'm not saying
2 that. But it would also be a mistake to underestimate the
3 seductiveness, especially to the young, of a world of whose
4 complexity they have a very imperfect picture. It looks good
5 and the message that comes across is that if it feels good, it
6 can't be wrong. I don't think that's a message compatible with
7 what most self-defining people hold to be right or necessary
8 for their preservation. I'm not saying it's impossible for them
9 to do it, but that it requires the prior consideration, the
10 hardest kind of question from my standpoint, and that's why I
11 began with it, and a question that only you can answer for
12 yourself... you, not as a Tlingit, but you as Rosita Worl.
13 What is being X mean to me? I'm not saying it's... I mean, that
14 there's a single formula or... Are the Eskimos less Eskimo
15 because they... May one use that word?... Okay... because they
16 use epoxy to append the pins to their carvings, because they
17 have some other tools maybe, because they adapted scrimshaw
18 techniques to the market of whalers or whatever? Are the Navahos
19 less Navaho because their designs were affected by the demands of
20 Fred Harvey, or whatever? No. I mean, that would be simplistic
21 in the extreme. I mean, then you're not talking about a living
22 tradition. You're talking about a museum.

18 MRS. WORL: The point that I
19 was trying to make was that I... First of all, I think that
20 Native Americans have that kind of general understanding. The
21 point that I was trying to make was the perception from the
22 dominant society when they look at Native Americans and they
23 see this mixed bag, they perceive that to be somehow not legiti-
24 mate. That perception carries over in some laws, some legislation
25 such as, you know, hunting and fishing where the people who are
making the laws insist that... that they should use traditional
technology. They don't want them to use rifles or things like
that. It's that perception that causes problems for Native



1 Americans.

2 MR. LERNER: General rule:
3 Never underestimate other people's capacity to misunderstand
4 you. Right.

5 MR. BERGER: Kim Gottschalk and
6 then Russell Jim.

7 MR. GOTTSCHALK: I think it
8 would be better to defer to him at this time if he's going to
9 follow-up on this because I'm on a different topic. I wanted
10 to go back a little bit.

11 MR. JIM: How far back?
12 (LAUGHTER)
13 MR. JIM: Thank you, Mr.
14 Chairman.

15 I will not defend myself because of my limited vocabu-
16 lary and your academic life is showing to me and your ability
17 to dissect every word and phrase, which perhaps brings you as
18 the term would be, as I heard here, your problem. But I don't
19 think it's a problem. I think you're bringing out some very
20 insightful, perhaps irregularities, in regard to the under-
21 standings, misunderstandings.

22 It is certainly enlightening to hear someone say that
23 the Indian people are human beings, which was very questionable
24 not too long ago. The term, nits make lice and savages, terms
25 of this nature which was not too long ago in the past. And your
term, how can you afford to allow a group of people, and your
constant reference to Lithuanians, Jews, et cetera. But I must
refer back to my original statement when I first sat here and I
mentioned that we were put under the Office of Public Affairs
under the present administration because... And the Office of
Public Affairs dealt with nongovernmental functions of the
United States. And we quickly were... We were quick to announce
to Mr. Blackwell, "You are dealing with the oldest government on



1 this land, but also you are dealing with the oldest culture on
2 this land," and Americans just celebrated 200 years here not too
3 long ago.

4 And so, not only the oldest culture, the oldest religion
5 perhaps in the world. No one really knows, but I can only reflect
6 what I have been taught that has been handed down through the
7 ages, from hand to mouth, unwritten, no different from the songs
8 that we sing on Sundays are unwritten, unrecorded. They are
9 learned from mouth to ear to heart. So the point Mr. Case made
10 also and others in regard to the uniqueness of these indigenous
11 people, and so, therefore, the constitution of the United States,
12 not directly involving the indigenous people, but implying, such
13 as the implications in our treaty and other treaties, as alike.

14 So I had to say this and I hope I didn't misunderstand
15 you in any way. But the points you do bring out are somewhat
16 valid. But I hope, for the sake of this meeting and for the
17 sake of my conscience, that you will understand what I am saying
18 also.

19 MR. BERGER: Kim Gottschalk?

20 MR. GOTTSCHALK: Yes. I just
21 wanted to try to understand a little bit better your points about
22 individual versus group rights. I guess in my mind, to a large
23 extent, that question has already been asked and answered in a
24 definitive way by the supreme court which identifies the rights
25 of however you want to call it, of self-governance or whatever,
as group rights for Indians and there's an extensive body of
common law to that effect. And even within the right of self-
governance, if there's a right of hunting and fishing, it's
recognized that that is not an individual right belonging to each
individual Indian, but rather it is an Indian right as a member
of a political group. And these are doctrines that have been
formed in the white man's court. I understood you to say you're
going to the white man's court and using the white man's rules



1 and, therefore, you must understand that the rights that they
2 place value on and protect are individual and not group rights.
3 And yet, we have gone to the white man's courts and the rules
4 that they have given as far as Indian law are concerned say that
5 they are group rights that they're dealing with.

6 MR. LERNER: I'll repeat again,
7 I'm not a lawyer and I don't give legal advice without a license.
8 I don't have a license so I'm not giving legal advice. I just
9 ... sense that when those alleged group rights, I don't know if
10 the supreme court has used that term... have they?

11 MR. GOTTSCHALK: Well, they've
12 said tribal rights.

13 MR. LERNER: Tribal rights.
14 Your problems seem constantly to arise when tribal rights come
15 up against other people's rights, rights asserted by individuals
16 as individuals.

17 MR. GOTTSCHALK: That's already
18 happened, as well, and they've come down solidly on the side of group
19 rights, that's the Santa Clara Pueblo case that Mr. Naranjo was
20 talking about.

21 MR. LERNER: The solidity of
22 judicial judgment is a sometimes thing. It has... I think that
23 Mr. Jorgensen and others have pointed to the weather cock
24 character of those judgments, they point one way and they point
25 another, and when things become hot, they cease pointing altogether
and just say they can't do it. They don't know what to do with
it.

I'm suggesting there's a problem in this because,
although the language that is often used... you see it here in
this journal, this Inuit... these resolutions. The language is
the language of demand. In fact... I mean, it's like, you know,
kids in the '60s were demanding. They had non-negotiable
demands. But, in fact, you're asking someone who has the power



1 to give or to withhold. I'm saying there's an appeal that might
2 be raised to... what Lincoln called the higher angels of our
3 nature and that, by creating a situation where people have to deny
4 what they constantly are asserting is the dearest thing to them
5 ... Yes... that this is a nation of rights, of individual rights
6 and that man ought to be safe and protected against tyrannical
7 action from those who've got more clout and more might.

8 If you put people in a position where they have to deny
9 that, then you reach them in a very different way and not one
10 likely to elicit the kind of response that somebody reported
11 earlier. What did the Indians want now? Haven't we settled this
12 already? Haven't we given them everything that they wanted?
13 Yet again?

14 MR. BERGER: Joe Jorgensen, you
15 wanted to --

16 MR. LERNER: This is not a
17 legal doctrine. I... I'm.... And it's not even a legal strategy.
18 I... I'm... I'm raising a question.

19 MR. GOTTSCHALK: Well, from the
20 ... It's hard for me to disagree with the proposition that if you
21 can have a right phrased in terms so that if someone took away
22 your right, their own right would be threatened. I can't argue
23 the fact that that would be a nice strategy. Whether it fits
24 in, I guess, is the question I'm raising.

25 MR. LERNER: One other point
on this. Some people believe that the decision of the supreme
court in Brown versus Board of Education of Topeka rested in
some way on some social science evidence that was footnoted
somewhere. Well, it doesn't really, but in any event... I mean,
it doesn't within the terms of that opinion. But what a terrible
risk that entails for blacks to the extent that people believe
that their enjoyment of nonsegregated schools, nondiscriminatory
schools rests on some social science research based on the



1 reactions of white children and black children to white dolls
2 and black dolls. We're not talking about social psychology.
3 We're talking about the most fundamental thing a human being
4 could have. What's the basis for it? What if we have new
5 social science coming out of some college, maybe better conducted
6 than the one that was summarized in that footnote that shows,
7 in fact, that segregated schools are better for blacks, better
8 for whites? What if segregated schools are better for Inuits?

9 I mean... the enjoyment of your rights, the way in
10 which you govern yourself, has to be based on something more
11 fragile, transitory, less subject to... I'll use the word
12 sophistication, the kinds of cleverness that lawyers on the
13 other side or on your own side or somewhere, you know, can
14 reduce the thing to some kind of babble. You're talking about
15 what's most important to you being who you are. You've got to
16 decide who you are. You've got to decide what's absolutely
17 indispensable for doing what you want to do. Then you have to
18 be ingenious. I mean, Good Lord, the law changes all the time.
19 If Indian society is dynamic, what are you going to say about
20 the law? Aren't there ways? I mean, are there no forms of...
21 I mean, I know nothing about this matter and it's obvious, I
22 suppose, now to everybody. Are there no forms of cooperative
23 and collective organization in which people can organize their
24 lives and do it within the general framework of the law?

25 But, you know, you've got other things going and that's
why I raised the question about pride. You don't want to pay
taxes because you don't owe anybody anything. You're not going...
Indians are not taxed. They're in a special category. Yeah?
You want the advantages of taxation? Dare say, of other people's
taxation? You want a special status? You want to give special
preference to your own people? These are hard things to accom-
plish under a law that prides itself... I'm not speaking now about
the hypocrisy of it, I'm talking about the principle of it. I'm



1 talking about the principle of it that prides itself on its
2 color blindness, and its not knowing or caring who your daddy
3 was or what his status was in the old country or what your
4 color is, that speaks to you as a human being and tries to
5 secure your inalienable rights. It's a hard thing.

5 MR. BERGER: Joe Jorgensen?

6 MR. JORGENSEN: Yes. Thomas
7 Jefferson thought the problem would be resolved, and that is
8 with Native peoples, so soon as an admixture took place, as soon
9 as all Indians married whites and there would no longer be a
10 problem. That would be one way to address it and to get back
11 to the problem of individual rights and individual rights under
12 the law.

13 But the very problems that you pose, and I think David
14 Case has made it clear, you've joined the debate. But the whole
15 sweep of Indian legislation, legislation in behalf of Native
16 Americans, has played with this very, very serious dialectic
17 between individual rights and group rights. In fact, I could
18 be corrected but I even think the Brown versus Board of Education
19 was decided on the commerce clause not the equal protection clause,
20 is that correct? I think that it went to the commerce clause,
21 didn't it, Kim?

22 MR. GOTTSCHALK: My under-
23 standing was... I think it was equal protection.

24 MR. JORGENSEN: I think not,
25 but anyway you can correct it later. Okay, two to one... I give.

26 The commerce clause of the constitution I think is
27 important in the debate nevertheless... I thought I had an
28 extra point there. The values that become important in the
29 majority view are individual values. They were... I think that
30 taxation without representation had something to do with the
31 revolution, even perhaps more than religious freedom or natural
32 laws. I think, too, that when the United States government came

1 to deal with Natives in the embrace of the territory that they
2 claimed for themselves, and it constantly grew, that they
3 recognized... and I'll be firm now... the sovereign states, these
4 nations with which they had to deal. Even in the Northwest
5 Ordinance, when they said that people cannot be claiming territory
6 in the Northwest territories until such time as the federal
7 government had worked out the procedures whereby you could
8 purchase land from those Indian nations with their consent, and
9 only with their consent, one of the first groups of speculators
10 to beat the Non-intercourse Act of 1790 and to make claims
11 against the suggestions of the Northwest Ordinance was George
12 Washington and others, to speculate on land in the Northwest
13 Territories.

14 There has always been a pull for commodity, for
15 individual gain, for each person to make his own way, accumulating
16 capital if he wishes, to the best of his abilities. Dealings
17 with Indians to purchase their land, to sign treaties with them,
18 treaties that often were not ratified, treaties that were
19 usually discussed in English, treaties that went back to the
20 Senate, usually to be revised on the floor of the Senate, many,
21 many miles away from the Indians who had, perhaps, agreed to
22 another version of the treaty, only then to be signed and come
23 back... often were not the treaties that were agreed to by a
24 consenting Indian nation. This came to bother the House of
25 Representatives by 1871 and their constituencies. Indian nations,
Indian tribes, were being dealt with as groups, as collectivities,
groups with rights, with properties that were not being used.
This is all that I said yesterday.

And there was a change. Congress took it upon itself
to put a rider on an appropriations bill in 1871 to deny treaty-
making powers further to these Indian nations with which they
dealt. And so we plunged into a long period of dealing with
Individuals, protecting them... letting them make it as individuals,



1 only to have it spin around again and we got some more group
2 rights back. But the old treaties, some were still in force,
3 some came to be argued in the courts, recognizing that there
4 were group rights and many of them reserved, only to be challenged
5 again, this constant tension to terminate tribes, to extinguish
6 their claims to title to land, to push them into the mainstream.

7 This precipitated some waffling policies and here we
8 are again, claiming what was recognized when the nation was
9 founded and prior to it, that sovereign nations had the right
10 to property, of self-governance, and when they came under the
11 embrace of the United States government, this weaker power did
12 not give up its right to self-governance by taking the protection
13 of the stronger power.

14 MR. BERGER: Mr. Lerner.

15 MR. LERNER: You cover a very
16 long period, almost a century, and without distinguishing which
17 sentences have to do with which period.

18 I want to say just a word about the Northwest Ordinance.
19 In restricting settlement in the Northwest Ordinance, the
20 Continental Congress was asserting its authority to regulate
21 the public domain against free-wheeling entrepreneurs, against
22 land companies who had, through fair means or foul, secured
23 special licenses from the various state or colonial governments.
24 They were trying to establish a public domain. They wanted this
25 principally with a view to two things.

One, to have orderly progression westward as white
population grew and Indians were prepared to move along, with
a view to avoiding the kind of reckless behavior... You know, nice
people don't move to the frontier... I shouldn't say this in
Alaska --

(LAUGHTER)

MR. LERNER: When I say nice,
I mean... square.

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(LAUGHTER)

MR. LERNER: Okay. These are usually people who... You know, who have the don't tread on me mentality, right? So they're likely to do things their way and ask questions later, if ever. And, of course, it's exactly the presence of such people in that kind of a situation that can lead to a war with very formidable Indian tribes, a war that could stretch for a thousand miles and where you wouldn't even know about that war until two months later when it was all too late.

And partly because... still speaking about the motivations of the Continental Congress... Partly because they wanted to sell that land under regular ways that it established, that they established, as a means of paying off the crushing debt of the country. The United States was a debtor nation, over its ears in debt and had all these mighty loans to pay off to the French and the Dutch and the Russians, and whoever else they could put a bite on.

MR. BERGER: The... There's a couple of other questions... Oh, Joe?... A couple of other questions that occur to me. The discussion has proceeded from premises, political philosophy, that animated the founding fathers and David Case and Joe Jorgensen have tried to persuade you that there was another stream of political philosophy that was not clearly articulated in the constitutional documents but which acknowledged the political entities that were known as Indian tribes.

But you still assert that the genius of the U.S. constitution proceeds from its recognition of the rights of individual human beings, and you seem to reject the legitimacy and U.S. political thought of any other idea of the origin of... human rights. In Alaska, and I'm trying to summarize, I hope doing rough justice to all, what the discussion has thus far



1 elicited... In Alaska, ANCSA, the Alaska Native Claims Settlement
2 Act of 1971, provided... did not make provision for political
3 institutions for Alaska Natives. It did provide for economic
4 institutions, Native corporations in which the sole shareholders
5 are Native persons and other persons are prohibited from having
6 shares issued to them, and shares cannot be sold to other persons.
7 So the only persons entitled to be enrolled as shareholders for
8 20 years, from 1971 until 1991, are Native persons. Do you
9 have any... Those are not political institutions, those are
10 economic institutions. But do you have any observations to make
11 on the propriety, in terms of your own notions of U.S. political
12 theory of that?

10 MR. LERNER: It's very strange.
11 It's not strange to imagine why they wanted to do it, but imagine
12 our notion if a government-financed corporation, whatever, and...
13 I mean, any government-financed corporation, of which there is a
14 multitude, issued stock to which it said, no Irish need apply.
15 Very peculiar. People might take umbrage. They might not like
16 it. Clearly, this is something exceptional. Clearly, it is
17 ... a special favoritism toward a particular people. I don't
18 know that anyone would challenge it. Maybe someone would, but
19 it's so much in the way at odds with the pre... no, with the
20 general notion that government operation works indiscriminantly on
21 the population at large, in terms of the general population. But
22 I think it's to be understood, some recognition that Indians are
23 really a special case somehow, special.

21 Please, I said something that struck you as wildly
22 wrong? From your expression...

22 (LAUGHTER)

23 MR. COULTER: What exactly is
24 it that you thought was favoritism towards Alaska Natives somehow?

24 MR. LERNER: No, no --

25 MR. COULTER: Is that what you



1 meant?

2 MR. LERNER: I'm not... When I
3 say that, I'm not saying, there they've gone again. They've
4 given those Alaska Natives something that they don't deserve.
5 I mean, it's just outrageous. I am not... I repeat, not saying
6 that. I am saying that they are introducing a principle of
7 discrimination that otherwise American law, in dealing with the
8 general population, rejects. We do not permit, welcome, legisla-

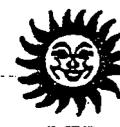
9 tion that singles out groups as groups for preferential
10 treatment did you have in mind?

11 MR. LERNER: That only Indians
12 could be shareholders.

13 MR. COULTER: How about all the
14 millions of acres of Indian title that were extinguished? What
15 kind of preference does that show?

16 MR. LERNER: What... Excuse
17 me, you're confusing... to my mind, if I may say so, two
18 different considerations. I'm not saying what would have been
19 the case in Georgia if an Indian had wandered in, or if someone
20 who wasn't an Indian has wandered in, as an agent for an Indian
21 and said, "Okay, I'm buying fee simple title to this parcel and
22 then I'm buying the other parcel," and so on. It probably
23 wouldn't have sat well with the Georgians in the 1830s, but did
24 the law forbid it? You could say the practical situation of
25 the Indians was that many or most or the overwhelming proportion
weren't in a position to buy anything. The point is, it wasn't
the law that excluded them from purchasing.

Again, these are always difficult things because one is
reminded of what happened with people who went that great American
route, the Cherokees. Okay? They're doing everything right,
so to speak, and it didn't help them. I'm not talking about that.



1 But the face... I mean, the letter of the law did not say, "This
2 is for this biological or religious group only." Only... That
3 is in the nonpejorative sense, discrimination. I discriminate,
4 I distinguish you from the next guy on the basis of this thing,
5 not because... you are Coulter and he's Naranjo, but because
6 one of you is Indian... Well, I mean, it's a mistake. I can
7 take another example. Between you and me... Okay, let's leave it
8 that way. Because you are Indian and I am not. That's a new
9 consideration. That's a discrimination, and I say it to the
10 extent that there's a benefit.

11 Look... I mean, let's not forget the obvious. It's a
12 benefit to be a shareholder in this corporation. If it weren't
13 a benefit, you wouldn't worry about people selling it off and
14 being bought out by Japanese or Saudi Arabian investors who
15 want to recycle their dollars and want to have a good investment.
16 And they'll come to Alaska and make resorts. If it weren't a
17 good thing, you wouldn't worry about it. Isn't that true?

18 MR. COULTER: No, I don't
19 think it can be counted a benefit to be spared the evils of
20 theft. I mean, I don't think it's any discrimination to say
21 that only you should own your sport coat. That's ridiculous,
22 it's your sport coat and to say that others don't own it is
23 no sort of benevolence or favoritism towards you.

24 MR. LERNER: That, sir --

25 MR. COULTER: And to --

MR. LERNER: -- is because the
law establishes my claim to my sport coat --

MR. COULTER: Well --

MR. LERNER: -- on the theory...

(LAUGHTER)

MR. LERNER: Yes, on the
theory that it's somehow mine, my individual property, whether
I earned it, whether I bought it at a salvage shop, whether I



1 found it on the streetcar... I mean, it doesn't go into that
2 too much. But if it were a challenge, I suppose some way or
3 another I would have to establish that I do, indeed, have a
4 right under the constitution to this thing I, Lerner, have a
right to this thing that I'm passing off as my property.

5 MR. COULTER: Well, now, when
6 did the Alaska Native people have that chance? And isn't it
7 true that Congress not only claimed but exercised the power to
8 extinguish the Native claim to millions and millions of acres
of land that they claimed by natural right?

9 MR. LERNER: You used natural
right earlier --

10 MR. COULTER: By any right,
11 legal right. Call it anything you want, I don't care.

12 MR. LERNER: But you see, it is
13 the difference. As far as I know, the Indians did not before
14 claim that their right to the law... to the land down in the 48
rested on the white man's law.

15 MR. COULTER: Who cares what
16 law it rests upon? What difference would that make? They
claim to own it.

17 MR. LERNER: It only cares
18 to those who pass on the law, like judges and lawyers --

19 MR. COULTER: Well, so in --

20 MR. LERNER: -- They're so
narrow minded about these things.

21 MR. COULTER: Who's narrow
minded?

22 MR. LERNER: All these judges
23 and lawyers, they seem to care what the law is. They don't think
24 they have a license --

25 MR. COULTER: Well, not in
my view.

1 MR. LERNER: Well, I know, but,
2 you see, that's the peculiar thing. You're operating within
3 another man's setup. If the court... to paraphrase a famous
4 remark... You know, we're authorized to sit like a *cadi*, that's
5 an Islamic judge, under a tree dispensing justice, well that's
6 okay. But they don't have that license. They are authorized
7 only by the language of Article III, Section 1 and 2, as enlar...
8 not even enlarged, but as specified by the Judiciary Act of
9 1789 as amended.

10 MR. COULTER: Well --

11 MR. LERNER: They can't just
12 do anything... They're not supposed to just do anything that
13 strikes them as a nice thing to do. You wouldn't, in your
14 heart of hearts, want to give anybody the right to do anything
15 he damn well pleased on the grounds that he's a nice guy because
16 he might not always be a nice guy and his successor might even
17 be a rotten guy, so you keep him to the letter of the law, to
18 the extent you can. That's not a small thing. That doesn't
19 deal with the question that you're stirring here.

20 MR. COULTER: It's very strange.
21 This was never before a court. We're talking about what... Well,
22 it has been in some limited instances, but the courts said
23 that Congress can just steal the Alaskan Native lands if they
24 want and pay nothing at all. Now, that is, you know, the thinking
25 of many people, exactly what ANCSA accomplished, and to be sure
it did set out that Alaska Native peoples and corporations
retain certain other rights which you now feel are a discriminatory
benefit.

MR. LERNER: I'm not going to
get hanged up on this because I'm only suggesting, and when I
use words like discrimination and benefit, I was trying to use
it in ways that reached beyond the passion that one has that,
not only have I got this coming, but I haven't nearly got enough



1 that I have coming. I'm trying to invite you to step back from
2 it for a moment. And I was responding to Mr. Berger's effort
3 to elicit some kind of notion of how this thing, this... this
4 statement that only Native peoples may be shareholders in
5 this government-financed corporation, how that sits with the
6 vast other body of the law which says we don't pick and choose
7 among people in that way when government action is concerned.

8 I'm not saying that the Russian Orthodox Church hasn't
9 got a right, if it floats some kind of bond, to limit purchases
10 to Russian Orthodox believers and even to establish a test oath
11 to make sure that they're really Russian Orthodox and not, you
12 know, guys who are pretending to be Russian Orthodox that are
13 actually working for someone else. That's another matter.
14 You're talking about a government for all the people.

15 Now, again, it's a special thing and I think it recog-
16 nizes the specialness of Indians... or of Native peoples generally.

17 MR. COULTER: It certainly
18 does --

19 MR. LERNER: Okay.

20 MR. COULTER: -- I can't
21 think of any other group that would ever be subjected to that
22 kind of legislation, certainly nobody else.

23 MR. BERGER: I wonder, Mr.
24 Lerner and Tim Coulter, could we just... Kim Gottschalk's arm
25 is going to fall off if I don't recognize him.

MR. GOTTSCHALK: Well, I just
think this is a perfect example of what we were talking about
before as individual versus group rights. You want to know
where this fits in with the whole body of law and Professor
Johnson answered that earlier. The way it fits in is, the way
that the supreme court rationalized it is, they said when they
allow only Indians to own this stock or Natives or whatever,
they're not granting an individual preference and there is no

1 discrimination. Now, I realize that's somewhat... In some ways,
2 that's a hard concept to buy. But what they said is, they're
3 dealing with groups of people, they're dealing with Indian tribes,
4 not individual Indians, and, therefore, when they say only
5 Natives may hold this stock, they're not granting an individual
6 discrimination. Their discrimination... discriminating on the
7 basis of groups with certain rights vis-a-vis individuals, just
8 like in Morton versus Mankari (ph) when they said there can be
9 Indian preference for jobs in the BIA. That was not granting
10 an individual preference over another individual. That's the
11 way the supreme court has fit that in with the other body of
12 law that you're talking about which generally says that everyone
13 must be treated alike.

14 MR. LERNER: I have no interest
15 in reconciling the many things that the supreme court says about
16 any topic in particular, let alone one as complex and multi
17 faceted as Indian law. Nor am I saying that it's a bad thing.
18 I'm not saying that it's a bad thing for Indians to control
19 their own corporation. I'm not saying anything about that.
20 I'm just speaking about the problem of dealing with this under
21 ordinary concepts of American law, and to the extent that you've
22 got it, you're lucky. And to the extent that you can do some-
23 thing about keeping it, bon chance... that means good luck in
24 English. But beyond that, the notion that this supplies an
25 entering wedge for reconstituting the whole basis or status
of Native people under American law... that's a very tall order.
When you have Indian corporations that will be big in the wood
pulp and paper manufacturing, salmon cannery business, there's
no reason why they can't go into microcomputers or anything else
that people who make corporations might want to go into.

You're going to have interesting questions down the
road.

MR. BERGER: Excuse me. I think

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1 Rosita Worl should have the last question this afternoon, and
2 we'll... and just before you ask it, Rosita, I thought that
3 tomorrow morning, when we returned at 9:00 a.m., we would ask
4 Ted Chamberlin to lead off, and I thought after Ted, Alma
5 Upicksoun, if you wish to make a contribution then, we will
6 welcome it. The same goes for Kim Gottschalk and, of course,
7 for Dalee Sambo and, of course, for Alfred Starr. Mr. Starr,
8 you, sir, have been with us now a week and a half and you
9 participated fully last week and I don't want you to think that
10 we don't want you to speak tomorrow, if you wish.

11 After that, I think Browning Pipestem will be here and
12 we will ask him, once he's got his sealegs and knows what kind
13 of roundtable this is (LAUGHTER) to participate. And, Rosita,
14 we'll have time for one more question before we give up the
15 room.

16 MRS. WORL: Again, you might
17 have answered this question when I was out feeding my meter.

18 In your... And speaking non-lawyer to non-lawyer... Okay?

19 MR. LERNER: Gratitude.

20 MRS. WORL: In your analysis,
21 how... I mean, how do you move from this individual rights to
22 collective rights? We here in Alaska, within the last several
23 years, have heard how we must yield to greater interests, national
24 interest needs and, you know the rights of other people outside.
25 But... It talks about a collectiveness and in your mind... in
your analysis, how do you move from individual rights to these
group or collective rights?

MR. LERNER: What you have are
group or collective interests, and they're the things that are
dearest to you. For example, you have an interest that your
children should somehow be what you would like them to be. I
suppose that, under law, you have a right to federal funds for
one thing or another. I've got little sense of... of this

1 (INDISCERNIBLE) of legislation that exists on these matters.

2 I don't know how successful schools are in Alaska. I've
3 got a pretty clear notion of how successful they are in Chicago.
4 I think that probably, if something really mattered to you, really
5 mattered to you, that your children should have it or somehow
6 accept it or be exposed to it, not as a piece of a museum exhibit
7 but as a life lived, it wouldn't be a thing that you would
8 entrust to a school teacher on the public payroll. If it mattered
9 to you really, you would do it, you would live it, you would make
10 sure that it was done right. I mean, when you deal with people
11 with marginal interests in your interest, who've got a lot of
12 other things on their minds, who may or may not be competent,
13 may or may not care, you wouldn't entrust it to them. You
14 wouldn't expect them... I mean, it's... If I may touch a subject
15 of which... over which people go crazy, you know... public... Will
16 one minute of public silent prayer in the schools convert a
17 school population of aethists into the believer in the Almighty
18 Living God? Who can believe it? If that child learns about
19 the meaningfulness of God, it's going to be what that child
20 observes in the behavior of those who are closest to it, what
21 they do and how they do it.

22 So I don't know, you know, how you secure the things
23 that are most important to you. If you can get money, get money.
24 That's all right, but the real control over your lives probably
25 has to go at a level much more fundamental than the usual
bureaucratic establishment.

MR. BERGER: Could I just make
an observation before we depart? And I don't know whether anyone
... I don't know whether anyone wishes to return to this tomorrow
but I leave it on the table.

Professor Lerner, in his remarks this morning, referred
to something that people often do refer to, and that is they are
surprised to find, on Baffen Island or on the Bering Sea or

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1 anywhere on the frontier, they're surprised to see the manifestation
2 of the universal culture of the West. That is, the Eskimo
3 girl listening to rock and roll is... perhaps not by Professor
4 Lerner, but by others seen as somehow impairing her standing as
5 an Eskimo. You know, you could go to Nepal, the Himalayas, you
6 could go to the South Seas, and you will find that... that the
7 universal culture of the West has penetrated there.

8 A week before last, this commission held meetings at
9 two villages on the Bering Sea, Emmonak and Tununak. At one
10 of those, Tununak, I think it's safe to say people are largely
11 engaged in making a living off the land, and we had... we ate
12 musk ox and dried fish dipped in seal oil and... I mention those
13 things to show that the substance of the land, even on a two-
14 day visit, loomed very large in the ordinary events such as eating
15 and so on. Yet, every home has a television set. You can watch
16 "As the World Turns" or the man with red hair on late at night,
17 two programs that I noticed were available there... "Night Line,"
18 that's the one I'm thinking of.

19 Well, does that... Does that in any way diminish the
20 way in which you would characterize those people? And certainly
21 the evidence they gave to the commission indicated that the...
22 the presence of... And, you know, the Ayatollah Khomeini
23 cannot stamp out blue jeans and rock and roll. The Kremlin --

24 MR. LERNER: He'll give it a
25 good try.

(LAUGHTER)

MR. BERGER: Well, the Kremlin
is unable to do so... and so where does that leave us? Would it
be any... Would it make any difference if the Eskimo girl was
listening to Beethoven? Would that... Dalee Sambo, you wanted
to say something before we adjourn.

MS. SAMBO: Yes, just as a side
note to that, the reference that you made to the entertainment at



1 the ICC conference, it was country and western, it was rock and
2 roll, it was in Inupiaq, Inupititut and Inuvialowi languages.
3 It was not in English and it wasn't with a Southern drawl.

(LAUGHTER)

4 MR. LERNER: And what did the
5 words say?

6 MS. SAMBO: Well --

7 MR. LERNER: As distinguished
8 from what the music said?

9 MS. SAMBO: Well, some of the
10 tunes were adapted to music that was... that came from the
11 hearts and minds of the Inuit people living in those areas, but,
12 again, some of them were translated from the English versions.

13 MR. BERGER: All right. Well,
14 I think that we're indebted to Professor Lerner for uttering
15 some propositions that we all know in due course have to be
16 considered, and we're grateful to you, sir.

17 And... 9:00 a.m.

(HEARING ADJOURNED)





