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Legal Sidebar

Supreme Court Holds Alaska Native Corporations Are "Indian Tribes" Entitled to CARES Act Funds

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On June 25, 2021, in *Yellen v. Confederated Tribes of the Chehalis Indian Reservation* (*Chehalis*), the Supreme Court rejected a challenge to the Department of the Treasury's (Treasury) decision to distribute to the Alaska Native Corporations (ANCs) approximately $450 million of the $8 billion in funds allocated to "Tribal governments" under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The challengers had argued that ANCs do not satisfy the CARES Act's definition of *Indian tribe,* which is drawn from the Indian Self-Determination and Education Assistance Act (ISDEAA).

The Supreme Court's decision reverses the judgment of the U.S. Court of Appeals for the D.C. Circuit interpreting the ISDEAA definition of *Indian tribe* as a term of art that, while expressly mentioning ANCs, excludes them by separately requiring federal recognition. The Supreme Court rejected that interpretation and held that the plain meaning of the ISDEAA definition of *Indian tribe* includes ANCs because they are recognized as eligible for a wide array of benefits and services under the Alaska Native Claims Settlement Act (ANCSA), and "the required recognition is of an entity's eligibility for federal Indian programs and services, not a government-to-government relationship with the United States."

An earlier Legal Sidebar previewed the oral argument in *Chehalis*. This Legal Sidebar summarizes the statutory background and prior litigation in the case before discussing the Supreme Court's decision and related considerations for Congress.

Statutory Background

Chehalis involved a regulatory scheme established by statutes including ANCSA, ISDEAA, the List Act, and the CARES Act.

Congress enacted ANCSA in 1971 to settle Alaska Natives' aboriginal land claims. To that end, ANCSA extinguished all aboriginal claims to land in Alaska and terminated all but one of the existing reservations in the state. In exchange, Congress transferred 44 million acres of Alaska land and $962.5 million to the two types of ANCs established in the statute—Alaska Native Regional Corporations (of which there are now 12 out of an original 13) and Alaska Native Village Corporations (of which there are almost 200).

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The ANCs are state-chartered, private, for-profit business corporations with Alaska Natives as shareholders. Congress also granted the Alaska Native Regional Corporations statutory authority to provide "health, education, and welfare benefits" to their Alaska Native shareholders and the shareholders' family members. Unlike traditional Alaska Native villages, ANCs are not included on the list of 574 federally recognized tribes that engage in government-to-government relations with the United States, which the Department of the Interior (DOI) publishes annually pursuant to the 1994 List Act.

Enacted in 1974, the ISDEAA authorizes the federal government to enter into contracts with Indian tribes under which the government provides funds to an individual tribe to use in providing services to tribal members. Although the ANCs do not exercise tribal sovereignty, DOI has "consistently adhered to the view that ANCs qualify to be treated as Indian tribes" for purposes of the ISDEAA. The ISDEAA defines *Indian tribe* as

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or *regional or village corporation* as defined in or established pursuant to the Alaska Native Claims Settlement Act . . ., *which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.* [Emphasis added.]

The 1994 List Act mirrors the final clause of this definition, requiring DOI to publish an annual list of "all Indian tribes which the Secretary recognizes to be *eligible for the special programs and services provided by the United States to Indians because of their status as Indians*." [Emphasis added.] As codified in the List Act, recognition is a "formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." Federal recognition obligates DOI to provide an array of benefits and services to the recognized tribe and its members. The ANCs are not, and cannot be, included on DOI's list of federally recognized Indian tribes because DOI's regulations preclude corporations "formed in recent times" from applying for federal recognition, "unless the entity has only changed form by recently incorporating or otherwise formalizing its existing politically autonomous community."

The CARES Act, enacted in 2020 in response to the COVID-19 pandemic, directs Treasury to reserve $8 billion of the Coronavirus Relief Fund for payments to "Tribal governments." The act defines *Tribal government* as "the recognized governing body of an Indian tribe" and defines *Indian tribe* by reference to the ISDEAA's definition of that term. Thus, the ANCs' eligibility for CARES Act funds potentially requires an affirmative answer to each of two questions: (1) whether the ANCs qualify as "Indian tribe[s]" under the ISDEAA's definition of that term; and (2) whether the ANCs' boards of directors qualify as "Tribal government[s]," that is, the "recognized governing bod[ies] of an Indian tribe."

Lower Court Decisions

On April 17, 2020, seventeen federally recognized Indian tribes from Alaska and the lower 48 states sued to enjoin Treasury from implementing its determination that the ANCs are eligible for CARES Act payments. The district court rejected that challenge on June 20, 2020, reasoning that Congress could not have intended the ANCs' eligibility for CARES Act payments to turn on their ability to satisfy the recognition clause. The court identified three bases for its conclusion. First, the court reasoned that Congress's inclusion of ANCs in the ISDEAA's definition of *Indian tribe* would not make sense if the recognition clause applied to them, because Congress knew that ANCs could not satisfy the standard for federal recognition. Second, the court opined that the legislative history of the ISDEAA shows "that Congress took pains to include ANCs in the ISDEAA definition." Third, the court concluded that, "to the extent that the . . . definition of 'Indian tribe' contains any ambiguity," the court should defer to DOI's interpretation that ANCs qualify as Indian tribes under that definition.

The D.C. Circuit reversed the district court's judgment based on its interpretation of the clause in the ISDEAA's definition of *Indian tribe* that states that the definition applies to any of the listed entities that

"*is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.*" The court held that this language is a term of art that encompasses only federally recognized Indian tribes, and therefore unambiguously precludes treating ANCs as Indian tribes for purposes of the ISDEAA or CARES Act. The court also concluded that the only way to "constru[e] the statute to make grammatical sense" is to read the recognition clause to "modify all the nouns in the definition," including the ANCs. According to the court's reasoning, "it is not grammatically possible for the recognition clause to modify" every noun in the definition *except* "the one noun . . . that is its most immediate antecedent ('corporation')."

The D.C. Circuit also reviewed the long history of uncertainty about the existence of tribal sovereignty in Alaska until the 1993 decision of the Bureau of Indian Affairs to include only Alaska Native villages as federally recognized tribes. The court reasoned that, because Congress enacted the ISDEAA during this period when tribal sovereignty in Alaska remained uncertain, it made sense that Congress would have phrased the definition of *Indian tribe* to include "whatever Native entities ultimately were recognized—even though, as things later turned out, no ANCs were recognized."

Supreme Court Decision

The Supreme Court, in an opinion written by Justice Sotomayor and joined by Chief Justice Roberts and Justices Breyer, Kavanaugh, and Barrett, with Justice Alito joining in part, held that ANCs are eligible for CARES Act funding. The opinion, like that of the D.C. Circuit, focused on the clause of the CARES Act/ISDEAA definition of *Indian tribe* that refers to recognition of eligibility for U.S. services to Indians. According to the Court, this clause requires recognition of "an entity's eligibility for federal programs and services, not a government-to-government relationship with the United States." Under that interpretation, ANCs meet this requirement based on their eligibility for ANCSA benefits and services.

The Court also endorsed an alternative reading of the ISDEAA definition: even if the third clause of the definition of *Indian tribe* requires formal federal recognition, that clause does not apply to the ANCs because "[o]therwise . . . all ANCs would be excluded by a federal-recognition requirement there is no reasonable prospect they could ever satisfy."

Finally, the Court held that an ANC's board of directors qualifies as "the recognized governing body of an Indian tribe" under the CARES Act definition of *tribal government*. The Court noted that Black's Law Dictionary defines "Board of Directors" as "[t]he governing body of a private corporation" and that federal agencies have long understood that language in the ISDEAA to include an ANC's board of directors. In addition, in the CARES Act and in the ISDEAA, "recognized governing body" merely "pinpoints the particular entity that will receive funding on behalf of an Indian tribe"; it does not limit the tribes eligible for funding.

The Court reviewed the history of "the unique circumstances of Alaska and its indigenous people" and explained that DOI had consistently interpreted the ISDEAA definition to include ANCs. It concluded that the definition's third clause, which the Court labeled the "recognized-as-eligible clause," does not refer to any particular program of special benefits, such as the benefits available to federally recognized tribes. The Court reasoned that the vast and continuing benefits ANSCA confers on the ANCs satisfy that clause as "special programs and services provided by the United States to Indians because of their status as Indians" The Court also read the express mention of ANCs in the statute's text as sufficient confirmation of ANC eligibility, "regardless of whether they and their shareholders are eligible for federal Indian programs and services other than those provided in ANCSA." The Court warned that its holding has a limited reach and that other "groups receiving federal benefits" may not be "similarly situated to ANCs" and emphasized that ANCs are "*sui generis* entities created by federal statute and granted an enormous amount of special federal benefits as part of a legislative experiment tailored to the unique circumstances of Alaska and recreated nowhere else."

The Court rejected arguments that the word "recognized" in the definition of *Indian tribe* in the ISDEAA's definition of *Indian tribe* necessarily confines the definition to federally recognized tribes. It specified that it had identified no evidence establishing the ISDEAA definition as a term of art equivalent to "federally recognized tribe" or that the word "recognized" necessarily "connotes political recognition." On the contrary, the Court declared that "'[r]ecognized' is too common and context dependent a word to bear so loaded a meaning wherever it appears, even in laws concerning Native Americans and Alaska Natives." The Court also discounted the relevance of "linguistic similarity" in other statutes, rejecting some as not exactly mirroring the ISDEAA language or as post-enactment legislation with little relevance to what Congress was considering when enacting the ISDEAA. The Court did, however, identify some post-enactment legislation, including Native American Housing Assistance and Self-Determination Act of 1996 block grant appropriations, as examples of Congress's awareness of ANC participation in ISDEAA projects.

Reasoning that "[t]he most grammatical reading of a sentence in a vacuum does not always produce the best reading in context," the Court held that, even if the last clause of the definition of *Indian tribe* requires federal recognition, the clause does not apply to the ANCs. Justice Alito did not join this part of the opinion of the Court. In deciding that the last clause of the ISDEAA definition does not apply to ANCs, the Court specifically declined to apply a canon of statutory construction, the series-qualifier doctrine, according to which "a modifying clause at the end of a list . . . often applies to every item in the list." The Court pointed out that Congress enacted the ISDEAA amid doubt that Alaskan entities would ever be recognized "as sovereign political entities" and that "[a]ny grammatical awkwardness involved in the recognized-as-eligible clause skipping over the Alaska clause pales in comparison to the incongruity of forever excluding all ANCs from an 'Indian tribe' definition whose most prominent feature is that it specifically includes them."

Highlighting agency practices of including ANCs in ISDEAA programs, the Court discounted arguments of the Respondent tribes that including ANCs might complicate administrative burdens or motivate ANCs to try to participate in other programs. The Court also noted that some existing laws, such as the Indian Tribal Energy Development and Self-Determination Act of 2005, include the ISDEAA definition but otherwise expressly limit applicability to the ANCs.

In a dissenting opinion, Justice Gorsuch, joined by Justices Thomas and Kagan, emphatically disagreed with the Court's interpretation of the last clause in the ISDEAA's definition of *Indian tribe*, which he referred to as "the recognition clause." According to the dissent, considerations such as grammatical structure, "materially identical language in the List Act," similar language in a series of statutes "granting and terminating formal federal recognition of certain tribes," and congressional intent when enacting the ISDEAA point to interpreting the clause as referring to federal recognition. The dissent also emphasized that inclusion in the CARES Act of "tribal governments side-by-side with States and local governments reinforces the conclusion that Congress was speaking of government entities capable of having a government-to-government relationship with the United States." The dissent cautioned that interpreting the clause to require only eligibility for the kind of services that ANCSA provides to the ANCs may mean that "many other Indian groups might suddenly qualify as tribes." The dissent called it "passing strange to suggest that the recognition clause applies to everything *except* the term immediately preceding it," proclaiming that "an ordinary reader would understand that the recognition clause applies the same way to all Indian groups." The dissent concluded that, "if that's true, there's just no way to read the text to include ANCs as 'Tribal governments' for purposes of the CARES Act."

Considerations for Congress

The litigation in *Chehalis* led a majority of the Court to offer two interpretations of the CARES ACT/ISDEAA definition of *Indian tribe*, both of which the dissent contested. Congress may consider legislation clarifying whether and how the definition should apply to ANCs for purposes of the ISDEAA

and the approximately 150 other statutes that use that same definition. Furthermore, when defining "Indian tribe" in future legislation, Congress may consider whether to avoid referencing the ISDEAA definition without specifying whether ANCs are included or excluded. For example, one recent enactment, Section 501(k)(2)(C), Division N, Title V (the Coronavirus Response and Relief title) of the Consolidated Appropriations Act, 2021, P. L. 116-260, defines "Indian tribe" in language mirroring the ISDEAA definition, but includes the following qualifying phrase: "For the avoidance of doubt, the term Indian tribe shall include Alaska native corporations established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, et seq.)." Congress also may consider whether legislation is needed to avoid the possibility that other non-federally recognized indigenous groups that are eligible for federal services under a particular statute, such as the statute protecting Indian arts and crafts products, will claim that they qualify more generally under the ISDEAA definition.

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