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IN THE SUPREME COURT OF THE UNITED STATES

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ALASKA, :
Plaintiff :
v. : No. 128, Orig.
UNITED STATES. :
- - - - -X

Washington, D.C.
Monday, January 10, 2005

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:03 a.m.

APPEARANCES:
JONATHAN S. FRANKLIN, ESQ., Washington, D.C.; on behalf of
the Plaintiff.
JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Defendant.

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P R O C E E D I N G S

(10:03 a.m.)

JUSTICE STEVENS: We'll now hear argument in Alaska against the United States.

Mr. Franklin.

ORAL ARGUMENT OF JONATHAN S. FRANKLIN
ON BEHALF OF THE PLAINTIFF

MR. FRANKLIN: Justice Stevens, and may it please the Court:

Because title to lands underlying navigable waters is an inseparable attribute of State sovereignty, this Court has long held that there is a strong presumption that each State receives title to such lands at statehood. Under the Court's precedents, the United States cannot defeat the State's title unless Congress has definitely declared an intention to do so or has otherwise made that intention very plain.

Turning to the Glacier Bay claim in this case, the United States asserts that it received title to the submerged lands underlying the bay at statehood, but there is no express statement, an unambiguous statement by Congress evidencing an intent to defeat Alaska's title.

To the contrary, the proviso to section 6(e) of the Alaska Statehood Act, which is the only statute the United States identifies as ratifying the purported

1 reservation of the bay, in fact shows that title remains
2 with Alaska. Under the plain language of the statute, the
3 proviso applies only to a subset of the lands that would
4 otherwise have been transferred to the State under the
5 main clause. And this is important. In this case it is
6 undisputed by both of the parties and by the Special
7 Master that the Glacier Bay Monument was not included
8 within the main clause. The submerged lands, therefore,
9 did not --

10 JUSTICE O'CONNOR: Well, counsel, you --
11 apparently you agree that the U.S. retained title to the
12 uplands in Glacier Bay National Monument under section
13 5 --

14 MR. FRANKLIN: Yes, Your Honor.

15 JUSTICE O'CONNOR: -- of the statehood act.

16 MR. FRANKLIN: Absolutely.

17 JUSTICE O'CONNOR: And why was Federal title to
18 the monument not sufficient to retain title to the
19 submerged lands as well without reference to section 6(e)
20 at all?

21 MR. FRANKLIN: Because of section 6(m), Your
22 Honor. Section 5 of the Alaska Statehood Act provides
23 that the Federal Government retained all of the property
24 it previously possessed with one important exception,
25 except as provided in section 6. Section 6 has two

1 exceptions within it that are potentially relevant here.
2 Section 6(m) incorporates the Submerged Lands Act and
3 thereby provides that Alaska was to receive title to all
4 the submerged lands underlying its navigable waters, plus
5 those 3 miles seaward from the coastline, in order to put
6 Alaska on the same equal footing with the rest of the
7 States.

8 Section 6(e) dealt with an entirely different
9 set of properties. What section 6(e) did was to transfer
10 to the State a very specific and narrowly defined class of
11 property, property that was used for the purposes or
12 solely -- for the sole purpose of -- of fish and wildlife
13 conservation under three designated statutes. Those are
14 the State -- local-State fish and wildlife conservation
15 statutes.

16 Again, here it was -- it is undisputed that
17 Glacier Bay is not included within the main clause.
18 Therefore, the --

19 JUSTICE GINSBURG: -- problem, as -- you just
20 said that -- that the main clause is very, very narrow,
21 and we're told by the Government that no wildlife
22 reservation would come within that main clause, so that
23 there would be nothing to retain under the second clause.

24 MR. FRANKLIN: The Government is incorrect, Your
25 Honor. We have identified two wildlife refuges, the Kenai

1 moose range and the Kodiak bear refuge, that were
2 otherwise encompassed by the main clause but saved by the
3 proviso.

4 And here's why the United States is correct on
5 that. They argue in their brief that those properties
6 were not included in the main clause because they were
7 created under the Alaska Game Law of 1925 rather than the
8 Alaska Game Law of 1943. In fact, Your Honors, those are
9 the exact same statute. The '43 Alaska Game Law simply
10 restated the 1925 law with certain amendments. What that
11 means is that at statehood the Kenai moose range and the
12 Kodiak bear refuge were, in fact, being used for the
13 purposes under the Alaska Game Law of '43, which was the
14 then-existing version. These refuges were created in 1941
15 prior to the restatement and amendment of the statute. So
16 those are two properties.

17 And -- and actually the legislative history --
18 we don't think the Court needs to go to the legislative
19 history because the statute is plain and also because
20 there's a clear statement rule. But the legislative
21 history does indicate that Congress was specifically
22 concerned about those two very large refuges. The Kenai
23 and the Kodiak together comprise an area that is
24 approximately the same size as the State of Connecticut.
25 And Congress' concern or, more specifically, the concern

1 of the Fish and Wildlife Service was that Alaska might not
2 be able adequately to manage those properties. But there
3 was no such concern expressed with the monument that's at
4 issue here because it was never going to be transferred to
5 the State under the main clause.

6 JUSTICE O'CONNOR: Why -- why shouldn't we look
7 to the tests set out in the Idaho case here?

8 MR. FRANKLIN: We are advocating the tests set
9 out in the Idaho case, Your Honor. That test is a two-
10 pronged test.

11 JUSTICE O'CONNOR: Right.

12 MR. FRANKLIN: First, you have to look and see
13 if there is a --

14 JUSTICE O'CONNOR: Whether Congress has notice
15 of the inclusion of the lands and a Federal reservation,
16 which it certainly did for Glacier, did it not?

17 MR. FRANKLIN: That's -- that's relevant to the
18 first prong, Your Honor.

19 The second prong --

20 JUSTICE O'CONNOR: And second, whether the
21 transfer to the State would undermine the purpose of that
22 reservation. Should we look to that?

23 MR. FRANKLIN: If the Court were examining the
24 -- the first prong, Your Honor, I think those factors
25 might be relevant. Here, though, the test is set out in

1 not only the Idaho case but also the Alaska case, and that
2 is that there has to be an explicit action by Congress.
3 And Idaho applies that. Idaho looked very carefully for
4 some action by Congress ratifying the reservation in that
5 case.

6 Here, we need an action by Congress. The United
7 States has identified what they contend is the action of
8 Congress, that is, the proviso to section 6(e) of the
9 Alaska Statehood Act. That proviso, though, just does not
10 cover these lands.

11 JUSTICE BREYER: Why do you say explicit? I --
12 I thought it said you have to make it plain, which really
13 might matter.

14 MR. FRANKLIN: In --

15 JUSTICE BREYER: What it says -- the language I
16 think is -- or definitely declared or otherwise made very
17 plain.

18 MR. FRANKLIN: Yes. In the --

19 JUSTICE BREYER: Is that right? There's nothing
20 that says explicit. Right?

21 MR. FRANKLIN: Well, Your Honor, in the Alaska
22 case -- and here I refer the Court to page 44 of the 1997
23 Alaska case. There the Court said that Congress must,
24 quote, explicitly recognize or that Congress had
25 explicitly recognized the resignation in that case. So

1 the -- the Court --

2 JUSTICE SOUTER: But doesn't that simply mean
3 that if it explicitly recognizes, it has made it plain.

4 MR. FRANKLIN: Yes.

5 JUSTICE SOUTER: But it doesn't mean that it
6 must be explicit in every case. Isn't that correct?

7 MR. FRANKLIN: Well, I -- I think explicit --

8 JUSTICE SOUTER: You don't have to be explicit
9 to make it plain. It's a great way to do it, but that's
10 -- it's not the only way.

11 MR. FRANKLIN: It has to be definitely --
12 Justice Breyer, you're correct. It has to be --

13 JUSTICE BREYER: All right.

14 MR. FRANKLIN: -- definitely clear or otherwise
15 made plain. Yes.

16 JUSTICE BREYER: If I'm correct, then -- if I'm
17 correct, then I guess the main argument I thought is here
18 we have a national park and we want to keep the national
19 parks as the United States, which you'd expect. It's a
20 national park. And of course, they want to keep the whole
21 thing. I mean, it's obvious. You don't have to write
22 everything that's obvious. They no more want to give all
23 the water in the park to Alaska than they'd want to give
24 the gamekeeper's part to Alaska. A house, or maybe
25 there's a swimming pool somewhere they don't mention

1 either, but it's just obvious that unless there's
2 something very special about the water, that the water in
3 the park is part of the park.

4 MR. FRANKLIN: Well, there is something special
5 about the water, Your Honor, and that's what the Court has
6 recognized. The water is a State -- an essential
7 attribute of State sovereignty, and just to --

8 JUSTICE BREYER: I understand that. But I mean,
9 it's like saying we're keeping Yellowstone, but we're
10 giving you the geysers. I mean, that's water too. It's
11 even underground water. But I mean, what the argument I
12 think is -- would be is this like that, and the argument
13 that it is like that is that, well, of course, you need
14 this water in order to study the glaciers because there
15 are forests that go down to the edge, because the flora
16 and fauna can't be protected without it. And so though it
17 isn't as strong a case as the geysers in Yellowstone, it's
18 good enough. Now, what's your reply?

19 MR. FRANKLIN: First of all, the geysers are not
20 included because we're talking about navigable --

21 JUSTICE BREYER: I understand that. I'm using a
22 funny example to --

23 MR. FRANKLIN: Yes. Navigable waters.

24 (Laughter.)

25 MR. FRANKLIN: But let me -- let me just assure

1 the Court. There is nothing at all unusual about State-
2 owned submerged lands within national monuments. The
3 reason is simple. The Antiquities Act, which allows the
4 President to designate national monuments, was enacted in
5 1906. At that time there were 45 States already in the
6 Union. Therefore, any national monument created in those
7 45 States would necessarily have included State-owned
8 submerged lands unless there had been some conveyance.

9 And let -- let me give Your Honors a -- a
10 concrete example. In the 1978 California decision decided
11 by this Court, the Court recognized that the Channel
12 Islands National Monument, which is an offshore national
13 monument off the coast of California, included State-
14 owned submerged lands because even though the reservation
15 order was asserted to have included those lands, there was
16 no congressional statement of an intent to defeat the
17 State's title.

18 Another --

19 JUSTICE BREYER: Like in Yellowstone. There is
20 a river I think. Who owns that?

21 MR. FRANKLIN: Well, Yellowstone was created
22 before the State of Wyoming and --

23 JUSTICE BREYER: No. But I mean, does the State
24 or the Feds own the -- the river that goes through it?

25 MR. FRANKLIN: One would need to examine the

1 particular reservations and statutes there.

2 JUSTICE BREYER: What about in Yosemite? I
3 think there's a river down there too. Is the river in
4 Yosemite owned by California or by the -- the Feds?

5 MR. FRANKLIN: I'm not familiar with that, but I
6 will give you an example that I am familiar with.

7 JUSTICE SCALIA: Before you do that, Mr.
8 Franklin, is -- is the rule that -- that we're operating
9 under that Congress had to have made it clear --

10 MR. FRANKLIN: Yes.

11 JUSTICE SCALIA: -- that it reserved, or is the
12 rule that it is clear that Congress ought to have reserved
13 it?

14 MR. FRANKLIN: No. It's the former rule, Your
15 Honor.

16 JUSTICE SCALIA: It's the former.

17 MR. FRANKLIN: Yes.

18 JUSTICE SCALIA: So the mere fact that it
19 doesn't make any sense not to have reserved it does not
20 make it clear that Congress reserved it, does it?

21 MR. FRANKLIN: Absolutely, Your Honor.

22 JUSTICE BREYER: Right, but normally you assume,
23 I guess, that Congress does what is -- tries to avoid
24 things that are ridiculous. So if they say keep the park,
25 I guess the question would be is that included. I mean --

1 MR. FRANKLIN: It's not --

2 JUSTICE BREYER: -- can you read it this way? I
3 -- I think it would be relevant, wouldn't it?

4 MR. FRANKLIN: Well, first of all, this is not
5 the ordinary -- in this case we presumed the -- the
6 opposite. In fact, there's a strong presumption.

7 But let me give you the other example that I was
8 going to refer to you.

9 JUSTICE BREYER: Yes.

10 MR. FRANKLIN: There's something called the
11 California Coastal National Monument. That extends the
12 entire length of California and goes out 12 miles to sea.
13 In that monument, the -- the lands, the submerged lands,
14 are both State-owned and Federal-owned, and they are
15 managed cooperatively.

16 And that's what we are seeking to do here. And
17 importantly, the fact --

18 JUSTICE SCALIA: Mr. Franklin, are -- are these
19 submerged lands covered by navigable waters?

20 MR. FRANKLIN: Yes.

21 JUSTICE SCALIA: What is it that the Government
22 could do, if they owned the submerged lands, by way of
23 protecting wildlife and doing all the good stuff they want
24 to do, that they cannot do simply by -- by reason of -- of
25 having jurisdiction over the navigable waters?

1 MR. FRANKLIN: There are a few things,
2 presumably very localized activities that the State would
3 have the exclusive authority in. Importantly though, the
4 Federal Government, even though the State owns title here,
5 will retain all of its constitutional authority under the
6 Interstate Commerce Clause to regulate activities that
7 affect interstate commerce that --

8 JUSTICE O'CONNOR: Yes, but just as a practical
9 matter, tell us what you're arguing about. What does
10 Alaska think it can do if it prevails in the Glacier
11 Monument area by virtue of prevailing, as a practical
12 matter?

13 MR. FRANKLIN: As -- as a practical matter,
14 there are issues relating to local subsistence fishing
15 that are important to the State. There are issues
16 relating to local uses of the bay. But more
17 importantly --

18 JUSTICE SOUTER: Well, could -- could you be
19 concrete? I mean, there -- I don't know what you mean.
20 What are the issues? Can you give me an explicit example?

21 MR. FRANKLIN: Well, one explicit example is I
22 think the State would prefer to have more local
23 subsistence fishing in the bay. And the Court -- to -- to
24 move out a bit, the --

25 JUSTICE O'CONNOR: So the State would permit

1 more fishing than the U.S. would allow --

2 MR. FRANKLIN: I think --

3 JUSTICE O'CONNOR: -- as a practical matter.

4 MR. FRANKLIN: As a practical matter. And --
5 and there -- there --

6 JUSTICE SCALIA: But couldn't Congress forbid
7 that under -- by reason of its control of the navigable
8 waters --

9 MR. FRANKLIN: Well, if --

10 JUSTICE SCALIA: -- if it really wanted to?

11 MR. FRANKLIN: If Congress really wanted to,
12 Congress could -- could affect activities relating to
13 interstate commerce.

14 But importantly, what Alaska seeks here really
15 is a seat at the table. Right now Alaska has no say over
16 anything that happens in its navigable waters which are
17 its sovereign State lands. What it seeks really is to
18 have its views being considered.

19 Right now -- and I'll give you a concrete
20 example that goes to the enclaves that are issue in the --
21 in the next count that I'll discuss. For some time cruise
22 ships were going out into the middle of these enclaves and
23 dumping their untreated sewage because that was outside --
24 or asserted by the Government to be outside the scope of
25 Alaska's pollution laws and not within the scope of

1 Federal laws. That was fixed, but it took an act of
2 Congress to do that. There had to be an act of Congress
3 to prohibit those cruise ships from dumping their sludge
4 out in these, what they used to call, donut holes. Alaska
5 finds it unacceptable to have to go petition Congress
6 every time something comes up on its navigable waters that
7 it believes ought to be regulated or dealt with.

8 Now, if Congress decides to preempt the State
9 under its interstate commerce power, it has the right to
10 do that.

11 I think we also need to keep in mind what waters
12 we're talking about. This is southeast Alaska. The
13 waters of southeast Alaska quite literally define the
14 region. They are central to the economy, the history, the
15 society, and the culture of all the Alaskans who live
16 there and who travel there.

17 Just to take an example, there are still today
18 very few roads anywhere in southeast Alaska, and the --
19 the towns and the cities like the -- the State capital of
20 Juneau historically were accessible only by the water.
21 This is an area -- the water in particular is an area that
22 is of great importance to Alaska. And they are seeking to
23 confirm that that area does belong to Alaska. And I think
24 we have set forth in quite detail why --

25 JUSTICE O'CONNOR: Well, there -- there are big

1 differences between the -- the analysis concerning the
2 bays that you assert and Glacier Monument. I think
3 they're quite different.

4 MR. FRANKLIN: Well, the -- the tests are
5 different. The Glacier Bay test involves -- needs to have
6 an explicit reservation -- explicit ratification by
7 Congress of a reservation and --

8 JUSTICE O'CONNOR: You're lumping them all
9 together, but I think the tests are quite different.

10 MR. FRANKLIN: The tests are different.

11 What I was trying to explain is, in answer to
12 Your Honor's question, why this matters to Alaska. It
13 matters quite a deal.

14 JUSTICE BREYER: But in -- in respect to Glacier
15 Bay --

16 MR. FRANKLIN: Yes.

17 JUSTICE BREYER: -- I -- I mean, is the only --
18 you said, for example -- is the only dispute about the use
19 of the water that's in the middle of the Glacier Bay park
20 whether there should be more or less fishing, or are there
21 other things that Alaska wants to do with that water in
22 the park that they can't do if the United States owns it?

23 MR. FRANKLIN: There are two issues. I think
24 it's fishing and also to allow more local people to visit
25 the area that would otherwise be prohibited by the Park

1 Service. There was -- but just to assure Your Honors --

2 JUSTICE BREYER: How could they do that? You
3 mean they would go into a boat in the middle of the water
4 there, but they couldn't get off the boat?

5 MR. FRANKLIN: Well, that's normally what --
6 what people do is they just visit the --

7 JUSTICE BREYER: I see.

8 MR. FRANKLIN: -- by boats.

9 But to assure Your Honor, there -- for example,
10 there are no mineral interests here anywhere in the
11 picture.

12 JUSTICE BREYER: All right. So if -- if
13 the normal way of visiting the park is to go into a boat
14 and to go up along the waterway and to look at the
15 glaciers on the shore, then it surely is odd that the
16 United States intended to give that waterway to Alaska,
17 for under those circumstances, there would be nothing left
18 of the park. I mean, it would be like -- you see, if it's
19 essential to it.

20 MR. FRANKLIN: Well, that's not true, Your
21 Honor. 80 percent of the park, even if one assumes it
22 included the submerged lands, is uplands. But it's no
23 more unusual --

24 JUSTICE BREYER: No. I understand that, but I
25 mean, it's the way of visiting the park.

1 MR. FRANKLIN: Yes, but I just mentioned, for
2 example, the two monuments in California. The Channel
3 Islands National Monument this Court held included the --
4 the submerged lands were State-owned. There's no other
5 way to get to the Channel Islands Monument but to traverse
6 State-owned submerged lands. In fact, I think there are
7 few national parks in this country you can't get to
8 without going across State lands.

9 I think there's another important point here and
10 that is the Property Clause of the Constitution would also
11 allow the Federal Government to regulate activities on
12 lands that abut national parks to the extent that they
13 might affect park activities.

14 But here what we need is an expressed statement
15 by Congress ratifying the purported reservation of the bay.
16 Without that, Your Honors -- and the -- the precedents are
17 clear. Without that, the presumption is -- in fact, the
18 strong presumption is -- that these are State-owned lands.
19 And again, there is absolutely nothing unusual. That is
20 part of our Federal system. It's the way that these
21 monument properties have been managed since 1906 when the
22 President first got the authority. It's the way that
23 Glacier Bay will continue to be managed. We expect, we
24 intend to work cooperatively with the Federal Government
25 to resolve any issues that might remain.

1 What we're seeking here, again, is a seat at the
2 table. We just are seeking to have Alaska's views dealt
3 with because they are the owner.

4 JUSTICE GINSBURG: In the -- in the '97 case,
5 was the area at issue within the first part of 6(e)?
6 Because this --

7 MR. FRANKLIN: Yes. The -- the Court expressly
8 stated that it was at pages 60 to 61, and that was in the
9 absence of any contrary argument.

10 JUSTICE GINSBURG: It -- it made an assumption.

11 MR. FRANKLIN: The Court made an assumption, but
12 in fact --

13 JUSTICE GINSBURG: But was it in fact?

14 MR. FRANKLIN: I think there would have been a
15 substantial -- had that -- had that issue been litigated,
16 there would have been a substantial argument that it was
17 not within the main clause. But again, there was no
18 argument on that point before the Court. The Court at
19 pages 60 to 61 expressly stated -- again, it was an
20 assumption, but the Court expressly stated that the lands
21 were within the main clause. Apparently the Court was
22 considering the fact that the application for ANWR did, in
23 fact, reference the purposes that were set forth in the
24 main clause, the Alaska Game Law.

25 The important point of that case for this case,

1 though, Your Honors, is that the Court embraced the
2 construction of section 6(e) that we are advocating here,
3 namely that the proviso exempts and saves for the Federal
4 Government a subset of the properties that would otherwise
5 have been transferred to the State under the main clause.
6 There simply was no need for Congress to have expressed an
7 intent --

8 JUSTICE SCALIA: I thought we had left that
9 open. I thought we --

10 MR. FRANKLIN: I think what I said is that the
11 Court embraced that position, and it was actually an
12 essential attribute of the -- essential premise for the
13 Court's holding. At 60 to 61 and again at page 48 of the
14 -- the decision, what the Court made clear is it was
15 concerned that unless the lands were saved by the proviso,
16 all of them, the submerged lands and the uplands, would
17 have passed to Alaska under the main clause, and that was
18 one of the reasons the Court, I think, held that it was
19 covered by the proviso. No such concern is present here.

20 I'd like at this point briefly to turn, if I
21 might, to the count I, which is the historic waters count.
22 There the United States asserts that at statehood the
23 waters of southeast Alaska were riddled with isolated
24 enclaves of international high seas that were wholly
25 surrounded by U.S. territorial waters. The historical

1 record, though, belies that contention.

2 At least from 1903 until 1971, the United States
3 took what this Court has described in the Mississippi
4 Sound case, the Alabama and Mississippi Boundary Case, as
5 the publicly stated policy that the waters of the
6 archipelago were inland and that the political boundary
7 ran along the outside edge. Thereafter, the United States
8 took -- consistently based a discriminatory enforcement
9 regime, fisheries enforcement, on that position. What I
10 mean by discriminatory is that the United States allowed
11 U.S. fishing but prohibited foreign fishing in that area.

12 JUSTICE SOUTER: Well, the argument on the other
13 side, as I understand it, is that the -- the assertion of
14 authority to regulate fishing really is -- is relevant.
15 It has no necessary implication for the historic waters
16 doctrine. What -- what is your answer to that?

17 MR. FRANKLIN: That's the assertion. My answer
18 is that the Court announced to the contrary in the 1975
19 decision, the Cook Inlet case, there at page 201 and 202,
20 and this is quoted at page 28 of the blue brief. What the
21 Court said there is it examined an incident in which a
22 Japanese fishing vessel had been caught in the general
23 area, and the Court said -- and I quote -- that incident
24 deserves scrutiny because the seizure of a foreign vessel
25 more than 3 miles from shore manifests an assertion of

1 sovereignty to exclude foreign vessels altogether and,
2 quote, must be viewed as an exercise of authority over the
3 waters in question.

4 JUSTICE SOUTER: What -- what page was that?

5 MR. FRANKLIN: I'm sorry. That's 201 to 202 --
6 201 and 202 of the Cook Inlet case, and that's at 28 of
7 the blue brief.

8 What the law was at statehood is that the United
9 States had no authority, after 3 miles out, to enforce
10 discriminatory fishing regulations against foreign
11 vessels.

12 Now, importantly there's a caveat here, and that
13 is that the law has changed. The law has changed since
14 1971. Beginning in 1976, the United States asserted a
15 200-mile -- what's known as an exclusive economic zone
16 that allows the United States to enforce discriminatory
17 fishing, and in 1982 international law embraced that.

18 But -- and we have quoted a UN study. In fact,
19 the UN study that we have quoted -- and that is noted at
20 page 29 of the blue brief. That is the study that's
21 called the Juridical Regime Study. It's the study that
22 this Court itself, in all of its historic waters cases,
23 has used as the authoritative statement of the law. That
24 study quite clearly states that if a -- if a country
25 enforced discriminatory fishing rules against foreign

1 vessels outside -- that that manifests an assertion of an
2 historic inland waters claim. And what we have here --

3 JUSTICE SCALIA: On -- on this point, it seems
4 to me there -- unlike the first point you were discussing
5 where I think the Federal Government can work its will
6 anyway, on this point there is really a significant
7 Federal interest involved. That is to say, if the United
8 States takes the position that these are, indeed, inland
9 waters, it's going to have to acknowledge similar rights
10 in foreign countries with similar archipelagos.

11 MR. FRANKLIN: No. Your Honor, they assert
12 that, but they don't provide any specific examples. And
13 the reason they can't provide a specific example of any
14 instance abroad where it would affect their position is
15 that each historic waters inquiry is decided on its own
16 facts. The fact that something is an archipelago does not
17 render it historic waters.

18 JUSTICE SCALIA: But -- but you say a
19 determinative fact, a conclusive fact is simply -- is
20 simply enforcing discriminatory fishing regulations.

21 MR. FRANKLIN: It is a claim to the -- to the
22 waters, which was made in 1903, accompanied with
23 discriminatory fishing enforcement, accompanied with other
24 statements in this case, including the California brief to
25 this Court. There has to be an -- excuse me --

1 an examination of all of the facts and circumstances before
2 one can conclude that waters are historic waters. These
3 ones are. Other waters would not be. The United States
4 has not identified any waters abroad that have precisely
5 these constellation of facts. So its -- its position is
6 basically: we say it, therefore it must be so. I --

7 JUSTICE GINSBURG: But it's not the United
8 States that will be making the judgment about what areas
9 are controlled. It would be the country abroad. And I --
10 I think the argument was, what the United States does
11 other nations will copy.

12 MR. FRANKLIN: Right.

13 JUSTICE GINSBURG: And they will decide what
14 looks like the Alaska --

15 MR. FRANKLIN: Right.

16 What the United States does, Your Honor, is
17 follow the well-settled international law on historic bays
18 -- historic waters. Those are set forth in the
19 convention. Each state will have the same authority where
20 its facts and circumstances dictate it. If there has been
21 a continuous claim asserted by a nation with the
22 acquiescence of foreign nations, then it will qualify as
23 historic waters. But it has to be done based on a -- an
24 examination of the particular facts of the case.

25 And one thing else -- one thing other that is

1 worth noting, if you have an archipelago like this, a
2 nation can always close it off using article 4 straight
3 baselines. That is permitted under the convention. The
4 U.S. has decided not to do that, but other states are
5 fully able to do that.

6 I think that if the United States is going to be
7 arguing that there is some international precedent here
8 that's going to hurt it adversely, it needs to identify a
9 particular body water abroad that it believes this case is
10 going to affect.

11 JUSTICE GINSBURG: Why should it make that
12 suggestion? It would certainly not be in the interest of
13 the United States.

14 MR. FRANKLIN: Well, it -- it needs to explain
15 more specifically then, other than just stating we think
16 it might affect our position. The -- the facts and
17 circumstances -- the Court, for example, applied the
18 historic bay question in Mississippi Sound, in the
19 Mississippi Sound case. I am aware of no instance in
20 which that precedent was ever used adversely and the
21 United States has not identified any -- any instance.

22 But more importantly, what this Court did in the
23 Mississippi Sound case is it looked at the evidence and it
24 said is this a historic bay or is it not. The Court
25 concluded that it was and that was the inquiry that the

1 Court follows.

2 At this point, I'd like to reserve the remaining
3 time for rebuttal.

4 JUSTICE STEVENS: Yes, Mr. Franklin.

5 Mr. Minear.

6 ORAL ARGUMENT OF JEFFREY P. MINEAR

7 ON BEHALF OF THE DEFENDANT

8 MR. MINEAR: Thank you, Justice Stevens, and may
9 it please the Court:

10 I would like to begin with the focal point of
11 Alaska's argument, namely Glacier Bay National Park.
12 Alaska's core contention is that section 6(e) of the
13 statehood act does not provide an adequate showing that
14 the United States intended to retain the submerged lands
15 in Glacier Bay. For this --

16 JUSTICE SCALIA: Could -- before you go into
17 that, could you tell me how 6(e) begins?

18 MR. MINEAR: Yes. In fact, I think it's very
19 helpful. It's listed at page 7a --

20 JUSTICE SCALIA: I mean, (e) --

21 MR. MINEAR: -- of our -- of the gray brief.

22 JUSTICE SCALIA: Yes, but the -- well -- well,
23 the -- the introduction to it is -- is not listed, is it?
24 I mean --

25 MR. MINEAR: That may -- that may be so.

1 JUSTICE SCALIA: I mean, it's incomplete. It --
2 it just says all real and -- what about all real and
3 personal property? Is there an intro that says there is
4 hereby -- there is hereby granted to the United -- to
5 Alaska?

6 MR. MINEAR: Well, 6(e) I think begins stating
7 that this -- these are exceptions to section 5 which is
8 the retention -- the general retention provision of the
9 United -- for United States lands.

10 But if we look at 6(e) itself, it's --

11 JUSTICE SCALIA: Well, you say they're
12 exceptions. How -- how are the exceptions introduced? I
13 mean, it's incomplete to just read (e) that says all --
14 what about all real and personal property of the United
15 States? There has to be some introductory language. What
16 is it?

17 MR. MINEAR: No. Actually there doesn't, Your
18 Honor, because if you go on, it says all real and personal
19 property -- then you skip down, about halfway down --
20 shall be transferred and conveyed to the State of Alaska
21 by the appropriate Federal agency. So it is -- so this is
22 complete in terms of --

23 JUSTICE SCALIA: Okay. Okay. You're right.

24 MR. MINEAR: But if I could walk you through
25 those provisions because I think they're quite important.

1 The first provision says, as you say, all real and
2 personal property which is specifically used for the sole
3 purpose of conservation and protection of wildlife shall
4 be transferred to the United States.

5 JUSTICE SCALIA: Right.

6 MR. MINEAR: It's followed by another provision
7 here.

8 JUSTICE SCALIA: To -- to Alaska.

9 MR. MINEAR: To -- to Alaska. Excuse me.

10 And it's followed by another proviso which says
11 that the United States will continue to control fish and
12 game matters in Alaska until the Secretary of Interior has
13 certified that Alaska is ready to do so. Clearly that
14 proviso is not a subset --

15 JUSTICE STEVENS: Mr. Minear, before you get too
16 far, I also would like to ask a preliminary question that
17 was raised by Justice O'Connor before. Do you agree that
18 section 5 itself, the second part of it that says the
19 United States retains title to its own property, that the
20 response to that is adequately provided in the Submerged
21 Lands Act referred to in subparagraph (m)?

22 MR. MINEAR: No, I don't. I don't believe --
23 let me frame the -- your -- your question, if I may, for
24 you. Section 5 indicates the United States would retain
25 all of the lands that it presently holds. Section 6(m)

1 then makes the Submerged Lands Act applicable to the -- to
2 the -- to Alaska. In doing so, it recognizes that there
3 are some lands the United States would continue to retain,
4 provided it meets the requirements of the Submerged Lands
5 Act.

6 The particular exception we're concerned about
7 here is the expressly retained exception, in other words,
8 if lands are retained by the United States. This Court
9 said in the Arctic Coast case that that provision adopts
10 the general law that applied before the Submerged Lands
11 Act, that it had to be made plain that the United States
12 would be holding onto these lands. It doesn't require an
13 express statement. It simply requires that it be made
14 plain.

15 Now, our view is that these lands would be
16 retained by the United States, quite apart from 6 -- the
17 6(e) exception we're arguing about here on summary
18 judgment. And if you denied our motion for summary
19 judgment, we'd go back and talk about the other exceptions
20 that are applicable.

21 But in this case we're simply focusing on 6(e)
22 and we're focusing on that because the Court's Arctic
23 Coast decision made clear that 6(e) -- and I quote --
24 reflects the very clear intent to retain title, unquote,
25 to submerged lands, quote, so long as those submerged

1 lands were among those set apart as refuges or wildlife --
2 or reservations for the protection of wildlife.

3 JUSTICE SCALIA: Well, we didn't have this issue
4 before us. Let -- let me --

5 MR. MINEAR: Yes, we did.

6 JUSTICE SCALIA: -- let me -- why don't you go
7 back to your argument? You said that the first proviso on
8 its face is simply not a subset of the first part of (e).

9 MR. MINEAR: Yes. It's an example how provisos
10 do not need to be --

11 JUSTICE SCALIA: But that's not the proviso at
12 issue here.

13 MR. MINEAR: Yes.

14 JUSTICE SCALIA: The proviso at issue here is
15 the second proviso which begins provided that such
16 transfer shall not include lands. Such transfer. Now,
17 this is -- the word such refers you back to something.
18 What -- what possible transfer could it mean except the
19 end of the introduction, which says shall be transferred
20 and conveyed to the State of Alaska?

21 MR. MINEAR: Your Honor --

22 JUSTICE SCALIA: I mean, anybody reading that
23 would -- would think that proviso refers to that transfer
24 or at least it is not clear that it provides to -- that it
25 applies to every transfer in -- in the whole act.

1 MR. MINEAR: I disagree with you, Justice
2 Scalia, for these reasons.

3 First of all, the such transfer simply tells you
4 what's not included. That language tells you -- this is
5 outside. It doesn't mean that whatever follows
6 necessarily was within the main clause. What Congress was
7 doing here, by making clear that these lands were not
8 transferred --

9 JUSTICE SCALIA: What does the such refer to?

10 MR. MINEAR: It does refer to the transfer
11 before. But what follows here, refuges and reservations
12 for the protection of wildlife, they do not fit within
13 that -- that main clause. It's obvious they don't because
14 the only things that fit within the main clause are those
15 lands and real property specifically used for the sole
16 purpose of conservation and protection of wildlife.

17 What we're talking about here -- wildlife
18 reservations are multiple purpose lands. They're not used
19 solely for -- for the purpose of conservation. The
20 purpose of the first provision here was to transfer
21 vehicles, fish hatcheries, other equipment that the State
22 would need to enforce Alaska game laws. That was the
23 point of -- of that first provision. But Secretary
24 Chapman who drafted this made clear in the legislative
25 history that what he was doing was drawing a line between

1 those -- those facilities and equipment that are used by a
2 State in its traditional game management and drawing a
3 contrast with the matters that would be retained by the
4 United States.

5 JUSTICE BREYER: Where is the language that says
6 that the submerged land that fits the proviso is retained
7 by the United States?

8 MR. MINEAR: We do not need --

9 JUSTICE BREYER: What the proviso says is just
10 what Justice Scalia said.

11 MR. MINEAR: We do not need express language
12 that expresses --

13 JUSTICE BREYER: No, no, but where is the
14 implication in that?

15 MR. MINEAR: The implication is that we are
16 retaining all of the reservation. And this is what the
17 Court said in the Arctic Coast decision. It saw that this
18 was --

19 JUSTICE BREYER: That's -- that's -- it -- I
20 mean, in -- in -- I take it in the Alaska case we were
21 considering a transfer that did fall within the main
22 sentence of (e).

23 MR. MINEAR: Justice Breyer, neither party made
24 that argument. This issue came up in a letter that was
25 written after. The -- the language --

1 JUSTICE BREYER: Were we or weren't we?

2 MR. MINEAR: You were not considering that.

3 JUSTICE BREYER: We weren't.

4 MR. MINEAR: That -- that was -- simply neither
5 party suggested that ANWR fell within the first provision.
6 And it doesn't. It's clear that it doesn't. It was not
7 land that was specifically used solely for conservation of
8 wildlife under these three listed statutes. The ANWR
9 reservation at that time was set apart. It was BLM land.
10 It was also used for mining and other activities.

11 Likewise, the other matters --

12 JUSTICE GINSBURG: But the Court did assume --
13 the Court did assume that.

14 JUSTICE BREYER: Yes.

15 MR. MINEAR: It made that assumption with no
16 briefing, but it did that with regard to the second issue
17 that was presented there. The issue that people were
18 fighting about in the Arctic Coast decision was was this
19 land properly set apart or not for purposes of the
20 proviso. And that's where this discussion takes place.

21 JUSTICE BREYER: All right. Then --

22 MR. MINEAR: It's an afterthought that simply
23 reinforces.

24 JUSTICE BREYER: All right. Then at best Alaska
25 is a neutral. Because we didn't think it, we're operating

1 as a mistake. It's a neutral. Okay.

2 Now, what's bothering me about the case is just
3 what Justice Scalia said, that -- that why I -- if I sell
4 you all my clothing and then I put, but not my camping
5 gear, I mean, I can absolutely see you don't get my
6 camping clothing, but you want to say that's a reservation
7 of mess kits from some other transfer? I mean, it has
8 nothing to do with mess kits.

9 MR. MINEAR: Your Honor, but that's -- it's
10 clear that what this is -- this is more along the lines if
11 someone said that I will sell you my house, provided that
12 transfer shall not include the detached garage.

13 JUSTICE BREYER: Fine, and then it doesn't go in
14 that.

15 MR. MINEAR: In that case --

16 JUSTICE BREYER: But it doesn't mean that the
17 next --

18 MR. MINEAR: Yes, but it was not a part of the
19 house.

20 JUSTICE BREYER: Yes.

21 MR. MINEAR: You know, that's -- it's just
22 providing clarification, just that one of the purposes of
23 the proviso is to provide clarification.

24 JUSTICE KENNEDY: This is an abundance of
25 caution?

1 MR. MINEAR: In other -- that is exactly right.

2 And we can tell that from --

3 JUSTICE BREYER: All right. If it's an
4 abundance of caution, where's the other language that
5 almost reserves it so we need the caution?

6 MR. MINEAR: That would be section 5. It
7 indicates the general retention for lands of this sort.

8 JUSTICE BREYER: But 5 is subject to the
9 Submerged Lands Act and the Submerged Lands Act brings you
10 back to the reservation has to be explicit. And then --
11 see, that's --

12 MR. MINEAR: Well, Justice Breyer, again, if I
13 can just complete the point --

14 JUSTICE BREYER: That's why I was talking about
15 Yellowstone.

16 MR. MINEAR: Yes.

17 JUSTICE BREYER: I was looking for something
18 that would be obvious that they wouldn't have meant to
19 transfer. He comes back and says, well, very often States
20 do control the water.

21 MR. MINEAR: Your Honor, I just need to make a
22 point. I think it's very important for you to understand
23 this point. First of all, that at page 57 of the Arctic
24 Coast decision, this Court was clearly reading this
25 language, the 6(e) proviso, as sufficient to provide a

1 clear indication of transfer of title, and in doing so, it
2 was recognizing what is clear in the proviso itself, that
3 these particular items that are discussed there are not a
4 part of the main clause and cannot be. And a good example
5 of that is the third thing that's being transferred,
6 facilities that are utilized in connection with general
7 research activities related to fisheries and wildlife.

8 Now, that is not going to be something that's
9 specifically used for the sole purpose of conservation and
10 protection of wildlife. It's the antithesis of that. It
11 makes quite clear that our construction is correct. The
12 subset theory just doesn't work because the items that are
13 here are not things that fit within the main clause. What
14 Congress was doing here was drawing a very clear line --

15 JUSTICE KENNEDY: But why -- why doesn't (m)
16 supersede that argument anyway? Let's -- can't we say
17 that, well, you may be right so far as the second clause
18 of (e) is concerned, but you still have to deal with (m)?

19 MR. MINEAR: Then you have to explain what
20 happened in the Arctic Coast case, why we were able to
21 retain the ANWR lands which did not fall within the main
22 provision. And that is because Congress was making --
23 because this Court concluded that Congress was making
24 clear that wildlife lands are very important and they
25 wanted to make absolutely clear that those lands would not

1 be transferred. And even a provision that could be
2 misconstrued, as I'm afraid this Court did in -- in Arctic
3 Coast -- could be misconstrued to contain some of these
4 lands, we need to make adequate assurance that -- that the
5 courts that read this realize a clear division is being
6 made. We are retaining these wildlife lands. That's --

7 JUSTICE SCALIA: Mr. Minear, I'm -- I'm not sure
8 I agree with you that -- that that language, facilities
9 used in connection with general research activities
10 relating to fisheries or wildlife, is not a subpart of the
11 earlier -- of the earlier grant, namely property used for
12 the sole purpose of conservation and protection of
13 fisheries and wildlife. Surely one -- one can readily
14 regard general research activities relating to fisheries
15 or wildlife to be part of the activity of conserving and
16 protecting fisheries and wildlife.

17 MR. MINEAR: But we're talking about a facility
18 here. So a facility that might conduct some -- some
19 research tangentially related to wildlife is not a
20 facility that's used for the sole -- specifically used for
21 the sole purpose of conservation and wildlife. There's a
22 clear difference here. These two -- these two sets do not
23 overlap, and it's even more so with regard to wildlife
24 refuges. Wildlife refuges and wildlife reservations are
25 used for multiple purposes.

1 At the time of statehood, the -- the regulations
2 in place, the fisheries regulations and wildlife
3 regulations, made clear that permits could be issued for
4 purposes apart from wildlife conservation. And this
5 Court's own decision in Udall v. Tallman recognized that
6 one of the -- the refuges that Alaska cites as being
7 included in the main clause was being used for oil and gas
8 purposes. It was not being used solely for the purposes
9 -- specifically used solely for the purposes of
10 conservation.

11 JUSTICE SCALIA: Mr. Minear, you know, I -- I am
12 just overwhelmed by the reality that this is a terrible
13 mess of a statute. I can't figure out what it means.

14 MR. MINEAR: Well, Your Honor --

15 JUSTICE SCALIA: And -- and it seems to me
16 that's exactly why we have a clear statement rule.

17 MR. MINEAR: Your Honor --

18 JUSTICE SCALIA: There are arguments here, there
19 are arguments there, but it -- it does not dawn upon me
20 that -- that anything is clear about this at all.

21 MR. MINEAR: Well, this -- we believe the
22 statute has been clear for 50 years. That's why these
23 issues have only arisen recently with regard to Glacier
24 Bay National Park.

25 JUSTICE O'CONNOR: Mr. Minear, what do you say

1 are the practical consequences from the Federal
2 Government's perspective of going -- of disagreeing with
3 the U.S. position? What harm is done? Can the U.S.
4 protect itself in any event under other clauses?

5 MR. MINEAR: We agree that the United States has
6 the regulatory authority to protect -- to limit vessel
7 entries and protect commercial fishing, but that's not
8 what our concern is.

9 Our concern is with the actual use of the
10 submerged lands. This is a laboratory. This is a
11 laboratory for scientific research, and we occupy and use
12 the submerged lands for that purpose. That includes such
13 things as withdrawing cores of materials so we can analyze
14 its historic features. We've installed a 5-mile cable
15 with a hydrophone on the -- on the submerged lands so we
16 can listen to vehicle traffic and determine if the -- the
17 volume is sufficient to interfere with the whales that
18 migrate through there.

19 JUSTICE SCALIA: Don't you do that on -- on dry
20 land in some States?

21 MR. MINEAR: Your Honor, in order to hear
22 vehicle traffic --

23 JUSTICE SCALIA: Doesn't your authority under
24 the Commerce Clause or under -- under -- over navigable
25 waters allow you to do that kind of stuff?

1 MR. MINEAR: Your Honor, we think that -- that
2 Alaska would have a realistic argument that we cannot
3 withdraw materials from the submerged land which we use
4 and study. And in fact, I would point out that the park
5 superintendent's affidavit --

6 JUSTICE SCALIA: Are they likely to do that?

7 MR. MINEAR: What?

8 JUSTICE SCALIA: Are they likely to do that? Is
9 this a real problem?

10 MR. MINEAR: There are 900 papers, scientific
11 papers, that are cited in the affidavit of the park
12 superintendent. This is exhibit number 8 on count IV.
13 And of those describing the type of research we do in
14 Glacier Bay National Park --

15 JUSTICE BREYER: Well, I thought --

16 MR. MINEAR: -- scores and perhaps hundreds of
17 those involve submerged lands.

18 JUSTICE BREYER: All right. Given what you're
19 saying -- and I -- you're not accepting this I think, and
20 I -- well, there is language in this act which maintains
21 in the United States title to the park.

22 MR. MINEAR: That is correct.

23 JUSTICE BREYER: All right. Now, I would have
24 thought when you get title to the park, you mean the park,
25 and by the park, you mean those essential parts of the

1 park.

2 MR. MINEAR: We --

3 JUSTICE BREYER: And therefore, if you have a
4 part of the park which is the only part of the park where
5 people look at the park, and it's the only part of the
6 park that brings them into the park, and it's the only
7 part of the park where you do the research, et cetera,
8 that's the park. Just as if I were to sell my house and I
9 list the rooms and forget the kitchen, well, the kitchen
10 is an essential part of the house.

11 MR. MINEAR: That's --

12 JUSTICE BREYER: Now -- now, once I made that
13 argument, he said that's a very clever argument, but
14 really, there are all kinds of instances where States have
15 reserved submerged land inside national parks and it's
16 worked fine.

17 MR. MINEAR: But those are instances --

18 JUSTICE BREYER: What's your response to all
19 this?

20 MR. MINEAR: The instances -- the examples
21 they're giving are cases in which we've created those
22 national monuments or parks after statehood. And in those
23 cases, we cannot acquire those lands because they have
24 already been transferred to the State at statehood.

25 JUSTICE SCALIA: It hasn't resulted in a -- in a

1 disaster. That's the point that Justice Breyer is making.

2 MR. MINEAR: But in this case --

3 JUSTICE SCALIA: It has not resulted in a
4 disaster.

5 MR. MINEAR: But in this case, it is going to
6 impede the -- the activities we have there.

7 And a good example of this is in the amicus
8 brief at page 25 where Alaska does not even assent to our
9 authority to control fish and wildlife. The Alaska
10 legislature has passed a statute in which it refuses to
11 assent to our authority to control fish and wildlife
12 within the park. This gives you some sense of the type of
13 difficulties that we're going to encounter.

14 JUSTICE SOUTER: Mr. --

15 MR. MINEAR: And our chief concern --

16 JUSTICE SOUTER: Mr. Minear, may I ask you? At
17 the time the statute was passed, was the national
18 Government conducting these activities?

19 MR. MINEAR: Yes, it was. It was created as a
20 national monument. Now, in terms of what degree of
21 activities, the record is not clear, but we're --

22 JUSTICE SOUTER: Maybe you were monitoring
23 passages through to see whether the whales were going to
24 be interfered with and doing that sort of thing. Were you
25 taking core samples?

1 MR. MINEAR: We were definitely studying the bed
2 of the lake, and our -- our briefs below explain. We have
3 an affidavit from our glaciologist which describes the
4 type of research that was being done.

5 JUSTICE SOUTER: So in -- in other words, you --
6 you're saying it is fair to say that at the time of the
7 passage, this would have been on the congressional mind,
8 going back to Justice Breyer's --

9 MR. MINEAR: It -- it definitely would have.

10 And also I want to point out that when we
11 created the national monument, we also preserved such
12 things as the interglacial forests. These are forests
13 that are left behind as the glaciers retreat and go
14 forward over these submerged lands. The glacial forests
15 are in the submerged lands, and so they become a part of
16 it. As these glaciers continue to retreat, it's likely
17 that other glacial forests will be revealed, and those
18 should remain a part of the park. That was part of the
19 purpose, was to study those --

20 JUSTICE BREYER: Should. Now, you're not -- how
21 far are you prepared to go? You can't go more than your
22 brief and your facts justify. Are you prepared to say
23 that this water is an essential part of the park?

24 MR. MINEAR: Yes.

25 JUSTICE BREYER: Yes?

1 MR. MINEAR: Yes. Certainly --

2 JUSTICE BREYER: Have you said that before this
3 minute?

4 MR. MINEAR: Not only have we said it, but the
5 Park Service at statehood said that this is a water park
6 when they were describing these lands and saying why they
7 should be retained. They told Congress -- the -- the park
8 superintendent or the -- the director of the Park Service
9 said this is a water park that's mostly -- this is, after
10 all, Glacier Bay National Park.

11 And in that -- with that respect, I'd like to
12 point out this --

13 JUSTICE SCALIA: Why did they keep the other 80
14 percent then?

15 MR. MINEAR: Excuse me, Your Honor.

16 JUSTICE SCALIA: Why did they keep the other 80
17 percent?

18 MR. MINEAR: Well, the --

19 JUSTICE SCALIA: I gather only 20 percent of it
20 is water.

21 MR. MINEAR: It's slightly more than 20 --

22 JUSTICE SCALIA: They should have given away the
23 rest.

24 MR. MINEAR: We haven't given away. We have all
25 of these lands. The -- the uplands here are the glaciers

1 and the mountains that are inaccessible except by the
2 water. You cannot reach these areas. There are no roads
3 in this park except for the park visitors center, and
4 beyond that --

5 JUSTICE SCALIA: Then make it a water park. I
6 mean, you want to say it's a -- it's a water-accessible
7 park, fine.

8 MR. MINEAR: Yes. But, Your Honor, the --

9 JUSTICE SCALIA: 20 percent of the park is under
10 water. Right?

11 MR. MINEAR: More than 20 percent. Roughly 25.
12 I'd say close to 25 percent of the park is -- within the
13 park boundaries is submerged lands.

14 But there's another point I'd like to make with
15 regard to the establishment of the park. This park was
16 created under the Antiquities Act, and under the
17 Antiquities Act, the President is given authority to
18 create national monuments, but they cannot be
19 disestablished except by act of Congress. Now, Congress
20 could have disestablished this monument if it had meant to
21 give up the land. It could have disestablished some part
22 of it, and it chose not to do so. And yet, that's another
23 indication that Congress was intending to retain these
24 lands.

25 Now, I would like to move on to the other two

1 counts we have here, unless we have further questions
2 about -- about Glacier Bay. But I -- I think one thing
3 that I do -- one thought I want you -- to leave you with
4 with regard to Glacier Bay is that these lands are
5 essential to the park. They are understood to be
6 essential at the time that the park was created. And the
7 -- the line we're suggesting here is a very reasonable one
8 with regard to this park. Those lands are -- continue to
9 be used -- the submerged lands for scientific research
10 that is vitally important.

11 Now, I'd like to point out that the master also
12 correctly rejected the claim that the archipelago straits
13 are historic inland waters, and on that basis, Alaska
14 failed to satisfy any part of the Court's three-part test.
15 This Court specifically failed to show a continuous
16 assertion of -- of sovereignty to exclude vessels that
17 have -- that are visiting the park or passing through in
18 innocent passage or to indicate any acquiescence of
19 foreign nations.

20 During the past 150-year period, neither Alaska
21 nor the United States ever attempted to exclude a vessel
22 based on -- merely on innocent passage. Rather, Alaska --
23 Alaska cannot point to a single incident in which we
24 unambiguously did so. The only --

25 JUSTICE SOUTER: Alaska is arguing, as I

1 understand it now, that the -- the exclusion for purposes
2 of fisheries regulation has the same implication as a
3 matter of international law, which is a point that you
4 disagree on. What -- what is your response to their
5 response to --

6 MR. MINEAR: The answer is in order to establish
7 a historic inland water claim, you have to exclude a
8 vessel based on this passing through in innocent passage.
9 Fisheries is not -- engaging in fishing activity under the
10 convention is not innocent passage. And so, therefore, an
11 exclusion based on fisheries can never -- can never give
12 rise to a claim of --

13 JUSTICE SOUTER: And what's -- what's your best
14 authority for that?

15 MR. MINEAR: Well, our best authority is the
16 convention itself. The convention makes clear under
17 article 14 that fisheries is -- that fisheries activities
18 are not innocent passage. Rather, innocent passage is
19 merely transit through from one point to another.

20 Moreover, the Marguerite incident that they
21 describe involves a single incident; that is, it does not
22 satisfy the continuity requirement that the inland -- the
23 historic inland waters test requires.

24 And finally, it also didn't satisfy the
25 acquiescence test since the British Government protested

1 the seizure of the ship.

2 And finally on top of that, this vessel -- we
3 don't know exactly where this vessel was at the time that
4 it was seized. There continues to be a dispute and the
5 master was unable to determine whether that -- the ship
6 was in -- inside or outside the 3-mile limit.

7 Now, I'd also like to speak briefly to the
8 juridical -- juridical bay claim as well. This is a
9 matter that Alaska did not touch upon, but I imagine it
10 would address on rebuttal.

11 The master correctly rejected Alaska's
12 extraordinary claim that the Alexander Archipelago can be
13 turned into two large -- large juridical bays. And
14 basically it attempted to do so by establishing a headland
15 on an island. Now, that does not suffice the purpose of
16 the convention. The only way that it can establish a bay
17 headland or -- or closing point is by showing that it's on
18 the mainland. In order to establish that this is on the
19 mainland, Alaska has to ignore four intervening bodies of
20 water. And as the master recognized, these bodies of
21 water are simply too substantial to ignore. In the case
22 of these bodies of water, Keku Strait is 41 miles long, on
23 average 4 and a half miles wide. It's -- simply those
24 intervening waters cannot be ignored in order to establish
25 that this is -- is part of the mainland.

1 It's also separated by Wrangell Narrows, which
2 is a 12-mile-long strait that is an important passage for
3 international navigation. That too precludes it from
4 being ignored and treated as dry land.

5 The failure of those two assimilations by itself
6 is sufficient to establish that -- that these -- that
7 these juridical bays do not exist.

8 And even if that were not enough, the master
9 went on to say that this would not be a well-marked
10 indentation, that even if you were willing to assimilate
11 these lands, it's still the case that the bay itself would
12 not be -- the supposed, imaginary bays that Alaska has
13 created here would not be recognizable to a mariner who is
14 passing by.

15 For all those reasons, the juridical bays here
16 are -- are simply not well founded, and the master was
17 correct in rejecting them.

18 So what we see --

19 JUSTICE O'CONNOR: Mr. Minear, could I go back
20 to Glacier --

21 MR. MINEAR: Certainly, Your Honor.

22 JUSTICE O'CONNOR: -- Park again for a moment
23 and ask why the Government decided to base its claim to
24 the lands in Glacier Bay exclusively on that murky
25 provision of 6(e) rather than to talk about the standards

1 set out in the Idaho case?

2 MR. MINEAR: Well, Your Honor --

3 JUSTICE O'CONNOR: Do you -- do you not rely on
4 that standard --

5 MR. MINEAR: Quite --

6 JUSTICE O'CONNOR: -- of analysis?

7 MR. MINEAR: Quite honestly we thought that
8 under the Arctic Coast decision, the Court is required to
9 create absolutely new -- no new law. It had already
10 interpreted 6(e) and it was clear that section 6(e)
11 applied to this case.

12 We think the Idaho provisions provide another
13 opportunity for us to establish it. It's quite clear that
14 the purposes of the -- the lands here, the submerged
15 lands, are so essential to the park that it's simply
16 inconceivable that Congress would have intended for those
17 lands to pass out of ownership.

18 However, we relied on --

19 JUSTICE KENNEDY: Would you -- would you tell us
20 again why, if you do not prevail on this argument, you
21 still go back before the -- the Special Master to show
22 certain facts?

23 MR. MINEAR: Well, first of all, Alaska has not
24 moved for summary judgment. We moved for summary judgment
25 on some of our theories. Other theories would require

1 some factual development. One of the theories that we
2 would -- we would go forward with is that these lands are
3 occupied under a claim of right, and that's another
4 exception under the Submerged Lands Act.

5 In addition, we would renew the argument with
6 regard to Antiquities Act, that once Congress takes an
7 area and authorizes the President to set it aside under
8 the Antiquities Act and provides that it cannot be
9 disestablished except by act of Congress, we think that's
10 a very clear indication of Congress' intent to retain
11 those lands.

12 JUSTICE KENNEDY: Well, given the absence of a
13 summary judgment, we wouldn't have to address that.

14 MR. MINEAR: No. You would not have -- we -- we
15 believe the master adverted to this claim, but we do not
16 think that he foreclosed it.

17 But rather, I'd like to discuss briefly the
18 relationship of Idaho and Alaska because I think it's
19 important and worthwhile. We think that this case falls
20 squarely within the Alaska Arctic Coast case, and in
21 particular we relied on it primarily because it provides
22 an actual textual basis for showing that the -- the United
23 States retain those lands. We do not need to go further
24 and show purpose, although we certainly can. We relied on
25 the Alaska case because we think it provides a very clear

1 example of why retention is -- is required in this case.

2 The master agreed with us. He analyzed the
3 Arctic Coast decision and he concluded that the -- the
4 proviso here necessarily must be considered an independent
5 retention clause. There's no other way to understand the
6 Arctic Coast decision except on that basis.

7 And we think that's the right interpretation,
8 and we think if we -- if you focus on what the Court said
9 on pages 56 to 57, it becomes quite clear. The statement
10 that Alaska relies on to create its so-called subset test
11 is an afterthought at the end of the opinion. It's a
12 statement that's made in the Court's words to reinforce
13 the conclusion it's already reached. It doesn't provide a
14 basis for -- for departing from that. And in fact, as I
15 hope I have showed to the Court, the subset test doesn't
16 make any sense, that they're simply -- all of those lands
17 that fall within the proviso are lands that would not fall
18 within the main clause.

19 The wildlife refuge is occupied for multiple
20 purposes. It's -- the two wildlife refuges that they
21 point to both the record shows were used for multiple
22 purposes. They were not used solely for conservation
23 purposes. And in addition, they were -- to the extent
24 that those refuges adverted to any lands at all -- any
25 statutes, they were referring to a 1925 statute, not --

1 not the 1943 statute.

2 Furthermore, there are 24 other refuges that we
3 believe that Congress intended to retain that Alaska has
4 no answer for. One -- one of those refuges, in
5 particular, the Semidi Islands, quite clearly describes
6 within its boundaries submerged lands, reefs, and other
7 areas. It clearly is being used for those purposes. We
8 think the right interpretation of the proviso is clearly
9 that it was meant to ensure, to provide the clarity that
10 this Court needs to determine that Congress clearly did
11 intend to retain these lands.

12 That was the point that -- that this proviso, as
13 Secretary Chapman himself indicated, and in fact, he
14 stated in -- the excerpt appears in page -- on page 47,
15 note 37 of our brief. He stated that these reservations
16 -- the land and water would be reserved. He clearly was
17 aware and told Congress that that was the purpose here, to
18 reserve both land and water.

19 Finally, I'd like to ask the Court to step back
20 and look at the big picture here. The United States'
21 position overall results in a very sensible division of
22 submerged lands in this case. We have not contested
23 Alaska's right to the vast majority of the submerged lands
24 here that are encompassed in Tongass National Forest.
25 Rather, we've identified two areas where the Federal

1 Government interests are paramount.

2 First of all, with regard to drawing
3 international -- developing international principles to
4 establish baselines, which creates these bays and -- and
5 pockets, that's a necessary consequence of what our
6 foreign policy requires.

7 Secondly, where the United States has clearly
8 reserved a unique treasure, namely Glacier Bay National
9 Park. This park was set aside for the benefit of the
10 entire Nation. We think that the Court should adopt the
11 master's report in full.

12 Thank you.

13 JUSTICE STEVENS: Thank you, Mr. Minear.

14 Mr. Franklin, you have about 3 and a half
15 minutes.

16 REBUTTAL ARGUMENT OF JONATHAN S. FRANKLIN

17 ON BEHALF OF THE PLAINTIFF

18 MR. FRANKLIN: Thank you, Your Honor.

19 To get back to the Idaho case, we are, in fact,
20 advocating the principles of that case. It is not
21 sufficient that Congress be on notice of a reservation
22 that might include submerged lands. Congress has to take
23 some action to explicitly ratify that. That was what
24 happened in the Idaho case, according to the Court. And
25 the United States has identified one statute and one

1 statute only that it asserts can -- ratifies the bay, and
2 that's section 6(e), the proviso. We think the plain
3 language to section (e) -- 6(e) is dispositive in this
4 case.

5 We are operating here under a clear statement
6 rule. The presumption is, in fact, the strong presumption
7 is, that if Congress does not expressly ratify the
8 reservation, Congress is presumed not to have intended
9 that the submerged lands -- title to submerged lands be
10 defeated.

11 There was -- the statute says such transfer
12 shall not include. There simply was no need for Congress
13 to have included -- to have specified that such transfer,
14 the main clause transfer, shall not include submerged
15 lands when they were not included -- or excuse me -- shall
16 not include properties that were not included in the first
17 place. That includes Glacier Bay.

18 JUSTICE SCALIA: Would -- would you respond to
19 the -- to the argument that the Alaska Arctic Coast case
20 decided that the proviso goes beyond subsection (e)?

21 MR. FRANKLIN: Well, my -- my first response is
22 even the master, who ruled -- who -- who decided against
23 us, did not find that the Alaska case decided that, and
24 indeed, it could not have because the Court at pages 60
25 and 61 expressly assumed that the lands would fall within

1 the proviso. Therefore -- excuse me. The main clause.
2 Therefore the Court did not hold and could not have held
3 that lands that did not fall within the main clause were
4 included by the proviso.

5 It is important, though, to -- to note this,
6 that even if the statute is ambiguous -- and we think that
7 it is not -- Alaska still prevails here because a -- there
8 is a clear statement rule and a clear statement rule
9 cannot be satisfied by definition by an ambiguous statute.

10 JUSTICE SOUTER: But the -- the argument is that
11 it is clear because the reservation without the
12 reservation of the waters would be crazy.

13 MR. FRANKLIN: Well, it --

14 JUSTICE SOUTER: Why isn't -- I mean, what's --
15 what's the answer?

16 MR. FRANKLIN: We dispute that for the following
17 reason, Your Honor, that -- that the -- the point of the
18 monument was to study the glaciers and the effects of the
19 glaciers as they recede on dry land. Title to the
20 submerged lands was simply not necessary for that purpose.

21 But I think their sky-is-falling argument really
22 falls apart here. All that the counsel can point to is
23 the idea is that they would like scientists to go scuba
24 diving down there and to perhaps look at the bottom.
25 There is absolutely no contention here that Alaska would

1 -- would prevent scientists who want to study this --
2 these lands from doing that. We let scientists onto all
3 of our properties, all of our submerged lands when they
4 have a good reason for doing it. We hope to work
5 cooperatively with the Federal Government on this.

6 The -- the idea that Alaska is somehow going to
7 be less receptive to scientific research here I think
8 demeans our Federal structure. We have a Federal
9 structure here under which sovereignty of submerged lands
10 is given to the States because they are viewed as the ones
11 principally affected by the activities that go on there.
12 We are not planning on -- on preventing scientists from
13 scuba diving down there. By the way, they did not at the
14 time of the monument, Your Honor, do scuba diving because
15 there -- there really wasn't any scuba diving going on.

16 But to -- to move on -- I see my time is up.

17 JUSTICE STEVENS: Thank you, Mr. Franklin.

18 The case is submitted.

19 (Whereupon, at 11:01 a.m., the case in the
20 above-entitled matter was submitted.)

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