

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 INYO COUNTY, CALIFORNIA, :

4 ET AL. , :

5 Petitioners :

6 v. : No. 02-281

7 PAI UTE-SHOSHONE INDIANS OF :

8 THE BISHOP COMMUNITY OF :

9 THE BISHOP COLONY, ET AL. :

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11 Washington, D. C.

12 Monday, March 31, 2003

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States at

15 10:16 a.m.

16 APPEARANCES:

17 JOHN D. KIRBY, ESQ., San Diego, California; on behalf of

18 the Petitioners.

19 BARBARA B. McDOWELL, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington, D. C. ;

21 as amicus curiae, supporting the Petitioners in part

22 and the Respondents in part.

23 REID PEYTON CHAMBERS, ESQ., Washington, D. C. ; on behalf

24 of the Respondents.

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P R O C E E D I N G S

(10:16 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 02-281, Inyo County, California v. the Paiute-
Shoshone Indians of the Bishop Community.

Mr. Kirby.

ORAL ARGUMENT OF JOHN D. KIRBY
ON BEHALF OF THE PETITIONERS

MR. KIRBY: Mr. Chief Justice, and may it please
the Court:

In this case the Paiute propose and are seeking
a categorical rule that makes Indian tribes, their
casinos, their commercial businesses, and their personal
property immune from search warrants and subpoenas issued
in connection with the investigation of crime and the
prosecution of crime.

They seek this rule under Federal statutory law,
under Federal common law, and under the Constitution.
However, such a categorical rule is not supported by the
text, structure, or history of the Constitution, by any
Federal statute, or by any sufficient or rational public
policy.

Further, there is not now, nor should this Court
extend or create a common law right to be immune from
search warrants and subpoenas that are issued in

1 connection with the investigation of crime and the
2 prosecution of crime.

3 It is a --

4 QUESTION: Counsel, did the tribe offer to
5 accept as consent by the employees their employment forms?

6 MR. KIRBY: Your Honor, I am prepared to answer
7 that question. It does involve matters outside the
8 record, and I will proceed to answer.

9 QUESTION: I see. I just thought it was a
10 little curious that if some means of solving this had been
11 offered, why we're here.

12 MR. KIRBY: There was not any means of solving
13 it at the time, Your Honor, because the Federal
14 regulations that govern the public welfare act at
15 question, title 45, part 205, prohibits the information
16 from being disclosed.

17 QUESTION: Okay, thank you.

18 MR. KIRBY: It is --

19 QUESTION: That goes for -- they had asked for
20 edited copies. They just wanted the last page, and they
21 said that they could be edited. Does the -- in your view
22 didn't Federal regulations preclude even those edited
23 copies of just the last page from being turned over?

24 MR. KIRBY: Yes, Justice Ginsburg, because the
25 information that's precluded from being distributed is the

1 names of the individuals who are being investigated.

2 Now, I know that the allegation is made that in
3 the letter that was sent by the district attorney and by
4 the Department of Health and Human Services stated that
5 this was a welfare fraud investigation. However, that
6 letter actually did not so state. It stated that the
7 investigation was a confidential investigation that
8 required the payroll information being sought.

9 The fundamental right and responsibility of
10 government is to protect its citizens, and one of the main
11 ways it does that, of course, is through the investigation
12 and prosecution of crime. The Federal Government and the
13 State government have together an integrated law
14 enforcement regime that allows for search warrants and
15 subpoenas to be executed and issued in connection with the
16 investigation of these crimes or alleged crimes whether
17 the criminal conduct occurs on the reservation or off the
18 reservation and regardless of whether the evidence or
19 proceeds of crime is thought to be on the reservation or
20 off the reservation.

21 For instance, in a Public Law 280 State, such as
22 California, if there is a crime committed off the
23 reservation, frankly as well as on the reservation, the
24 Federal Government does not have jurisdiction over that
25 crime. Thus, the Federal Government does not have the

1 ability to issue a search warrant. If the States do not
2 have the ability to issue a search warrant under those
3 circumstances and there is evidence of crime or proceeds
4 of crime on the reservation, then that property or
5 evidence remains immune from law enforcement.

6 QUESTION: Is California one of the 280 States
7 that has jurisdiction?

8 MR. KIRBY: Yes, Justice Kennedy, California is
9 a Public Law 280 State.

10 Now, in a non-Public Law 280 State, the same
11 situation presents itself because in that situation, the
12 Federal Government has the right to -- and the -- the
13 duty, if you will -- as a responsibility to its citizens
14 to enforce the criminal law with regard to crimes that
15 occur on the reservation that would be State crimes if
16 they occurred off the reservation. And under the Major
17 Crimes Act, as well as the General Crimes Act, the Federal
18 Government prosecutes that crime and, of course, does the
19 investigation prior to prosecution. In order to conduct
20 those activities and to fulfill that mission, if you will,
21 the Federal Government needs to have the right and does
22 have the right to execute search warrants and to issue
23 subpoenas.

24 Now, as we have seen, there may be a situation
25 where a crime is committed on the reservation in a Public

1 Law 280 State and a crime committed in a -- the same crime
2 in a non-Public Law 280 State, and in those situations,
3 there must be parity with regard to the law enforcement
4 regime. If not, what we end up with is gaps in the
5 criminal justice system, and that wasn't the intent of the
6 legislature in enacting Public Law 280.

7 As the Court will recall, Public Law 280 was
8 passed by Congress because of a perceived lawlessness on
9 certain reservations. That lawlessness arose because
10 Congress felt that the Federal Government -- due to the
11 vast distances, if you will, of Federal Government law
12 enforcement agencies, and the lack of density of those
13 agencies -- simply wasn't able to enforce criminal laws
14 throughout the vast acreage of reservations. And so --

15 QUESTION: Mr. Kirby, here what happened I -- as
16 I understand it, was that a search warrant was served on
17 the tribe itself, and so I think that's what your argument
18 should probably be addressed to. I think in Hicks we held
19 that there could be process served against individual
20 tribal members.

21 MR. KIRBY: Yes, Your Honor. The search warrant
22 was issued as to tribal property. I -- I would point out
23 that the search warrant itself didn't actually require the
24 tribe to do anything other than stand by and allow the
25 officers to go forth and search. And in this --

1 QUESTION: Well, that's true of most search
2 warrants.

3 MR. KIRBY: Yes, Your Honor.

4 QUESTION: I mean, the person served doesn't
5 have to do anything except let them search.

6 MR. KIRBY: Yes, Your Honor, the point being --
7 the point being that the search warrant did not hail the
8 reservation or the tribe into court for the purpose of
9 responding to a civil judgment for the purpose of --

10 QUESTION: What -- what was the tribal property
11 at issue?

12 MR. KIRBY: It was common payroll records,
13 Justice Scalia.

14 QUESTION: Were they records of the casino?

15 MR. KIRBY: They were records of the commercial
16 business operated there, yes, the casino.

17 QUESTION: Where were they kept? Were they kept
18 at the casino?

19 MR. KIRBY: Your Honor, they were kept in back
20 of the casino, as I understand it, in an outbuilding that
21 was secured by a padlock.

22 QUESTION: Would you -- would you draw a
23 distinction between the subpoena of the records of the
24 commercial operation and a subpoena of the records of the
25 -- of the government records of the tribe itself?

1 MR. KIRBY: Yes, Justice Scalia, there could
2 very well be a distinction there. And the solution that
3 we believe would address that distinction would be a
4 solution that Justice White presented in the Brendale
5 decision when he talked about a tribe having a unique
6 protectable interest in certain situations. And the tribe
7 ought to have a right to go to court -- in this case, it
8 would be a State court -- to present that protectable
9 interest so that a -- an interest-balancing assessment can
10 be accomplished.

11 In this case the interest of the tribal record
12 may very well outweigh a minimal interest of the State if
13 it was a simple minor misdemeanor. On the other hand, it
14 may be that if it's a large serious felony of multiple
15 murder and there is very direct evidence in the records of
16 the tribal government, perhaps under those facts the court
17 may find that the interest weighed in favor of the State's
18 police power.

19 QUESTION: But that --

20 QUESTION: Isn't there the obvious --

21 QUESTION: Is it that the local magistrate in
22 each case has to -- and then the law enforcement officer
23 weigh these interests? Well, this is a misdemeanor.
24 Well, this is a felony. I -- I don't -- I think that
25 would be a very difficult rule to implement in practice.

1 QUESTION: What does everybody do? Sort of
2 stand around until the appeal is finally exhausted --

3 MR. KIRBY: No.

4 QUESTION: -- for a couple of years to see
5 whether they can do the search or not?

6 MR. KIRBY: No, Justice Scalia, and no, Justice
7 Kennedy.

8 What would happen would be once the probable
9 cause determination is made that there is evidence of a
10 crime within the records of the casino in our
11 hypothetical, the search warrant would be executed and the
12 property would be seized and brought before the court. At
13 that time the tribe, if it thought it had a protectable
14 interest under State statute, perhaps because of certain
15 statutory privileges, or under some special protectable
16 interest that the tribe may feel that it has because of
17 its unique domestic dependent sovereign status, could
18 present that interest balance analysis to the magistrate
19 immediately.

20 QUESTION: But what good did it do to the State
21 -- to the tribe after the horse is out of the barn? In
22 other words, the State -- the tribe is not being
23 prosecuted for anything in these cases. It's a tribal
24 member who's being prosecuted. And if you're saying,
25 well, the -- the warrant has to be executed but after the

1 fact the State -- the tribe, to -- to ease its wounded
2 feelings, can have this declaration? I don't follow it.

3 I mean, the tribe's idea is there is no right to
4 come on our property and seize our records. If you're
5 saying every time the county can do that and that all the
6 tribe has is an after-the-fact determination by some
7 magistrate that the county was wrong, it's not much of a
8 remedy, is it?

9 MR. KIRBY: With all respect, Justice Ginsburg,
10 I believe it's the best remedy available. The tribe's
11 desire to have a categorical rule that no search warrants
12 may be issued with regard to its property has disastrous
13 consequences when evidence or proceeds of a crime is
14 located upon the reservation.

15 QUESTION: Why? Why is that? I mean, from what
16 you've said so far, it sounds to me as if the State or the
17 county went to the tribe and said, we want your records,
18 and the tribe said, why? And the county said, we can't
19 tell you. Well, obviously that would be a situation where
20 they might get their backs up.

21 But suppose you just said, look, the reason is
22 that we think there are a couple of people here who are
23 cheating us. We think they get welfare from us and you're
24 paying them too much. That's why we want to look at it.
25 Maybe they would have said, sure, go look at it. But I

1 take it you couldn't do that simple thing?

2 MR. KIRBY: Your Honor, the Federal regulation
3 prohibits the --

4 QUESTION: All right. So then isn't the
5 solution that maybe you need a law to overcome the Federal
6 regulation or maybe you just go to a Federal official and
7 say, will you please ask them?

8 MR. KIRBY: No, Justice Breyer.

9 QUESTION: There's no way to do it. In other
10 words, under the law the only choice -- your major
11 constitutional thing is you have to say the only
12 possibility is the county that wants to prosecute somebody
13 has to -- goes to the tribe and says, we want to prosecute
14 somebody. We won't tell you who. We can't tell you why.
15 Give us all your records. I mean, on that circumstance,
16 I'd think the tribe would certainly have a point. And yet
17 -- yet if -- if you were behaving reasonably and maybe --
18 maybe if Federal law prevents you from behaving
19 reasonably, maybe they should change it.

20 How is this supposed to work out?

21 MR. KIRBY: Well, Justice Breyer, looking at the
22 situation that you've presented, which is our situation,
23 one must remember that letters were sent by the Department
24 of Health and Human Services to the three individuals
25 asking for a reconciliation. Letters were sent by the

1 district attorney to these same three individuals. Two
2 letters were sent to the tribe asking for the information,
3 which the tribe had honored five times in the last
4 approximately two years, and the tribe had actually in one
5 of those occasions asked for a search warrant, which it
6 then honored. There was a history of working with the
7 tribe to obtain this information.

8 During this circumstance, the tribe took the
9 position it was no longer going to do that. It wanted to
10 have something more, and in fact the tribal attorney
11 suggested that a search warrant be obtained. And as it
12 had been in another circumstance within the preceding 12
13 months. So there is a clear history of trying to work
14 with the tribe.

15 What ended up happening in this case is what
16 could happen in any case. The tribe, for whatever reason,
17 depending upon whatever tribal government might have been
18 elected at the time -- and it -- they may have been
19 different on that day than they were during the preceding
20 2 years -- decided, no, we're not going to do that any
21 longer. And that's how this situation came to fruition.

22 And what we're looking at --

23 QUESTION: Well, do you have other means to get
24 the information? Can you question the people you suspect
25 of welfare fraud and ask them how much they earned, if

1 anything?

2 MR. KIRBY: Justice O'Connor, that was done on
3 at least two separate occasions. Letters were sent to
4 each of the three casino employees advising them of the
5 discrepancy and asking that the employees come in and
6 reconcile the discrepancy. Those letters, unfortunately,
7 were ignored. And so the county was faced with the
8 situation where it is mandated to have such an
9 investigation process into potential fraud by the --

10 QUESTION: Well, presumably you could question
11 supervisory employees who prepare payroll records and ask
12 them how much have you paid these people, if anything.
13 Could you do that?

14 MR. KIRBY: Yes, Justice O'Connor, that could be
15 done. That presumes, however, that the tribal officials
16 would subject themselves and submit to questioning and
17 providing the information verbally that they have refused
18 to provide in writing simply by filling out a form
19 requesting the information.

20 QUESTION: Well, we have said that the -- in
21 Minnesota v. the United States, I think we said that a
22 proceeding against property in which the United States has
23 an interest is a suit against the United States. Do you
24 take the position that you can file a suit against the
25 Indian tribe without its consent?

1 MR. KIRBY: Justice O'Connor, when property is
2 at issue, we have an in rem situation that doesn't require
3 a lawsuit. We have the -- I believe it's Minnesota and
4 the Cass County case which --

5 QUESTION: Well, you didn't answer my question.

6 MR. KIRBY: I apologize.

7 QUESTION: Do you take the position that you can
8 file a suit against the tribe?

9 MR. KIRBY: Not to differ or to draw hairs, yes,
10 the suit could be filed and if the tribe consented to
11 jurisdiction, then we could resolve it in court.

12 QUESTION: Yes, but -- against its consent.

13 MR. KIRBY: Not against its consent. That's
14 right.

15 QUESTION: No.

16 QUESTION: Mr. Kirby, isn't it the case that --
17 that you can sue -- the United States can be sued against
18 its -- against its consent if it's operating a commercial
19 enterprise. Isn't that the international law of sovereign
20 immunity, just as under our Foreign Sovereign Immunities
21 Act a foreign sovereign can be sued in this country
22 against its will if it is operating a commercial
23 enterprise?

24 MR. KIRBY: That is my understanding, Justice
25 Scalia, and that is the case we have here.

1 QUESTION: No, but isn't there one difference?
2 And that is, take the foreign sovereign situation.
3 There's a statute of the United States. And -- and if we
4 start with the assumption, as I do, that we are in a
5 different situation from -- from what we faced in Hicks so
6 that we're talking about, in effect, a claim directly
7 against the -- the sovereign itself, and if we also
8 assume, which I think is correct, that the ultimate party
9 in interest in this kind of a welfare fraud situation is
10 the United States, why isn't the sensible answer to say,
11 all right, if the United States wants the tribes to be
12 treated like foreign sovereigns in a commercial
13 enterprise, and if the United States wants to regard the
14 casinos as a commercial enterprise for that purpose, let
15 it pass a statute comparable to the Foreign Sovereign
16 Immunities Act?

17 MR. KIRBY: That would certainly be a resolution
18 of this case, Justice Souter. However, what we're left
19 with dealing today without congressional action is the
20 common law tribal immunity doctrine as set forth by this
21 Court and the Montana analysis that this Court has set
22 forth with regard to --

23 QUESTION: Has Congress ever adopted a statute
24 speaking to tribal sovereign immunity?

25 MR. KIRBY: No, Justice Scalia.

1 QUESTION: Isn't it entirely a creation of this
2 Court?

3 MR. KIRBY: Yes, Justice Scalia, it is.

4 QUESTION: And if in fact --

5 QUESTION: Well, isn't -- isn't it also a -- a
6 creation which basically was an adoption of an
7 international law norm?

8 MR. KIRBY: Initially --

9 QUESTION: Isn't that what John Marshall thought
10 he was doing?

11 MR. KIRBY: I believe that the tribal sovereign
12 immunity doctrine commenced with the Turner decision which
13 was approximately 1919. And as this Court indicated in
14 the Kiowa decision, that sovereign immunity doctrine was
15 created almost by accident. It was --

16 QUESTION: What about Worcester v. Georgia? I
17 thought that the -- the tribal sovereign immunity began
18 long before 19-something.

19 QUESTION: So did I.

20 MR. KIRBY: Worcester v. Georgia, Justice
21 Ginsburg and Justice Souter, dealt with primarily treaty
22 rights and the -- the need for Justice Marshall to try to
23 -- to put, if you will, or place the tribes who were
24 nation -- independent nations, sovereigns of this country,
25 into some category that was different from nation states.

1 Our Constitution recognizes that Indian tribes are not
2 nation -- foreign nation states. In the Commerce Clause,
3 we speak to the Interstate Commerce Clause as States being
4 one type of entity, Indian tribes being another, and
5 foreign nations being another. So tribes have always been
6 considered differently. And here they are domestic
7 dependent sovereigns which has characteristics totally
8 different from foreign nation states.

9 QUESTION: Mr. Kirby --

10 QUESTION: I think we will hear in about a
11 minute, if we get to the main issue of this, I suspect --
12 you see, on the one hand if we decide in your favor, that
13 means that any magistrate in the State, of which there may
14 be many, in any criminal case whatsoever for probable
15 cause can allow State officials to go into all the tribal
16 documents no matter how many there are, no matter how
17 related to government of the tribe, whatever they are.
18 They're most -- they're most key matters for the tribe's
19 governance. But if we decide against you, all it means is
20 that you have to go to the Federal Government and convince
21 them that this is really important and then they'll deal
22 with it.

23 MR. KIRBY: Well, Justice Breyer, Congress
24 certainly has plenary power over Indian tribes.

25 QUESTION: I'm not thinking of Congress. I'm

1 saying right now -- you go to the Interior Department.
2 They have people there. You go tell them what the problem
3 is, and they say -- you say, this tribe is being totally
4 unreasonable here, completely. I don't know why but they
5 are. And -- and if they feel it's important that the
6 Federal Government now has adequate ways of getting you
7 the information you need. Now -- now am I wrong?

8 MR. KIRBY: Justice Breyer, with all respect,
9 yes, you are wrong.

10 QUESTION: There's no way. In other words, it's
11 just we're at a -- at a loss. Either -- either -- we'd
12 have to get legislation, in your opinion.

13 MR. KIRBY: In my opinion we have to adopt a --
14 first of all, we cannot adopt a categorical rule that the
15 tribes propose. So what we are looking for is a solution
16 that is acceptable to certainly the majority of the
17 Court --

18 QUESTION: All right. You -- it's acceptable to
19 you. You say commercial -- if it's a commercial body like
20 a casino, that's -- they don't have the immunity, but if
21 it's noncommercial, it's okay. But has this been argued
22 below whether they're commercial or noncommercial?

23 MR. KIRBY: It has not been argued below,
24 Justice Breyer. However, that's not the distinction that
25 we're making between commercial and governmental activity

1 because, as I indicated earlier, if the government
2 minutes, if you will, the tribal minutes, have direct
3 evidence of a very serious felony for whatever reason --

4 QUESTION: Okay. The distinction you would be
5 making is?

6 MR. KIRBY: A balancing interest, Your --
7 Justice Breyer. And I believe that --

8 QUESTION: Why do you want to --

9 MR. KIRBY: -- under the Younger abstention
10 doctrine -- yes, Justice Kennedy.

11 QUESTION: You want to do it the hard way. I
12 mean, the -- you win this case if we say you can subpoena
13 the commercial -- the records of a commercial enterprise
14 being run by the tribe, but you don't want to do that.

15 MR. KIRBY: We'd be happy to win this case on
16 that ground, Justice Scalia.

17 (Laughter.)

18 QUESTION: May I ask, speaking of that -- that
19 question, does the tribe itself operate the casino or does
20 it operate it through a corporation of some kind?

21 MR. KIRBY: The casino is operated through a
22 corporation that is chartered by the tribe, not by the
23 State. So the tribe has certain policies wherein it
24 blesses an organization as a -- as a tribal corporation.

25 QUESTION: Your -- your petition raises three

1 questions, and so far, due to no fault of your own, you've
2 only covered one of them. Do you want to try to get to
3 the other two or three?

4 MR. KIRBY: Justice Rehnquist, I see that my
5 time is drawing to a close. If I may, I would like to
6 reserve my time and perhaps address that in reply.

7 QUESTION: Very well.

8 MS. McDowell.

9 ORAL ARGUMENT OF BARBARA B. McDOWELL
10 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
11 SUPPORTING THE PETITIONERS IN PART
12 AND THE RESPONDENTS IN PART

13 MS. McDOWELL: Mr. Chief Justice, and may it
14 please the Court:

15 I would first like to correct one
16 misunderstanding that the Court may have been left with as
17 a result of Mr. Kirby's comments. There is no Federal
18 regulation or other Federal requirement that would have
19 prevented the county or the State from sharing with the
20 tribe the information, the welfare applications, and so
21 on. Federal --

22 QUESTION: Well, but even so, let's assume
23 there's a serious felony having been committed involving a
24 crime of violence where employees of the casino are
25 implicated. Surely, the district attorney's office or the

1 county is not going to share that information with --
2 necessarily with -- with the whole tribal council.

3 MS. McDOWELL: In the first place --

4 QUESTION: That seems -- that seems to me a very
5 disruptive proposal for -- for orderly law enforcement.

6 MS. McDOWELL: Well, Your Honor, nothing in the
7 position that's being urged here would preclude a State
8 from proceeding against individual tribal members and
9 searching their own --

10 QUESTION: No, but the suggestion was that
11 there'd be a lot of cooperation between the tribes. But
12 it seems to me that that may compromise a very serious
13 criminal investigation.

14 MS. McDOWELL: Well, and -- and if that's the
15 case, they would not need to share the information with
16 the tribe, but they could proceed against the individual
17 tribal member.

18 QUESTION: No, no. But -- no, the problem that
19 he's trying to put -- imagine the most serious crime you
20 can think of committed off the reservation by people who
21 have nothing to do with the Indian tribe, for example, but
22 there is a key piece of evidence that is there in the
23 tribal document and they want to get it.

24 Now, what we've just been told is there -- they
25 can't -- if -- if we decide for the tribe, there's no way

1 whatsoever they can get it. It's impossible. If the
2 tribe refuses to cooperate, the Federal Government can do
3 nothing without new laws being passed. Now, is all that
4 the case?

5 MS. McDOWELL: No, that's not the case, Justice
6 Breyer. In many instances, of course, if there was a
7 serious crime, it's a crime that the Federal Government,
8 as well as the State, could prosecute, and there's no
9 immunity bar to --

10 QUESTION: But if there -- it's not --

11 QUESTION: In the 280 jurisdiction?

12 MS. McDOWELL: Even in the Public Law 280
13 jurisdiction, Justice O'Connor, because there are Federal
14 statutes, as you're well aware, dealing with firearms,
15 narcotics, racketeering and so on that could often be used
16 in this sort of situation.

17 In addition, the Federal Government could often
18 bring the parties together and try to reconcile these
19 sorts of disagreements. Tribes, after all, are sovereign
20 governments. They have a significant interest in law
21 enforcement.

22 QUESTION: Well, Ms. McDowell, let's talk about
23 their being sovereign. I had thought that we -- that our
24 cases make very clear that their sovereignty is a peculiar
25 and lesser kind of sovereignty. It is certainly -- does

1 not exceed the sovereignty of the States or of foreign
2 countries. And I -- I am perplexed at why -- why the
3 United States wants to accord the -- the tribe's
4 commercial enterprises greater protection than is accorded
5 to England or -- or Germany or any -- any foreign
6 sovereign --

7 MS. McDOWELL: Well, of course --

8 QUESTION: -- where suit is allowed. And I'm
9 sure in the course of suit, you can subpoena documents
10 relating to that -- to that commercial enterprise. Why
11 should we -- and that provision in the Foreign Sovereign
12 Immunities Act was simply a reflection of what the
13 international norm had become. Now, why in the world
14 should we accord greater protection to this lesser
15 sovereignty that -- that consists of the Indian tribe?

16 MS. McDOWELL: Well, in the Kiowa case, Your
17 Honor, the Court extended tribal sovereign immunity to
18 commercial off-reservation activities of a tribe. The
19 Court recognized that any limitation on tribal sovereign
20 immunity that would exclude a tribe's commercial
21 activities from the protections of sovereign immunity was
22 a task for Congress rather than for the judiciary.

23 And it is significant that when commercial
24 activities of the United States Government, for example,
25 have been -- when suit has been allowed against such

1 entities, it's been a matter of -- of statute, not a
2 matter of judicial decision. Indeed, the Foreign
3 Sovereign Immunities Act is, after all, a statutory
4 protection.

5 QUESTION: I think there was a dissent in that
6 case that made the point that Justice Scalia has been
7 pursuing.

8 I'd like to back up and find out how we got
9 here. This is a suit brought by the tribe, not by the
10 county, right?

11 MS. McDOWELL: That's correct, Your Honor.

12 QUESTION: And I think you are urging that 1983
13 is not available --

14 MS. McDOWELL: That's correct.

15 QUESTION: -- to the tribe either as plaintiff
16 or defendant.

17 If 1983 is not available, then what is the
18 basis? What statute does the tribe's case arise under for
19 the substantive determination that you would like to have
20 the Court adjudicate? If we don't have 1983, what Federal
21 law does the case arise under?

22 MS. McDOWELL: It's generally been understood,
23 Your Honor, although not specifically addressed in a
24 decision of this Court, that the Supremacy Clause and the
25 Federal jurisdictional statutes provide a right of action

1 for injunctive and declaratory relief when a party is
2 claiming that State action is precluded by superseding --

3 QUESTION: Are you saying it's a kind of Bivens
4 action?

5 MS. McDOWELL: It may be that. It's -- it's
6 similar to Ex parte Young. Justice Kennedy's dissenting
7 opinion in the second Golden State Transit case discusses
8 this at -- at some length. Also the Court's decision in
9 Shaw v. Delta Air Lines provides a number of -- of
10 citations to cases that arose in this particular context.
11 So it is a settled, although not frequently discussed
12 basis, of coming into Federal court to challenge State
13 action.

14 QUESTION: Is -- is there a problem on an Ex
15 parte Young theory here? I mean, you're -- we're not --
16 they're not simply asking the tribe to stop doing
17 something that's unlawful by going against the officer who
18 does it. They are asking for tribal property.

19 MS. McDOWELL: I think you're referring to a
20 situation where a State would sue the tribe.

21 QUESTION: Well, they -- that's what's going on.
22 The -- the county here wants tribal property, right?

23 MS. McDOWELL: That's correct. It has obtained
24 a search warrant against tribal property. Interestingly
25 enough, the return of the search warrant directs the tribe

1 that if they want the property back, they will have to
2 come into State court and proceed under the California
3 Criminal Code.

4 QUESTION: Well, is that Ex parte Young?

5 MS. McDOWELL: No. That's not Ex parte Young.
6 Ex parte Young is -- is based essentially on what the
7 Court has called the legal fiction that when a State
8 officer is violating superior Federal law --

9 QUESTION: Right. So -- so Ex parte Young isn't
10 going to cover a situation like that. I mean, an Ex parte
11 Young analog in this situation isn't going to cover the --
12 the request here.

13 MS. McDOWELL: Well, it is when one is
14 considering the tribe's suit against the petitioners.

15 QUESTION: Well, if -- if the -- what is the
16 Federal -- basis for Federal jurisdiction of the tribe's
17 suit against the petitioners if 1983 is not available?

18 MS. McDOWELL: Well, the jurisdictional basis is
19 section 1331, Federal question jurisdiction, Your Honor.

20 QUESTION: But surely the Federal law that the
21 case arises under is not 1331 itself. You have to have
22 another law, and the one exception to that is on the
23 Federal side when the Court created the Bivens action
24 because Congress had not enacted a statute like 1983 to
25 cover Federal offices.

1 But you seem to be asking us to create another
2 such category where there's some right of action implied
3 from what?

4 MS. McDOWELL: From the Supremacy Clause, Your
5 Honor, because the tribe's Federal common law immunity
6 supersedes the State enforcement of a State search warrant
7 against it.

8 QUESTION: This is such an obvious way to raise
9 this kind of issue without that. The next time somebody
10 wants something from the tribe, they say no, make them go
11 to court and appeal it.

12 MS. McDOWELL: Yes, but a search warrant is
13 obtained in an ex parte proceeding, Your Honor. There's
14 no opportunity for --

15 QUESTION: Well, I mean, can't you just resist a
16 search warrant and say, no, I think it's an unlawful
17 warrant and go right to the State court and appeal it?

18 MS. McDOWELL: No, you can't, Your Honor.

19 QUESTION: Everybody just has to follow this.
20 There's no procedure to resist --

21 MS. McDOWELL: No, there's no procedure for
22 that. And indeed, a -- a party that resists the search
23 warrant may subject itself to criminal penalties for doing
24 so.

25 QUESTION: May I ask --

1 MS. McDOWELL: So that's not an optimal
2 procedure.

3 QUESTION: May I ask you a question about your
4 theory that the tribe is not a person within the meaning
5 of 1983? You seem to assume that if they could not be
6 made a defendant, they also could not be a plaintiff.
7 Don't you make that assumption in your argument?

8 MS. McDOWELL: That's correct, Your Honor, and
9 that's because the term person --

10 QUESTION: And isn't that assumption plainly
11 wrong? Because for -- to be a defendant, you have to act
12 under color of State law. So there are all sorts of
13 persons who can be plaintiffs who could never be
14 defendants.

15 MS. McDOWELL: Well, it -- it is not necessarily
16 the case that a tribe could not act under State law, Your
17 Honor, because, for example, with jointly administering --

18 QUESTION: But in the normal course of events,
19 it wouldn't be acting under State law. It's acting under
20 its own law.

21 MS. McDOWELL: That's correct, or it may be
22 acting under Federal law.

23 QUESTION: So in the normal course of events,
24 the fact that it might not be a defendant wouldn't shed
25 any light at all on the question of whether it could be a

1 person for plaintiff purposes.

2 MS. McDOWELL: Well, generally, Your Honor, the
3 Court has applied the interpretive presumption that the
4 term person doesn't include a sovereign. The term person
5 appears twice in the same sentence in section 1983, so it
6 would be curious if it was construed differently.

7 QUESTION: Well, but a citizen, an ordinary
8 citizen, could be a person for plaintiff's purposes but
9 not necessarily a defendant.

10 MS. McDOWELL: Well, that -- that may indeed be
11 the case, Your Honor.

12 In the South Carolina Ports decision recently,
13 the Court recognized that the preeminent purpose of
14 sovereign immunity is to assure that sovereigns are
15 treated with the dignity that their sovereign status
16 entitles them. The execution of a State warrant is a
17 particular threat to the dignity of a sovereign tribe,
18 even more so perhaps than hauling it into court. It's
19 obtained ex parte.

20 QUESTION: You think that's so when -- when what
21 you're doing is getting the records of a casino? I
22 mean --

23 MS. McDOWELL: That's correct. Now, we're not
24 saying that every tribal business necessarily is an arm of
25 the tribe for sovereign immunity purposes, but the

1 particular characteristics -- may I finish, Your Honor?

2 QUESTION: Thank you, Ms. McDowell.

3 Mr. Peyton -- Mr. Peyton Chambers.

4 ORAL ARGUMENT OF REID PEYTON CHAMBERS

5 ON BEHALF OF THE RESPONDENTS

6 MR. CHAMBERS: Thank you, Mr. --

7 QUESTION: Are you Mr. Peyton Chambers or Mr.

8 Chambers?

9 MR. CHAMBERS: Thank you, Mr. Chief Justice.

10 I'm Mr. Chambers.

11 QUESTION: Very well.

12 MR. CHAMBERS: Thank you. Thanks, Mr. Chief

13 Justice, and may it please the Court:

14 There are three principles of Federal law that

15 bar this search warrant. The first is tribal sovereign

16 immunity. The second is the longstanding principle that

17 States may not infringe the right of tribes to govern

18 themselves or internal affairs on their reservation. And

19 the third is that there's no act of Congress that

20 authorizes this search warrant, though two statutes,

21 Public Law 280 and the Indian Gaming Regulatory Act, do

22 provide a framework for some assumption of State

23 jurisdiction over tribes and Indians on reservation -- the

24 -- reservations. The county doesn't claim that either

25 applies here to authorize this act, and they do not.

1 I -- I want to address, if I may, Justice
2 Scalia's question about the commercial and governmental
3 distinction because basically the Indian Gaming Act by
4 Congress sets up a framework for tribes to operate gaming.
5 This is a tribal enterprise. It has to be, under the
6 Gaming Act, owned and controlled by the tribe. It -- and
7 the proceeds of the gaming have to be used for tribal
8 purposes, chiefly tribal governmental purposes. And they
9 are by the Bishop Paiute Tribe.

10 The Bishop Paiute Tribe is a small tribe in a
11 remote area of California. It uses all of its gaming
12 revenues to operate tribal programs on its reservation.
13 Like most tribes, the Bishop -- the Bishop Tribe operates
14 a health clinic, for example, educational programs,
15 welfare programs --

16 QUESTION: May I just interrupt --

17 MR. CHAMBERS: Certainly, Justice Stevens.

18 QUESTION: -- on the corporate point that was
19 brought up earlier? Who pays the income tax on the
20 earnings of the casino? The corporation or the tribe?

21 MR. CHAMBERS: The -- the tribe is not taxable
22 under the Federal income tax laws, Justice Stevens. And
23 -- and the corporation, as an arm of the tribe, is not
24 taxable.

25 QUESTION: So there are no taxes on the

1 earnings.

2 MR. CHAMBERS: There -- there are no taxes.
3 This is a relatively small casino. It's in a pretty
4 remote part of California, sort of halfway between Los
5 Angeles --

6 QUESTION: But it is owned by a corporation
7 rather than by the tribe itself?

8 MR. CHAMBERS: Well, Justice Stevens, it's
9 operated by a corporation that was chartered by the tribe.
10 It's wholly owned by the tribe. And it -- it -- the board
11 of directors, for example, is removable --

12 QUESTION: Well, who owns the real estate that
13 the casino is located on? The tribe or the corporation?

14 MR. CHAMBERS: No, the tribe, Justice Stevens.
15 The tribe owns all the real estate on this small
16 reservation in eastern California. It's an 800-acre real
17 estate -- or trust land. It's owned by the United States
18 in trust for the tribe.

19 QUESTION: How about the slot --

20 QUESTION: But this -- what you're saying is
21 true of all --

22 QUESTION: How about the slot machines? Who
23 owns the slot machines? The tribe or the corporation?

24 MR. CHAMBERS: They'd be tribal property,
25 Justice Stevens, and operated --

1 QUESTION: Well, what does the -- does the
2 corporation own anything?

3 MR. CHAMBERS: No, I don't believe so, Justice
4 Stevens. It's a simply a tribal arm and -- and it's --
5 it's -- it is the tribe. And it has to be the tribe under
6 the Indian Gaming Act. My point is that Congress --

7 QUESTION: You're -- you're sure that it doesn't
8 own -- what does it do? What -- you say it doesn't own
9 the land. It doesn't own the slot machines. What -- what
10 does it do?

11 MR. CHAMBERS: It -- it operates the gaming
12 facility rather than having the tribal political leaders,
13 Justice Scalia, engaged in the day-to-day operation of the
14 -- of the gaming activity. But it's --

15 QUESTION: But if -- if what was formerly tribal
16 government has now been so infused with a commercial
17 character, that it seems to me calls tribal immunity into
18 question generally.

19 MR. CHAMBERS: Well, let me try to persuade you
20 it doesn't, Justice Kennedy. That the -- I mean here,
21 first of all, the Indian Gaming Act was enacted for the
22 purpose of strengthening tribal governments. That's what
23 Congress was doing. Secondly, Congress required the tribe
24 to own and control gaming operations. And third, Congress
25 limited the revenues that the tribe gets from the gaming

1 operation to be used essentially for the welfare of the
2 members of the --

3 QUESTION: How is that different from any
4 foreign country that wholly owns a corporation engaged in
5 -- in business? For any foreign country, when it owns
6 such a corporation, all the revenue, all the profits go to
7 the treasury of the foreign country to be used for the
8 public benefit. At least where that is the case, I think
9 that the sovereign immunity turns on the nature of the
10 operation, not on whether the revenues go to the benefit
11 of the people of the country.

12 MR. CHAMBERS: But, Justice Breyer, there of
13 course the country, the legislature, or the government of
14 that country could decide what to do with its revenues.

15 QUESTION: And they're all for -- well, what is
16 -- so tell me precisely what is the difference between the
17 casino and, let's say, the state of -- the Government of
18 Finland which happens to own a shipping business 100
19 percent and the revenues and profits from that shipping
20 business go entirely to health care, parks, other things
21 for the people of Finland. Now, what's the difference
22 between our Finnish shipping line and the casino here?

23 MR. CHAMBERS: There are two differences,
24 Justice Breyer.

25 First, the Finnish government, if it wanted to

1 could decide to invest the proceeds of the shipping line
2 in the U.S. stock market. The tribe cannot do that. The
3 tribe is constrained by Congress to use the revenues
4 essentially for governmental purposes or for charitable
5 donations or a couple of other purposes. But it's not --
6 it's like a State lottery I suppose, although even there
7 the State legislature could decide to use the State
8 lottery for some other purpose.

9 The second distinction really was I think
10 pointed out in -- in Justice Souter's question to -- I
11 forget whether it was to Mr. Kirby or Ms. McDowell. But
12 -- but Congress has enacted the Foreign Sovereign
13 Immunities Act which provides that a commercial enterprise
14 of a foreign nation operating in the United States is
15 stripped of its sovereign immunity.

16 Congress has never done that for a tribe, and
17 it's very important to note that while sovereign immunity
18 in the tribal context is a common law doctrine developed
19 by this Court, it has been adopted by Congress. Most
20 importantly, in the Indian Self-Determination Act of
21 1975 --

22 QUESTION: Why aren't you relying on Kiowa
23 County? Because that was as commercial as a deal could be
24 and the Court said no sovereign immunity.

25 MR. CHAMBERS: Justice Ginsburg, as you pointed

1 out, there was a dissent there, but a difference in Kiowa
2 County is that you had a tribe engaged in the commercial
3 operation outside the reservation. That's not so here.
4 This is entirely on the reservation. It's a tribe --

5 QUESTION: That's a fortiori for you I would
6 think. I would think that the difference in Kiowa is --
7 is -- it seems to me one -- one might say when the money
8 is coming -- when money is sought that comes out of the
9 tribal treasury, we're not -- we're not willing to take
10 into account the commercial nature of the enterprise.
11 It's still coming out of the tribal treasury.

12 But this is quite a different matter. Nothing
13 comes out of the tribal treasury. And you're -- you're
14 just seeking documents that belong to the commercial
15 enterprise essentially. I -- I don't know that Kiowa
16 necessarily covers this case.

17 MR. CHAMBERS: I hope I can persuade you that it
18 does, Justice Scalia, that -- that -- the sovereign
19 immunity basically covers funds and property and the
20 operation of a tribal or any government, whether it's the
21 Federal Government, a State government, or a tribal
22 government. And it protects that categorically from
23 judicial process of a non-superior sovereign.

24 Here the tribe is not subordinate to the State
25 of California. The tribe is subordinate to the United

1 States and the county is subordinate to the State of
2 California. But the tribe is not subordinate to
3 California. So the tribe's policy cannot be displaced by
4 California when it's operating its own government.

5 Now, this could apply to any record of the
6 tribe, and -- and the tribe operates, as I said, health
7 care programs, educational programs. All -- virtually all
8 Indian tribes do this today, and it's --

9 QUESTION: The tribe is subordinate to this --
10 to this extent, that the laws of the State of California
11 can be enforced under -- under section 280.

12 MR. CHAMBERS: Justice --

13 QUESTION: Under law 280.

14 MR. CHAMBERS: Justice Kennedy, Public Law 280
15 confers criminal jurisdiction on California on offenses by
16 or against Indians. That's the language of Public Law
17 280. It does not apply to tribes. The Court held in the
18 Bryan v. Itasca County case that Public Law 280 does not
19 apply to tribes, and in the second Three Affiliated Tribes
20 decision, the Court said that Public Law 280 does not
21 waive tribal immunity or interfere with tribal rights of
22 self-governance. So -- so Public Law 280 -- and the State
23 doesn't claim -- I'm sorry -- the county doesn't claim
24 that the State has any jurisdiction over the tribe under
25 Public Law 280.

1 That proceeds really to another reason why the
2 -- why the warrant is not good here under Federal law.

3 QUESTION: Well, but it -- but it has
4 jurisdiction over individuals who by hypothesis either in
5 this case or some hypothetical case might be given --
6 might be being -- being sheltered by the tribe.

7 MR. CHAMBERS: Well, Justice Kennedy, the tribe
8 isn't sheltering anybody. This tribe wouldn't shelter
9 anybody and -- and tribes don't do that.

10 QUESTION: Well, why didn't the tribe --

11 QUESTION: We're -- we're talking about
12 hypothetical instances --

13 MR. CHAMBERS: Okay.

14 QUESTION: -- as to how this -- as to how this
15 rule that you advocate would apply.

16 MR. CHAMBERS: Justice Kennedy, I think how it
17 should apply is that the rule should encourage cooperative
18 intergovernmental agreements between tribes and counties,
19 and that is in fact what happens all over Indian
20 reservations today, that --

21 QUESTION: Well, then why didn't it happen on
22 your side?

23 I would like to ask a question of the same
24 nature that Justice O'Connor asked the county. These were
25 employees of the casino. They had twice received notices

1 from the county saying, here's the payroll thing, what it
2 says you've got, and here is the welfare payment you
3 received. Would you please reconcile these? And the
4 employees didn't respond, didn't respond twice. And so
5 the county comes to the employer, the casino, and says,
6 help us out. These people -- I guess we could lock them
7 up, but we would prefer just to have you give us the
8 records that will enable us to determine whether there was
9 welfare cheating.

10 MR. CHAMBERS: Justice Ginsburg, the tribe tried
11 to avoid this confrontation. First, the tribe did get a
12 letter asking for information about three employees
13 without any specification of why. The tribe responded
14 that its policies do not allow a disclosure of employee
15 information without the consent of the employees. Then,
16 without any further notice, the county came to the tribe
17 with armed officers and insisted on seeing the records.

18 Now, the reason that -- I mean, the tribe has
19 security officers in the casino. They came in a private
20 part of the casino. But obviously the tribe doesn't want
21 that kind of confrontation. They told the officers where
22 the records were. The officers went with deadbolt cutters
23 into the tribe's building, cut the locks, and seized the
24 records.

25 QUESTION: Are you saying the tribe did not know

1 that this investigation pertained to welfare fraud?

2 MR. CHAMBERS: I believe that is correct at the
3 time that the search warrant was executed, Justice
4 Ginsburg.

5 Now, the tribe took that hit basically. I mean,
6 the tribe didn't do anything. They approached the
7 district attorney. They said we don't want to have this
8 kind of thing happening again and offered to work it out
9 by accepting simply a copy of the last page of the --
10 California law requires a welfare applicant to sign an
11 acknowledgement that employers can turn records over to
12 the county investigating welfare fraud.

13 QUESTION: Mr. Kirby said there was some Federal
14 regulation that blocked that and then Ms. McDowell told us
15 that there is no such regulation.

16 MR. CHAMBERS: I think Ms. McDowell is right,
17 Justice Ginsburg. But -- but I guess one would have to
18 look at the regulation, and I'm sure the Court will.

19 QUESTION: All right. So what's your suggestion
20 on this point? That -- it seems to me that what we have
21 is an instance where perhaps both sides feel the other was
22 being very unreasonable, but something that should have
23 been worked out. And -- and so because you couldn't work
24 it out, one way to work it out would be get the Federal
25 Government involved, but it couldn't be worked out.

1 So now we're in a position of either having to
2 say no matter how unreasonable the tribe is in stopping
3 the State from getting evidence of a serious crime, well,
4 that's -- the tribe wins, or saying no matter how
5 unreasonable the State is in trying to interfere with the
6 activities of the tribe, they win.

7 Now, to me quite honestly, neither of those
8 solutions is satisfactory. Do we have to choose the one
9 or the other?

10 MR. CHAMBERS: I think that you have to choose a
11 -- a solution that respects the tribe's operation as a
12 government. The tribe --

13 QUESTION: If I have to choose, why wouldn't I
14 just say, if I'm trying to look for a compromise that
15 preserves the essence of it, very well, if I have to
16 choose between two imaginary, unreasonable warring
17 parties, I will say that where it's commercial, the tribe
18 loses; where it's noncommercial, the tribe wins. What's
19 wrong with that, which is where we started?

20 MR. CHAMBERS: Well, what's wrong with that here
21 is we don't have imaginary parties. We have real parties
22 here.

23 QUESTION: No. I understand that.

24 MR. CHAMBERS: I understand your hypothetical
25 and I -- I don't want to say it's not this case. I know

1 I'm not supposed to say that.

2 But I -- but I think that -- that the -- I mean,
3 here what you have is a tribe that tried to work it out.
4 The tribe was willing and is willing to sign an
5 intergovernmental law enforcement agreement with the
6 county.

7 Tribes and counties do this all over the
8 country. You know this, for example, from the amicus
9 brief filed by four States on behalf of the tribe in this
10 case, four States that have two-thirds of the Indian
11 reservation trust lands in the country in their borders
12 and the majority of Indians who live on reservations
13 within their borders. Those States say that they work it
14 out between tribes and counties, tribes and States.
15 Tribes have agreements all over the country with counties
16 about domesticating search warrants, about extradition --

17 QUESTION: Those -- those agreements may be
18 prompted by at least the uncertainty of what would happen
19 if they didn't make an agreement. I mean, we don't know
20 that those agreements aren't prompted in part by the
21 uncertainty as to whether, if there were not an agreement,
22 the State couldn't come in anyway.

23 MR. CHAMBERS: Well, Justice Scalia, I -- I
24 think that ascribes -- tribes do try to operate -- tribes
25 have a very strong interest in law enforcement too. And

1 -- and there were plenty of alternatives here available to
2 the county. The county could have gone and gotten a
3 search warrant against the individuals. That -- those are
4 the people they had to prove had the intent to defraud
5 them anyway.

6 QUESTION: But the individuals don't have the
7 records. The -- the tribe does have the payroll records.

8 MR. CHAMBERS: They would presumably, Justice
9 Ginsburg, I think have their bank accounts or -- or
10 cancelled checks or -- or other information.

11 QUESTION: Suppose the question were the casino
12 didn't file whatever was required, the State -- whatever
13 payroll reports it was required to report to the State.
14 So it's the tribe's default. And the State now wants to
15 enforce the requirement that -- that all employers in the
16 State file certain records about their employees. Could
17 the State, which could go after any other operation that
18 fails to file required papers, go after the tribe?

19 MR. CHAMBERS: Justice Ginsburg, the tribe is
20 required under its compact with the State of California to
21 file certain information because the tribe, for example,
22 participates --

23 QUESTION: Yes, and if it doesn't -- doesn't --

24 MR. CHAMBERS: If it doesn't, there are dispute
25 resolution mechanisms in the compact and there's a waiver

1 of tribal sovereign immunity for the enforcement of those
2 dispute resolution provisions. So the answer to the
3 question in -- in that situation is that the State could
4 get that information.

5 But here the tribe has filed all the things it's
6 required under that compact to file with the State --

7 QUESTION: May I ask kind of a background
8 question? Because I'm really not sure of the answer.

9 Supposing a tort was committed within the casino
10 by one non-Indian against another non-Indian. Where would
11 the recovery be allowed for that tort? Could they sue in
12 an Indian court or State court, and what law would apply?

13 MR. CHAMBERS: Justice Stevens, in that case
14 they would sue in State court because the State would have
15 jurisdiction over a civil action, even actually in a
16 Public Law 280 State between an Indian and an Indian.

17 QUESTION: Suppose there was a tort committed by
18 a casino employee against a patron. Would the State have
19 jurisdiction over that suit?

20 MR. CHAMBERS: The State would have jurisdiction
21 over that suit, Justice Stevens, unless the nature of
22 the --

23 QUESTION: Well, could the -- could the litigant
24 in that suit get discovery from the tribe in that suit --

25 MR. CHAMBERS: I was going to say --

1 QUESTION: -- in State court?

2 MR. CHAMBERS: They could not get discovery to
3 the extent that it would intrude on essential governmental
4 functions of the tribe because that would be --

5 QUESTION: Well, the very records that were
6 involved in this case -- some reason they had to identify
7 the particular person in the casino who was responsible
8 for the tort and you have to look at employment records to
9 find out. Could they get that in a civil suit in State
10 court, do you think?

11 MR. CHAMBERS: No -- no, they could not without
12 the tribe's consent, Justice Stevens. But in the ordinary
13 course of business, if the tribe understood the nature and
14 need of the issue, why, almost surely it would comply with
15 a -- with a request like that. But --

16 QUESTION: You -- you say essential government
17 records, but these are basically commercial records, are
18 they not?

19 MR. CHAMBERS: Mr. Chief Justice, I see I
20 haven't persuaded you. I -- I think they are given the
21 nature of Congress' oversight and limitations Congress has
22 put on the operation of this facility and -- and all
23 tribal gaming facilities. So this isn't just any tribal
24 business. This is a business that's operated under pretty
25 strict guidelines by Congress for it to be owned and

1 operated by the tribe.

2 QUESTION: Well, if the tribe were operating a
3 trading post, would it be different?

4 MR. CHAMBERS: It could well be different,
5 Justice -- Chief Justice Rehnquist.

6 QUESTION: Mr. Chambers, you -- the tribe filed
7 this suit under section 1983. Is that correct?

8 MR. CHAMBERS: It filed it under several --
9 under 1331 and 1983, Justice O'Connor.

10 QUESTION: And one of the questions we have to
11 answer is whether the tribe is a person under section
12 1983.

13 MR. CHAMBERS: Well, if you -- yes, if the Court
14 decides that --

15 QUESTION: And I -- I would appreciate it if you
16 would address that point because the interpretive
17 presumption is that the tribe, as a sovereign, which
18 you're so strongly urging here, is not a person under
19 section 1983. Why should we recognize that it's covered
20 as a person under section 1983?

21 MR. CHAMBERS: Justice O'Connor, you should do
22 so because -- because section 1983 is a broad remedial
23 statute for violations of Federal rights by States.

24 QUESTION: Well, does that mean we should just
25 go wild construing it for that reason?

1 MR. CHAMBERS: No, Mr. Chief Justice. And I
2 don't think you have. I --

3 QUESTION: I don't think we will.
4 (Laughter.)

5 MR. CHAMBERS: No, but -- but --

6 QUESTION: But it doesn't include States?

7 MR. CHAMBERS: No, it doesn't, Justice O'Connor.

8 QUESTION: Why would it include the tribe?

9 QUESTION: And it doesn't -- it doesn't include
10 foreign governments. We said a couple of years ago
11 Paraguay couldn't bring a 1983 suit.

12 MR. CHAMBERS: Yes, you did. You did in the
13 context of a pretty late capital punishment --

14 QUESTION: No, but I mean --

15 MR. CHAMBERS: -- interception by Paraguay.

16 QUESTION: No. Sure, it was -- it was late in
17 the day for capital punishment. We were deciding a -- a
18 question of -- of the meaning of section 1983, and I don't
19 know why that isn't good for your case too.

20 MR. CHAMBERS: Justice Souter, it's not good
21 because there wasn't a history in 1871 of States impacting
22 negatively on States' Federal rights or on the Federal
23 rights of foreign states and there was in the case of
24 Indian tribes. This Court had decided in 1867 two cases
25 cited in our brief involving the Kansas Indians and the

1 New York Indians, and the Court had decided the Cherokee
2 cases about 30 years before where there were serious
3 intrusions on tribes' Federal rights by States.

4 So Congress, when it enacted section 1983, was
5 not only presumptively aware of those, but in the 1870
6 committee report relied on by the Government, by the
7 Senate Judiciary Committee, specifically makes reference
8 to the Kansas Indian case when it's considering whether
9 Indians are citizens under the Fourteenth Amendment and
10 when they're not.

11 QUESTION: But -- but you agree, I think, that
12 the tribe is not suable. Under -- as a defendant, the
13 tribe is not amenable to 1983 as a defendant.

14 MR. CHAMBERS: That -- that is correct, Justice
15 Ginsburg. But, for example, in the antitrust cases,
16 you've held that States can sue as plaintiffs. You've
17 held that foreign nations can sue as plaintiffs. They
18 can't be sued as defendants under antitrust statutes. And
19 I think in the Vermont Natural Resources Agency case on
20 the False Claim Act, you decided that while a State could
21 not be sued as a defendant under the False Claim Act, that
22 it wouldn't necessarily preclude it from suing as a
23 plaintiff.

24 QUESTION: Mr. Chambers, I thought your -- your
25 first position on this issue was that it was not raised

1 below. You raised that in your brief in opposition to the
2 petition. Are you abandoning that now?

3 MR. CHAMBERS: No, I'm not, Justice Scalia. I'm
4 trying to answer the question --

5 QUESTION: No, I understand that. But you --
6 but -- but you didn't mention a thing about it, and it was
7 in your brief in opposition to the petition. It was also
8 in your brief. You claim that the 1983 issue was not
9 raised below.

10 MR. CHAMBERS: And -- and should have been if
11 it's going to be pressed to this Court. I -- I do agree
12 with that, Justice Scalia.

13 QUESTION: Then what is county's jurisdictional
14 basis? And don't tell me 1331 because it has to arise
15 under some law other than 1331.

16 MR. CHAMBERS: I'm not going to tell you 1331.

17 QUESTION: I don't mean the counties. I mean
18 the tribe.

19 MR. CHAMBERS: No, no. It arises under Federal
20 common law when sovereign immunity or the right to self-
21 government is being pleaded. And that's --

22 QUESTION: And your -- and your best citation
23 for that proposition?

24 MR. CHAMBERS: Two cases, Justice Kennedy: the
25 National Farmers Union v. Crow Tribe and the second Oneida

1 case, both in 1985.

2 QUESTION: So is the injunctive relief -- I
3 looked at the declaratory relief in the complaint and it
4 didn't seem really directly on point. The -- the request
5 for declaratory relief had to do with the Gaming Act, law
6 280, compacts, et cetera. So they didn't seem really to
7 raise the question we now have. Then there's a section on
8 damages, which is 1983, and then some requests for
9 injunctive relief.

10 MR. CHAMBERS: Justice Breyer, the -- the first
11 count in the complaint did raise the right of self-
12 governance.

13 QUESTION: Not the first request for relief.
14 The requests for relief -- there are five, and the first
15 two have to do with the declaratory judgment. I think
16 they're not right on this point, but --

17 MR. CHAMBERS: Okay. Well, I -- I think at
18 least the -- the count did do that and sovereign immunity
19 was pled in the complaint.

20 And then also, the preemptions -- Supremacy
21 Clause issue that Ms. McDowell was mentioning in the
22 Golden State Transit, I think, dissent by Justice Kennedy
23 cites Gibbons v. Ogden and the Cooley case v. the Port of
24 Philadelphia, going back into the 19th century for the
25 proposition --

1 QUESTION: Those came up out of State courts,
2 though. They didn't come up through the Federal system

3 MR. CHAMBERS: I guess that's correct. I think
4 that -- yes, there wasn't Federal question jurisdiction in
5 that part of -- of the 19th century.

6 QUESTION: So what -- the Federal question
7 jurisdiction you're saying is Federal common law.
8 Anything else?

9 MR. CHAMBERS: Well, I certainly think in
10 footnote 27 of our brief, we cited a number of Indian
11 cases, the Chickasaw case, the Sac and Fox case, New
12 Mexico Apache Tribe v. Mescalero, where the Court had
13 entertained similar claims under 1331.

14 We're only seeking here prospective injunctive
15 and declaratory relief against the county, and we only
16 brought the action when they threatened the second search
17 and seizure. We didn't do anything with the -- with the
18 first intrusion. So -- so I would rely on -- on -- I
19 mean, on -- on the number of cases where you have allowed
20 tribes to bring preemption type claims against States
21 without relying on section 1983, though -- though we do
22 believe the compensatory damages are appropriate under
23 section 1983 also.

24 If there are no further questions, thank you,
25 Mr. Chief Justice.

1 QUESTION: Thank you, Mr. Chambers.

2 Mr. Kirby, you have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF JOHN D. KIRBY

4 ON BEHALF OF THE PETITIONERS

5 MR. KIRBY: Thank you, Mr. Chief Justice.

6 I would like to address very briefly the flip
7 side, if you will, of the categorical rule being proposed
8 by the tribe and the problems with that. And that flip
9 side involves not the police power of the State, which we
10 have already talked about, but the constitutional rights
11 of a defendant who is faced with criminal prosecution in a
12 State court when that defendant feels there is exculpatory
13 evidence in the possession of the tribe. For instance, it
14 may be a video surveillance of the parking lot or whatnot
15 that shows perhaps a self-defense defense for this
16 particular person.

17 Under the tribe's rule --

18 QUESTION: It's odd for you to be raising a
19 tribal member as a defendant when you have potential
20 tribal members here who might be subject to suit. You
21 seem a strange champion for such people.

22 MR. KIRBY: It doesn't necessarily need to be a
23 tribal member who might be a criminal defendant, Justice
24 Ginsburg. It could be anyone, a non-tribal member or even
25 a patron, who feels that there is exculpatory evidence

1 that the tribe possesses. And under the Sixth Amendment,
2 that person has the right to have the State issue
3 compulsory process to obtain that exculpatory evidence.

4 Under the tribe's rule that's being proposed,
5 the tribe would have the ability to trump the Sixth
6 Amendment right of the accused in that situation and not
7 produce the exculpatory evidence. The tribe would also
8 have the right to trump the Fourteenth Amendment rights to
9 a fair trial of that particular person. And that's the
10 flip side of the categorical rule that's being proposed
11 and why we believe it's another reason it should not be
12 adopted by this Court.

13 With regard to the 1983 action, I would like to
14 say that not only is the tribe not a person within the
15 meaning of the statute and the interpretive presumption
16 that this Court has set forth in, I believe, the Vermont
17 Agency it was acknowledged. But also the right that the
18 tribe is asserting, the right to self-governance, is not a
19 Federal statutory right and it's not a constitutional
20 right, and as such, it cannot support a 1983 action. And
21 that is another reason why 1983 provides no relief for the
22 tribe in this case.

23 In -- in closing, I would like to say that this
24 case does not implicate traditional sovereign immunity
25 which is sovereign immunity from civil suit. And there

1 was a question raised with regard to that, I believe by
2 Justice Scalia, pointing out that the tribe's treasury is
3 not at issue here. It's not at stake here. What we're
4 dealing with is process, in this case the criminal process
5 of the court. And that's a totally different situation.

6 This Court has never addressed criminal process
7 as being subject to tribal immunity. All of this Court's
8 decisions have addressed the tribe's immunity to civil
9 lawsuit. That is not what we have here. The doctrine of
10 tribal immunity should not be extended in this case to
11 include criminal process for the reasons that we have set
12 forth.

13 While there may not be any wholly satisfactory
14 result, Justice Breyer, we believe that our position is
15 the best position. Even if one has to choose between
16 either of the two categorical approaches, simply even
17 looking at the rights of an accused and compulsory
18 process, that should mitigate toward the county's position
19 here. We've also suggested a procedure, as presented by
20 Justice White in Brendale, as being a potential resolution
21 of this problem, maintaining the dignity of the tribe and
22 also allowing the State to exercise its police power and
23 protect its citizens as it investigates and prosecutes
24 crime.

25 If there are no further questions --

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kirby.
2 The case is submitted.
3 (Whereupon, at 11:15 a.m., the case in the
4 above-entitled matter was submitted.)
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