

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   PAIUTE-SHOSHONE INDIANS OF       :  
8    THE BISHOP COMMUNITY OF        :  
9    THE BISHOP COLONY, ET AL.       :

10   - - - - -X

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

2 (10:16 a.m.)

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

6 Mr. Kirby.

7 ORAL ARGUMENT OF JOHN D. KIRBY

8 ON BEHALF OF THE PETITIONERS

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

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

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

23 Further, there is not now, nor should this Court  
24 extend or create a common law right to be immune from  
25 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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