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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
STATE OF NEVADA, ET AL. :  
Petitioners :  
v. : No. 99-1994  
FLOYD HICKS, ET AL. :  
- - - - -X

Washington, D.C.  
Wednesday, March 21, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:04 a.m.

APPEARANCES:

C. WAYNE HOWLE, ESQ., Carson City, Nevada; on behalf of  
the Petitioners.

S. JAMES ANAYA, ESQ., Tucson, Arizona; on behalf of the  
Respondents.

BARBARA MCDOWELL, ESQ., Assistant to the Solicitor  
General, Washington, D.C.; on behalf of the United States,  
as amicus curiae, supporting affirmance

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll argument now  
Number 99-1994, Nevada v. Floyd Hicks.

Mr. Howle.

ORAL ARGUMENT OF C. WAYNE HOWLE

ON BEHALF OF PETITIONER

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

I would like to make three principal points this  
morning. The first is that state officials should not be  
sued in tribal courts. Tribal jurisdiction over state  
officials would be inconsistent with their status.

QUESTION: You mean, ever, for anything, no  
matter what?

MR. HOWLE: Yes, Your Honor, as long as they  
were acting in a representative capacity for the state.

QUESTION: This comes to us in the context of a  
state official who went to the tribal court to get  
authority to carry out a search warrant, and was given a  
warrant with certain terms and conditions to go on the  
reservation and carry it out. And if the allegation is  
that the officer did not follow the limitations in the  
authorized warrant, you think the tribal court can never  
have jurisdiction over those actions of the officer?

1 MR. HOWLE: Your Honor, I --

2 QUESTION: That's your position?

3 MR. HOWLE: Yes, Your Honor, that is --

4 QUESTION: Suppose he just goes and buys some  
5 gasoline and doesn't pay for it. Say he drives up to the  
6 tribal gas station, buys some gasoline, drives off,  
7 doesn't pay for it. I mean, can they sue him for the  
8 money in the tribal court?

9 MR. HOWLE: The answer is no, Your Honor, not in  
10 tribal court, but in state or federal court, and there is  
11 a remedy there. We're not here to suggest that there's no  
12 remedy --

13 QUESTION: Okay, what is your authority for this  
14 broad initial proposition you're making?

15 MR. HOWLE: The authority is --

16 QUESTION: What case?

17 MR. HOWLE: Oliphant, which describes a  
18 divestiture of tribal jurisdiction which is inconsistent  
19 with the tribe's status.

20 QUESTION: But that's criminal jurisdiction, is  
21 it not?

22 MR. HOWLE: Yes, Your Honor, it was.

23 QUESTION: How about civil jurisdiction?

24 MR. HOWLE: In the case of civil jurisdiction,  
25 the case of National Farmers Union also requires an

1 examination of the tribe's sovereignty, and to the extent  
2 it's been divested.

3 QUESTION: I read another brief -- a 1934  
4 opinion of the Solicitor General who said that the tribes  
5 under Acts passed by Congress had the basic sovereignty  
6 that they had for generations, unless it was taken away.  
7 And I guess for generations they could have sued people  
8 who went and bought gasoline without paying for it. I  
9 don't know if it always would have been gasoline, but I  
10 assume a basic contract action would be within their  
11 grant, wouldn't it?

12 MR. HOWLE: Well, Your Honor, first of all I'm  
13 not prepared to concede that much regarding even a  
14 nonmember in a private capacity, but with regard to state  
15 officials, there are special considerations. The state  
16 officials are protected, we know, with a certain immunity  
17 which has constitutional dimensions. And our position is  
18 that that in conjunction with the Court's instruction to  
19 examine the extent to which tribes have been divested  
20 implicitly because of their statuses as tribes results in  
21 the rule that jurisdiction over state officials has been  
22 divested.

23 QUESTION: Mr. Howle, I could understand a  
24 position that says when a state official is acting  
25 pursuant to state authority -- there's a warrant, a state

1 warrant -- that that person can't be questioned in tribal  
2 court. But suppose this officer, instead of going in with  
3 a warrant, just went in, rammed down the door, beat up the  
4 plaintiff. He's still wearing his state uniform, and he's  
5 still looking for evidence of whatever animal that was --  
6 would you say that even in such a case there would be no  
7 tribal court jurisdiction?

8 MR. HOWLE: We would, Your Honor. No tribal  
9 court jurisdiction.

10 QUESTION: You're not even making a distinction  
11 that's often made in these public employment cases between  
12 acting within the scope of one's authority and going so  
13 far beyond the pale of anything that would fit within that  
14 authority as to be on a frolic of one's own. You wouldn't  
15 --

16 MR. HOWLE: We're suggesting a higher standard,  
17 and that being acting in a representative capacity, and  
18 that's a standard that we see employed, albeit in an  
19 ambiguous fashion --

20 QUESTION: What does that mean? He at least has  
21 to believe that he's pursuing the state's business?  
22 Suppose he's wearing his uniform and he just goes on the  
23 reservation to beat up one of the members of the tribe  
24 that he doesn't like, but he's in uniform and he's on  
25 duty.

1 MR. HOWLE: That's a difficult case, Your Honor.  
2 I'll concede, but this is --

3 QUESTION: Gee, I don't think it's difficult at  
4 all.

5 MR. HOWLE: That isn't this case, though.  
6 There's no allegation that our officials acted outside of  
7 any state authority. The only allegation regarding scope  
8 of authority is the constitutional violation alleged, and  
9 otherwise the complaint alleges that they were acting as  
10 game wardens. They do what game wardens do, and they get  
11 warrants and search for evidence of crime that was  
12 committed off the reservation by a reservation member.  
13 And this is a core state function. It's a peace officer  
14 function. Nevada has to be able to enforce its criminal  
15 laws within its own borders.

16 QUESTION: May I be sure I understand your  
17 position -- are you saying that your immunity rule would  
18 only apply when the state official is acting within the  
19 scope of his authority? Is that what your position is?

20 MR. HOWLE: I phrase it differently, Your Honor.  
21 I suggest a representative capacity being the standard.

22 QUESTION: Well, supposing he goes beyond his  
23 representative capacity and does what Justice Scalia  
24 describes. Would he be immune or not?

25 MR. HOWLE: Well, I think that -- I think in

1 that case the analysis then falls back to a different  
2 test, and that being the ordinary test for a private  
3 citizen.

4 QUESTION: But that isn't this frolic of his own  
5 or something like that?

6 MR. HOWLE: Surely he'd be treated differently  
7 if he were an officer, but unrelated to any of the state  
8 business.

9 QUESTION: But why don't you go the whole hog  
10 and say that it's your position that it ought to be a  
11 question for the state court and not for the tribal court  
12 whether, in fact, he was just going in to beat up a tribal  
13 member he didn't like, or he was going on state business.  
14 That's doubtless going to be one of the issues in the  
15 case, and that whole case should belong in state court  
16 rather than tribal court? That's not an irrational  
17 position.

18 MR. HOWLE: No, it isn't, Your Honor.

19 QUESTION: Is that the position you're taking?

20 MR. HOWLE: I'll take that position, Your Honor.

21 QUESTION: Why not take it?

22 (Laughter)

23 QUESTION: But if you take that position, what  
24 about the case in which the officer acknowledges that he's  
25 not on state business? How about that officer?

1 MR. HOWLE: That officer would then have to be  
2 tested under the appropriate standard for a private  
3 citizen, and tribal jurisdiction over private citizens.

4 QUESTION: So then your view is that the  
5 immunity attaches if the officer acknowledges that he was  
6 not within his state authority.

7 MR. HOWLE: I'm sorry? The immunity would not  
8 attach --

9 QUESTION: It's backwards, yes, you're right.

10 MR. HOWLE: That's correct, Your Honor.

11 QUESTION: Does your argument depend on the fact  
12 simply that there is uncertainty under the jurisdictional  
13 standard as to how far the tribal court's jurisdiction  
14 goes, or would your argument be the same if the statute  
15 were clear beyond a peradventure of a doubt that someone  
16 who was acting in what you describe as official capacity  
17 but is being sued in his individual capacity would  
18 nonetheless be subject to jurisdiction? In other words,  
19 are you making this argument in order to construe a vague  
20 jurisdictional grant, or are you making this argument into  
21 something that would be entitled to prevail no matter how  
22 clear the statutory grant was?

23 MR. HOWLE: First of all, Your Honor, there is -  
24 - I'm sorry, I may have misapprehended. There isn't a  
25 statutory grant here, save for the civil rights law of the

1 federal government. But our first position is that there  
2 is a categorical rule that state officials doing state  
3 business should not be subject to the tribal court's  
4 jurisdiction.

5 QUESTION: If I agree with you on that as to  
6 state officers enforcing the state's criminal laws, which  
7 is what was at issue here, do I have to agree with you  
8 with regard to all other state officers?

9 MR. HOWLE: Not that -- yes, Your Honor, I think  
10 so.

11 QUESTION: Professors at state universities?  
12 Anybody else? I mean, there's a distinctive aspect of the  
13 enforcement of the criminal law, and that is that the  
14 tribe has no authority to stop the state from enforcing  
15 its criminal laws on the reservation, and one can very  
16 plausibly argue that along with that goes no authority to  
17 determine whether persons acting in that criminal law  
18 enforcement capacity have gone beyond the scope of their  
19 authority. That's very rational.

20 But I wouldn't have to extend that to other  
21 state officers, would I? Because in the civil field the  
22 state can't just walk in and take over the enforcement of  
23 civil laws on the reservation.

24 MR. HOWLE: Your Honor, you're correct. The  
25 state can't take over a reservation, but the state carries

1 on a multitude of functions on reservations outside of  
2 those --

3 QUESTION: Well, do you take the position that  
4 the state has authority to send its criminal law  
5 enforcement officials onto a tribal reservation to carry  
6 out state criminal law functions?

7 MR. HOWLE: I do take that position, but I  
8 acknowledge that it's tentatively based --

9 QUESTION: There's some question about that,  
10 isn't there?

11 MR. HOWLE: There is indeed --

12 QUESTION: Like the right to exclude on the part  
13 of the tribal authorities?

14 MR. HOWLE: Yes, Your Honor.

15 QUESTION: From the reservation? There is no -  
16 - what would you point to for the extraordinary notion  
17 that the state criminal law enforcement officers have  
18 total freedom to go on a reservation to carry out criminal  
19 law functions?

20 MR. HOWLE: I point to the fact that state --

21 QUESTION: Is there some law or some case that  
22 you can point to for that?

23 MR. HOWLE: Yes, the case of Ex rel re v.  
24 Martin, and I believe McBrattney described the existence  
25 of state criminal jurisdiction on reservations. It's not

1 an exclusive jurisdiction that the tribes --

2 QUESTION: For crimes committed off -- I perhaps  
3 put my hypothetical a little too broadly, but in fact the  
4 tribal courts do not have jurisdiction to try for crimes  
5 committed off reservation, do they? If a crime is  
6 committed off reservation, it's not within the  
7 jurisdiction of the tribal court, is it? Even if it's a  
8 crime committed by a tribal member, or a tribe --

9 MR. HOWLE: I think that's correct, Your Honor.  
10 I'd say it with some uncertainty --

11 QUESTION: Well, I think it's pretty crucial to  
12 your case, and I assume that to be the case. I assume  
13 that to be the law -- that the state has the authority to  
14 enforce its state criminal laws with regard to offenses  
15 committed off the reservation even when that requires the  
16 state to go on the reservation to get the culprit.

17 MR. HOWLE: Yes. That all is correct with my  
18 understanding, too.

19 QUESTION: It's not up to the tribe to enforce  
20 that law. It must be up to the state to enforce it.  
21 Since only the state can enforce it, I assume the state  
22 can go on the reservation.

23 MR. HOWLE: The state also has criminal  
24 jurisdiction on reservations over a nonmember crime.

25 QUESTION: If that much is right, then getting

1 the back-up of the tribal court's approval for the warrant  
2 was just a polite gesture, meaning a form that was not  
3 necessary legally. In other words, here we do have an  
4 investigation of something that occurred off the  
5 reservation. The warrant is to go on the reservation to  
6 investigate, but the crime itself was off reservation.

7 MR. HOWLE: That's correct, Your Honor.

8 QUESTION: And I think Justice Scalia asked you,  
9 would the tribal court have authority to prosecute a case  
10 that occurred off the reservation. I think you said the  
11 answer was no.

12 MR. HOWLE: I think that's correct. I am  
13 tentative on that answer --

14 QUESTION: But you're not certain about it.

15 MR. HOWLE: I know in this case that the tribe  
16 would not prosecute that crime. I do know that for a  
17 certainty.

18 QUESTION: But then the next thing is that the  
19 crime occurs off the reservation. The warrant is to go on  
20 the reservation and conduct a search there. As you  
21 understand it, it is not necessary to get any permission  
22 of any kind from the tribe, because what the state  
23 official is enforcing is an investigation for a crime that  
24 occurred off the reservation. Is that right?

25 MR. HOWLE: Yes, Your Honor. I believe that the

1 state's physical jurisdictions follows its legal  
2 jurisdiction.

3 QUESTION: So you think it was not necessary to  
4 get the tribal court's permission to carry out a search  
5 warrant on a house belonging to a tribal member on the  
6 reservation?

7 MR. HOWLE: Correct, Your Honor, although I  
8 admit I

9 --

10 QUESTION: I think that's an unusual  
11 proposition. Do you cite anything in your brief for that  
12 proposition? I thought we took it as a given that the  
13 tribal court had to authorize the search.

14 MR. HOWLE: In my reply brief on page eighteen,  
15 I've referenced some authorities that are indirectly  
16 related that establish a criminal jurisdiction for the  
17 states on reservations. It's only by reasoning and  
18 inference that I get to the conclusion that we have this  
19 authority, and if we had not sought the tribal judge's  
20 approval, perhaps we'd be here on that issue as well. I  
21 confess there's -- it's a great area of uncertainty, but  
22 it is a concurrent jurisdiction that the state and the  
23 tribe have on reservations. Reservations are still part  
24 of the state, and so the state has to be able to perform  
25 these functions in order to do its job properly with law

1 enforcement.

2 QUESTION: I certainly wouldn't think that the  
3 state's ability to enforce criminal laws off the  
4 reservation is going to be dependent upon whether a tribal  
5 court will deign to issue a search warrant or not. I  
6 mean, that would be a tremendous incursion upon the  
7 state's sovereignty that it can't enforce its criminal  
8 laws unless it gets a tribal court to let it go on and  
9 search for the offense.

10 MR. HOWLE: Exactly. And that's the position we  
11 have --

12 QUESTION: I assume that to be pretty clear law.

13 MR. HOWLE: Yes. Another point we've made is  
14 the way that this --

15 QUESTION: Where did you take that position,  
16 because I didn't see the --

17 MR. HOWLE: I'm sorry. It's on page eighteen of  
18 my reply brief, in the second paragraph. The argument  
19 also incorrectly assumes state officials are powerless to  
20 pursue state law enforcement objectives on a reservation,  
21 except with the tribe's consent. And here I've identified  
22 the fact that states do have authority over off-  
23 reservation crimes committed by tribal members, and that  
24 reservations are part of the state within which they  
25 occur.

1                   QUESTION:  So now you are confirming that it was  
2   a matter of a test to ask the tribe, but it was not  
3   necessary.

4                   MR. HOWLE:  That's correct, Your Honor, although  
5   we did ask the tribal judge on both occasions out of  
6   deference to the tribe.

7                   QUESTION:  And he granted permission, did he  
8   not?

9                   MR. HOWLE:  Yes, Your Honor.

10                  QUESTION:  What statutes are there concerning  
11   state criminal law jurisdiction with respect to either  
12   on-reservation or off-reservation crimes?  Are there some  
13   federal statutes that speak to that issue?

14                  MR. HOWLE:  There is federal statute on the  
15   matter.  It eludes me at the moment.  Certainly Public Law  
16   280 was a grant to certain states of jurisdiction on  
17   reservations.

18                  QUESTION:  Was that, in effect, pure in Nevada?

19                  MR. HOWLE:  It was in the past, but it isn't  
20   now.  All that jurisdiction has been --

21                  QUESTION:  Then you're not relying on Public Law  
22   280?

23                  MR. HOWLE:  No, we're not.

24                  QUESTION:  While we're on the subject of federal  
25   statutes, one thing you said surprised me, and I just want

1 to make sure I understand it. Is it your position -- do  
2 you understand that there is no federal statutory  
3 recognition for tribal jurisdiction?

4 MR. HOWLE: Not in this case, not with this  
5 tribe. There --

6 QUESTION: Well, what about other cases? I mean  
7 --

8 MR. HOWLE: Treaties and statutes unique to  
9 different tribes, there's a whole --

10 QUESTION: But there are all specific to the  
11 tribe or to the jurisdiction? There is no general  
12 statutory recognition?

13 MR. HOWLE: As far as I know, Your Honor, that's  
14 correct.

15 QUESTION: Why, just out of curiosity -- not  
16 quite just out of curiosity, but why didn't the defendant  
17 instead of sort of engaging in all of these proceedings  
18 for ten years -- why didn't he simply remove the case to  
19 federal court?

20 MR. HOWLE: I'm sorry? The defendant --

21 QUESTION: Why didn't the defendant in this case  
22 simply remove it to the federal court?

23 QUESTION: There is no --

24 MR. HOWLE: Your Honor, that goes to the  
25 question brought up in U.S. brief -- I don't see removal

1 authority.

2 QUESTION: Well, it says -- you'd have to read  
3 the word state to mean state or a tribe. But one -- maybe  
4 you can't, maybe you can't.

5 QUESTION: Isn't that hard?

6 (Laughter)

7 QUESTION: You say that as though it's the  
8 simplest thing in the world.

9 QUESTION: I thought for you it might be.

10 (Laughter)

11 QUESTION: I mean, that is an issue. But if  
12 that's possible, then doesn't that offer a perfect  
13 solution? There's no problem.

14 MR. HOWLE: There's no perfect, exact solution.

15 QUESTION: Any state official's not bothered,  
16 all he has to do is remove, and then that would be the end  
17 of any potential conflict.

18 MR. HOWLE: That would be a --

19 QUESTION: Mr. Howle, if that had been the case,  
20 then this Court would not have had to go through the  
21 motions it went through in those two cases that says you  
22 have to exhaust the tribe, and then you can go into the  
23 district court at the end of the line. It's only because  
24 you couldn't get out -- there was -- I am unaware of any  
25 authority that says you can remove from the tribal court

1 to any other court.

2 MR. HOWLE: I'm not aware of any either, Your  
3 Honor. We spent three years in tribal court arguing our  
4 immunity questions.

5 QUESTION: Did you try to remove it? Maybe it's  
6 just obviously impossible to do, and if it is impossible  
7 to do, then the conflict of interest that you're talking  
8 about exists, but that's why I wondered -- I see a lot of  
9 cases where apparently it starts off in the tribal court,  
10 and then they're over in the federal court, and there are  
11 injunctions being issued back and forth. What's the  
12 basis? Is there some -- I'm trying to see if this  
13 conflict of interest is necessarily there.

14 QUESTION: The basis is you can't remove.

15 MR. HOWLE: We considered removal but didn't see  
16 that it was specifically provided for in the statutes. We  
17 also were aware of the exhaustion requirements, and we  
18 attempted to exhaust.

19 QUESTION: And, of course, removal would not be  
20 an option -- removal to a federal court would not be an  
21 option. The whole matter would have to be left in tribal  
22 court, even though there was an enforcement action with  
23 respect to state criminal law, if a 1983 action hadn't  
24 been part of the claim, if it had just been the tribal  
25 claim under tribal law. Then you would have been stuck.

1 Even on the fanciful reading of Section 1441, you couldn't  
2 get it into federal court.

3 MR. HOWLE: Yes, Your Honor.

4 QUESTION: My question is best reserved for the  
5 Solicitor General. I mean, you're not aware it?

6 MR. HOWLE: Maybe he can explain -- or she, I'm  
7 sorry. On the question of immunity, we did spend three  
8 years trying to exhaust this issue in tribal court, and  
9 only then went to the federal court with an independent  
10 action. And our position on the immunity issue is that  
11 immunity is a bar to suit, and it should be decided when  
12 it's raised. And therefore, if the tribal court won't  
13 acknowledge the immunity --

14 QUESTION: What is the source of immunity law  
15 here? I mean, I take it your position is it can't just be  
16 finally determined by the tribe but should finally be  
17 determined by the law of Nevada?

18 MR. HOWLE: It depends on the claim, Your Honor,  
19 on a 1983 claim, assuming that there's one available in  
20 tribal court. I guess that would be a question of federal  
21 law. The other ones would be answered in reference to the  
22 state law.

23 QUESTION: If it's a 1983 action, then immunity  
24 is determined under qualified immunity doctrines laid down  
25 under 1983?

1 MR. HOWLE: Possibly so, Your Honor, although  
2 that is a question as well. The whole question of whether  
3 1983 is available in tribal court, I think, is cast in  
4 doubt.

5 QUESTION: What was the basis of the action in  
6 the district court? It was 1983, was it not?

7 MR. HOWLE: In the tribal court, Your Honor?

8 QUESTION: No, this case comes to us from the  
9 Ninth Circuit.

10 MR. HOWLE: Yes.

11 QUESTION: And so there obviously must have been  
12 some action brought in the district court. The District  
13 Court of Nevada.

14 MR. HOWLE: Nevada brought the action.

15 QUESTION: Nevada brought the action.

16 MR. HOWLE: It was an independent action to  
17 enjoin the tribal court after three years there.

18 QUESTION: Those two cases that we had, that  
19 said that's what you do. You go to the district court.  
20 And I think in those cases they said the reason why you  
21 have to do that is that there is no removal. That was the  
22 whole point of Nevada coming into the district court. If  
23 you could have removed to get there, you wouldn't have to  
24 bring an action -- an independent action.

25 MR. HOWLE: Yes.

1                   QUESTION: I thought that there were statements  
2 in more than one of our cases to the effect that there is  
3 no removal from tribal to federal court. And you say you  
4 don't know?

5                   MR. HOWLE: I'm not aware of language like that,  
6 Your Honor.

7                   QUESTION: If this case had been brought in  
8 state court under 1983, could the tribal claims that were  
9 being asserted under tribal law be pended to that action  
10 in state court?

11                  MR. HOWLE: They could be presented to the  
12 court, Your Honor, and then I think it would be a matter  
13 of comity for the supreme court to consider whether or not  
14 to acknowledge those claims brought under tribal law. It  
15 would be up to the state supreme court, ultimately, so it  
16 would be a question of state law.

17                  QUESTION: In other words, these claims under  
18 tribal law are left to the grace of the state. The state  
19 can allow them if it wants to, disallow them if it wants  
20 to. So you're saying, as far as tribal law is concerned,  
21 the tribe has no authority, and the state is not obliged  
22 to hear those claims.

23                  MR. HOWLE: Ultimately yes, that's correct, Your  
24 Honor.

25                  QUESTION: As you understand it, where does the

1 tribe get its tort law? Does it borrow Nevada law?

2 MR. HOWLE: As I understand it, yes. It does -  
3 - it uses Nevada law as a guide, which makes it very  
4 uncertain, but it does refer to Nevada law quite often.

5 QUESTION: And as you understand the complaint,  
6 is the liability under Nevada tort law as borrowed by the  
7 tribe, roughly coextensive with the liability under 1983,  
8 other than say for attorney's fees?

9 MR. HOWLE: Well, first of all the state tort  
10 law supplies limits or caps on claims, which aren't  
11 available under 1983 actions, so there is some --

12 QUESTION: Does the tribal law borrow those caps  
13 as well, as you understand?

14 MR. HOWLE: As I understand it, they would not,  
15 Your Honor.

16 QUESTION: Well, then, the liability is  
17 coextensive under the tort law theories and under 1983.

18 MR. HOWLE: If this were in tribal court, Your  
19 Honor, as I understand it.

20 QUESTION: All right. And the tribal court  
21 doesn't borrow Nevada law insofar as the caps are  
22 concerned, as best you understand?

23 MR. HOWLE: That's correct, although I don't  
24 have an expressed statement from the court.

25 QUESTION: What is -- the tribal law is

1 codified, or is it just common law developed by the tribal  
2 court, case by case?

3 MR. HOWLE: A little of the first and a lot of  
4 the latter, Your Honor. There isn't law and order code,  
5 but a great deal of it, I think, is just the custom in  
6 practice.

7 QUESTION: Law and order code is civil actions,  
8 or just criminal?

9 MR. HOWLE: It includes civil matters, I  
10 believe, as well as criminal.

11 QUESTION: Can I still -- I'm not going to give  
12 up yet on getting your opinion on this.

13 MR. HOWLE: Okay.

14 QUESTION: What the Solicitor General precisely  
15 recommends is recognizing the policy of the removal  
16 statute, namely remove -- that's the policy -- that you  
17 could have what the court did in El Paso which is, quote,  
18 an injunction given by a federal court against further  
19 litigation in tribal courts that in practical effect gives  
20 the same result as a removal. Now, that's the Solicitor  
21 General's precise -- which then just like removal would  
22 eliminate any possibility of conflict between state and  
23 tribal interests. So that's what I'd like your comment  
24 on.

25 MR. HOWLE: Okay, Your Honor. We see a

24

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1 difficulty with the U.S. position, because it works very  
2 well for the federal civil rights claims. Those are  
3 immediately removed. The difficulty is with tribal  
4 claims, because there -- the U.S. suggests there's a  
5 federal defense, but that --

6 QUESTION: In your case it would resolve because  
7 the whole case would come along, and what you'd say about  
8 other cases is sufficient unto the day.

9 MR. HOWLE: I'm sorry, Your Honor.

10 QUESTION: I guess normally when you remove, the  
11 entire case goes with the --

12 MR. HOWLE: Yes.

13 QUESTION: So if the injunction is the same as  
14 removal, you get to the result that you want in respect to  
15 all of the claim.

16 MR. HOWLE: Unless there were not a federal  
17 claim to begin with in order to remove it.

18 I'd like to reserve the rest of my time with  
19 your --

20 QUESTION: Very well, Mr. Howle.

21 Mr. Anaya, we'll hear from you.

22 ORAL ARGUMENT OF S. JAMES ANAYA

23 ON BEHALF OF RESPONDENTS

24 MR. ANAYA: Thank you, Mr. Chief Justice, and  
25 may it please the Court:

25

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1           This case began when Nevada game wardens sought  
2 the approval of Fallon tribal court not once but twice, in  
3 order to come on the Fallon reservation and conduct a  
4 search against a tribal member.

5           QUESTION: Well, the petitioner says they didn't  
6 even need to get tribal court permission to get a search  
7 warrant.

8           MR. ANAYA: We disagree, and the authority of  
9 this Court will indicate the contrary.

10          QUESTION: And what do you rely on?

11          MR. ANAYA: Williams v. Lee, and its progeny,  
12 Your Honor, which establishes clearly that the sovereignty  
13 of tribes precludes the authority of the state to the  
14 extent it interferes with the ability of the tribe to make  
15 its own laws and be governed by them.

16          QUESTION: But it's not governed by its own  
17 criminal laws insofar as a crime that occurs off the  
18 reservation is concerned. Could this tribal court have  
19 tried this crime?

20          MR. ANAYA: Your Honor, the tribal court -- if  
21 this were a crime under tribal law, and it is not a crime  
22 under tribal law as far as I know.

23          QUESTION: The tribe can make off-reservation  
24 crimes a crime under tribal law triable in the tribal  
25 court?

1 MR. ANAYA: It could as to members, perhaps.

2 QUESTION: Oh, crimes by members.

3 MR. ANAYA: By members.

4 QUESTION: Not crimes against members.

5 MR. ANAYA: Yes, Your Honor.

6 QUESTION: And what if they did make it triable  
7 in tribal court -- would the state still be able to  
8 prosecute it as a violation of state law?

9 MR. ANAYA: The state could, in any instance,  
10 prosecute this case. What is at issue here is whether it  
11 can go onto the reservation to execute a warrant.

12 QUESTION: Well, the state's ability to  
13 prosecute is not worth a whole lot if it leaves the by  
14 your leave of somebody else to go and grab the person who  
15 allegedly did the offense.

16 MR. ANAYA: That may be.

17 QUESTION: That's what you're saying -- that the  
18 state is entirely at the mercy of the tribal court to get  
19 a search warrant, and I presume an arrest warrant as well.

20 MR. ANAYA: Yes, Your Honor, that is what I'm  
21 saying.

22 QUESTION: That's quite an incursion on the  
23 state's criminal jurisdiction, it seems to me.

24 MR. ANAYA: The state judge who issued the state  
25 warrant agreed with that position. The state judge

1 himself explicitly said on the face of the warrant that  
2 the warrant was invalid within the reservation --

3 QUESTION: He might have been wrong. I don't  
4 know the man.

5 MR. ANAYA: Well, he could be wrong, but we --  
6 he got it right as far as our position goes, Your Honor.  
7 The Attorney General of Nevada himself has issued an  
8 opinion, has issued an opinion saying that the state has  
9 no authority to go on the reservation to execute searches  
10 or investigate crimes against members.

11 QUESTION: Where is that?

12 MR. ANAYA: Your Honor, that's not in our brief.

13 QUESTION: I didn't think it was, and I would  
14 have sat up, and my eyes would have popped open.

15 (Laughter)

16 MR. ANAYA: Well, Your Honor, we were surprised  
17 --

18 QUESTION: Was that opinion an opinion of state  
19 law?

20 MR. ANAYA: Yes. Well, it was an opinion of  
21 federal law.

22 QUESTION: He was applying federal -- the  
23 Attorney General of Nevada was --

24 MR. ANAYA: The opinion was applying an  
25 interpretation of federal law, and the lower court have

1 held the same.

2 QUESTION: What about John Marshall, Cherokee  
3 Nation v. Georgia?

4 MR. ANAYA: Exactly, Your Honor. The laws of  
5 the state of Georgia have no force in the territory of the  
6 Cherokee.

7 QUESTION: But that doesn't quite resolve this  
8 question, it seems to me. Is there some case authority,  
9 either in the Nevada courts or the federal courts, that a  
10 federal -- that a state official seeking to enforce a  
11 federal, state summons or subpoena or arrest warrant can't  
12 go on the reservation unless the --

13 MR. ANAYA: Yes, Your Honor. The Turtle case.

14 QUESTION: The what?

15 MR. ANAYA: The Turtle case that we cited. I  
16 believe it's the Ninth Circuit, which specifically  
17 precluded Arizona from going onto the Navajo reservation  
18 and trying to execute a warrant against people on the  
19 reservation.

20 QUESTION: Suppose this had been a federal  
21 officer executing a similar warrant investigating  
22 violation of federal --

23 MR. ANAYA: Well, that would be a different  
24 matter, Your Honor. Under the Major Crimes Act, federal  
25 officers do have jurisdiction over the reservations. This

1 is a state officer, and the weight of authority in the  
2 lower federal courts and in the state courts interpreting  
3 federal law is that state authorities do not have the  
4 authority to go on the reservation and execute warrants -  
5 -

6 QUESTION: How much of the authority pertains to  
7 crimes committed off reservation?

8 MR. ANAYA: Most of it, Your Honor, or a good  
9 deal of it, at least, and the Turtle case is --

10 QUESTION: Turtle? What else? That's a Ninth  
11 Circuit case, I gather, right?

12 MR. ANAYA: Well, we have authority -- the  
13 Attorney General's opinion that I cited to.

14 QUESTION: I'd like the cite of that.

15 MR. ANAYA: The Attorney General's Opinion  
16 Number 80-42. Nevada Highway Patrol Jurisdiction on  
17 Indian Reservations. Nevada -- again, Opinion Number 80-  
18 42, and we can make this available --

19 QUESTION: Wait -- Nevada Highway Patrol. It's  
20 just related to what? The Highway Patrol doing what?

21 MR. ANAYA: Does Nevada Highway Patrol acting  
22 under the authority granted by the state, have the  
23 authority to investigate accidents on a reservation? To  
24 go onto the reservation, investigate accidents --

25 QUESTION: An accident that occurred on the

1 reservation?

2 MR. ANAYA: Occurring wherever -- to investigate  
3 accidents on the reservation, even to pursue someone onto  
4 the reservation. And the Nevada Attorney General, citing  
5 federal authority, citing the opinions of other state  
6 courts, says no. This is the common understanding. This  
7 was the understanding of the state judge who issued the  
8 warrant. It was the understanding of the tribal  
9 authorities that the state authorities could not go onto  
10 the reservation.

11 QUESTION: It's not the understanding of the  
12 state here. They had an epiphany or something.

13 MR. ANAYA: I think that's right -- they did  
14 have an epiphany. In their opening brief, they didn't  
15 pick this position. They did not pick this position. You  
16 will recall that Mr. Howle, in articulating the position,  
17 now referred to the reply brief. He did not reply to the  
18 opening brief. This came as a surprise to us. If they  
19 had taken that position, you can be sure we would have  
20 included sufficient authority for the proposition that the  
21 state authorities cannot go onto the reservation to  
22 investigate crimes committed even off of the reservation  
23 by nonmembers, or allegedly by nonmembers.

24 QUESTION: Mr. Anaya, we've gotten pretty far  
25 afield, I think, from what we have to resolve in this

1 case, possibly, and there is remaining, as I understand  
2 it, a suit by Mr. Hicks against a state official in his  
3 individual capacity.

4 MR. ANAYA: Your Honor, that's correct.

5 QUESTION: And some other people too?

6 MR. ANAYA: Yes. No. They're all state  
7 officials. Three state officers who participated.

8 QUESTION: And that remains. In their  
9 individual capacity. The official capacity suits have  
10 been dropped.

11 MR. ANAYA: That is correct.

12 QUESTION: The state says these officials have  
13 personal immunity from that suit.

14 MR. ANAYA: Yes, Your Honor.

15 QUESTION: In tribal court.

16 MR. ANAYA: Yes.

17 QUESTION: And that issue was raised by them in  
18 the tribal court, right?

19 MR. ANAYA: It's ambiguous. They raised it in  
20 the context of a motion to quash service of process. They  
21 raised the threshold of jurisdictional issues and  
22 conflated what appeared to be personal immunity defenses  
23 with those.

24 QUESTION: And the tribal court declined to  
25 what? Rule specifically on the personal individual

1 immunity?

2 MR. ANAYA: That's correct, Your Honor. The  
3 tribal court only reached the threshold --

4 QUESTION: The subject matter jurisdiction?

5 MR. ANAYA: That is correct.

6 QUESTION: And then the state went to federal  
7 district court and said, you, federal district court,  
8 should decide these issues. Is that right?

9 MR. ANAYA: That's correct. The state went  
10 immediately to federal district court. The state could  
11 have --

12 QUESTION: Well, immediately after three years.

13 MR. ANAYA: After a month, after about two  
14 weeks, I think.

15 QUESTION: A month. Okay.

16 MR. ANAYA: In that time period --

17 QUESTION: All right.

18 MR. ANAYA: -- after the court ruled.

19 QUESTION: And the district court did not deal  
20 with individual immunity allegations?

21 MR. ANAYA: It did not. The state could have  
22 immediately moved for a motion to dismiss. At that time  
23 we presumed that the tribal court would convene an  
24 evidentiary hearing and would have heard the personal  
25 immunity defenses, would have heard --

1 QUESTION: No, by now we're in the federal  
2 district court.

3 MR. ANAYA: That's right.

4 QUESTION: And the district court didn't deal  
5 with it, and then it went to the Ninth Circuit Court of  
6 Appeals, and it didn't deal with that issue, either.

7 MR. ANAYA: The district court, nor the circuit  
8 court, dealt with the personal immunity defenses because  
9 they applied the rule of exhaustion.

10 QUESTION: Is there a 1983 action here, or not?

11 MR. ANAYA: The complaint by Mr. --

12 QUESTION: It isn't clear to me.

13 MR. ANAYA: The complaint by Mr. Hicks before  
14 the tribal court pleads violations of United States  
15 constitutional law. Those allegations have been treated  
16 as allegations under Section 1983.

17 QUESTION: Well, do you represent Mr. Hicks?

18 MR. ANAYA: Yes, I do.

19 QUESTION: And is it a 1983 action, or is it  
20 not?

21 MR. ANAYA: We -- it is a 1983 action.

22 QUESTION: Are you aware of any court within the  
23 territory of the United States that can interpret 42  
24 U.S.C. 1983 without review by this Court? I suppose  
25 France or England could apply 1983 and we couldn't review

1 their -- are you aware of any court interpretation?

2 MR. ANAYA: I am not. I am not, and we're not  
3 contending necessarily the tribal courts would not be  
4 subject to review.

5 QUESTION: Well, how would that happen?

6 MR. ANAYA: It would happen along the device  
7 that Justice Souter has suggested -- excuse me, Justice  
8 Breyer has suggested -- a device that the United States  
9 has suggested as well --

10 QUESTION: Even apart from removal?

11 MR. ANAYA: Well, that wouldn't be a review, but  
12 that would be a device by which the action could be heard  
13 by the federal court.

14 QUESTION: You mean injunction?

15 MR. ANAYA: Yes, an injunction. Another  
16 possibility --

17 QUESTION: You mean an injunction after the  
18 tribal court has ruled on the issue, then you enjoin the  
19 tribal court because it's made a mistake in interpretation  
20 of federal law?

21 MR. ANAYA: Your Honor --

22 QUESTION: It seems to me that that's more  
23 intrusive

24 --

25 MR. ANAYA: It is.

1 QUESTION: -- than what they're asking for here.

2 MR. ANAYA: And we are not saying that we would  
3 favor that approach.

4 QUESTION: All right. So under your position,  
5 there is no way to review a ruling on a matter of federal  
6 law given by the tribal court.

7 MR. ANAYA: That is yet to be determined --  
8 could be determined by the lower courts.

9 QUESTION: What is your position as to whether  
10 or not a ruling on an issue of federal law in a tribal  
11 court in this suit can be reviewed ultimately in a federal  
12 court?

13 MR. ANAYA: Your Honor, Mr. Hicks at this point  
14 would choose not to take a position because in litigating  
15 the case in the tribal court, if this Court were to affirm  
16 jurisdiction, he would have to explore his options whether  
17 or not it would be to his advantage to seek some kind of  
18 review depending upon the tribal court, however --

19 QUESTION: Suppose, at least so far as I were  
20 concerned -- and I can't speak for my colleagues -- that  
21 the case turned on whether or not there ultimately could  
22 be review in the federal court. Then I would say you  
23 would have to lose, because you have indicated to me that  
24 that review is problematic, or at least reserving your  
25 position, and you're later going to say there is no

1 review.

2 MR. ANAYA: I simply articulated the position to  
3 Mr. Hicks. The position of the tribe and the tribal court  
4 in this case is that there could be review. There could  
5 be review after exhaustion, and that would be the  
6 appropriate --

7 QUESTION: After exhaustion? I could imagine  
8 --

9 QUESTION: May I just pursue? And that review  
10 consists of an injunction for some kind of abuse of  
11 discretion by the trial court, or --

12 MR. ANAYA: That would be more the removal  
13 theory of the United States.

14 QUESTION: Suppose the removal theory doesn't  
15 work -- is there any other way to review it?

16 MR. ANAYA: The review mechanism would work  
17 something along the lines of the following although,  
18 again, this is uncharted territory. The claims would be  
19 exhausted in tribal court, and then assuming that the  
20 defendants were to lose, they could then go to the federal  
21 court and seek some kind of relief against the tribal  
22 court.

23 QUESTION: What -- some kind of -- what kind of  
24 relief? I've never heard of such a procedure.

25 MR. ANAYA: Well, it would be the same kind of -

1 - essentially the same kind of action that defendants have  
2 taken in order to challenge the jurisdiction of trial  
3 courts -- essentially an injunction action. But in the  
4 course of determining whether or not an injunction should  
5 lie, the court would then review the jurisdictional issues  
6 as well as the merits, or at least the application of the  
7 law in the Section 1983 action.

8 QUESTION: Why shouldn't the federal court have  
9 decided these issues of immunity of the officers when it  
10 had the case before it?

11 MR. ANAYA: It applied the rule of exhaustion  
12 that this Court laid down in National Farmers Union, as  
13 well as Iowa Mutual v. LaPlante.

14 QUESTION: Well, that case really just went to  
15 exhaustion on the jurisdictional issue.

16 MR. ANAYA: Yes, they did, but it could be that  
17 the exhaustion could also apply to the merits, and indeed  
18 could.

19 QUESTION: But did the district court have the  
20 power to decide that issue when it had the case in front  
21 of it?

22 MR. ANAYA: Strictly speaking, I believe it did.  
23 This Court has articulated the exhaustion rule as one of  
24 comity, and so out of comity, out of respect for the  
25 tribal court --

1           QUESTION: But it is correct, is it not, that  
2 we've never held that there must be exhaustion of anything  
3 other than the jurisdictional issues?

4           MR. ANAYA: Yes, Your Honor, that is the case.  
5 But the exhaustion doctrine is a flexible one, and it is  
6 intended to accommodate the interests that might --

7           QUESTION: But the exhaustion doctrine assumes  
8 that there is some later substantive power to exercise  
9 jurisdiction over the case, but you question whether that  
10 power ultimately exists. You don't have exhaustion if  
11 there's not going to be some further jurisdictional  
12 substantive review.

13          MR. ANAYA: The position of the tribe in this  
14 case is that there could be substantive review, and --

15          QUESTION: As I understand it, the tribe's  
16 position would allow for an injunction on either or both  
17 of two grounds. One, of course, the jurisdictional issue  
18 could be reviewed again as the basis for the injunction,  
19 and if the tribe won the jurisdictional issue, then  
20 presumably the merits of the 1983 claim could also be  
21 litigated in the federal court, and if the federal court  
22 thought the tribal court was wrong on that, it would  
23 enjoin enforcement of the judgment. Is that correct? Is  
24 that the way it would work?

25          MR. ANAYA: Yes, Your Honor.

1           QUESTION: But you'd have to wait until the end  
2 of the line, and that seems to be at odds with the notion  
3 of qualified immunity that you get out sooner rather than  
4 later. Here your positing a case -- and I think the Ninth  
5 Circuit supported it -- that you must exhaust in the  
6 tribal court, even your qualified immunity defense, you  
7 must exhaust in the tribal court before you can come over  
8 to seek an injunctive relief in the federal court.

9           MR. ANAYA: Right. The way we contemplate it  
10 working, if such an exhaustion were to apply to a 1983  
11 cause of action or to the tribal cause of action in this  
12 case, would be for the tribal court to immediately move  
13 forward to determine the qualified or personal immunity  
14 defenses. And at that point, the defendant could go to  
15 federal court to seek review of that prior to an  
16 adjudication of the merits of the claim in the tribal  
17 court.

18           QUESTION: Even in the federal court system, as  
19 I recall it, we allow the denial of qualified immunity to  
20 be appealed immediately, because, you know, the belief is  
21 that the important interests served by it are simply  
22 defeated if you wait until the whole litigation is  
23 finished before you tell the governmental agent, well, you  
24 don't have to worry about it. Why should there be a  
25 different rule when we go that far to allow such an

1 interlocutory appeal in the federal system? It seems very  
2 strange to require the government official to go all the  
3 way through the tribal court and await an injunction  
4 afterwards.

5 MR. ANAYA: Well, what we're suggesting, or what  
6 the model would suggest, is that there would be the  
7 opportunity to go immediately upon a determination in the  
8 tribal court of the qualified immunity defense to the  
9 federal court, so it would be in the nature of a  
10 interlocutory review.

11 QUESTION: Then if you lost and you went back  
12 and you exhausted on the merits, there would be another  
13 opportunity to go into the federal court for a different  
14 injunction.

15 MR. ANAYA: Yes, Your Honor.

16 QUESTION: Okay. I didn't understand. You  
17 would allow it immediately as soon as the qualified  
18 immunity --

19 QUESTION: But would it not have been consistent  
20 with our cases for the district court in this case to have  
21 said I'm going to decide the qualified immunity issue  
22 right away. He didn't do that -- it would have been  
23 consistent with our cases for the district judge to have  
24 done that, would it not?

25 MR. ANAYA: Perhaps, Your Honor, but the

1 rationale of National Farmers Union of Iowa Mutual, I  
2 think, counseled in favor of what the district court did.

3 QUESTION: If you assume the rationale of  
4 exhaustion applies beyond jurisdictional issues.

5 MR. ANAYA: Yes, Your Honor. And I think --

6 QUESTION: It has not been decided.

7 MR. ANAYA: And I think it does. The rationale  
8 is to support the self-governance of the tribe, and to  
9 support the development of tribal courts and their  
10 autonomy. And for the district court to have ruled on  
11 something --

12 QUESTION: Yes, but it supports them to the same  
13 extent that it would respect the sovereignty of the  
14 states. Of course, if it were a state court involved,  
15 they would respect the jurisdiction, require exhaustion on  
16 the jurisdictional issue, but nevertheless might have gone  
17 ahead on the merits, if this were a state court rather  
18 than a tribal court. You're in effect asking for a  
19 stronger rule of exhaustion in tribal courts than if it  
20 were a state court.

21 MR. ANAYA: Well, Your Honor, we think that the  
22 situation here is one in which we have a tribal court  
23 struggling to maintain its jurisdiction, and the deference  
24 that the exhaustion doctrine gives to tribal courts is  
25 warranted, and the interests of the state officials -- the

1 federal interest that might exist in ensuring that their  
2 interests are protected, are sufficiently met by the  
3 exhaustion rule as long as there is some kind of review  
4 and, perhaps, an interlocutory review of the personal  
5 immunity defenses.

6 QUESTION: Do tribal courts routinely hear  
7 Section 1983 federal claims?

8 MR. ANAYA: Not routinely, Your Honor, but there  
9 is nothing -- there is no federal law that precludes them  
10 from hearing a 1983 claim. The Fallon tribal court is a  
11 court of general jurisdiction. The 1983 statute is a  
12 jurisdiction intended to provide broad remedies for  
13 violations of constitutional rights and, in the absence of  
14 an affirmative limitation on the jurisdiction of the  
15 court, the tribal court, under federal law, it seems to  
16 follow quite naturally that the Fallon tribal court as a  
17 court of general jurisdiction would have jurisdiction to  
18 hear a Section 1983 --

19 QUESTION: It is still not clear to me the  
20 theory on which any such -- any tribal court  
21 determinations on such matters can be reviewed in any  
22 federal court. What is the theory?

23 MR. ANAYA: The theory is that there is a  
24 federal interest in ensuring that the state defendants'  
25 immunity defenses would be sufficiently aired --

1           QUESTION: So is it a federal question? Use  
2 federal question jurisdiction to this --

3           MR. ANAYA: Well, that's right. This would  
4 assume that immunity defenses would be defenses under  
5 federal law, and that is the position that the United  
6 States has taken, and it's a position that the tribe  
7 accepts -- that these defenses could become federal law  
8 and hence they would be the basis for review in federal  
9 court.

10          QUESTION: There are other situations where we  
11 just fire off injunctions where we think a federal  
12 interest may be involved? Do we have authority to do  
13 that?

14          MR. ANAYA: This is a unique context, Your  
15 Honor.

16          QUESTION: Yeah, it sure is.

17          MR. ANAYA: It is. And the unique context and  
18 wrinkles that exist here are because of historical  
19 situations and patterns that have existed, that have  
20 arisen and continued, and require this Court to --

21          QUESTION: Well, maybe they require. I mean,  
22 there are two conclusions that you could draw from the  
23 absence of any review provision in the tribal court for a  
24 1983 action. One is that we could invent some never-  
25 before-heard-of, and never-elsewhere-used power of this

1 Court or federal courts to issue an injunction. The other  
2 one is that the tribal court has no authority to entertain  
3 1983 actions. That would solve the problem just as well,  
4 wouldn't it?

5 MR. ANAYA: That would solve the problem, just  
6 like --

7 QUESTION: But not your client's problem. I  
8 understand that.

9 QUESTION: Thank you, Mr. Anaya.

10 Ms. McDowell, we'll hear from you.

11 ORAL ARGUMENT OF BARBARA MCDOWELL

12 ON BEHALF OF THE UNITED STATES

13 AS AMICUS CURIAE, SUPPORTING AFFIRMANCE

14 MS. MCDOWELL: Mr. Chief Justice, and may it  
15 please the Court:

16 The tribal court has jurisdiction over Mr.  
17 Hicks' civil damages suit against the state game wardens  
18 in their personal capacities.

19 QUESTION: Well, how about a 1983 action?

20 MS. MCDOWELL: Well, we would say that the  
21 federal courts have concurrent jurisdiction over that sort  
22 of action, as in El Paso Natural Gas. We think that there  
23 should be an opportunity effectively to remove the case to  
24 federal court through an injunction.

25 QUESTION: I agree, but does it exist?

45

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1 MS. MCDOWELL: To the extent it existed in El  
2 Paso, Your Honor, it exists here as well. Congress has  
3 expressed its preference for a federal forum at a  
4 defendant's request when he has been sued on a federal  
5 cause of action. That occurs through the removal statute  
6 when the defendant is sued in state court.

7 QUESTION: But the Wheeler Act -- is that the  
8 Act -- the Nuclear Power Act -- had a specific provision  
9 for exclusive jurisdiction. We don't have that here.

10 MS. MCDOWELL: Exclusive jurisdiction, Your  
11 Honor --

12 QUESTION: The El Paso case was not a removal  
13 case.

14 MS. MCDOWELL: Yes, it was, with respect, Your  
15 Honor. It was a removal case. It was a case in which  
16 there was --

17 QUESTION: Excuse me -- there was an underlying  
18 congressional act which gave exclusive jurisdiction.

19 MS. MCDOWELL: Only if the defendant raised it,  
20 Your Honor, the case would be free to proceed in state  
21 court for a nuclear tort, or in tribal court, unless the  
22 defendant sought a federal forum. That was the case in El  
23 Paso as we understand it, and that would also be the case  
24 here. The cases under 1983 could proceed in tribal court,  
25 but if the defendant elects a federal forum, he should be

1 entitled to that at the outset of the case so that the  
2 trial of the facts --

3 QUESTION: Really making up a statute that  
4 Congress didn't pass because that's what happens -- a  
5 federal officer is sued in state court. He can remove it.  
6 Why can he remove it? Because Congress has said so. So  
7 here Congress has said nothing at all.

8 MS. MCDOWELL: Well, that's correct, Your Honor.  
9 That was also the case in El Paso, but the court didn't  
10 think that Congress' silence in that instance reflected  
11 any specific intent to leave the case in tribal court if a  
12 defendant wanted it in --

13 QUESTION: But they don't have to have any  
14 intent to leave it in trial court, you need an intent to  
15 get it removed from tribal court. The extant state of  
16 affairs is what it is. What we're looking for is some  
17 reason to remove it.

18 MS. MCDOWELL: Well, the reason to remove it is  
19 because the plaintiff has asserted a federal cause of  
20 action, and we would think that Congress would want a  
21 defendant sued in tribal court to have the same right as  
22 the defendants sued in state court to get a federal forum.  
23 We think that Congress' failure to provide in Section 1441  
24 for removal from tribal court was inadvertent, it doesn't  
25 reflect a policy choice on the part of Congress that such

1 cases should remain in tribal court. Simply the fact that  
2 --

3 QUESTION: No, I don't mean to cut you off -- I  
4 thought maybe you would address this. El Paso was a  
5 stronger case for your position in one respect, at least,  
6 because in El Paso, I think, as I recall it, the federal  
7 statute preempted all other causes of action so that the  
8 federal right was, in effect, was exclusive, because you  
9 don't have that feature here.

10 So if there's an injunction in this case on the  
11 El Paso model, it in effect would leave the litigation to  
12 go forward on non-1983 claims arising, I mean, for  
13 example, tribal tort claims. So the result would sort of  
14 be a bifurcation of the litigation and sort of a mess, and  
15 you didn't have that feature in El Paso. Shouldn't that  
16 bear on the question of whether or not we want to follow  
17 the El Paso model here?

18 MS. MCDOWELL: We don't think that would be the  
19 necessary result, Your Honor. As with removal from state  
20 court, any pendent state causes of action follow the  
21 federal cause of action.

22 QUESTION: Okay, but I mean this is getting Rube  
23 Goldberg. Now there's another rule and pendent  
24 jurisdictional claims are now being removed by means of a  
25 novel use of injunction. I mean, there's a character here

1 that we're making up an awful lot as we go along on your  
2 theory.

3 MS. MCDOWELL: Well, there is a common law  
4 nature to much of this Court's jurisprudence with respect  
5 to Indian law, certainly the cases --

6 QUESTION: But what is the justification, then,  
7 for saying to the tribes that they could not proceed in  
8 their related tort actions in the tribal courts merely  
9 because we think the 1983 action should be enjoined for  
10 purposes of quasi-removal. What is the basis for saying  
11 that they can't receive in their own courts under their  
12 own law?

13 MS. MCDOWELL: Well, they certainly can choose  
14 to proceed in their own courts. They're the masters of  
15 their complaints, and they can drop the 1983 --

16 QUESTION: No, but what I'm getting at is your  
17 notion that all -- that these tribal tort law claims would  
18 be deemed pendent to the 1983 actions and enjoined with  
19 them. I am saying what is your basis for saying -- is it  
20 simply a basis of convenience to the defendant?

21 MS. MCDOWELL: Well, that's typically the  
22 treatment of state law claims when we remove to federal  
23 court.

24 QUESTION: But we've got a statute on it. We've  
25 got a statute.

1                   QUESTION: How does it work? That is, in your  
2 view on the tribal claims. Your view is that the torts -  
3 - if the tribe -- suppose the tribe has a strict liability  
4 tort theory and there is no defense of official action,  
5 and it says that all the FBI agents, Bivens agents,  
6 Department of Interior agents, anybody you want in the  
7 federal government, is now going to be strictly liable for  
8 their torts, okay? Now, in your view they could just go  
9 do that. That's the government's view. That's the  
10 federal government's view.

11                   MS. MCDOWELL: There would be federal immunity  
12 defenses.

13                   QUESTION: But where do they come from?

14                   MS. MCDOWELL: They come from the federal  
15 government's unique interest in law enforcement on  
16 reservations.

17                   QUESTION: So if they're going to have -- and  
18 are we now going to have a new sort of federal government  
19 thing we're making up, which -- well, then why not have it  
20 all in the federal court? I mean, I'm a little worried  
21 about what we're getting into when we're making these  
22 things up. That's not meant to be a criticism -- I'm just  
23 quite -- having a hard time foreseeing where this case is  
24 going.

25                   QUESTION: Why does the federal government have

1 a unique interest in law enforcement? My goodness -- it's  
2 not only not unique, its interest in law enforcement is a  
3 good deal less than that of the states. They do most of  
4 the law enforcement in this country.

5 MS. MCDOWELL: Not with respect to Indian  
6 reservations, Your Honor. The federal government is the  
7 principal law enforcement authority on the reservations.  
8 It is delegated some of that authority --

9 QUESTION: Not with respect to state crimes that  
10 occur off the reservation. I mean, I can see the state -  
11 - can I ask you? It matters to me -- it may not matter to  
12 anybody else, but can you resolve the conflict here as to  
13 whether state officers are allowed just on the basis of a  
14 state warrant to enter a reservation to pursue a criminal  
15 from state justice for a crime that occurred off the  
16 reservation?

17 MS. MCDOWELL: Not in the circumstances of this  
18 case. Footnote seven of our brief cites some cases on the  
19 proposition. I think the way of looking at this is in the  
20 state/state context. If somebody commits a criminal  
21 offense in Nevada, yes, Nevada has the right to prosecute  
22 that offense, but if the person goes to California,  
23 perhaps even lives in California, if Nevada wants to  
24 execute a search warrant against that person's California  
25 home, the Nevada warrant isn't self-executing. There is a

1 need to go to a California court to get approval of the  
2 search, and we would say that the same model applies in  
3 the state/tribe situation.

4 QUESTION: In that situation, I'm just thinking,  
5 aren't you really on the other side? Imagine this is only  
6 the 1983 action. What's the difference between your  
7 position and their position? Their position is that the  
8 1983 action has to be brought in federal court. Your  
9 position is that it has to be brought in federal court as  
10 long as the defendant wants to do it. That seems to me  
11 the only practical difference. Am I right?

12 MS. MCDOWELL: As a practical matter, that may  
13 well be correct.

14 QUESTION: Then you have to think that the Ninth  
15 Circuit got it all wrong here, because as I take it,  
16 you're saying we let the tribal members sue in tribal  
17 court, but the defendant state officer the next day can  
18 remove it and there's nothing that the tribe or the tribal  
19 member can do about it. It's just kind of we let them  
20 park for an hour in the tribal court, and then the federal  
21 officer has the control, or the state officer has the  
22 control, can get it immediately into a federal court. Is  
23 that your position?

24 MS. MCDOWELL: Yes, although the tribal  
25 plaintiff would have the opportunity to amend his

1 complaint to assert only tribal causes of action, in which  
2 case the case would remain at least initially in tribal  
3 court.

4 QUESTION: What about the officer's position? I  
5 don't care whether they say it's tribal or 1983 -- I am  
6 cloaked with immunity because I was executing a state  
7 warrant, and that should be resolved in a state or federal  
8 forum, not in a tribal forum.

9 MS. MCDOWELL: I would disagree with that. We  
10 believe that the state officers' personal immunities are  
11 matters that should be presented first to the tribal  
12 court, and then only subsequently to the federal court.

13 QUESTION: So that this case could remain in  
14 tribal court if they just alleged tribal torts, the  
15 officer says I have qualified immunity, I don't want that  
16 resolved in tribal court, but it belongs in tribal court,  
17 in your view of this?

18 MS. MCDOWELL: In our view, in the ordinary  
19 course the state officer defendant should raise the  
20 defense first in tribal court and then would have review  
21 of the defense under the National Farmers Union approach  
22 in federal court after exhaustion.

23 QUESTION: How far? How far? It's only under  
24 the tribal code. Qualified immunity is the defense. At  
25 what point does that get over into a federal court?

1 MS. MCDOWELL: May I answer?

2 QUESTION: Yes, shortly.

3 MS. MCDOWELL: If there's not an opportunity  
4 before trial for the defense to reach federal court, we  
5 would say exhaustion shouldn't be required.

6 QUESTION: Thank you, Ms. McDowell. Mr. Howle,  
7 you have four minutes remaining.

8 REBUTTAL ARGUMENT OF C. WAYNE HOWLE

9 ON BEHALF OF THE PETITIONER

10 MR. HOWLE: Thank you, You Honor. One of our  
11 major concerns in this case is the non-federal claim in  
12 tribal court, because that's problematic. The removal of  
13 the non-federal claim if there's no federal claim to which  
14 it's pendent loses really in tribal court. And even if  
15 there's review of the immunity defense, ultimately in  
16 federal court, there's no basis for federal court  
17 jurisdiction to review the judgment.

18 And so it leaves us exactly where we started,  
19 which is at the mercy of the tribal court. That is a  
20 derogation of state sovereignty. This isn't the kind of  
21 treatment that the federal government would accept for its  
22 own officials, and the reference I would make, if I may,  
23 in the U.S. brief is footnote twenty-two on page twenty-  
24 nine where the whole theory of federal officer immunities  
25 is set out. And in the end they conclude, just as we

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1 have, that because of the status of the tribes as  
2 dependent sovereigns within the federal system, additional  
3 considerations may apply to the exercise of tribal court  
4 jurisdiction over federal officers even when sued in their  
5 personal capacities. That's exactly what we're asking for  
6 in this case as state officers. We're not asking for any  
7 more than the federal government.

8 And perhaps the difference here is due to the  
9 fact that the U.S. views states and tribes as coordinate  
10 sovereigns. Coordinate sovereigns. And tribes and states  
11 are not coordinate sovereigns, they're different. States  
12 and tribes are fundamentally different. State immunities  
13 have a constitutional dimension, whereas tribes have been  
14 implicitly divested of their sovereignty to the extent  
15 that it's inconsistent with their status. And that's our  
16 ultimate position in the case and explains the position we  
17 take. Thank you, Your Honor.

18 QUESTION: Thank you, Mr. Howle.

19 MR. HOWLE: Thank you, Your Honor.

20 CHIEF JUSTICE REHNQUIST: The case is submitted.

21 (Whereupon, at 12:05 a.m., the case in the  
22 above-entitled matter was submitted.)  
23  
24  
25