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In the

Supreme Court of the United States

SANTA CLARA PUEBLO, ET AL.,

PETITIONERS,

V.

JULIA MARTINEZ, ET AL.,

RESPONDENTS.

No. 76-682

Washington, D. C.
November 29, 1977

Pages 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

SANTA CLARA PUEBLO, et al., Petitioners, v. JULIA MARTINEZ, et al., Respondents.	No. 76-682

Washington, D. C.,

Tuesday, November 29, 1977.

The above-entitled matter came on for argument at 1:36 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

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APPEARANCES:

MARCELINO PRELO, ESQ., Prelo & Grodner, P.A., 5921 Lomas Boulevard, N. E., Albuquerque, New Mexico 87110; on behalf of the Petitioners.

RICHARD B. COLLINS, ESQ., Box 306, Window Rock, Arizona 86515; on behalf of the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-682, Santa Clara Pueblo against Martinez.

Mr. Prelo, you may proceed whenever you're ready.

ORAL ARGUMENT OF MARCELINO PRELO, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is before this Court on a writ of certiorari to the Tenth Circuit Court of Appeals. The case involves the application of Section 1302(8) of the Indian Civil Rights Act of 1968, as it applies to a Santa Clara Pueblo Membership Ordinance enacted in 1939.

The Ordinance provides that children born of Santa Clara males and Santa Clara females shall be Santa Clara members. Children born of Santa Clara males and non-Santa Clara females would likewise be members of the Tribe.

Whereas, children born of Santa Clara females and non-Santa Clara males would not be members of the Tribe.

The plaintiffs allege that the Ordinance violates the Indian Civil Rights Act and the defendants have continuously raised the lack of jurisdiction in the sovereign immunity of the Tribe.

The District Court for the District of New Mexico found that there was in fact jurisdiction, but that the

Ordinance did not violate the Indian Civil Rights Act.

The Tenth Circuit reversed, not discussing tribal immunity to any extent whatsoever, and finding that in fact there was jurisdiction and that the Ordinance was violative.

A little factual background on Santa Clara Pueblo, I believe, would be beneficial before going on to further argument.

It is a small reservation, some 4800 acres. The membership is small, approximately 1200 members. It's located in the northern part of the State of New Mexico. It's a --

QUESTION: Whereabouts in the northern part of the State?

MR. PRELO: It's near Santa Fe; immediately north of Santa Fe.

The tribe was organized pursuant to a constitution, under the Reorganization Act of 1934, and it is uncontradicted that the Tribe has existed as a distinct social and cultural unit for at least 700 years, and has existed at its present location for some 300 years.

It has been surrounded first by the Spaniards, and now by the United Statesof America, and has continued to exist, notwithstanding the fact that it has been surrounded by an alien culture.

QUESTION: Mr. Prelo, does it make any difference in your argument whether this is, in fact, a reservation or

whether the Santa Blara Pueblo is an Indian Tribe?

MR. PRELO: May it please the Court, I would use them identically.

QUESTION: Interchangeably?

MR. PRELO: Yes, sir.

The Governor is the chief executive officer of the Tribe and is empowered to run the day-to-day functions of the Tribe primarily, and he serves on the Council, and can only vote on the Council at such time as the Council may have a tied vote. The Council, under the constitution, has the authority to determine membership in the Tribe, and has thus done under the 1939 Ordinance.

The defendants in this case, Santa Clara Pueblo, have, from the very outset, claimed that the Ordinance, the 1939 Ordinance, is a written embodiment of pre-existing unwritten rules of membership. And I might point out that prior to 1935, nothing was written within the Pueblo culture. They had no written rules.

They have further alleged throughout, and do so, that the Ordinance is essential to the cultural and religious heritage embodied in the very existence of the Tribe.

There has been no variance from that Ordinance from the time it was enacted.

A plaintiff, Mrs. Martinez, is a Santa Clara Pueblo, daughter of both parents who were Santa Claran.

Under the Ordinance, her children are not members of the Santa Clara, because she is married to a Navajo from a separate reservation.

The testimony was clear that the children could be registered in the Navajo Nation had they so desired.

The questions presented for this Court, as I see them, are whether or not there's an implied waiver of sovereign immunity in the 1968 Civil Rights Act, and whether, in fact, the Civil Rights Act gives federal courts jurisdiction in anything other than habeas corpus provisions.

QUESTION: That's really the first questions, isn't it?

MR. PRELO: Yes, sir. That is the threshold question.

QUESTION: Yes.

MR. PRELO: If we get past that question, assuming that the Court should find that there is in fact --

QUESTION: Then you get to sovereign immunity.

MR. PRELO: Yes, sir.

QUESTION: Yes.

MR. PRELO: Of course the immunity would go to jurisdiction, if they are immune there would be no jurisdiction in any court.

QUESTION: Well, but there might be -- yes, that's correct -- but there might be federal jurisdiction over individuals, individuals who were not immune.

MR. PRELO: Under the habeas corpus, Your Honor, we submit that there would be jurisdiction over the individual that might detain any given --

QUESTION: Even against the Governor, for example.

MR. PRELO: The Act states that it applies to Tribes.

QUESTION: Yes.

MR. PRELO: It does not say anything about the executives. The argument has been made that it would apply to the Governor. And based on what I indicated a while ago, the Governor just has the power to run the day-to-day affairs, and has no power beyond that into the Council area. So I don't know what effect that would have.

QUESTION: Yes.

MR. PRELO: If, as Your Honor pointed out, there is jurisdiction, then we get to the question of what standard of equal protection should apply under the Indian Civil Rights Act. We have submitted, have argued consistently, that it is something less than the Fourteenth Amendment standard, and that has been admitted by the plaintiffs at the early stages of this proceeding.

QUESTION: Everybody, at least all the parties here, plus the amicus, all seem to agree on that.

MR. PRELO: I think that is correct.

QUESTION: Is that correct? The question is: How

much less?

MR. PRELO: Speaking of the waiver of sovereign immunity, it has been over 145 years, that this Court held that Tribes are sovereign nations, notwithstanding that they are quasi-sovereign at this particular time; they still retain the independent political sovereign that was found by the Court over a hundred years ago.

Eighty-two years ago, at least, it has been recognized that as sovereigns they are immune from suit in federal courts unless Congress -- and Congress has plenary power to do so -- unless Congress enacts legislation saying that they can be sued, if their immunity is waived.

Such waiver has never been implied, and we submit that it should not be at this time. It must be an express waiver, and Congress must spell this out.

This Court, in the recent case of the Puyallup Tribe of Washington, decided just in June, again reaffirmed the common law principle of sovereign immunity.

The reasons for this principle that have been pointed out are twofold: one is because of the limited resources of the Tribes to be constantly in court defending their culture, their way of living; and the other is so that they may continue to perpetuate their culture without interference from an outside alien culture, if you will.

The plaintiffs in -- I might point out that there

has been a half a million dollar judgment under the Indian Civil Rights Act in the Tenth Circuit, as pointed out by amicus, just recently.

QUESTION: What are the other elements besides preservation of a particular culture that turn on this?

MR. PRELO: The elements are the preservation of the culture, the preservation of the tribal cohesiveness, the unit of the Tribe, their religious beliefs, and, to some extent, their economic holdings which are, as I've indicated, small. It's the over-all keeping of a Tribe that's existed for years that is slowly, under this approach, going to be destroyed.

QUESTION: Well, the Anglo-Saxon adversary legal system is quite inconsistant with the tradition of many Indian Tribes, isn't it?

MR. PRELO: It is totally inconsistent, I would say, Your Honor.

QUESTION: But in so far as sovereign immunity goes, that has historic roots as much as anything when, in the earlier years, the dealings of our country with the Indian Tribes were very similar to the dealings of our country with the Government of England or France.

MR. PRELO: That is correct, Your Honor.

QUESTION: They were separate nations, and made Treaties with them.

MR. PRELO: And this was done because we were on a

more equal --

QUESTION: And sovereign immunity has its historic roots in that concept of what Indian Nations were, and Indian Tribes were.

MR. PRELO: Based on the more equal footing. At that time theTribes were stronger, compared to what they are today, as compared to the United States. And it was beneficial to this country to make such Treaties or Agreements, and we should continue to honor these.

QUESTION: Right.

QUESTION: But that regime was pretty well destroyed, wasn't it, by that 1870 or '71 statute?

QUESTION: It used to be that Treaties had to be ratified only by the Senate. And the House complained of that back in the late Sixties, wasn't it?

MR. PRELO: Well, I would not argue that Treaties would be entered into at this particular time, Your Honor.

QUESTION: Well, to the extent that bears on sovereignty, there's no longer that situation, is there?

QUESTION: Well, it has its roots in the concept reflected in this Court's decision in -- what was it -- Worcester v. Georgia --

MR. PRELO: Worcester v. Georgia.

QUESTION: -- which, within the last two or three terms, in an opinion for the Court by Mr. Justice Marshall,

was given a good deal of weight, that whole concept.

MR. PRELO: Going on, Your Honor, if there is a wavier, it must be expressed and should not be implied.

We were talking about the reasons for it. Again, the plaintiffs have not told us how they would propose to limit judgments to equitable relief and not have money judgments.

The waiver also, I might point out, would have an excessive workload for the courts, that the courts may not be geared to, and it would do -- unduly interfere with Tribal law and order systems.

This was considered --

QUESTION: Well, part of the argument is that the Civil Rights Act clearly intended to protect individuals from Tribal Governments in some respects.

MR. PRELO: Your Honor, my argument on that is that the intention primarily was to avoid criminal type lack of due process in the courts, in the Tribal Courts. That was the bulk of the legislative history. There are other mentions of other things --

QUESTION: Well, could you tell me, would a Tribal Court have any authority to invalidate a Tribal Ordinance on the grounds that it was inconsistent with the Civil Rights Act?

MR. PRELO: If they did not, the Secretary of the

Interior would definitely have it.

QUESTION: I know, but I didn't ask you whether they would or not; do they have the authority of invalidating an Ordinance, or are they just supposed to enforce an Ordinance the way it's written?

MR. PRELO: I missed the initial thrust of your question.

QUESTION: Do they have the authority to say, "Well, we know what the Ordinance says, but we refuse to enforce it because it's invalid"; do they have the power of judicial review? And do they have the power to say, "This Ordinance is inconsistent with the Civil Rights Act and therefore it's invalid"?

MR. PRELO: Do the courts have that power at this time?

QUESTION: Do the Tribal Courts?

MR. PRELO: The Tribal Courts do not -- well, the Tribal Courts could certainly change this Ordinance, because they have that authority under the constitution.

QUESTION: They do?

MR. PRELO: And they could --

QUESTION: Under the Tribal Constitution?

MR. PRELO: They have the authority to make the Ordinance, so I assume that they have the authority to unmake it. If they can pass such Ordinance --

QUESTION: But can they invalidate it? Not repeal it. Can they invalidate it?

MR. PRELO: I think that they can.

QUESTION: Well, they're governed by the Civil Rights Act, wholly governed by the Civil Rights Act. They not only have the right but the duty, I would think, to follow the Civil Rights Act; don't they?

MR. PRELO: Within their Tribe, I think that that is true.

QUESTION: Another way of phrasing the question: Which is supreme in an Indian Tribal Court, federal statutory law or Indian Tribal law?

MR. PRELO: We would like to think that Indian Tribal law is subject to --

QUESTION: Even where there's a conflict between that and the federal statute?

MR. PRELO: -- subject to the Indian Civil Rights Act now, as applied in the context of the Indian Tribal Courts.

QUESTION: But if an Indian Tribal Court concluded that the federal Civil Rights, Indian Civil Rights Act were violated, would not the federal Tribal Court have a duty to obey the federal statute?

QUESTION: Yes.

MR. PRELO: I think you're correct on that, Your Honor.

QUESTION: Your point was that providing Congress had moved.

MR. PRELO: Providing Congress has so indicated. And we take the position that Congress has not so indicated. Congress has only indicated that there should be a specific remedy, which is habeas corpus.

QUESTION: It may be that my question is wholly inappropriate because I gather from what you said and what now is in, I think is in the briefs, that legislative and judicial authority are vested in the same body.

MR. PRELO: In the Tribe?

QUESTION: In the Tribe.

MR. PRELO: That is correct.

QUESTION: The Pueblo Council.

MR. PRELO: But they do have and are getting more codes and setting up separate judges under model codes that the Interior Department has promulgated.

QUESTION: And I presume the matter varies from Tribe to Tribe; does it?

MR. PRELO: Your Honor, in all of these areas it varies from Tribe to Tribe.

QUESTION: Would you just give me one -- an answer to a rather practical problem: Assuming that there is sovereign immunity or no jurisdiction or no implied cause of action, whatever the theory might be, and looking at the portions of

the statute other than the criminal procedure portion, provisions such as "you can't take property without just compensation" and equal protection, does the statute have any practical significance, --

MR. PRELO: Yes, Your Honor.

QUESTION: -- if there is no federal remedy?

MR. PRELO: It does, because it would be applied within the Tribal Courts, and it would have the Secretary looking over it as far as approving Ordinances and reviewing anything that the Tribe does that is subject to the Secretary's approval. So it would have.

QUESTION: Could the Secretary of the Interior invalidate this particular Ordinance?

MR. PRELO: I think that that's probable.

QUESTION: If he felt it violated the statute.

MR. PRELO: That is correct. He would have had to approve it initially.

QUESTION: And this Ordinance has been approved by the Secretary?

MR. PRELO: This Ordinance was approved, I believe, in -- and I don't want to be held to that, Your Honor; I think it was approved when it was passed.

QUESTION: But that means that it was approved -- that means it was approved, if you're correct, before the enactment of the Indian Civil Rights Act?

MR. PRELO: That is correct, Your Honor.

The jurisdictional issue, reliance has been placed on 28 U.S.C. 1343(4). I submit that this reliance is misplaced. That requires that the district court shall have jurisdiction of any civil action authorized by laws to be commenced; and we submit that nothing has been authorized in the Civil Rights Act except habeas corpus. And, as a result, reliance on this is improper, and this Court has ruled in similar cases, under the Tucker Act and the Administrative Procedure Act, in Califano v. Sanders and in Testan recently.

QUESTION: Well, the Governor is a party defendant, isn't he?

MR. PRELO: Yes, Your Honor.

QUESTION: Well, does -- so even assuming that you're right on the jurisdictional question as to the Tribe, does it make any difference as long as the relief that's sought can be obtained against the Governor, couldn't it?

MR. PRELO: Your Honor, it makes a difference, because I think that the Act specifically applies to Tribes, No. 1; and, secondly, because the Governor himself would not have the authority, the Council would have the authority to promulgate Ordinances concerning membership.

QUESTION: No, but in a dispute over whether the Ordinance was consistent with the Indian Rights Act, couldn't that be determined and, if found inconsistent and invalid

because inconsistent with the Civil Rights Act? Couldn't there be an appropriate remedy just against the Governor without reference to the Tribe?

MR. PRELO: It is my position that it would not be proper.

QUESTION: I see. Why?

MR. PRELO: Because I think the Act speaks to the Tribe itself and not to an individual, and the Governor does not have the requisite authority, in any event, to tell the Council -- I would assume, then, the Council would have to become also involved, because the Governor does not have the authority to tell the Council.

QUESTION: Mr. Prelo, without regard to the Civil Rights Act, what authority does the Governor have? Is he the chief executive officer?

MR. PRELO: He's the chief executive, and he's entitled --

QUESTION: Well, I thought you said he didn't enforce the Ordinance?

MR. PRELO: He enforces the law and order portions of it, but he doesn't have the authority to pass an Ordinance or to knock out an Ordinance; that would be with the Council.

QUESTION: Well, he has authority to enforce it.

MR. PRELO: He has the authority to enforce it --

QUESTION: Well, then, why isn't he subject to suit?

MR. PRELO: If he enforces it wrongfully, he perhaps could be subject to suit, but --

QUESTION: Well, in Shell Oil, I think this Court said the Governor of the State of Ohio was subject to suit.

MR. PRELO: Therefore, in the Indian context, it would not necessarily follow, because of the different power.

QUESTION: Well, if I understand what you say, the Governor is nothing, he just sits there. And that cannot be true.

MR. PRELO: He does not just sit there, he runs the day-to-day affairs and --

QUESTION: Then why isn't he subject to suit if he runs the day-to-day affairs?

MR. PRELO: Because the Act addresses Tribes.

QUESTION: It does what?

MR. PRELO: It addresses Tribes; it says "No Tribe shall", it does not say "no person".

QUESTION: Well, who is the Tribe?

MR. PRELO: I submit that the Council and, I don't know, the religous leaders; these are things we don't know. The people behind the secular people.

QUESTION: Well, what did Congress mean when they said Tribe?

MR. PRELO: I think they meant the political body, the Council --

QUESTION: You think. Can't you help me a little better than thinking?

MR. PRELO: They must have meant the political body, which would be the Council.

QUESTION: You mean there's nothing there, one way or the other?

MR. PRELO: No, it's not clear what they meant.

As to the standard of equal protection, it is clear that this Court has consistently taken the approach that Indians are sui generis and different from any other body in the country. They've been treated with deference. Things have been considered by this Court that, had it been any other group, a different ruling would have been arrived at; for example, Morton v. Mancari, the Fisher case.

We think that Congress intended that the remedy of habeas corpus be applied, and that they would later look at the entire case and, if that was not sufficient, they can enact new legislation and mandate to the courts what they want.

Congress did not intend to prohibit Indian Tribes from maintaining their traditional criteria for establishing their membership.

I might point out that not only Santa Clara is affected by the Court of Appeals decision, but every Tribe in the nation; 13 Tribes, as noted in amicus briefs, 13 other Tribes in the nation have either female or male descendency

rules. So it not just a question of Santa Clara, it's a question of all Indian Nations throughout the country.

All Tribes are striving to remain culturally and politically viable right now, and they're finding it difficult because a tremendous amount of lawsuits are being filed against them, and Congress and this Court have continually stressed that they are in favor of Tribal self-determination and Tribal self-autonomy.

If we read the ICRA in the context of all of these laws, it appears fairly obvious to me that the full impact of the Fourteenth Amendment was not intended.

QUESTION: How big is this Tribe? Of course the answer to that question might depend on the outcome of this lawsuit. But approximately how big is it?

MR. PRELO: It's 48 --

QUESTION: How many?

MR. PRELO: It's 48,000 acres and 1200 members.

QUESTION: Twelve hundred. Men, women and children.

MR. PRELO: That is correct, Your Honor.

And I might point out that approximately ten percent of those that live on the Pueblo now are in the class of the -- that plaintiff Audrey Martinez is in. And they've never been asked to leave the Pueblo.

QUESTION: So it might be, whatever it is, 1,020 instead of 1200?

MR. PRELO: That is correct, Your Honor.

QUESTION: A thousand and eighty, I guess.

MR. PRELO: The cases below have held basically that equal, even-handed application of the law is what should be applied if it is in the Indian context. If it is in the Anglo-American context, then they have in fact applied the Fourteenth Amendment standards; and nothing could be more Indian context than membership. The Tenth Circuit recognized this, but proceeded to apply the compelling -- compelling test. They didn't talk about rational or substantially further important governmental objective; they said, they have shown no compelling interest.

I submit that this Court, not even in Frontiero v. Richardson or any other case, has agreed totally that the compelling interest should be shown in a gender type case.

I further submit that the Court has retreated to some extent from that holding and now holds that they must show a substantially further important governmental objective, that the Ordinance would do so. And I submit that nothing could be more important than the culture and the actual existence of the Tribe, and that it clearly comes within the standard in Craig v. Boren.

However, the Tenth Circuit did apply the improper rule.

We have also asked the Court to consider treating

this case similar to immigration laws in the United States. The Tribes and the countries are quite similar in that membership in a Tribe is similar to citizenship in a country.

This Court, in Fiallo, has taken the position that they will not interfere in that, that Congress should make those decisions, and that the Court will not second-guess Congress.

I submit that that is certainly a proper test to apply in this particular case.

When we look at the background concerning whether or not the Ordinance is proper, we need to see that the rule has been uniformly applied since it was enacted. The undisputed testimony was that -- from a Dr. Ellis, who was hired by the government, not by the Tribe, initially -- that the culture would eventually break down and be lost if this Ordinance were not allowed.

This type of testimony was elicited also from the Governor and other members of the Tribe. And I submit that they feel very strongly that this is true, because the father is the party that passes down the custom and culture, and it is through him that all of these things are taught to the children.

Without this Ordinance, it's just a question of time before this Tribe would cease to exist, notwithstanding the fact that it's existed for 700-plus years.

The court below found that the Tribe was patri-local, patricultural, indicating that everything descended through the father, and that the Ordinance itself was rooted in deep tradition.

To say that the Ordinance cannot stand would be to terminate the very Tribe that these plaintiffs would be members of, and that clearly they do not want.

The record is clear that the cultural impact of a non-Santa Clara mother is very minimal, as compared to that of a Santa Clara father -- my time has run out.

MR. CHIEF JUSTICE BURGER: Mr. Collins.

ORAL ARGUMENT OF RICHARD B. COLLINS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

One of the basic disagreements between the parties in this case has been the defendants' characterization of what tribal interest is represented by this Ordinance that's at issue here. They have said, as counsel just said at the close of his argument, that without this Ordinance the culture and religion of Santa Clara would be lost and destroyed.

We submit that this cannot possibly be the case.

The court below and the district court, in their opinions, each stated that the Martinez children are culturally Santa Clara Indians. They found that to be a fact. That

finding is undisputed so far before this Court.

Furthermore, that finding is based on a number of significant subsidiary facts that are also undisputed, that the Martinez children are full-blood American Indians, that their mother is a full-blood Santa Clara Indian, that they speak and understand the Tewa language which is the official and legal language of the Santa Clara Pueblo. In fact, the expert witness for defendants, to which counsel just referred, defined a Santa Claran Indian -- a Tewa Indian as one who speaks the Tewa language. She defined the Indians in question according to the language.

QUESTION: Mr. Collins, is your point addressed to the factual question of whether or not these children will kind of fit in in the Santa Clara Pueblo, or whether the federal district court, as opposed to the Indian Tribe, should determine what the traditions of the Tribe are?

MR. COLLINS: Mr. Justice, my point is addressed to the Tribal interest asserted as a justification for this Ordinance. They have constantly said that without the Ordinance their culture would be lost, and we submit that can't be the case, because the persons who are so closely identified with the culture as these persons are excluded by the Ordinance, and, conversely, the Ordinance mandates the admission of male-line children, even if they grow up in Chicago or Los Angeles or what-have-you, even if they're half

or a quarter or less Indian ancestry, even if they've never seen Santa Clara Pueblo, even if they know nothing of its language.

QUESTION: This is like a Baptist telling the Pope that he's wrong about the Immaculate Conception, in a sense, isn't it?

[Laughter.]

QUESTION: I mean, presumably, the best authority is the Indian Tribal standards or culture is the word of the Tribe itself. If we're simply talking about that.

MR. COLLINS: Well, Your Honor, the issue of culture was raised by the defendants, not by the plaintiffs. The plaintiffs suggest that the record is clear, that this Ordinance was not based on any cultural interest of the Pueblo, but based on a desire to limit membership to hold down the -- to keep up the amount of the per capita payments that the government was making to the Tribe. We think the record is clear on that.

Culture was raised by them as a defense. Now, we're forced to meet that. But we didn't raise the issue. We don't think that -- we don't -- and, furthermore, Your Honor, in any Indian Civil Rights Act case a Tribe that has any differing traditions from a State or local government under the United States is going to have some cultural involvement in that decision. And therefore, the Indian Civil Rights -- if

tradition or culture were an automatic and absolute defense of an Indian Civil Rights Act action, then the Act is meaningless.

QUESTION: That I can understand, if Congress has said its tradition and culture will have to be overridden in some situations. But I thought your point was that here, even though the Tribe says its culture and tradition aren't being overridden, the Tribe is really mistaken because Judge Mecham and Judge Doyle decided that it wouldn't be.

MR. COLLINS: No, Your Honor, not that at all. We're only saying that the record, we think, is overwhelmingly clear that the cultural defense is mistakenly raised by the defendants. Because it cannot possibly maintain culture to enforce a rule like this. That's what Judge Doyle so clearly said in his --

QUESTION: But isn't the point as to who is to be a member of the Tribe involved in the cultural survival of that Tribe?

MR. COLLINS: Well, it is, Your Honor. That goes to a different point.

QUESTION: Well, isn't that basic?

MR. COLLINS: Yes, it is basic, Mr. Justice, but --

QUESTION: Is it as important as citizenship is to a citizen of the United States?

MR. COLLINS: It's as basic to the plaintiffs --

QUESTION: Is it? Is it as important?

MR. COLLINS: I can't answer that, Your Honor. I think they are rather different. I don't think that they are necessiarly equivalent.

QUESTION: Different to what extant?

As to the culture of the two.

MR. COLLINS: Well, United States citizenship issues usually arise in the case of an alien, somsone who is not brought up in the culture of the United States. If these plaintiffs are denied membership in the Tribe that they were brought up in, they've lived all their lives on the reservation, the loss to them would be much greater than the effect on a true alian whose --

QUESTION: I'm not talking about the loss to the individual, I'm talking about the culture.

MR. COLLINS: Yes, Your Honor.

QUESTION: I'm saying that who is eligible to be a member of a Tribe is as important as anything I know of to a culture.

MR. COLLINS: But I'm saying, Your Honor, that there is a --

QUESTION: C-u-l-t-u-r-e is what I'm talking about.

MR. COLLINS: Yes, Your Honor, but I'm talking about the fact that there's a crucial difference in the cultural impact between outsidars, persons who have not grown up in a

society, and insiders, those who have.

QUESTION: Well, couldn't they have st up a culture which says you can't be a member of the Tribe, get out? Unless you are a full-blooded Tribal Indian of this Tribe, get out. Is there anything wrong with that?

MR. COLLINS: Well, Your Honor, if --

QUESTION: If the Council adopts that and it was approved?

MR. COLLINS: That presents very different questions. What they could do --

QUESTION: Could they do that?

MR. COLLINS: I don't know, Your Honor. What they have done here is to pass a rule that discriminates between members of the Tribe. It says to one group, it says to women, your children may not become members --

QUESTION: Well, you assume that they are members of the Tribe. And I thought that's what we were here to decide.

MR. COLLINS: Your Honor, there's no doubt that plaintiff Julia Martinez is a member, it's her children --

QUESTION: For certain purposes.

MR. COLLINS: For all purposes.

QUESTION: No, sir. Not to her.

MR. COLLINS: She's not eliminated -- yes -- oh, Your Honor, that's a mistake that counsel made. There is nothing in the record to indicate that there's an inheritance rule

through the man only in this Tribe. Nothing in the record. That's a mischaracterization of the record, because the -- it's clear enough that if Mrs. Martinez had married a member of the Tribe, her children could inherit from her. There's no prohibition against inheritance through the female line.

The only thing is there's a prohibition against passing membership to your children, but not a prohibition against inheritance as a general matter. She's --

QUESTION: Mr. Collins, far be it from me to direct the order of your argument, but I hope, before you sit down, you will address what I consider to be very important preliminary questions; i.e., whether or not there was federal court jurisdiction of this case. And, if so, whether or not the Tribe could be sued? Because only if the answer to both of those questions is yes do we get into any of these issues that you and some of the members of the Bench have been discussing.

MR. COLLINS: Mr. Justice, I'll be happy to address those.

QUESTION: You don't -- you do it in your own time and in your own order, of course.

MR. COLLINS: Well, the two jurisdictional issues that have been raised are: whether there's federal court subject matter jurisdiction, and whether the sovereign immunity of the Tribe precludes such jurisdiction.

The inquiry into these is very detailed, fairly detailed, and I must refer in part to our briefs. I'll outline our answers to the contentions.

The main answer is: we contend that Congress contemplated that these kinds of reviews would be heard by the federal courts. And, in fact, this is the tenth year of the statute. The lower federal courts, all four Courts of Appeals that have looked at this statute have said we have the power to review and that sovereign immunity doesn't bar that review.

QUESTION: Mr. Collins, in 25 1303 of the Act, Congress expressly conferred habeas jurisdiction on the federal courts. It did not expressly confer any other kind of jurisdiction. Don't you have to meet the argument that expressio unius exclusio -- whatever the Latin words are --

QUESTION: Altarius.

[Laughter.]

QUESTION: -- altarius?

MR. COLLINS: Yes, Your Honor. There are several responses to that. In the first place, there's no legislative history to suggest that Congress thought that was an exclusive remedy. In the second place, habeas corpus in the federal Code is always a statutory remedy at the present time; it has been for some years. And equitable remedies, especially exercised against government officers, have usually not been a statutory

remedy. That's the normal assumption.

Furthermore, the legislative history is a confusing point here, because we're relying on different parts of the legislative history and I think it's really essential to answer this question and some others, to make clear where the legislative history lies.

Counsel for defendants has principally relied upon hearings, upon testimony before hearings, including testimony of persons who opposed passage of the Act. We submit that that doesn't accurate reflect what Congress intended to do.

There is one and only one Committee Report on this bill -- on the bill that became this Act, or any of the bills leading up to it. A report of the Senate Judiciary Committee in 1967.

In that report, the Senators state, we -- they have a section on unconstitutional actions of Tribal Governments, discussing the subject. In that section they refer to five decisions of the lower federal courts denying a civil remedy, in a civil non-custody context, to Indians in disputes with their Tribes, and they are obviously expressing disapproval of those decisions.

One of those five arose in the context of Tribal membership. We submit that the report of the Senators themselves indicates that they contemplated that the federal courts would review membership cases and the other cases in

that report are -- there are two cases on freedom, free exercise of religion, and there's a case on tribal taxation of members, and there's a case on tribal taxation of non-Indians on the reservation.

In all of those the Senators were expressing disapproval of the lack of a remedy for those plaintiffs, and they were saying that this is why this Act was passed.

QUESTION: Is the free exercise of religion clause incorporated in the Indian Bill of Rights?

MR. COLLINS: Yes, it is, Your Honor. But there's no establishment -- anti-establishment clause.

How one differentiates between those is yet to come.

Now, returning to the sovereign immunity question, the terms of the Act are mandatory on their face. The Act is a limitation on the Tribes themselves. Congress, it's conceded, has plenary power to limit the Tribes in this way. Defendants have conceded that. That's not -- the power of Congress to do this isn't at issue; it's only a question of what Congress did do.

QUESTION: Well, then, if, as you say, it's a limitation on the Tribe, it's a limitation on the Tribal Courts, isn't it?

MR. COLLINS: Yes -- in fact, Your Honor, --

QUESTION: And it sets out substantive law, paramount substantive law that the Tribal Courts must follow.

MR. COLLINS: Well, in this case, the Tribal Court and the Tribal Legislature are one and the same. The lower courts have developed a rule, with which we have no quarrel, a salutary rule, saying that a plaintiff, to bring a case to the federal courts, must first exhaust all his internal remedies within the Tribe.

We have no quarrel with that rule. The district court found, without contradiction, that we had done that in this case. And, of course, that, I am sure, has resolved in the context of some other Tribes a number of disputes, the existence of that rule.

But this Tribe has no separate court, there's no separate review. All you need do is go back to the same officers with whom you have a quarrel. And, in addition, the Act --

QUESTION: And point out the provision of the Indian Civil Rights Act upon which you rely.

MR. COLLINS: Well, that was attempted for two years before this case was filed.

QUESTION: Well, that's -- in any court system you reach the end of the line somewhere. Even though you think you've been wronged. You come to this Court. That's the end of the line. If there were a reviewing court for this Court, it wouldn't be.

QUESTION: But you do agree that it's not like a court,

because all they can do is change the rule.

MR. COLLINS: Yes, Your Honor.

QUESTION: They can't say that the rule violates the Civil Rights Act.

MR. COLLINS: Yes, sir. I was just answering the inquiry, really, that was made during my brother's argument.

QUESTION: Right.

But you agree basically on the structure, the Council, the Governor, et cetera, that he has? Thatthe Governor has no more power than he just is there?

MR. COLLINS: Well, the written constitution of the Pueblo says that he has all the executive authority of the Pueblo, the authority to enforce all the laws, and we assume that included membership laws -- we still assume that. We take the written laws at their word; it's in the Appendix.

We would point out, in connection with this scope of the Act again, that the Act on its face limits -- and these are the words of the statute -- all governmental powers possessed by an Indian Tribe, executive, legislative and judicial, and all offices, bodies and tribunals by and through which they are executed, including courts.

So it's comprehensive, the Act on its face, in its terms, is comprehensive in defining what it limits.

One of the -- that relates to one of the arguments that's been made by my brother, which is that the equal protec-

tion clause of this Act should be interpreted to -- only to enforce existing Tribal rules even-handedly, I believe they call it.

In the first place, of course, the Act says that the legislative Councils of the Tribe are limited as well as the administrative. And this even-handed rule, of course, would only go to the administration of the law.

And in the second place, such a rule would make a mockery of the equal protection clause, because as soon as an uneven application arose, all that would be necessary to make it immune from any review would be for the legislature to codify that rule.

So that rule makes no sense to us.

And we submit that Congress could not possibly have intended such an undertaking. Particularly since Congress paid special attention, the Senator paid special attention to the equal protection clause in this law.

When the law was drafted by the Interior Department, there was an equal protection clause in it that guaranteed equal protection only to members of the Tribe, and the Senators didn't like that and they changed it, and guaranteed equal protection to all persons under Tribal jurisdiction. A point which had been noted by lower courts in some other cases.

So the Senators took a particular look at the question of equal protection, and they rejected a narrower clause.

In which regard I might add, a reply brief was just filed by petitioners, in which they quote some legislative history about equal protection, and they quote legislative history about that rejected clause applying only to members of the Tribe, and they don't disclose that; so I think the Court should note that that legislative history does not apply to the clause that was actually enacted by the Congress.

QUESTION: What standard do you think applies here if there is jurisdiction and you reach the merits, do you defend the opinion of the Court of Appeals?

MR. COLLINS: I suppose not in every last particular, Your Honor.

QUESTION: Well, what standard do you suggest?

MR. COLLINS: We have -- again I must refer to our briefs, because it's a detailed discussion of the subject. But what we say there is that a lot of the faulty analysis, I think, a lot of the fears that have been raised under equal protection analysis with regard to Indian Tribes, derive from a totally faulty source. They have taken the result in State cases and transferred it laterally to Indian Tribes. And we clearly say that that's not correct.

The equal protection clause must be applied in the context of whatever government or society it's being applied to. And for that reason we concede that the sensitive issue of membership is entitled to weight in analyzing an equal

protection situation.

QUESTION: You mean the Tribe's judgment?

MR. COLLINS: The Tribe's judgment and the Tribe's standards and the Tribe's traditions are entitled to weight.

But the problem with this particular rule is that it -- they claim it's a rule based in culture, and it actually has a counterproductive effect on culture.

Again I'm not trying to say that it's the function of the courts to determine every last cultural nuance of the Tribe, but I'm saying that --

QUESTION: So you think the Tenth Circuit's approach is generally acceptable, a balancing?

MR. COLLINS: Yes, Your Honor, a balancing approach of that kind -- well, I don't know if "balancing" is the correct word.

QUESTION: Well, whatever it was.

MR. COLLINS: Governmental justifications, in all the different formulas that are used with regard to the equal protection clause, in different verbal formulas, governmental interests are always accorded weight according to the circumstances.

QUESTION: You can't get it any more balled up than we have.

[Laughter.]

QUESTION: Yes, speak freely.

[Laughter.]

MR. COLLINS: I was trying to address different points of view.

But whatever verbal formula is used, the governmental interests are accorded weight. And since the Indian governmental interest in any context will be different, we think that that raises different analyses for application of the clause.

QUESTION: But membership is rather a fundamental question, isn't it?

MR. COLLINS: Membership is a fundamental -- in fact, Your Honor, you have to consider also the importance to the plaintiffs. The Interior Department issued a decision in 1969, a year after this Act was enacted, in which they termed Tribal membership for a person raised in the Pueblo, a child, like -- this was a different Tribe, not a Pueblo Tribe -- to be a fundamental interest. The Interior Department decision called it that.

And they ruled that a Tribal rule was invalid on that ground.

That raises a point that was made earlier about a Secretary of Interior review. The problem with the suggestion that that's a sufficient remedy is -- in the first place, by the way, I must correct the record. There's nothing on the record to indicate that the Secretary of the Interior ever

approved this rule. We tried mightily to find out at the time of trial if he had. There's no evidence either way, whether it was ever approved or disapproved.

QUESTION: For the purpose of applying the Indian Civil Rights Act, what is a Tribe? It says "No Indian Tribe will" --

MR. COLLINS: There's a statutory definition, Your Honor. It says "Indian Tribe means any Tribe, band or other group of Indians subject to the jurisdiction of the United States, and recognized as possessing powers of self-government." That's the statutory definition.

QUESTION: And so if a group of Indians -- say a group of Indians wants to be recognized as a Tribe, you have to decide what the Tribe is in the first place, and you have to -- and they just say, "Here is our Tribe; here are our members", and they list them. They list the various members.

MR. COLLINS: Well, in Nineteenth Century case law, Your Honor, there were a fair number of decisions in this Court that adjudicated that kind of a question, and what the Court basically said is that that's a political question for the Congress and the Executive Branch.

QUESTION: And for the Indian Tribe, yes.

MR. COLLINS: You mean to --

QUESTION: To define itself.

MR. COLLINS: I thought you were referring to tribal

recognition by the United States.

QUESTION: I am -- I'm just wondering, it seems to me that an Indian Tribe, if it wants to be recognized, it says, "We want to be a Tribe, and here are our members".

Now, can the -- you say -- can the courts -- if the Secretary accepts that, and people who are excluded from the list complain, can the court adjudicate that?

MR. COLLINS: I think they can adjudicate it. I think it presents very different substantive questions, and very, very different substantive questions from this case.

The thing about -- membership is a sensitive issue, and we concede that. But it's extremely an important issue for the plaintiffs in this case, having been raised in the culture. And for that very reason, it's of less importance to the Tribe in this case than would be the question of an outsider.

It's like the difference between a person born and raised in the United States applying for citizenship versus a person born and raised in France. That difference, we think, goes to the fundamental irrationality of the statute.

QUESTION: So you're saying, as applied to this particular plaintiff, the Ordinance is invalid?

MR. COLLINS: That's right, Your Honor.

QUESTION: Of course, we have ten, twelve odd amicus briefs from other Tribes here, saying that it is of tremendous

importance to the Tribe, the particular question here.

MR. COLLINS: Well, I realize that, Your Honor. But I think what they're saying is they don't want any of their membership rules examined ever, which I can understand their position, but I don't think they're examining the particular facts of this case very exactly when they say that. To expel someone as culturally identified with the Tribe as the Martinez children are cannot possibly have the importance to the culture of the Tribe as they ascribe it. It just can't.

QUESTION: Yes, but how can either you or I know that with confidence?

MR. COLLINS: Your Honor, again that goes -- that leads to -- that leads down the slope to the notion that nothing is reviewable so long as there's some cultural input into it. Unfortunately, the Congress, in passing the Act, has said -- I withdraw my "unfortunately". Congress, in passing the Act, has said that tribal laws are subject to review.

All of those tribal laws are passed in a social and cultural milieu that's somewhat different from a State. And occasionally issues are bound to arise where, as a defense to some Act, a Tribe says, well, we're allowed to do that for cultural reasons.

We again are only trying to meet that defense. We're not suggesting that this Court or any court should determine tribal tradition or culture. But I --

QUESTION: I thought you were saying that cultural reasons are really not very good ones, even if cultural reasons were relevant.

MR. COLLINS: Well, I am saying that -- I'm saying that, though, only with regard to a rather clear and dramatic and undisputed fact in this case, which is the notion of insiders versus outsiders. The notion that these people are raised in the society, admitted to the religion; and in the literature, if you were admitted to this Pueblo a hundred years ago, that was tantamount to membership. Things have changed.

The Bureau of Indian Affairs came along and said to this Tribe, you've got to have a written Tribal Roll. That's something new. That came along in the Thirties. And then they came along and they said, "We've taken some land away from you and we're going to pay you some money." And that gave rise to per capita payment.

And if you look at the legislative history in the Pueblo's own record, in the testimony and the record in this case, it's clear that what the Council had in mind when they passed this rule was keeping those per capita payments up; nothing more, nothing less.

QUESTION: Mr. Collins, have you answered Mr. Justice Stewart?

MR. COLLINS: I doubt entirely, Your Honor.

To continue on that point, Mr. Justice, on the point of jurisdiction, rather, there is a long tradition in the federal courts of enforcing the Constitution against future violations by equitable relief against governments, deriving from the principle of Ex Parte Young. And we suggest that --

QUESTION: Well, that's -- that doesn't go to federal jurisdiction, that goes to immunity.

MR. COLLINS: Yes, sir.

QUESTION: The very first question is whether or not the federal courts have jurisdiction. Now, federal courts are courts of limited jurisdiction. Generally jurisdiction is expressly and explicitly conferred by Congress, within the mates and bounds of the Constitution.

There certainly was no explicit conferral of jurisdiction in this case. You would agree with that. The only explicit conferral of jurisdiction upon the federal courts was with respect to habeas corpus proceedings.

So the question is: Is there jurisdiction implicitly conferred? Isn't that it?

MR. COLLINS: Yes, Your Honor, and we think the --

QUESTION: I know that most every federal court that has passed on it to date has held, yes, there is.

MR. COLLINS: We think the reasoning of those courts is correct, and that, you know, the two statutes that have been

relied upon are 1331, on the ground that these actions arise under the laws of the United States, and 1343, the Civil Rights jurisdiction, by analogy to the decisions of this Court in such cases as Allen v. Board of Elections -- that's a particularly relevant case, the Allen v. Board of Elections case, because the Court implied a private civil remedy in that case in spite of the fact that the statute involved in that case the Voting Rights Act of 1965 contained a narrower civil remedy, not criminal, not habeas corpus or something else, within the statute.

And in other actions, under 42 U.S.C. 1981, 42 U.S.C. 1982 and other circumstances, the Court has implied a private civil remedy to enforce the Constitution or enforce Civil Rights type laws. And --

QUESTION: Is that a -- a private civil remedy, but then you look somewhere for jurisdiction?

MR. COLLINS: No -- well, if the remedy is in the -- is implied, is in the intent of the statute, Mr. Justice, then 1343 does give you a remedy. That, it seems to me, is undisputed.

The only question is where the remedy comes from; if there is a remedy and we say there is, then we say 1343 gives the Court subject matter jurisdiction.

Now, again I would refer to -- Mr. Justice Stewart, I'd refer to the legislative history of the statute, with the

Senators saying "We disapprove of these cases where the federal courts have dismissed actions by individual Indians trying to rectify a membership case, tax case, free exercise case."

The Senators, in their written word, have indicated their intent that there be a remedy. They are disapproving expressly of cases where remedy was denied.

QUESTION: Well, presumably, if, as you say, the tribal governments in all their branches, including their judicial branch -- and I realize that sometimes in some Tribes the judicial and the executive are one -- but if they are all governed by this substantive federal law, then that's where the remedy arguably could be. There and only there.

MR. COLLINS: Well, Your Honor, it's like any other Civil Rights statute. There certainly --

QUESTION: Well, it doesn't necessarily follow that just because Congress thought that these substantive rights should be accorded --

MR. COLLINS: Yes, sir.

QUESTION: -- individual Indians, that necessarily that they be -- that they be invoked in federal district courts. Why couldn't they be invoked in the courts of the Indian Tribes?

MR. COLLINS: Well, the federal courts have said that they must be first invoked in the courts of the Tribe.

But --

QUESTION: Well, exclusively, why is it an inter-lectable inference that the federal courts have jurisdiction?

MR. COLLINS: Because it's fundamental civil rights that are at issue, Your Honor, and the court has a consistent -- in the Bivens case, the Court found a remedy under the Constitution itself. And it's clear from the legislative history --

QUESTION: Under 1331, the jurisdiction of the federal courts.

MR. COLLINS: -- the Senators said -- well, we've relied on 1331, Your Honor. And the Senators over and over said, "We are applying certain constitutional provisions to these Indian Tribes. That's what we're doing, is applying the Constitution in the context of disputes by any person against an Indian Tribe."

And it seems to me the analogy is quite precise, that if the action arises under the Constitution, it's the same kind of reasoning as in Bivens and Bell v. Hood, --

QUESTION: Well, are you saying that the Indian Civil Rights Act is equivalent to the Constitution?

MR. COLLINS: No, Your Honor, because Congress only applied certain portions of the Constitution to the Indian Tribes, and they altered other portions. But we do say that those portions they applied are equivalent, yes; I think the

legislative record is rather clear on that.

QUESTION: So that you don't have to decide whether you're bringing action under -- whether this is a statutory action or a constitutional action?

MR. COLLINS: I think -- well, it's a statutory action, Your Honor, because it's contained in the statute. But it seems to us that the reasoning by analogy to cases like Bivens is apt, because Congress intended, by the statute, to apply the Constitution itself. In the respects in which it did so. It omitted republican form of government; it omitted all kinds of parts of the Constitution. Quite intentionally and for good reason.

But where it did apply the Constitution, we suggest that the analogy to other Civil Rights cases is apt in this regard.

And we would also cite to the Court the Court's own reasoning in Cort v. Ashe, I don't have time to go down the four steps in that reasoning; but we --

QUESTION: The fourth step in Cort v. Ashe frankly is the one that seems to me raises the most difficult problem of whether the cause of action is one traditionally relegated to State law. Now, here, of course, it would be traditionally relegated to Indian law.

Why doesn't that defeat you?

MR. COLLINS: Well, Your Honor, because again we're

talking about equal protection of the law, which is certainly a provision of the Constitution that has generally been enforced in the federal courts and not elsewhere, not in the State courts in the analogous situation.

And, secondly, because the whole history of this Act is replete with the notion that Congress was dissatisfied in certain respects with the treatment of tribal members by the Indian Tribes. And what they're saying --

QUESTION: But surely it is correct, is it not, that tribal membership matters are probably a classic example of the kind of thing that is traditionally relegated to the Indians to decide for themselves?

MR. COLLINS: Well, Your Honor, so is every other constitutional question, because the Constitution has never been applied to the Tribes before at all. We acknowledge the sensitivity of membership, and we think that's entitled to some weight, but that doesn't -- they're trying to say that any membership rule, no matter how arbitrary, no matter how trivial, no matter how ill-conceived, is entitled to any review under this statute, under the First Amendment as applied, under the equal protection clause as applied, and to due process as applied. And Congress, in the legislative history, indicated an express disapproval of a Tenth Circuit decision denying a remedy to an Indian in just such a dispute.

QUESTION: But they did not include in the statute

itself a counterpart to Section 1983?

That's the problem.

QUESTION: What would happen if a male member of a Tribe, one of these matriarchal tribes, brings an action?

MR. COLLINS: Well, Your Honor, we would -- if you're talking about some other Tribe, I think there are other traditions and I think that each membership rule arises in the context of that Tribe. And each membership rule arises in the context of its own history.

We say it's clear in this record that the sole purpose of this rule was to keep up those per capita payments, it had no purpose to retain any -- the rule -- before 1938 --

QUESTION: And the answer to my question is?

MR. COLLINS: That it would be a different case.

QUESTION: Thank you. That's the best you can do.

QUESTION: Mr. Collins, may I ask one other very brief question? You referred to the exhaustion of tribal remedies. There's no question about that here.

Does the record tell us just what efforts your client did make to receive some kind of remedy from the Tribe or from the Secretary of Interior, something like that?

MR. COLLINS: The transcript was, Your Honor -- the matter, by the time it got to submission to the district court the matter was essentially not very much contested, and so the district court didn't write very much about it. Essentially

there was a long history of -- expanding some 18 years of attempted by Mrs. Martinez to get her children enrolled.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Prelo, you have some time left --

MR. PRELO: I have nothing further at this time.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:34 o'clock, p.m., the case in the above-entitled matter was submitted.]

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