Hearing
Before the
United States
Commission on Civil Rights

Enforcement of the Indian Civil Rights Act

Hearing Held in

PHOENIX, ARIZONA

September 29, 1988

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

•Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;

•Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;

•Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;

•Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;

•Submit reports, findings, and recommendations to the President and Congress.

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CONTENTS

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The U.S. Commission on Civil Rights reconvened its hearing on the enforcement of the Indian Civil Rights Act, in Phoenix, Arizona, on September 29, 1988, at the Courtyard by Marriott Hotel, at 9631 North Black Canyon. These proceedings were continued from their commencement in Flagstaff, Arizona, on July 20, 1988, which were recessed so that the subcommittee could receive testimony pursuant to subpoenas issued by the subcommittee and interrogatories provided therewith.

PROCEEDINGS

CHAIRMAN ALLEN. We will reconvene the hearing of the subcommittee of the United States Commission on Civil Rights inquiring into the enforcement of the Indian Civil Rights Act.

Let me inquire at the outset if there is anyone present who is hearing impaired or otherwise requiring need of translation? If there is anyone who is hearing impaired, I would like you to raise your hand so that the interpreter might know that you are present. And without her hearing such a signal, I will ask her to conserve her energy. I thank you.

Good afternoon. This hearing is reconvened from its recess on July 20, 1988. I have an opening statement to make, and will then turn to my colleague, Commissioner Robert Destro, who may also wish to make a statement.

I am William B. Allen, Chairman of the United States Commission on Civil Rights and of the Commission subcommittee before you today.

With me are Commissioner Robert Destro, our Acting Staff Director Melvin L. Jenkins, our General Counsel William J. Howard, and our Deputy General Counsel Brian Miller. Also present for your information is our Director of the Office of Press Relations John Eastman.

The purpose of this hearing, like four other subcommittee hearings which preceded it, is to examine enforcement of Title II of the Civil Rights Act of 1968. That title contains the Indian Civil Rights Act, the intent of which is to protect the basic rights of the American Indian vis-a-vis his tribal government and in the United States in general.

The particular focus of the subcommittee investigation is the period since the United States Supreme Court's 1978 decision in *Santa Clara Pueblo* v. *Martinez*. The Court there held that, but for writs of habeas corpus, the Indian Civil Rights Act was enforced only in tribal forums and was no longer enforceable, as was the case prior to *Martinez*, in the Federal courts.

It is important to note that the Court in *Santa Clara Pueblo* v. *Martinez* predicated its holding upon the finding, and I quote, that "tribal forums are available to vindicate rights created by the ICRA." If not, the Court said, Congress has authority to provide other recourse.

It is significant also that the Supreme Court thought that aggrieved Indians could press their ICRA claims with the Secretary of the Interior in those situations where tribal constitutions require secretarial approval of any changes. The Secretary of the Interior could simply withhold approval of those changes pending resolution of the alleged ICRA enforcement problem. This subcommittee has found, however, that what the Supreme Court in *Martinez* thought was the case simply is not the case: the Department of Interior is doing nothing to enforce the ICRA, nor even to monitor its enforcement.

Have we found problems with regard to the civil rights of American Indians and with their governments? Certainly, we have heard much about such problems. Some of these problems appear to be systemic, such as tribal council members' interference with tribal judges' decisionmaking; sovereign immunity claims to block ICRA enforcement, thereby rending the ICRA unenforceable; and, thirdly, inadequate training and funding for tribal courts.

Other problems we have found concerned not systemic problems but particular problems or, in other words, violations of the various provisions of the ICRA. Examples include verbal search warrants, *ex parte* hearings, incarceration without being apprised of the charges, inadequate representation by counsel, and the dismissal of a tribal prosecutor on eight occasions by the tribal council over politically based disagreements with her prosecution of the law.

Turning to the issues before the subcommittee this afternoon, I want to begin by introducing the Honorable Chief Justice Tom Tso, the Honorable Judge Robert Yazzie, and the Honorable Judge Wayne Cadman. My warmest greetings.

I want to be very clear about why we want to hear your testimony. Although you are subpoenaed to be here today, that should in no way be interpreted as an affront to the Navajo court system. The very contrary is true; I sought your appearance out of esteem for the Navajo court system, based on the subcommittee's concern that the independence of the Navajo courts was under attack from certain elements of the Navajo council. We have reliable allegations to that effect, completely substantiating these concerns.

This is not the first time we have sought your testimony. Chief Justice Tso was invited to address the subcommittee in August 1987 in Flagstaff, but a tribal council resolution forbidding Navajo officials' cooperation with the subcommittee prevented his appearance. We also sought your testimony on July 20, 1988, but the Navajo Nation Department of Justice sent a representative instead, despite our having provided you with a subpoena to appear.

But you are here today and I'm delighted.

No doubt the Navajo Nation would like to see an end to the Commission's inquiry into the enforcement of the ICRA as much as we would like to bring it to an end.

Permit me to say, also, that we have received, from time to time, certain inquiries or information from you, which, whatever else may be said, have been directed to your specific concerns and have been responded to by us.

The Commission's investigation of the enforcement of the Indian Civil Rights Act has not been without criticism. It is clear, however, that those criticisms have come from certain tribal governments, and by no means all tribal governments. They have not come from American Indians not representing tribal governments. This is indeed significant because it is the American Indian not speaking on behalf of his or her government that should have more to say about the subcommittee's investigation. We must remember that the ICRA protects not the rights of tribal governments but the rights of their members. We must also recall that these members are United States citizens who are otherwise unprotected from abuses of tribal government.

Chief Justice Tso, Judge Yazzie, and Judge Cadman, we are here because we are concerned about this independence of your courts, without which you cannot effectively enforce the guarantees of the Indian Civil Rights Act. My position as to the importance of judicial independence is a matter of public record, and you will best find statements to that effect in the subcommittee's hearing transcripts. The Navajo Tribal Code provides that the judicial branch operates

independently of the other parts of the tribal government. We are here today to confirm this and would be delighted to do so.

A word about the American Bar Association Code of Judicial Conduct, which the judicial branch has adopted, and then I will wrap this up.

It seems to me that the strongest arguments for you coming here today are found in the ABA Code. Consider the following provisions of that code, which no doubt, you are intimately familiar with:

Canon 1: A Judge should uphold the integrity and independence of the judiciary. An independent and honorable judiciary is indispensable to justice in our society. A Judge should participate in establishing, maintaining, and enforcing, and should himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this code should be construed and applied to further that objective.

Canon 2, in relevant part states: A Judge should not convey or permit others to convey the impression that they are in a special position to influence him.'

Canon 3 in relevant part prohibits a judge from publicly commenting about a pending or impending proceeding in any court.

Canon 4 in relevant part permits a judge to appear "at a public hearing . . . on matters concerning the law, the legal system, and the administration of justice." The ABA commentary on this language, in fact, encourages the judge to do this, "to contribute to the improvement of the law, the legal system, and the administration of justice."

These code provisions, again, I emphasize, not only justify your appearing here today, but they almost compel you to be here.

I have to tell you, therefore, my concern in learning that efforts were made to remove you from the decision whether you were going to appear here today. The *Arizona Republic* reported yesterday that the three of you may be putting your jobs on the line in coming here today, and that the tribal government was going to decide whether you would testify today.

You're here today because our subpoenas compelled you to be here, and because the judicial code of ethics strongly encourages you to speak to the kind of questions we have raised. It is to your great credit that you have come. I commend each of you for having done so, despite the risk that you have apparently undertaken.

Let me say that any retaliation against you for your appearance and testimony is specifically prohibited by 18 U.S.C. section 1505. The penalties thereunder are stiff, and the Commission will see to it that violations will be fully investigated by the United States attorney. We will stand with you.

Finally, at the conclusion of your testimony, there will be an open session. The purpose of that session is to receive 5-minute statements of relevance to our inquiry from members of the public.

Anyone wishing to make such statements should give their names to our clerk, Ms. Joan Connell. You will find her seated here to my right.

At this point, I will turn to Commissioner Destro and ask him if he wishes to make a statement:

COMMISSIONER DESTRO. A very brief one, so that we can get started.

I, too, would like to welcome you and thank you for coming. It is a great honor for me to be in the presence of the chief justice of the Navajo Nation and sitting judges. And it is with some great trepidation that the Commission even decided in the first place to subpoena you.

And so, I echo Chairman Allen's comments with respect to the way in which you will take these subpoenas, because we do have a concern not only for the rights of the Navajo people under the Indian Civil Rights Act, but also for your position as judges and your responsibilities under the ABA Code of Judicial Ethics.

My only comment to you is that as you answer the questions, please for our benefit and hopefully for the benefit of the record, emphasize what, in your views, should be our recommendations for protecting both the civil rights of the Navajo people and the independence and integrity and the future development of tribal judiciaries, not only in the Navajo Nation, but in your experience around the country.

And with that, I'll turn back to the Chairman.

Thank you again for coming.

CHAIRMAN ALLEN. Thank you, Commissioner Destro.

At this point, I would like to call forward the Honorable Chief Justice Tso and Judges Yazzie and Cadman to take their place as indicated here before us at the table, and their counsel.

While they are coming forward, is Mr. Eric Dahlstrom in the room?

MR. DAHLSTROM. Yes.

CHAIRMAN ALLEN. Would you approach please. While we are preparing to swear in the judges, we'll ask Mr. Eric Dahlstrom to make a brief statement to the hearing.

STATEMENT OF ERIC DAHLSTROM, DEPUTY ATTORNEY GENERAL, NAVAJO NATION

MR. DAHLSTROM. Thank you, Commissioner Allen.

My name is Eric Dahlstrom. I am the deputy attorney general for the Navajo Nation.

I have with me today Chief Justice Tom Tso and Judge Cadman and Judge Robert Yazzie.

Also present on behalf of Judge Cadman is his attorney, Larry Ruzow.

We will proceed today, Commissioners. I will make a brief opening statement, and then you can begin with your questioning.

Mr. Ruzow would like permission to reserve the opportunity to make comments prior to your inquiry of Judge Cadman, on whose behalf he is present.

CHAIRMAN ALLEN. We'll handle that when we get to the requests for the parties involved.

MR. DAHLSTROM. Commissioner, we are here today to—the judges are here today in response to subpoenas from the Commission.

For the record, I ask that it be clear that by appearing here today the judges do not concede their legal positions, which is that the Civil Rights Commission does not, by its statutes, have jurisdiction to compel testimony concerning inquiries involved with the Indian Civil Rights Act.

You are aware of our legal position concerning that, and I want to make clear that our presence here does not in any way concede our position.

Rather, the judges have decided to appear as a matter of judgment and put aside the legal battle that might involve a contest over that. Frankly, they have determined that it's in their interest to simply come and testify the best they can, and not expend the resources necessary to wage that battle.

It's further our position that, given the request of the General Accounting Office by the United States Congress to inquire as to your jurisdiction, it would have been more appropriate to wait until those issues have been resolved. But, be that as it may, you have decided to issue your second round of subpoenas, and the judges are here on those terms.

You should understand, of course, that also by being here, the judges do not concede their right to object to questions as they may be made concerning their ethical obligations.

And you are quite aware that the judges will not offer to you advisory opinions concerning legal matters that may occur to you as interesting, and may occur to you as things that you would like to have them express their opinion on.

But their view is under the obligations to the court and to the canons, they will not express a legal opinion concerning a matter that may come before the court in the future or which is currently pending in the court.

Further, they will withhold information which they believe is protected by judicial immunity concerning their thought processes and the judicial proceedings that may have occurred in the past.

With those ground rules, they are willing to proceed and to respond to your questions.

CHAIRMAN ALLEN. I thank you for your statement, Mr. Dahlstrom. Before your withdrawal, I would like to pose a question. Are you present as counsel to the judges before us?

MR. DAHLSTROM. I am.

CHAIRMAN ALLEN. Very well, I thank you. If you are serving as counsel, you may remain at the table.

MR. DAHLSTROM. Yes I am.

CHAIRMAN ALLEN. Thank you very much.

MR. DAHLSTROM. And I understand that Chief Justice Tso will be allowed to make a brief statement on his behalf before you proceed with the questions.

CHAIRMAN ALLEN. If you will permit us to take care of the proceedings, I assure you that we will show every indulgence.

MR. DAHLSTROM. It is also understood from the interrogatories accompanying your subpoenas that the Commissioners had agreed to ask the questions that were propounded to the judges and the chief justice in writing in advance.

CHAIRMAN ALLEN. If you will permit me, I will take care of explaining the procedure we are following as we come to it. You are well informed as to the foundation of that procedure. You will also be specifically informed in a moment. But rather than rehearse it twice, I would ask you to permit me to go through that as we come to that point.

As you are serving as counsel, you may remain at the table.

And I appreciate your opening statement.

I wish further to make a comment about the question of the Commission's approach in these specific hearings concerning questions, namely, that the observations which you have made at the outset reflect almost explicitly the assurances that we have given on more than one occasion to the assembled chief justice and judges in direct communication, and we appreciate your repeating them at this time.

Now, I would ask, if I may, Chief Justice Tso, Judge Yazzie, and Judge Cadman to stand and be sworn in.

[Tom Tso, Wayne Cadman, Sr., and Robert Yazzie were sworn.]

CHAIRMAN ALLEN. Thank you very much, gentlemen. Please be seated.

One more question. Would counsel identify themselves individually and whom they represent.

MR. DAHLSTROM. Mr. Eric Dahlstrom, on behalf of Chief Justice Tom Tso and Judge Robert Yazzie.

MR. RUZOW. Good afternoon, Mr. Chairman and members of the Commission, I'm Larry Ruzow, of Ruzow & Sloan, and I'm here on behalf of Judge Wayne Cadman, Sr.

MR. UPSHAW. Michael Upshaw, attorney general for the Navajo Nation.

CHAIRMAN ALLEN. Thank you. Are you not counsel to anyone specifically?

MR. UPSHAW. I'm here as counsel and representative.

CHAIRMAN ALLEN. So you are part of the team?

MR. UPSHAW. Yes.

CHAIRMAN ALLEN. Thank you.

Chief Justice Tom Tso, welcome, we are delighted to have you with us. We will begin the questions that we have to ask because we have already communicated that to you in a series of interrogatories. I understand that you wish to make a statement at the outset.

Before I begin that, permit me to ask you your full name, and then you can go on with your opening statement.

TESTIMONY OF TOM TSO, CHIEF JUSTICE, NAVAJO NATION

CHIEF JUSTICE TSO. Thank you, Mr. Chairman, members of the Commission, Judge Wayne Cadman, Judge Robert Yazzie. My name is Tom Tso, and I am the chief justice of the Navajo Nation.

Yes, I'd like to make a statement at the onset of my presentation. And I might be making some statements, rather repeating some of the statements made by my counsel, but I find it necessary to repeat them, so I request your indulgence when I do that.

It is the position of the Navajo Nation that the Civil Rights Commission lacks authority to conduct an investigation of the manner in which the Indian Civil Rights Act has been implemented within the Navajo Nation.

The Navajo Nation has previously made its position and the grounds for that position clear to the Commission, and I will not restate that position and argument; I would like to simply agree with the Navajo Nation.

It is my position that it is both highly unusual and highly improper for an agency within the executive branch of the Federal Government, or any government within the United States for that matter, to subpoena a sitting judge or chief justice to appear before it.

From time to time, we justices are invited to give testimony on pending legislation or proposed rule changes. But to subpoena us, to require our presence, is quite something else.

From a political standpoint, putting the legal questions concerning the authority of this Commission aside for the moment, a setting such as this is not one designed to promote mutual respect and understanding.

If the Commission wants to learn more about our ways, then we should be talking in private, and perhaps we should invite you to our land to see us in our institution, in the setting in which we actually function.

You have asked, and I assume would ask, hard and complex questions. These are matters that require thoughts and deliberation. They are unsuited to editing to an 18-second clip for the evening news, or a 25-word clip in the newspaper.

The questions can only be answered in a meaningful way if the person asking the questions and the person answering the questions have a common understanding in the law.

Before we let a witness offer an opinion, we require that a foundation be laid. You ask us questions, but we do not know what you bring to the questions either by way of background or, quite frankly, motive.

We recall that Winston Churchill once said that England and America are two countries divided by a common language. We wonder if this is also the case here.

We also wonder if you really care about the answers or if you are really doing this for some other reasons.

We know that there is legislation proposed by Senator Hatch to provide for a Federal review of the decisions of the American Indian courts. Has this Commission undertaken this investigation in order to help Indian nations or simply find justification for Senator Hatch's or other persons' proposals?

You tell us, the Navajo people and the American people, that you are a factfinding body, but I wonder if you could honestly take the oath that our legal system and the American legal system requires factfinders, juries to take, to render a true verdict based upon the law and evidence.

Our reluctance to cooperate with this Commission is caused, at least in part, by our experience as a people. We have been studied and studied for over 100 years, and almost none of those studies has brought any benefit to our people. Many outsiders grow wealthy from these studies, but our people do not benefit.

This is not to suggest that we have anything to hide. We are proud of the Navajo legal system that we have built, and we are proud of the Navajo legal system as we continue to build. We are happy to explain to our people and to those agencies which provide funding for this system that we are doing well. But we could do better in what problems we have. I do not suggest that the Navajo legal system is perfect. It has changed and will continue to change and improve.

I have a great deal of confidence in our justices and judges, including those who are here today. And I have confidence as well in our elective Navajo leaders. I'm well aware that the legal system of the United States did not emerge full grown and mature. Our country had to struggle with the Revolutionary War and the Civil War and many battles to get to where we are here. John F. Kennedy and his brother Robert Kennedy and the Reverend Martin Luther King were taken from us as part of the struggle. The American legal system is the product of the struggle and controversies. It would be unrealistic for you to expect our far younger legal system to gain maturity without a similar struggle. What we ask of you and the Congress is help from our terms, and more importantly, patience

and tolerance. As I have stated, despite our objections to this hearing, we are here today to answer your questions. We will respond honestly and truthfully to your questions, though you should keep in mind that we may not know the answers to all of them, and matters of privilege may mean that we cannot answer other questions even though we know the answers.

And I appreciate the Commission's concern and appreciation for the Judicial Canons of Ethics—canons one, two, three, and four—which the Chairman has repeated here just a few minutes ago.

I would not argue with the meanings of those canons. However, you must keep in mind that the Commissioners sitting before me are not experts in interpreting meanings of the Judicial Canons of Ethics. You have held yourself out as the investigating body looking into the implementation of the 1968 Indian Civil Rights Act.

I also want the committee to understand that the Navajo judges are here not necessarily in response to the subpoenas, but we are here in part voluntarily.

The Commissioners' activities, including issuing repeated subpoenas and other press releases desiring to communicate and speak with the Navajo judges as part of their investigative rule, has created some confusion in the minds of the Navajo people. They now think there is something wrong with the Navajo judges, that the Navajo judges are hiding something. The judges and the Commission know that the Commissioners are attempting to determine the degree that the Navajo judiciary is free from influence by the Navajo Tribal Council and the executive branch. The people do not understand this because they live under situations where Federal investigations mean the people being investigated have done something wrong.

I feel that I have a compelling duty to the Navajo people to clear some of the confusion created by the activities of this Commission. That's the reason why we are here.

Again, I'd like to reiterate that our presence should not be construed as the recognition of the legal authority of the Commission to investigate tribal courts. Again, we are here because we want to set the record straight in the minds of the Navajo people we have to service.

One of the things that I would like to relate to the Commission is that on September 16, 1987, two attorneys with the United States Civil Rights Commission met with the chief justice and the two associate justices on the Navajo Nation and an attorney with the Navajo Nation Department of Justice. That session was taped and recorded. A transcript of that session was provided and will be given to the Commission at a later time.

The justices and I met with the Commission's staff attorneys for approximately 3 hours. We provided information to their questions to the degree possible within the bounds of ethical and legal

considerations. Most of the questions in the interrogatories appear to be on the same subject area.

At that session, on September 16, 1987, the Commission staff attorneys were advised how to obtain opinions of the Navajo Supreme Court. Some of them are published in the *Navajo Reporter*, which is available to the public.

The *Navajo Reporter*, volumes 1 to 4, contains opinions for the years 1969 through 1983. Volume 5, which will contain opinions for the years 1984 through 1987, is being printed and bound by the Navajo Community Press in Arizona.

In the meantime, opinions for the years 1984 through 1987 are available from the Navajo Nation Bar Association. The Commission was provided with copies of the unbound opinions from 1984 through September 16, 1987. The Commission was also provided with other material such as the rules of court, rules of evidence, other articles, and speeches by me, which contained information from the courts and other miscellaneous material.

Provisions of this information and materials were consistent with the letter I wrote to the then-Chairman, Clarence Pendleton, on February 2, 1987.

Further, the Commission's staff attorneys were informed on September 16, 1987, that if additional materials along the lines of those provided were needed, to let me know, and I would make them available to you.

That is the extent of my opening statement, Mr. Chairman.

CHAIRMAN ALLEN. I thank you.

Mr. Chief Justice, I wish to acknowledge at the outset that you are here voluntarily, and I must say much to our pleasure.

I was charmed by your citation of Mr. Churchill about the divided state of the English-speaking people, which as you know, proceeds from his work, *The History of the English-Speaking People*, as part of his expression of his ambition to make a greater union of the English-speaking peoples on both sides of the Atlantic. It is to be hoped that those who have ambitions likened to Winston Churchill's ambitions won't have to be martyred for such notable ambition.

I would like to turn to Commissioner Destro to begin questioning.

COMMISSIONER DESTRO. Mr. Chief Justice, if you will, we'll just go through the questions that were propounded to you. Since several of them have one or two questions within the question, I'll just ask them exactly as they appear, one at a time. Let me start with question number 2 of the interrogatories dated September 13, 1988, and addressed to you as chief justice of the Navajo Nation.

Question 2 states:

On or about May 27, 1988, did any person not in the employ of the Navajo judicial branch, including a member of the advisory committee, speak with you about a judge, or about the termination of employment of a judge?

CHIEF JUSTICE TSO. The question does not bring anything to my mind. I suppose if the Commission was more specific, I might have been able to answer more specifically.

However, I do remember that a member of the Navajo Tribal Council—I don't recall his name, at this time, I believe he was a member of the Navajo Tribal Judiciary Committee—and I don't know precisely the date, but he called me wanting to verify a rumor that Judge Yazzie—Robert Yazzie was terminated from his judgeship by someone working in the office of the Chairman, and I remember—I informed that person that I was aware of the rumor—I was aware of the rumor and if there was any truth to the rumor, that I would be getting some documents on it probably later on.

I never received any documents on that rumor, and Judge Yazzie is still today a sitting judge at Window Rock, sitting as a judge in that court.

COMMISSIONER DESTRO. You went ahead and answered, I believe, the second question in that series, which was who spoke with you. And summarize the content of that discussion.

To your recollection, there was no action requested on your part?

CHIEF JUSTICE TSO. No sir. It was simply a rumor, and I was waiting for some documents on it if there was any truth to that rumor.

COMMISSIONER DESTRO. Then I will go into question 2(b). I'm asking these for the record, so please bear with me.

Do you possess any documents transmitted by any person not a party or an employee of the judicial branch concerning the termination of the employment of a judge?

CHIEF JUSTICE TSO. No.

COMMISSIONER DESTRO. Question 3:

During your tenure as a tribal judge, has any person, including members of the tribal council or administration or the BIA, attempted to influence the conduct of your official duties in any manner, through, but not limited to, *ex parte* contacts, use of personnel actions, use of the judiciary budget, or the use of other resources of the judiciary? If so, would you please provide the details.

CHIEF JUSTICE TSO. I discussed the general area of this question with your staff attorney on September 16, 1987. And you will find those discussions on page 17 through 32 in the transcript.

Like any other Federal or State courts, contact with judges by parties and nonparties to pending cases exists.

During my tenure as a district court judge, March 1981 through 1985, June 1985, members of the Navajo Tribal Council and other community leaders contacted me either requesting temporary releases of certain individuals being detained, or even to request reduction of pending sentencing.

Now, this situation is not outrageous, and can be comprehended, and those contacts are not deliberate.

Traditionally, each community has leaders which serve communities in many capacities, either for the entire group of the communities or individuals of the community.

Sometimes this meant that community leaders would advocate for someone in the courts, and this was especially true before the formal establishment of the Navajo Nation Bar Association. In fact, in the old law, there was statutory provisions that litigants could be represented by another member of the tribe. A lot of the people used their tribal councilmen to perform that function.

The court rules not only require practitioners to be members of the Navajo Nation Bar Association, but a lot of the Navajo people and a lot of the councilmen still believe that the old practice is still in effect, and they want to apply it. So these contacts are not deliberate. However, the Navajo courts, the judges and others working with the judicial branch are gradually educating the Navajo tribal councilmen and other community leaders that there are procedures for dealing with matters before the courts.

CHAIRMAN ALLEN. Chief Justice Tso, you are referring again to the transcript of the discussion with staff of the Commission on Civil Rights which took place on September 16, 1987? I do not have that available. I would not only like to have it, but I would also like to enter it in the record of this hearing. I would like to ask if you have it available with you today.

MR. DAHLSTROM. Mr. Commissioner, with your permission, if the record could be left open, we could supply it to you quickly after the hearing.

CHAIRMAN ALLEN. I appreciate that, Mr. Dahlstrom. I would then add that at this precise point in the transcript, I will ask, if there is no objection, to insert that testimony from pages 17 through 32, I believe you referenced, in response to the question that you were asked here.

MR. DAHLSTROM. Thank you.

CHIEF JUSTICE TSO. Thank you, sir. I'm not aware of any appeal to the supreme court where a party argued that a certain court decision was a product of improper influence. I believe that attempts out of ignorance or otherwise to contact a judge exist not only in the Navajo courts; I believe it exists in the Federal and State courts as well.

But I believe that the end results in the case determined whether the attempt has any effect on the decision at all.

The Navajo judges, according to my knowledge, rule according to the creditable evidence produced at trial, as well as the applicable laws.

CHAIRMAN ALLEN. Thank you.

COMMISSIONER DESTRO. Question 4:

Has the Navajo judiciary ruled on the applicability of the Indian Civil Rights Act to the Navajo tribal government?

CHIEF JUSTICE TSO. The Navajo judiciary to me means not only the supreme court, but the district courts and the children's courts.

The Indian Civil Rights Act was passed in 1968. We are now in 1988, so we are talking about 20 years. In order for me to give you an answer to that, that would mean that I would have to go back to all the courts, and look at all their cases, and then determine if the Navajo judiciary, the district court, and the children's court have issued any rulings on it. That would also require me to look at the opinions of the supreme court, which you have. And it would require me to form an interpretation and an advisory opinion on my part on the holdings of each particular case. I'm prohibited from doing that based on my ethics, and I don't want to do that, sir.

COMMISSIONER DESTRO. Thank you.

Number 5:

Has the Navajo judiciary ruled on the validity of the defense of sovereign immunity to a claim for equitable relief under the Indian Civil Rights Act?

CHIEF JUSTICE TSO. The Navajo judiciary, again, to me means the supreme court, the district court, and the children's court.

The Indian Civil Rights Act, again, having been passed in 1968, would require me to go through each of the courts, look at each of the cases, which is between 200,000 and 400,000 cases, in order for me to answer that question.

And again, it would require me to form an opinion, an advisory opinion on the holding of each of those cases and again, that would be prohibited by my ethics to go into it.

COMMISSIONER DESTRO. All right.

To your knowledge, judge, has the supreme court ruled on that issue?

CHIEF JUSTICE TSO. You must understand, sir, that if the supreme court issued an opinion they will have their reasoning in that opinion. They will be holding in that opinion. If the issue is the Indian Civil Rights Act, and if another issue comes up raising the same issue before the supreme court, the attorneys in the case would each be interpreting the holding differently, which would require me to rule on it. So any attempt to answer would be calling for an advisory opinion, and I do not wish to do that.

COMMISSIONER DESTRO. In other words, your testimony is, basically, we should look in the recordings, and we will find the answers that we are looking for?

CHIEF JUSTICE TSO. Yes, sir.

COMMISSIONER DESTRO. Question 6—question 6 is basically the same question, and if you have the same answer, you need not go through the entire recitation. But I will ask it for the record:

Has the Navajo judiciary ruled on the validity of the defense of sovereign immunity to a claim for equitable relief under the Navajo Bill of Rights?

CHIEF JUSTICE TSO. My answer would be the same because the Navajo Bill of Rights was passed in 1967. So that would require me to go through each of the cases, go back to 1967, and again, we are talking between 200,000 and 400,000 cases, that I would have to go through and look at the pleadings, and all the documents in the file.

CHAIRMAN ALLEN. Mr. Chief Justice, I'm going to ask the question.

Having great respect for the obviously impossible research task that you described, is it nevertheless the case, to your knowledge, that there is a settled rule of law within the Navajo Nation as to the question of the validity of sovereign immunity to a claim for equitable relief under the Navajo Bill of Rights?

CHIEF JUSTICE TSO. My answer remains the same. I have to go look at each particular case as far back as 1967, look at the file, and determine what issues are raised, if there are opinions, if decisions have been made. It will require me to interpret those holdings. That would require me to be giving an advisory opinion.

CHAIRMAN ALLEN. Let me ask you a followup question then. Would it be fair for me to say that, in your opinion, the only way that you can address yourself to the question of a settled rule of law is in resolving a case or controversy?

CHIEF JUSTICE TSO. I'm very reluctant to form any opinion right now simply because any issues on civil rights, the Navajo Bill of Rights, would be coming before me at a later time, requiring my ruling.

CHAIRMAN ALLEN. I don't want an opinion either on the ICRA or the Navajo Bill of Rights per se. I'm only asking whether it is your opinion, as an individual, you could never address those questions, and form a legal opinion on those questions, pending before you?

CHIEF JUSTICE TSO. I don't believe I understand the question. Although I do know that my answer remains the same. Simply because these questions are coming the same way, but only coming to me through another door.

COMMISSIONER DESTRO. Question 7:

Have any problems come to your attention which might hamper the ability of the Navajo judiciary's attempts to ensure a full and fair hearing of claims under the Indian Civil Rights Act?

CHIEF JUSTICE TSO. I see no problems which exist, which might prevent a full and fair hearing on the merits of any claim properly brought before the Navajo courts. And this Commission, I believe, has a copy of the Navajo court rules, and there is no problem.

COMMISSIONER DESTRO. All right. Thank you.

Question 8:

Have any problems come to your attention which may hamper the ability of the Navajo judiciary's attempt to ensure a full and fair hearing of claims under the Navajo Bill of Rights?

CHIEF JUSTICE TSO. We have a very well-established rule, of course, and there is no problem which might prevent a full and fair hearing

on the merits of any claim properly brought before the Navajo courts.

CHAIRMAN ALLEN. Mr. Chief Justice, I take it to be your answer, if I understand you correctly, both to 7 and 8, that to your knowledge, no problems interfere with the guarantees of the basic rights either under the Indian Civil Rights Act or the Navajo Bill of Rights.

If that is so, I of course want to congratulate the Navajo Nation on its accomplishment because we know that under the United States guarantees there are serious problems which hamper the enforcement of the rights of citizens.

So I simply want to follow the question by noting that you are declaring that the Navajo Nation has found a secret to guarantee the rights of individuals which at this point has even eluded the United States.

CHIEF JUSTICE TSO. Mr. Chairman, we look at the question, you are talking about the Navajo judiciary, and I think that is how the interrogatory is framed. It's not framed asking for activities in the Federal or State courts, so my answer is coming from the Navajo judiciary. If your understanding of the question is different from my understanding, I guess that's where our differences might be.

CHAIRMAN ALLEN. So you would argue, may I ask, that there is adequate training for the Navajo judiciary in your judgment?

CHIEF JUSTICE TSO. There is continued training for the Navajo judges.

CHAIRMAN ALLEN. And would you further argue that there is adequate funding for the Navajo judiciary?

CHIEF JUSTICE TSO. I wouldn't say that there is any funding, and I think that we are going outside the scope of the interrogatories. And I think that is one of your promises that we stay within the scope of the interrogatories.

CHAIRMAN ALLEN. I hope to stay within the scope with respect to what might hamper the enforcement of the act, and in either case, if indeed, funding might hamper, insufficient funding might hamper the enforcement of the act.

CHIEF JUSTICE TSO. Stretching it that far, funding—financing is all the problem, and it is true for the Federal and State courts, and certainly true for the Navajo courts.

COMMISSIONER DESTRO. Okay. Question 9—question 9 raises several questions. I'll go through them one at a time.

How many complaints, to your knowledge, raising claims under the Indian Civil Rights Act have been filed in the Navajo tribal court system since *Martinez*?

CHIEF JUSTICE TSO. *Martinez*, my understanding was handed down back in 1978. So that would mean that you are asking for complaints in the lower courts that would require me to go back to each of the district courts and look at each of the case files since 1978, and I can't give you accurate information.

COMMISSIONER DESTRO. Let me just ask you along those lines, judge, are there docket sheets filed with those? Is there a way to find out the information if we went back to the district court?

CHIEF JUSTICE TSO. Our courts are young. We do not have the benefit of automated computer systems. We have no information retrieval system. We can only do it manually. And we do have docket sheets, but that requires going into each of the cases.

Keep in mind that if a civil action is filed, it may have six causes of action. Six causes of action may be raised in a civil rights issue. So that would probably mean that we would have to look at each of the complaints, counterclaims, the cross-claims, and almost all of the information within a case file to determine that, and that's just a big burden.

COMMISSIONER DESTRO. Given the answer to the question, I think we can skip the subcategory, if the answer is going to be exactly the same.

Let me go through, so we will be complete, and ask questions 9(a) through 9(g). I'll ask them en masse. Would your answers be the same as to each of those questions?

CHIEF JUSTICE TSO. From (a) to (g) that would be contingent upon my answer to the general question.

COMMISSIONER DESTRO. You would have to go back and look it up.

Question 10—as to question 10:

How many complaints raising claims under the Navajo Bill of Rights have been filed in the Navajo Tribal Court system since the enactment of the Navajo Bill of Rights?

CHIEF JUSTICE TSO. The Navajo Bill of Rights was enacted in 1967. Again, I would have to go through each of the district courts, look at each of the case files, and then come out with the figure.

COMMISSIONER DESTRO. All right.

And as to questions 10(a) through 10(e), would your answer be the same?

CHIEF JUSTICE TSO. Yes, sir.

COMMISSIONER DESTRO. Thank you.

Question 11:

On May 6, 1988, the Navajo Tribal Council enacted a Resolution Number CMY–28–88, which states that the Navajo Bill of Rights, "exceeds and therefore supersedes the provisions of the Indian Civil Rights Act."

Since the Navajo Bill of Rights was enacted, has the Navajo judiciary rendered any opinions which address the relationship between the Navajo Bill of Rights and the Indian Civil Rights Act?

CHIEF JUSTICE TSO. The Resolution CMY–28–88 is a pending tribal law, subject to be contested, and which may happen. As you look at your question, that's May 1988, just a few months ago, which would require me to interpret the meaning from the bench, and I would rather do that from the bench.

COMMISSIONER DESTRO. Let me just clarify part of the answer. Is the legislation pending or is it in effect?

CHIEF JUSTICE TSO. I believe it's in effect.

COMMISSIONER DESTRO. I just wanted to clarify what you meant by the legislation was pending. I understood the rest of your answer to the question.

CHAIRMAN ALLEN. I didn't understand it entirely. So let me follow up.

I take it, Mr. Chief Justice, that you need to respond that, to your knowledge, there has not been a ruling on the question as posed here and there might well be one. Therefore, you will claim the privilege of not commenting in this circumstance?

CHIEF JUSTICE TSO. Generally, if there is any opinion on the issue by the supreme court there will be holdings, and which is subject to different interpretations by attorneys handling the case, arguing the law. And that would require me to form an opinion up front which would be unfair to the parties litigating cases, currently, and also in the future. For that reason I don't want to do that.

CHAIRMAN ALLEN. I appreciate that and certainly concur in your judgment. I want only to verify the fact that there is no existing holding at the moment?

CHIEF JUSTICE TSO. Again, the question is whether there are some opinions outstanding now but what holding those opinions has depends on how a particular attorney reads it and interprets it. Now, you are asking me to issue advisory on opinions that we have issued.

CHAIRMAN ALLEN. No, I hope not. I may have to be tutored by you on this. So I'll be careful. Bring me along slowly. I would appreciate it.

CHIEF JUSTICE TSO. Just a minor discussion like this matter brings us to argue on the point. Just imagine what would happen if you had two attorneys arguing deeply into a matter.

CHAIRMAN ALLEN. So there is something for the attorneys to argue about. That there are opinions out there with respect to which some attorneys may need pleadings.

CHIEF JUSTICE TSO. Attorneys would argue almost on anything.

COMMISSIONER DESTRO. Question 12. And if the answer is the same so that we can get through this, please don't hesitate at this time to say, "My answers would be the same."

Question 12:

The Indian Civil Rights Act states that "No Indian tribe shall in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both." In contrast, the Navajo Bill of Rights specifies that "excessive fines shall not be imposed." Has the Navajo judiciary rendered any opinions which consider the difference in the language of these provisions?

CHIEF JUSTICE TSO. The issue is highly likely to come before the supreme court at a later time. It requires interpretations of that particular section. So I would rather not go into it, because I would in essence be attempting to issue an advisory opinion which judges are prohibited from doing.

COMMISSIONER DESTRO. Thank you, judge.

Number 13: Has the Navajo judiciary construed the language of the Indian Civil Rights Act, section 1302, subsection 7, governing penalties and punishments, "for any one offense"?

CHIEF JUSTICE TSO. The Navajo judiciary again means to me that the court would require me to go through all the courts, through all the cases back to 1968 to do that and, generally, there again, require me to issue an advisory opinion, and I would rather not do that, sir.

COMMISSIONER DESTRO. Question 13(a)—again asking for the record:

Since the enactment of the Indian Civil Rights Act, has the Navajo judiciary consecutively sentenced anyone to more than 1 year of imprisonment?

CHIEF JUSTICE TSO. The Navajo judiciary? In order for me to answer that question, I have to look through every particular case and each court to do that, and we are talking about between 200,000 and 400,000 cases.

COMMISSIONER DESTRO. Okay. I assume that your answer is the same for the remaining of the subquestions in 13(a)?

CHIEF JUSTICE TSO. Yes, sir.

COMMISSIONER DESTRO. Question 14:

Has the Navajo judiciary rendered any decisions which indicate that, when a complainant cited identical provisions in pleading violations of both the Indian Civil Rights Act and the Navajo Bill of Rights, the complainant stated separate claims?

CHIEF JUSTICE TSO. My answer is the same as to the other answer.

COMMISSIONER DESTRO. That's fine. You don't need to go through it each time.

Question 15:

At the Commission's July 20 hearing in Flagstaff, testimony was submitted by former Chairman of the Navajo Nation, Peterson Zah, stating in part: "On June 7, 1988, during a meeting of the Tribal Council's Budget and Finance Committee, Virgil Kirk, a member of the committee and a councilman representing the Shiprock Chapter, remarked that tribal courts have no authority. He made this remark when the committee was given copies of the Window Rock court order which enjoins the tribe from taking action against the foundation. Mr. Kirk also said, If we wanted to, we could wipe out the Courts tomorrow.'" A Commission invitation to Mr. Kirk to testify at the Commission's July 20 hearing was declined. How, in your view, is the administration of justice by the Navajo judiciary

affected, if at all, by the lack of a constitutionally mandated judiciary branch?

CHIEF JUSTICE TSO. The Navajo judiciary, the Navajo judges, do apply applicable laws. We do have a tribal code, and we apply provisions of the code.

If a Navajo Tribal Council adopts a constitution, the Navajo judges would be applying provisions of the constitution. And I don't think it is for the Navajo judiciary to be establishing constitutions.

And then, I might add, if the constitution is assumed to be solving problems or it would solve all existing problems, then I take issue with it, simply because the United States has a Constitution over 200 years and that is to deal with matters. But I followed the nomination of Judge Bork, and it looks like the Constitution really didn't help in that case. I followed you on the Iran-Contra hearing, which in my estimation, that separation of powers was at issue, and the Constitution being in effect over 200 years, there are still issues in due process that continue to pop up. So it appears to me that the constitution would not immediately solve every and all existing problems.

COMMISSIONER DESTRO. Thank you, judge.

Let me go on to the second part of that question which is:

If greater judicial independence is needed for the proper administration of justice, what recommendations do you have which would be consistent with the sovereignty of the Navajo Nation?

CHIEF JUSTICE TSO. Well, certainly, I have a problem immediately with the recommendation of Federal court review of the tribal courts' decisions; that, I don't think, would be necessary to take care of the problem.

And certainly, there are a lot of recommendations that could be made to the Navajo Tribal Council to use or to implement in making the judicial branch more independent. But those recommendations, I think, can probably go to the Navajo Tribal Council. And I think the government can pretty well deal with that matter.

COMMISSIONER DESTRO. In following up, would there by any recommendations that you would consider other than the recommendation of Federal court enforcement, that you would consider to be useful in terms of advancing the integrity and independence of the judiciary?

CHIEF JUSTICE TSO. I would say that there needs to be a lot of development in the court system. The ability of the judges needs to be improved. And I think that we, meaning myself, and the other judges, having direct daily contacts with the Navajo court system, that we are in a better position to know what we need in order to improve the system. And, I think that what we would look for from the Federal Government is more funding. And then we could get proper application in the area that we need improvement. And

immediately one thing that comes to mind is more financial assistance.

COMMISSIONER DESTRO. If this is going to be beyond the scope, judge, please let me know. But we have heard other tribal judges and clerks from other regions of the country make other suggestions that might help in the administration of tribal justice, such as funding for an intertribal court of appeals.

We heard the suggestion with respect to the funding of tribal courts, of direct funding of tribal courts, rather than going through the tribal budget, and increased training for court clerks. Are there any other issues that you would suggest are worthy of discussion in the Commission's report?

CHIEF JUSTICE TSO. I think we must all understand that there are over 200, I believe, Indian courts across the Nation, across the United States, and each of those tribal courts are at a different level of development and different levels of sophistication. What the courts up north, or another court in another part of the United States, what their needs are may be different than what the needs are on the Navajo Reservation. So I think that each particular court must be dealt with separately in their own setting and according to their needs.

I have a lot of recommendations on ways that the Navajo courts can be assisted and improved. And certainly, more funding is one thing. Establishment of more facilities, office facilities, court buildings, that is essentially what we need. But, because of lack of funding, we are not developing in that area. Certainly, training for judges is needed. And we have been working with what we have. And I think we have been making good improvement toward the development of the judges. Yes, funding, more facilities, equipment, up-to-date equipment, computers for our record system so at some point when the Commission asks us for information, we can just punch one button and out comes that information.

We have assistance of that nature, but that all requires more funding with less red tape in getting the funding from the Bureau. And I understand when Congress appropriates money, it goes through several different hands before it comes out to the field. So if all the middlemen are cut out of funding, that way you can get more dollars to the field operation, rather than the administration.

COMMISSIONER DESTRO. Would that also include direct funding of the clerks themselves along with the funding of the tribal courts that did not go either through the BIA but also not to the tribal council?

CHIEF JUSTICE TSO. I have heard that suggestion, get the BIA out of the system and then have a commission work the courts out of the Washington level. That sounds like a good idea. But, then, we have to keep in mind some of the governmental operations of the courts to see how the budget and finance committee can deal with

it. And their opinion may be different from what I'm saying. But that does sound like a good idea.

COMMISSIONER DESTRO. Are there any particular jurisdictional questions that you think should be resolved at the Federal level with respect to the extent of tribal court jurisdiction that would help in terms of the independence and the perception of tribal courts as being courts of their own, with their own legitimate power, that should be respected in their own right?

CHIEF JUSTICE TSO. I'd like to see Congress reconsider the *Oliphant* decision on the jurisdiction over non-Indians. And I'd like to see that be restored back to the Indian tribes.

I certainly think that the Navajo courts are ready; they are in the position to give non-Indians and Indians alike a fair and full hearing on the merits. I think that they are ready, and I would like to see Congress restore that back to the Indian tribes.

CHAIRMAN ALLEN. Could you tell me please, Mr. Chief Justice, what was the holding in the *Oliphant* case that you cite?

CHIEF JUSTICE TSO. Generally, the Indian tribal courts don't have criminal jurisdiction over non-Indians.

COMMISSIONER DESTRO. Basically, if I understand you correctly, the jurisdiction of the Indian tribal court should be roughly to the same extent that any other court has jurisdiction, geographically, as well as long-arm then?

CHIEF JUSTICE TSO. Yes.

COMMISSIONER DESTRO. Let me move on to question 16:

In 1978 the Navajo Tribal Council established the supreme judicial council, composed of several council members and a retired chief justice of the Navajo Nation. The purpose of the supreme judicial council was to review decisions of the Navajo tribal courts in cases involving interpretation of Navajo law. In 1985 the tribal council enacted the Judicial Reform Act, abolishing the supreme judicial council. The preamble to that act reads in part: "Since its inception, the Supreme Judicial Council has heard only three cases, yet its very existence has continuously given rise to serious questions and challenges to the competence of the Courts of the Navajo Nation in various legal actions now pending or completed in Federal Courts; If the Navajo Nation is to continue as a sovereign Nation and move forward the reality of a three branch form of government, the Supreme Judicial Council must cease to exist, as Tribal sovereignty requires strong and independent Tribal courts to enforce and apply the law." In order that the Commission may ascertain the impact of establishment of the supreme judicial council on the civil rights of the Navajo people, please provide us with copies of the docket sheets for all cases it considered, and copies of the decisions that it rendered.

Were those available?

CHIEF JUSTICE TSO. The supreme judicial council apparently did not operate as part of the judicial branch. Cases filed with the supreme judicial council were apparently not docketed as a court case. The judicial branch has no records of the supreme judicial council.

COMMISSIONER DESTRO. Where would we find those? Where would you go to look for those?

CHIEF JUSTICE TSO. It's my understanding that the setup of the tribe was different than it is at this point. The Navajo Tribe had a legal department, now they have a justice department. It is my understanding that a law clerk from the legal department was accepting those cases. I don't have the slightest idea where you can find them now.

CHAIRMAN ALLEN. Mr. Chief Justice, did you ever appear before the judicial council or participate in one of these cases?

CHIEF JUSTICE TSO. I represented a client before them.

CHAIRMAN ALLEN. And the record of your hearing before them, was that made available to you?

CHIEF JUSTICE TSO. I received some documents from them, and this is several years ago. And I don't have any idea where my case file is. I believe I was working for legal services program at the time. And that building has since burned down. So I guess the records burned with it.

COMMISSIONER DESTRO. So basically, not to characterize your testimony, it's basically if we are going to need it, we are going to have to try to find it wherever we can get it?

CHIEF JUSTICE TSO. Yes.

COMMISSIONER DESTRO. Question 17:

Is it true that the supreme judicial council enjoined Judge Merwin Lynch from taking actions in regard to any reapportionment cases after Judge Lynch held that a reappointment plan adopted by the tribal council was invalid?

CHIEF JUSTICE TSO. The records of that case would have to be examined. The judicial branch does not have the record.

COMMISSIONER DESTRO. Let me just go back and ask one followup question with regard to that.

What branch was it in? Was it the legislative branch or the executive branch? To your recollection, who did you think you were appearing before when you appeared in that case?

CHIEF JUSTICE TSO. All I know is that I was appearing before the supreme judicial council. And the composition I cannot precisely tell you, but it should be in the old law. I think that is available to the Commission as well.

I don't know where it was, but certainly the tribal legal department was within the executive branch, I believe.

COMMISSIONER DESTRO. Okay, question number 18:

Were your responses to any of the preceding questions cleared, approved, or edited for content by anyone?

CHIEF JUSTICE TSO. This is all done in consultation with my attorney.

COMMISSIONER DESTRO. Would you indicate who acted as your attorney in this matter?

CHIEF JUSTICE TSO. The court solicitor is Miss Claudine Sattler. As to matters involving outside parties such as this Commission, the Navajo judiciary is represented by the Navajo Nation Department of Justice. Our attorneys in this matter are Mr. Eric Dahlstrom, Mr. Mike Upshaw, and Britt Clapham.

CHAIRMAN ALLEN. Mr. Chief Justice, I just have a couple of questions to ask you. We are in a position at the Commission on Civil Rights of having certain mandatory performances imposed upon us by Congress. Among these is the requirement that we study and process complaints received from American citizens. In light of the discussions that we have had now, and which you can conceive, underlie much of this investigation, that we have gone through in the past 2½ years, what, in your opinion, would it be correct for us, in the face of this statutory mandate, to reject complaints we receive from Navajos living on the reservation?

CHIEF JUSTICE TSO. I'm not sure I understand your question. But if it means what I think it means, and I think I covered that area pretty well in my opening statement. And that is: come to our land and look at our operations and talk to the people that have daily contacts, and then from a positive perspective point of view, I think that you might be able to get more information.

And I believe that in my—whatever contact I had with the Commission, I gave you as much, and all the relative information that I can for the Commission to study.

CHAIRMAN ALLEN. I'm asking you a different question. I'm not impugning the information that you shared with us.

I wanted your advice as a citizen and as someone who even in terms of judicial conduct has the encouragement to seek, to contribute to the improvement of the administration of the law. I wonder whether you would suggest that we recommend to Congress that we be exempted from following through on the complaints received from Indians living on the reservation?

MR. DAHLSTROM. I object to the question as outside the scope. And also, I believe, it has been answered.

CHAIRMAN ALLEN. Could you cite the answer?

MR. DAHLSTROM. The answer was the position that the United States Civil Rights Commission has no jurisdiction concerning the Indian Civil Rights Act. Therefore, your proper response would be the same as if you received a complaint under the Fair Labor Standards Act which would be to tell the complainants that they have come to the wrong door.

CHAIRMAN ALLEN. Would you pause long enough to give me a citation? In light of the statute that I cited, what makes it the wrong door? Would you deny that we are to respond to the complaints received from American citizens when those citizens are Indians living on reservations?

MR. DAHLSTROM. If the allegation is that they have violated a statute which you have jurisdiction to investigate, obviously, you should treat them equally.

CHAIRMAN ALLEN. That's not the question. We are bound by statutes to study and process complaints received from American citizens. Are you asking that we report to Congress that that language does not apply to American citizens who are Indians living on the reservation?

MR. DAHLSTROM. No, that would be an incorrect statement.

CHAIRMAN ALLEN. Thank you.

One other question.

You mentioned the *Oliphant* decision. You cited for me the holding of that decision regarding jurisdiction on reservations and Indian court systems over Indians and non-Indians. Do I understand you to say that you would consider yourself bound by the *Oliphant* decision in considering cases that arise on the Navajo courts?

CHIEF JUSTICE TSO. I generally cited the holding in the *Oliphant* case. That case continues to be brought up in the Navajo courts and has been applied.

CHAIRMAN ALLEN. Thank you very much.

Do you have any questions, counsel?

MR. HOWARD. No.

CHAIRMAN ALLEN. Staff Director?

I appreciate that very much.

I would like to turn to Judge Yazzie, if I may, and ask if you would state your full name.

TESTIMONY OF ROBERT YAZZIE, JUDGE, WINDOW ROCK DISTRICT COURT, NAVAJO NATION

JUDGE YAZZIE. Thank you. Mr. Chairman, and gentlemen. In response to the questions, I also stand with the chief justice in what has been presented here, and I object to the questions here on the basis that the Commission lacks the authority to conduct its present investigation. But I'm delighted to be here.

My name is Robert Yazzie, and I'm judge with the Window Rock District Court.

CHAIRMAN ALLEN. I thank you very much. Mr. Yazzie, would you tell us when does your term as a probationary judge end?

JUDGE YAZZIE. My probationary term began on November 25, 1985, but, as to when it ends, the Commission has been provided with enough material on Navajo law as to the terms of probation. But to

render any other answer would be inconsistent with my judicial obligation.

CHAIRMAN ALLEN. I'm not sure I understand. For you to tell us when your term ends would be rendering an advisory opinion?

JUDGE YAZZIE. Yes.

CHAIRMAN ALLEN. So it is a disputed question in law? It requires a legal opinion to be resolved? Thank you.

JUDGE YAZZIE. More so, it is inconsistent with my obligation as a judge, sir, to answer the question.

CHAIRMAN ALLEN. Would you tell us whether anyone has communicated to you, directly or indirectly, that you were, or are being, considered for removal from office?

JUDGE YAZZIE. If there was any communication to me to remove me from office as a judge, I make every effort to avoid any inappropriate *ex parte* contacts, with tribal court advocates and litigants in pending cases. But, unfortunately, there are times that I do make such contacts, but when it happens, my policy is that I do not let those contacts influence my decision or any decisions on the merits of the case.

CHAIRMAN ALLEN. Do I take the answer to the question to be yes?

JUDGE YAZZIE. Well, my answer is explained as I gave it.

CHAIRMAN ALLEN. Is it fair for me to say that the answers that you gave, that I ought to interpret the meaning to be yes?

JUDGE YAZZIE. I can just say that I think my answer is satisfactory.

CHAIRMAN ALLEN. I will ask the followup question, assuming from the answers that I have heard, that the answer is yes. In that case, would you please tell us, what was communicated to you, the date of the communication, and the person or persons that communicated with you?

JUDGE YAZZIE. Well, like I said, if there are any *ex parte* contacts to me, they would be done on an inappropriate basis. But, again I say, if there is such a contact in communication to me, that it is my rule that I do not let those contacts influence my decisionmaking process.

CHAIRMAN ALLEN. I would assume, judge, that you would indeed hold yourself always free from inappropriate influences and would ask now, only the question, whether you can precisely identify such an attempt?

JUDGE YAZZIE. In the case of any inappropriate contacts or attempts, my answer to that is there are avenues under Navajo law and within the Navajo government to remedy such matters. Any such avenues would be pursued. And I limit my answer to that.

CHAIRMAN ALLEN. Could you cite to me the avenue that you have in mind?

JUDGE YAZZIE. The avenues that I'm talking about are spelled out under Navajo law, and I believe that the Commission has been

provided with extensive material on the Navajo law, the Navajo Tribal Code.

CHAIRMAN ALLEN. Would you please tell us whether you fear reprisals from any Navajo official for any of your rulings?

JUDGE YAZZIE. My answer is the same as what I gave.

CHAIRMAN ALLEN. With respect to which question?

JUDGE YAZZIE. Do I fear reprisals from any official regarding my rulings.

CHAIRMAN ALLEN. Very well.

Has any Navajo official ever disobeyed an order issued by you?

JUDGE YAZZIE. Well, again, the Navajo law provides procedures for enforcement of court decisions and orders. And anyone who disobeys orders is a matter that should be brought before the court. And if it happens, there is a motion for order to show cause that would take care of the issue.

CHAIRMAN ALLEN. Is it the case, then, that there has been before your court an order to show cause for such purposes?

JUDGE YAZZIE. Again, my answer is the same.

CHAIRMAN ALLEN. As what?

JUDGE YAZZIE. If there is any incidence of disobedience of the court order that it would have to be brought before the court on an order to show cause.

CHAIRMAN ALLEN. Has it ever happened?

JUDGE YAZZIE. As a judge, I can't comment on any opinion.

CHAIRMAN ALLEN. Not pending, past? If it hasn't happened in the past, just say no and I'll go on. If it's pending, I don't count that among past cases.

JUDGE YAZZIE. If there is disobedience as to court orders, like I said, there is an order to show cause available that a party can petition the motion to court to bring the matter before the court and to hear the issues in the case.

CHAIRMAN ALLEN. During your tenure as a tribal judge, Judge Yazzie, has any person, including members of the tribal council or administration or the BIA, attempted to influence the conduct of your official duties in any manner, through, but not limited to, *ex parte* contacts, use of personnel actions, use of the judiciary budget, or use of the other resources of the judiciary?

JUDGE YAZZIE. My answer is the same as above.

CHAIRMAN ALLEN. I see. Has the Navajo Bar Association expressed support for you within the last year?

JUDGE YAZZIE. As of July 9, 1977, the Navajo Bar Association held its annual conference in Farmington, New Mexico. There the Navajo Bar Association passed a resolution to the Navajo Tribal Council Judiciary Committee and the Navajo Tribal Chairman to go forward with the process for my permanent judgeship.

CHAIRMAN ALLEN. Have any problems come to your attention, Judge Yazzie, which might hamper the ability of your court to ensure a full and fair hearing of claims under the Indian Civil Rights Act?

JUDGE YAZZIE. There are no problems. There are no problems that exist which would prevent a full and fair hearing on the merits of any claim properly brought before the court.

CHAIRMAN ALLEN. Have any problems come to your attention in similar language which might hamper your court's ability to ensure full and fair hearings under the Navajo Bill of Rights?

JUDGE YAZZIE. Again, to make the matter short, my answer is the same as the one I just gave.

CHAIRMAN ALLEN. How about, have you consecutively sentenced anyone to incarceration exceeding 1 year?

JUDGE YAZZIE. For the record, what is your question?

CHAIRMAN ALLEN. Have you consecutively sentenced anyone to incarceration exceeding 1 year?

JUDGE YAZZIE. Yes, as I'm aware, sure. I'm sure you are aware a convicted person sentenced by the tribal court may seek Federal review through habeas corpus, if she or he deems necessary.

CHAIRMAN ALLEN. So I take your response to mean that you have sought habeas corpus review?

JUDGE YAZZIE. Yes. I have sought habeas corpus review. Since my appointment of judgeship, November 25, 1985, I have disposed of 25,109 criminal cases, and some of those have involved consecutive sentencing.

But, if you want me to be specific, you have to give me a specific criminal docket number, and I'd be happy to provide judgment in those cases.

CHAIRMAN ALLEN. I appreciate that.

Could you tell me what the character of those cases have been? The holdings? Is there an identifiable tenor, tendency or tone in the 25,000 cases that you dealt with?

JUDGE YAZZIE. Excuse me?

CHAIRMAN ALLEN. Has there been any one thing that stood out more than anything else in the 25,000 cases? What kind of cases?

JUDGE YAZZIE. Again, I would have to look at the—

CHAIRMAN ALLEN. Gambling?—what are the crimes? Murder? What kind? You know crimes better than I do. Tell me. What kinds of cases have they been?

JUDGE YAZZIE. Well, our Navajo Tribal Code covers a number of offenses and sentences, and those offenses involve crimes against persons and property but—

CHAIRMAN ALLEN. But in what you have dealt with, have there been crimes against property?

JUDGE YAZZIE. Well, they are crimes, mixed—against persons—

CHAIRMAN ALLEN. Nothing that stood out?

JUDGE YAZZIE. There is nothing that stands out more than something.

CHAIRMAN ALLEN. Tell me, in your view, is the administration of justice by the Navajo judiciary affected by the lack of a constitutionally mandated judicial branch?

JUDGE YAZZIE. The Navajo judiciary is covered by the Navajo Tribal Code and other sources of Navajo law which have been made available to the Commission. I'm not in a position to make any comments as to the question.

CHAIRMAN ALLEN. Were your responses to any of the preceding questions cleared in advance by anyone, approved, or edited?

JUDGE YAZZIE. These responses have not been cleared or approved by anyone. I have made contacts with our attorneys here, and any content of the interrogatories have been discussed with my attorney.

CHAIRMAN ALLEN. You did receive interrogatories in advance and you shared them with your attorney, and arrived at a general understanding of what you wished to say?

JUDGE YAZZIE. Yes. That is correct.

CHAIRMAN ALLEN. I appreciate that very much, Judge Yazzie.

Judge Cadman, we have come to you now, not because we want to delay, but because these are just the way these things work.

I recall that you wish to make a statement or have Mr. Ruzow make a statement before we begin the questions. Is that correct?

JUDGE CADMAN. Yes.

CHAIRMAN ALLEN. Would you please state your full name and then you can make your statement.

TESTIMONY OF WAYNE CADMAN, SR., JUDGE, CHINLE DISTRICT COURT, NAVAJO NATION

JUDGE CADMAN. My name is Wayne Cadman, Sr. I am presiding judge at the Chinle District Court of the Navajo Nation.

And again, thank you, Mr. Chairman, members of the Commission, the Honorable Chief Justice Tso, Judge Yazzie. Ladies and gentlemen, with me today is my counsel, Lawrence A. Ruzow of Flagstaff and Window Rock, to my left. And again, I'm here on a voluntary basis, mainly to answer some of the questions created by the Commission.

As the Honorable Chief Justice Tso has stated, it is the position of the Navajo Nation that the Civil Rights Commission lacks authority to conduct an investigation in which the Indian Civil Rights Act has been implemented within the Navajo Nation.

The Navajo Nation has previously made its position, and the grounds of that position clear to the Commission, and I would not restate that position as argument. As Judge Yazzie and Chief Justice Tso stated, I do also agree with the Navajo Nation's position.

It is also my position that it is both highly unusual and highly improper for an agency within the executive branch of the Federal Government to subpoena a sitting judge to appear before it.

I have served as a Navajo district judge for about 3 years. I enjoy my work as a judge. I have tried to follow the Canons of Judicial Ethics and to render fair and impartial justice to all litigants.

I'm not sure of what you have learned from the previous testimony from the Navajo witnesses, but I have some concern. It is very difficult to understand our Navajo government without some understanding of our Navajo culture. Our legal system is a mixture of our own methods and the Anglo legal system. As is true of all living creatures, our system is still evolving.

While I have legal questions about the authority of this Commission to conduct this hearing, I'm here today despite these questions to answer your inquiries. I will try to answer your questions and provide explanations of the matters which might be unfamiliar to you concerning those which we have different analysis and interpretation. I hope you will be patient as I try to make these explanations. I do not suggest that our Navajo legal system is perfect. It has changed and will continue to change and improve.

I have a great deal of confidence in our chief justice, the Honorable Tom Tso, who is here today, and I have confidence as well in all our elected leaders. From my studies, from the history of the Navajo country, from your country, I'm well aware that the legal system of the United States did not emerge full grown and mature. So I liken our system, judiciary system, to the United States where we are still growing and learning and changing. The American legal system is a product of struggle and controversy. It would be unrealistic for you to expect our far younger legal system to gain maturity without a similar struggle.

What we ask of you and the Congress is to help on our terms and, more importantly, patience and tolerance. Thank you.

CHAIRMAN ALLEN. Thank you, Judge Cadman, for that statement, which is certainly a sensitive one.

I will proceed with the questions that I have had in advance as with the other respondents.

Could you tell us when your term as a probationary judge ends?

JUDGE CADMAN. I assume the question deals with the situation which I'm not confirmed as a permanent judge or have been removed from my position as a probationary judge, and I have not resigned. Our Navajo law, similar to Judge Yazzie's statement, does not provide a clear answer to this question. Such a question might well come before me for determination in a case. As a result, I would prefer not to comment further, because, simply, it's a legal question.

CHAIRMAN ALLEN. Let me make sure I understand this. Is it possible that you might have to decide legally on your own tenure in office?

JUDGE CADMAN. Not my own tenure, but by separate court.

CHAIRMAN ALLEN. So that you would have to decide the question which would determine your tenure in office in someone else's case?

JUDGE CADMAN. Yes.

CHAIRMAN ALLEN. You would not rule yourself out?

JUDGE CADMAN. I have been a permanent [probationary] judge since December 4, 1985, and when the probationary term expires, I have no idea aside from what is in the Navajo Tribal Code.

CHAIRMAN ALLEN. Thank you.

During the Commission's July 20 hearing, Michael Nelson testified that you told him that you signed a restraining order on May 25, 1988, at 9:06 p.m., enjoining former Navajo Chairman Peterson Zah and others from occupying the offices of the Navajo Education and Scholarship Foundation "because," according to Michael Nelson, "Donald Benally, who is a member of the Advisory Committee...had threatened to terminate your employment if you failed to sign the order." You dissolved this order the following day. Is the testimony quoted above an accurate representation of the alleged events?

JUDGE CADMAN. Well, before I answer the question, I'd like to inform the Commission that a formal complaint has been filed with the Navajo Nation Bar Association. And they are presently conducting an investigation, as well as the Navajo Department of Justice, and to comment on it would jeopardize and prejudice their ongoing investigation.

MR. HOWARD. I have a followup question. At this point, could you tell us whether that person under investigation in this pending proceeding is a person who testified before the Commission previously?

JUDGE CADMAN. As I previously stated, I have no information on the previous hearing, which I guess was conducted in Flagstaff.

MR. HOWARD. But you have before you, though, testimony here in number 3, which was read to you, with respect to a certain person who testified at the Commission's July 20 hearing?

JUDGE CADMAN. Which is Michael Nelson?

MR. HOWARD. That's correct.

JUDGE CADMAN. I didn't understand the question.

MR. HOWARD. Well, the question to put it directly, you have information of a Mr. Michael Nelson, who testified before the Commission on July 20.

JUDGE CADMAN. Yes, based on the interrogatory.

MR. HOWARD. My question to you was whether the person who is subject to the pending proceeding involves anyone who may have testified before the Commission. Your answer was that you are not sure of everyone who testified before the Commission. However, the

question as phrased in the interrogatory contains testimony of Mr. Michael Nelson. May I infer that it is not Mr. Michael Nelson who is under investigation?

JUDGE CADMAN. Mr. Michael Nelson, as far as I know, is not being investigated.

CHAIRMAN ALLEN. Has anyone communicated to you directly or indirectly during the period since April 1 of this year that a change in your status as a probationary judge was or is being considered?

JUDGE CADMAN. Again, that communication has been referred and a complaint has been filed to the Navajo Nation Bar Association.

CHAIRMAN ALLEN. To the same pending case?

JUDGE CADMAN. No, sort of similar. Separate incident, but the complaint also has been made with the bar association, and the bar association is integrated with the tribal courts. For me to comment on it any further would be very difficult.

CHAIRMAN ALLEN. I appreciate that. And I don't want to put you in an embarrassing situation.

Let me ask you: do you fear reprisals from any Navajo official for any of your rulings?

JUDGE CADMAN. No.

CHAIRMAN ALLEN. During your tenure as a tribal judge, has any person, including members of the tribal council or administration or the BIA, attempted to influence the conduct of your official duties in any manner through, but not limited to, *ex parte* contacts, use of personnel actions, use of the judiciary budget, or use of the other resources of the judiciary?

JUDGE CADMAN. As Judge Yazzie previously stated, we as sitting judges try to avoid *ex parte* communication at all possible times. However, sometimes it is unavoidable. And before I comment on your answer, I think some understanding of the Navajo culture needs to be presented, because similar to Chief Justice Tso's comments in his answers and statements, is that the council delegate was looked upon by their community as a spokesperson for the whole community.

So whenever a problem arose they went to him, and that individual would represent them in some manner. And this was brought forward to where before the tribal courts were actually implemented, some council delegates acted as attorneys and advocates in proceedings.

But since the bar association was formed, it has changed. And even today, we do get people such as council delegates and other officials who come in representing a person asking for reconsideration of a sentence or a temporary release of this nature. And to simply turn them away and deny having access to them, you know the community or the people would say that, you know, you are not sympathetic to their cause or their problems.

Like Judge Yazzie stated, *ex parte* communications did arise, but as a sitting judge, and very cognizant of your judicial ethics, understanding people, it has no effect, none, on your decisions. I may have had casual contact.

CHAIRMAN ALLEN. I wonder if there is anyone that stands out in your mind, not quite so casual, that troubles you? And would you provide details?

JUDGE CADMAN. Aside from the *ex parte* contact that was made to me in which the complaint has been filed, there have been very casual contacts.

CHAIRMAN ALLEN. Very good. Thank you. Have any problems come to your attention which might hamper the ability of your court to ensure a full and fair hearing of claims under the Indian Civil Rights Act?

JUDGE CADMAN. I do not know of any problems that would hamper a full hearing on the merits of the case. If it is properly brought before the court, we provide even indigent defendants court-appointed counsels in criminal cases.

CHAIRMAN ALLEN. Referring to the Navajo Bill of Rights, are you aware of any obstacles which might hamper the ability of the Navajo judiciary's attempts to ensure a full and fair hearing of claims under the Navajo Bill of Rights?

JUDGE CADMAN. Not that I know of. At every arraignment, I inform each of the defendants of the Navajo Bill of Rights and what their rights are.

CHAIRMAN ALLEN. And have you, Judge Cadman, consecutively sentenced anyone to incarceration exceeding 1 year?

JUDGE CADMAN. Reviewing, you know, reviewing the case similar to Judge Yazzie's, since I became a probationary judge, since September 1985, up to August 1988, there were 27,305 cases in my district court. And out of those, 22,102 have been litigated and completed.

So we have about 5,000 pending criminal cases. And it's hard to recall. But I made copies of two recent cases which were in September for your information.

CHAIRMAN ALLEN. I would appreciate if I could have those for the record. And may I ask if you are like Judge Yazzie in these cases—they are a little bit of everything and nothing standing out?

JUDGE CADMAN. Yes.

CHAIRMAN ALLEN. How, in your view, is the administration of justice by the Navajo judiciary affected by the lack of a constitutionally mandated judicial branch?

JUDGE CADMAN. Well, similar to Chief Justice Tso's statements, the constitution is no guarantee of the judicial independence. As a district court judge, I have tried to treat people equally regarding their side of any action. And, given the limited resources that are

available to us, we try to make fair and impartial decisions. You know, ultimately, the Navajos try to resolve their own differences.

And I just don't see how a constitution would guarantee judicial independence.

CHAIRMAN ALLEN. Okay. I appreciate that. Thank you for your time. And let me ask you one last question. Were any of your responses to any of the preceding questions cleared, approved, or edited for content by anyone in advance?

JUDGE CADMAN. The answers were made with consultation of my counsel, Mr. Ruzow.

CHAIRMAN ALLEN. We do have one other question that the Staff Director, Mr. Jenkins, would like to ask either one or all three of you.

MR. JENKINS. Chief Justice Tso, first. During your testimony, you indicated that you did not want to issue an advisory opinion, or maybe because of a real or current conflict, maybe because of a sitting case, or a case that is coming before you.

One question I have that seems fuzzy to me, is that it is my understanding that in certain instances the Navajo Department of Justice may appear before the supreme court or some other district court. I see that you have counsel from the attorney general's office, and I'm trying to figure out whether or not that would be a real or apparent conflict of interest with the judges, with a representative of the department of justice to appear before your court or before the district court judges?

CHIEF JUSTICE TSO. I tell you what you need to understand about the Navajo tribal government is that we are a young government. We are still developing. We are not enjoying the multitude of money that the Federal Government is enjoying.

We have limited tribal resources, monetary resources, and we just cannot afford to have attorneys for each judge, or for that matter in every division, in every department because of limitation of our resources. We have a group of attorneys who represent the Navajo Tribe.

Now, again, the Navajo Tribe composes of a legislative branch, the executive branch, and a judicial branch. We don't have the budget to hire our own legal counsel at this time.

We don't have any choice other than to use the attorneys that are available to us.

MR. JENKINS. Doesn't that raise an apparent or real conflict?

MR. DAHLSTROM. I object as asking for a legal opinion on the ethical matter. And I really think the question ought to be directed to me as a lawyer, to make that ethical decision on behalf of my client. Or if you feel that the ethical decision that we have made is inappropriate, I suggest you file a complaint with the State bar.

CHAIRMAN ALLEN. Let me say, Mr. Eric Dahlstrom, pardon me, to represent judges that's not entirely so. I do not think that you are

asked to give a legal opinion on an ethical question. And my ruling is that it is such a question as any one of you seated before us could answer given his professions. Therefore, I think that the question is entirely in order. Do you want to follow through?

MR. JENKINS. The question still remains whether or not there is a real or apparent conflict in providing advice from the Navajo Nation Department of Justice to a sitting judge.

He has asked several questions—the matters come before you in advisory fashion. So we are trying to figure out whether there is an apparent conflict or not from the information that is being provided.

CHIEF JUSTICE TSO. I understand your question specifically. My problem is I am not sure whether you are asking for an advisory opinion from me, or whether you want me to draw a conclusion on the situation that we have.

This is the problem of the Commission for calling the judges. It is unusual to subpoena judges and try to get into their thinking process, try to get their opinions and statements.

You have this heavy duty of ethics hanging over their head, and I think that is essentially what you are doing to us. And your question in particular is putting us in a very complicated position.

It is easy for you to ask the questions and hard for us to answer them.

CHAIRMAN ALLEN. I believe we want to ask you a simple question. I believe you told us in your testimony that you do have a solicitor in the judiciary system, namely, Claudine Sattler. Mr. Jenkins' question to you is why were you not represented by the court solicitor?

MR. DAHLSTROM. I'll object to the question.

CHAIRMAN ALLEN. The objection is overruled. You may consult with the witness. But the objection is overruled.

MR. DAHLSTROM. I'm instructing my client not to answer the question.

CHAIRMAN ALLEN. I will repeat the question for the record, so that it is clear, because the objection is overruled.

Why is it that the court solicitor, Claudine Sattler, is not present here as opposed to a representative of the justice department?

Your official response is that you decline to answer the question. So you need not direct—Mr. Jenkins' question is: why is it that the court solicitor, Claudine Sattler, is not present here as opposed to a representative of the justice department? And now you decline to answer that question?

CHIEF JUSTICE TSO. Correct.

CHAIRMAN ALLEN. Thank you very much.

This brings us to the conclusion of this hearing. We have no further questions.

We will have a brief public session in a moment.

I wish to give either of you 60 seconds to say anything that you wish to say at this point, including your counsel. Certainly, that is unusual.

MR. DAHLSTROM. Only in your experience, Mr. Commissioner. In my experience, closing remarks by counsel are quite normal.

CHAIRMAN ALLEN. In my opinion, closing remarks by counsel are not quite normal. Not anywhere at all. Please, we don't have to permit—

MR. DAHLSTROM. I'm allowed 60 seconds?

CHAIRMAN ALLEN. Thank you. Yes.

ADDITIONAL STATEMENT OF ERIC DAHLSTROM, DEPUTY ATTORNEY GENERAL, NAVAJO NATION

MR. DAHLSTROM. The closing comment, Mr. Commissioner, has to do with the concern that the Navajo Nation has regarding the intent and the motivation of this investigation, so-called investigation, in the Indian Civil Rights Act.

Certainly, the members of this Commission are entitled under the first amendment to their opinions regarding the relationship between the Indian government and the Federal Government. But we must say that the opinions expressed by the Chairman of this subcommittee are in the view of the Navajo Nation so outside of the bounds of the normal thinking concerning the relationships between Indian governments and the Federal Government as to raise questions as to the legitimacy and the intent of the body. And specifically to two matters.

One in which the Commissioner has expressed his opinion that citizens of Indian nations should choose between being either a citizen of the United States or a citizen of the tribal government. That's a matter that has been resolved in this governmental system years and years ago. And to have an opinion like that, which you are freely entitled, is one that raise questions by the Navajo Nation.

The other matter has to do with an opinion expressed that Indian tribes smaller than Rhode Island should be eliminated, and Indian tribes who are on a land base larger than Rhode Island should be the status of the State. Now, in view of the Navajo Nation, those opinions are so far out of the normal thinking in the regard of the proper relationship between governments is to raise serious questions about the legitimacy of this body.

CHAIRMAN ALLEN. Thank you very much. Did anyone else want to take advantage of the 60 seconds? The record ought to be clear that you, Mr. Dahlstrom, have abused the Chairman and his opinions. First, because the Chairman never did speak of any of the opinions in the memorandum that you have attributed to him. The record will show clearly in previous correspondence that Commissioner William Allen—who was neither Chairman of this subcommittee nor of this Commission—did utter some opinions in correspondence in

February or March of this year. And, that opinion was not to the effect that States or tribes smaller than the geographical size of Rhode Island should be eliminated, but, rather, to the effect that tribes at least that size or larger should be afforded the opportunity to become States. This is rather a different statement and the expression of an individual Commissioner, speaking only in his own name.

It is further the case that never, either as Chairman or Commissioner, have I made the comment that the Indians ought to be forced to choose between Indian citizenship and American citizenship. That is simply not true and cannot be cited anywhere, whatever. We know very well that that question has been resolved in American history, resolved by the Congress of United States in the 1920s. We do, however, point out that there are problems in the matter in which they are resolved, and all of us are willing to live with it.

I would like to say to you, Chief Justice Tso, Judge Yazzie, and Judge Cadman, that I'm grateful for you being here. If I might abuse history somewhat we were taught years ago to appreciate something, namely that powwowing—I don't know what the proper terms would be—we were taught that it was a decent and appropriate way for people to come and to understand their respective intentions regarding one another's ways. But I regret the manner of our coming into this business. I particularly regret the exchanges we have had on the subject of subpoenas. It has always appeared to me that nothing stood in the way of one speaking to one another, and understanding the questions which are on the agenda, and the concerns which you have apart from the fact that we simply weren't permitted to speak to one another.

We have spoken. I am delighted that you have been here. I'm delighted that this phase of our inquiry is now behind us all.

We will then be able to proceed to a conclusion. It will be a conclusion based on objectivity. Many things have been heard; not all of them have I even completed reading yet. As you know, many of them were heard before I was a member of the Commission, let alone a member of the subcommittee. It will not speak only of the Navajo. We will speak of Indians throughout the United States. We will speak above all not about Indians, but about Americans, and about the promise of American citizenship and whether indeed those promises can be delivered.

All too often in our history it has been the case that the promises of American citizenship have not been delivered, and that many people, many different people, from different places have been frustrated in their hopes and their ambitions.

This Commission was created 31 years ago precisely to address those kind of difficulties. Our study does nothing other than to continue those traditions of this Commission. We shall speak, and

we assure you, we shall speak with sensitivity to your particular concerns.

I thank you very much.

On the 20th of July, 1988, the Commission began this hearing; on this day, we are now completed.

[At 3 p.m., the hearing was adjourned.]

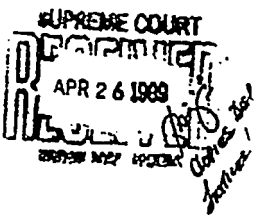
Exhibit No. 1

N N B A

NAVAJO NATION
BAR ASSOCIATION

President: ALBERT HALE
V. Pres: IRENE TOLEDO
Secretary: BRENDA ANDERSON
Treasurer: NORMAN R. CADMAN

April 25, 1989



Benjenita Bates
Supreme Court Clerk
P.O. Box 520
Window Rock, Arizona 86515

Re: Public and Formal Reprimand of
Donald Benally

Dear Ms. Bates:

Enclosed please find Public and Formal Reprimand of Donald Benally. Please see that all Court Clerks and the Navajo Nation Bar Association are informed of this reprimand.

The Disciplinary Committee of the Navajo Nation Bar Association thanks you for your assistance in this matter.

Sincerely yours,

NAVAJO NATION BAR ASSOCIATION

By James Jay Mason, Chairman
Disciplinary Committee

JJM/m
Enclosure

Wednesday 04/26/89 - Copies distributed/deposited in District and Children's Courts boxes. Copy forwarded to NNBA.

Exhibit No. 1 (continued)

N | N | B | A

NAVAJO NATION
BAR ASSOCIATION

PUBLIC AND FORMAL REPRIMAND OF DONALD BENALLY

MR. DONALD BENALLY contacted a Navajo Nation District Court Judge ex parte after hours regarding a case pending before another Navajo Nation District Court Judge. He pursuaded the District Judge to sign a restraining order without full disclosure of the claim pending before the other District Judge. This restraining order was later dismissed.

Mr. Benally's conduct constituted a violation of the Code of Professional Responsibility, and he is hereby formally and publicly reprimanded.

This Notice shall be posted for thirty (30) days.

Dated: April 25, 1989

NAVAJO NATION BAR ASSOCIATION

typo. error
this?

By James Jay Mason
James Jay Mason, Chairman
Disciplinary Committee

Exhibit No. 2

UNITED STATES COMMISSION

ON

CIVIL RIGHTS

- - -

COMMISSION MEETING

Room 512
1121 Vermont Avenue, N.W.
Washington, D. C.

Tuesday, February 11, 1986

The meeting of the Commission was convened at 9:05 a.m., Clarence M. Pendleton, Jr., Chairman, presiding.

COMMISSIONERS PRESENT:

CLARENCE M. PENDLETON, JR., Chairman
MORRIS B. ABRAM, Vice Chairman
MARY FRANCES BERRY
ESTHER GONZALEZ-ARROYO BUCKLEY
(Via Conference Call from Laredo, Texas)
JOHN H. BUNZEL
ROBERT A. DESTRO
FRANCIS S. GUESS
BLANDINA CARDENAS RAMIREZ

STAFF MEMBERS PRESENT:

J. AL LATHAM, Staff Director
MARION BOWDEN
BARBARA BROOKS
JAMES COREY
SAM ESKENAZI
LAWRENCE GLICK
SALLY HARRISTON
WILLIAM HOWARD
ALBERT MALTZ
JAMES MANN
SUSAN MORRIS
SYDNEY NOVELL

(Continued)

STAFF MEMBERS PRESENT (Continued):

JUNE O'NEILL
BERT SILVER
DEBORAH SNOW
DAVID TELL

ALSO PRESENT:

CLARK G. ROBERTS, Regional Director,
Midwestern Region

** ** **

Exhibit No. 2 (continued)

AFTERNOON SESSION

(1:45 p.m.)

CHAIRMAN PENDLETON: I would like to begin.

Let me lay some ground rules in the beginning.

Since we do not have to take action this afternoon, Commissioner Abram has been excused and so have Commissioners Ramirez and Berry. Commissioner Buckley is on the telephone and will probably be able to ask some questions if she feels it's necessary. I think we have pretty much of what we are going to have for the afternoon.

Let me begin by saying that certainly, Mr. Weiser, your series of articles on the Rosebud suit helped us a lot in formulating this kind of a briefing session, and I would like to thank you and the paper for providing that background, as well as the other materials we got from the staff.

As you know, Indian trial justice is a situation that is of concern to this Commission, and we want to have a briefing today about the state of affairs. I understand we have before us a resolution from the Rosebud Sioux Tribe, Resolution No. 86-35, and they are asking us to hold a hearing at St. Francis, South Dakota, on the reservation in June.

This is a resolution we will pass over to the Staff Director. There are several sites that have to be

reviewed in the process of having this hearing. If the Commission will recall, we indicated that we would try to split ourselves up in an appropriate way and have mini-hearings in those sites to be able to save time and collect information.

Mr. Destro has raised a good point, that perhaps at this time, budget constraints permitting, the State Advisory Committee persons in those areas would be able to attend with us at those hearings, and we could have sort of a multi-exposure situation to the problem, and certainly our SACs would be able to give us some eyes and ears in the field once we left.

(Rosebud Sioux Tribe Resolution No. 86-35 follows.)

Exhibit No. 2 (continued)

CHAIRMAN PENDLETON: With that, we will proceed to the briefing. Mr. Schermerhorn has asked that he be able to first, and then we will go in the appropriate order or some order. Maybe you can flip a coin or we'll just pick one.

Mr. Schermerhorn.

STATEMENT OF JAMES SCHERMERHORN, SPECIAL LITIGATION COUNSEL, CIVIL RIGHTS DIVISION, U. S. DEPARTMENT OF JUSTICE

MR. SCHERMERHORN: My name is Jim Schermerhorn. I'm a lawyer with the Civil Rights Division of the Justice Department. I want to thank you all for the invitation and the opportunity to appear here today at this briefing on the question of Indian justice systems and the enforcement of the Indian Civil Rights Act.

We believe there have been some examples of enforcement problems of the Indian Civil Rights Act post the Martinez case. Accordingly, we welcome the inquiry of the Civil Rights Commission in this matter, and we pledge our continuing support and cooperation in your efforts in this matter.

It may be helpful at the outset to explain that within the Justice Department I am responsible for the enforcement of civil rights statutes which affect American Indians, all civil rights statutes, including the Indian Civil Rights Act. I am not responsible and I am not an authority on Indian policy matters generally. Within the

framework of the Federal Government system the Interior Department has generally been the spokesperson for Indian policy matters. But I hope that my experience in enforcing Indian civil rights statutes will be of some help to the Commission in focusing the inquiry and identifying what some of the problems are and to gather the information that is necessary to complete your study.

We basically have three principal concerns about the enforcement of the Indian Civil Rights Act.

First, it has been apparent from some of the information that we have received that some tribal governments have had difficulty in enforcing the Civil Rights Act itself. Specifically, from a review of the federal court decisions, from a review of some of the other studies that have been done by other agencies -- and I am particularly thinking now of the Presidential Commission on Indian Reservation Economies -- and from a review of our complaints that we have received, and from other sources, it is apparent that there are some problems in enforcing the Indian Civil Rights Act by tribal governments.

Our second fundamental reason for concern over tribal enforcement of the Indian Civil Rights Act is essentially the differences in the structure, in the process, between tribal government and non-Indian governments. Although tribal governments are similar to non-Indian governments, there are very substantial

differences in their structure and in their format, and those differences may make it more difficult to enforce the Indian Civil Rights Act.

And specifically, the types of things that I am referring to now are the checks and balances that exist or that we assume exist in state and federal and local governments, and the question of whether or not they exist or to the same extent they exist in tribal government is an issue that perhaps may be the subject of some investigation on the part of the Civil Rights Commission.

The types of things that I'm thinking about, the types of checks and balances that may cause a problem in the enforcement of the Indian Civil Rights Act, are questions such as judicial review. In the non-Indian context, we assume that the judiciary can review the acts of a legislative and executive branch to determine their propriety. That may not necessarily be the case. It may be the case in tribal government; yet it may not necessarily be the case in tribal government. So the question of judicial review is one point of concern.

Another point of concern, I suppose, is the question of judicial independence. In the non-Indian court systems we assume that the judiciary is independent of the legislative branch and will serve independently of that. And that also may not necessarily be true in the Indian

context. It may be true. There may be tribes that have tenure for tribal judges, but there are examples of tribes which do not. And that structural difference may impact on, may play a part in difficulties in enforcing the Indian Civil Rights Act.

Finally, as far as structural devices are concerned, there is the question of the appellate process. Some tribes have functioning appellate court systems, and other tribes, at least from our experience, do not have functioning tribal court appellate systems, which may mean that while the tribal court may hear the lawsuit or take the action up initially, the tribal council may ultimately be responsible as an appellate tribunal for considering essentially the same matter that it instigated. So in some circumstances the tribal council may appear to be the forum that actually conducts the appellate review. That isn't true on all of the reservations but it may be true on some.

That leads to the third concern we have in this area of tribal court enforcement post Santa Clara Pueblo. That concern is essentially we don't have the information we need to make the types of judgments on enforcement issues.

I am not able to generalize and tell you today that tribes do or do not enforce the Indian Civil Rights Act. The problem is that there is very much of a lack of specific information, a lack of data, a lack of knowledge,

that would permit us to be able to generalize from some of the anecdotal examples that we have. Anecdotal examples, the types of things that indicate a problem, are helpful, but they are certainly not appropriate to then generalize and say, "All tribal governments are flawed in their enforcement," or, "All tribal governments have difficulty in enforcing the Indian Civil Rights Act."

With the accumulation of some specific knowledge and data, I think those of us who have an interest in this matter will be much better able to formulate some alternatives and some responses to the issues.

In the early 1960s, as a result of a number of complaints that had been received by Congress concerning essentially the questions of fairness of tribal governments, the Indian Civil Rights Act was enacted. It was enacted in response to concerns by some individuals in tribal government that they were not being treated fairly. The Indian Civil Rights Act essentially tracks the federal Bill of Rights. It provides to those individuals who come in contact with tribal governments the same type of rights, the same type of guarantees, that exist now for non-Indians vis-a-vis state and Federal Government.

But Congress, in an effort to balance the issues of sovereignty and self-government on the one hand with the rights of individuals on the other hand, did not apply the

Bill of Rights verbatim. Congress made a number of substantial exceptions to that. For example, there is no establishment clause in the Indian Civil Rights Act. It means that tribal governments can in fact associate themselves with a tribal religion.

Other examples of differences between the Indian Civil Rights Act and the Federal Bill of Rights are in the nature of the right to counsel. You have the right to counsel whether or not you can afford to pay for it in non-Indian courts. In Indian courts you have a right to counsel only if you are able to afford to pay for it.

So for 10 years, this Indian Civil Rights Act, from 1968 to 1978, was enforced both by federal courts and by tribal courts. In other words, there was a joint or dual enforcement of the Act. Essentially, federal courts refused to act unless individuals exhausted their tribal court remedies first before applying to the federal court.

But in 1978 the Supreme Court decided the Santa Clara v. Martinez case. In that case, essentially the Supreme Court said that federal courts lack jurisdiction to consider Indian Civil Rights Act matters. What the court said was that Congress has the power and the authority to permit federal courts to consider matters under the Indian Civil Rights Act, but what it said was Congress did not do so when it enacted the Indian Civil Rights Act, with the

exception of habeas corpus type cases.

The bottom line of Martinez was that it changed the forum, it changed the place where enforcement of the Indian Civil Rights Act was to occur, from prior to Martinez, a joint exercise of jurisdiction by tribal courts and by federal courts, to after Martinez, an exercise of jurisdiction only by tribal courts.

I think a thing that is very important to consider when we think about the Martinez decision is that it had no effect whatsoever on the substance of the Act itself. The substance of the act, that is, the rights, the guarantees, the things that are included in the Indian Civil Rights Act, were as effective after Martinez as they were before. So the only thing that changes was where you went to enforce those rights.

As a matter of fact, the Supreme Court in Martinez said that the enactment of the Indian Civil Rights Act had the effect of changing the law which the tribes were obligated to apply.

So there isn't any question as a result of the Martinez case as to the substance of the Act. It is only a procedural question as to where you go to enforce the Act.

The Supreme Court added in Martinez that Congress has plenary authority over Indian tribal governments -- and I'm quoting now -- "In the event that the tribes themselves

prove deficient in applying and enforcing" the Indian Civil Rights Act, Congress could grant federal courts jurisdiction to enforce the Act.

So in the words of the Supreme Court, the issue that is faced by the Commission then is -- and again I'm quoting -- "whether the tribes themselves have proved deficient in applying and enforcing" the Indian Civil Rights Act.

Since Martinez, the Civil Rights Division of the Justice Department has received a number of complaints. Maybe it would be best to just quickly summarize generically the types of concerns that we have heard from people.

We have received a total of about 45 complaints which have alleged perhaps 55 or 60 separate violations of the Indian Civil Rights Act. Those complaints basically came from 28 separate tribal governments. In other words, the allegations were leveled at 28 separate tribes.

And it is important to point out -- and I want to make it clear at this point -- that these are allegation. There is no adjudicated decision that there has been any wrongdoing. These are simply complaints that have been received by us.

Of the complaints that we have received, approximately 75 dealt with the alleged wrongdoing on the part of the tribal court -- the lack of the right to have

attorneys present, the lack of a jury trial, interference perhaps by the tribal council, which seems to be a major concern of those who complained to us, that tribal councils interfere with tribal courts.

Thirteen of the complaints we have received have dealt with tribal election matters, essentially questions of due process and of equal protection, alleging allegations of unfairness in the holding of tribal elections.

Six complaints have alleged problems in hiring by tribal governments. The allegations typically are of nepotism, that there are hiring decisions that are not made on the basis of merit but yet are made on the basis of nepotism or favoritism or some other type of thing such as that, which would violate the due process provision of the Indian Civil Rights Act.

Finally, we have received, I think, four cases of complaints of violations of the Indian Civil Rights Act in the area of tribal housing, principally in the area of housing assignment policies, who is actually assigned to tribal housing.

This is a capsule overview of the types of complaints that we have received.

We are aware, in addition to the complaints that we have received, of a number of federal court cases which have been critical of tribal enforcement of the Indian Civil

Rights Act post-Santa Clara.

We are also aware of the study I alluded to earlier, and that is the report of the President's Commission on Indian Reservation Economies, which essentially recommended that there be consideration given to a return to what I think the Commission called federal appellate jurisdiction where, as a result of matters that arise on the tribal level, appeals could be taken to a federal court.

Essentially, to conclude the introduction, there is a statement I'd like to make this afternoon. Essentially what we see as the issue is whether or not there is effective enforcement of the Indian Civil Rights Act post-Santa Clara. What we think the contribution of the Civil Rights Commission could be in this regard is to identify and define as clearly as possible, to focus what the issues are, to identify the criteria and the factors and the variables that play a part in this concern, particularly the contrasting values that are apparent between tribal governments and courts.

When I say "contrasting values," I don't mean to make that negative. I mean there are legitimate differences between tribal governments, and that these legitimate differences certainly have to be recognized and identified and dealt with.

Exhibit No. 2 (continued)

Also we think it would be helpful for the Commission to consider this problem of enforcement of the Indian Civil Rights Act. In the historical context in which it arises, the relationship between the federal tribes and the United States and the history of tribal governments is an important context in which to frame or to structure a Commission inquiry into this matter.

Third, we think that if problems are uncovered, it would be very helpful to identify potential alternatives, and to list, for example, the pros and cons of each would be of tremendous help in focusing a decision by policymakers on what alternatives there are likely to be.

And finally, of course, to make specific recommendations as to how some of these concerns could be remedied.

That concludes the statement that I have. I'd certainly be happy to answer any questions. Again, I want to thank you very much for the opportunity to be here today.

CHAIRMAN PENDLETON: Thank you, Mr. Schermerhorn.

(Mr. Schermerhorn's complete statement follows.)

CHAIRMAN PENDLETON: I think we'll go down the line and get all the testimony and then have some discussion.

Next is Judge Lorraine Rousseau.

JUDGE ROUSSEAU: Could I bow to Mr. Myers and have Mr. Myers go first?

CHAIRMAN PENDLETON: Certainly. Deference is always in order. I understand.

JUDGE ROUSSEAU: Thank you.

CHAIRMAN PENDLETON: Mr. Myers is the Executive Director of the National Indian Justice Center. It is an Indian-owned and operated non-profit corporation. The Center provides legal education, research, and technical assistance designed to improve tribal court systems and the administration of justice in Indian country. Mr. Myers is a graduate of the University of California at Berkeley's School of Law and has been training tribal court personnel for the past eight years.

STATEMENT OF JOSEPH A. MYERS, EXECUTIVE DIRECTOR, NATIONAL INDIAN JUSTICE CENTER

MR. MYERS: Thank you, Chairman Pendleton. I'd like to thank you for the opportunity to make a statement at this briefing.

I'd like to begin by saying one thing. Chairman Pendleton, you made a statement as to the worthiness of the

Washington Post article of September 1984 as being helpful in this particular study or investigation. There was recently an article in the Minneapolis Star-Tribune that I thought was the same sensationalism that you found in the Washington Post article.

These articles focused on three Indian reservations. There are 144 tribal courts throughout the United States. I would hope that we don't ground this particular effort in those newspaper articles or with regard to those three difficult situations -- the Rosebud, the Cheyenne River, and the Red Lake situation.

CHAIRMAN PENDLETON: I can assure you that that is not the intent. I was just citing the fact that we did get information that we had not been able to get before, sort of like firsthand. But let me assure you that it is not grounded in those three articles. I think it just helps us to begin to focus in on the entire situation.

MR. MYERS: Thank you, Chairman.

CHAIRMAN PENDLETON: I hope that is a clarifying statement.

MR. MYERS: Thank you.

I'd like to begin by saying also that when we look at the Martinez decision in 1978, I think we also have to look at what happened in 1978. There was another U. S. Supreme Court decision called the Oliphant v. the

Suquamish Tribe of Indians, which came down in the same term. In that particular decision, the United States Supreme Court took away criminal jurisdiction over non-Indians on Indian reservations, non-Indians who violate the laws of particular Indian tribes.

Now, together with the Martinez decision, I think we have some very, very strange reasoning with regard to Indian affairs. The Supreme Court in the Martinez decision essentially reaffirmed the two purposes of the Indian Civil Rights Act of 1968. The first purpose of the Indian Civil Rights Act of 1968, of course, was to assure and guarantee the civil rights of individuals on Indian reservations from the overreaching of tribal governments.

The second objective of the Indian Civil Rights Act was to promote tribal self-governments. And to do this within the framework of one piece of legislation, I think, is a very difficult proposition. I think we have to give way to one or the other.

When we look behind 1968, we come to 1924, and that is when Indians were granted citizenship in the United States.

We look at the beginning of Indian reservations in 1850 or thereabouts, and you will find there was no concern about civil rights. The only concern was the government-to-government relationship to some degree.

Indians were moved out of the way of the emerging American society and put on Indian reservations.

The first rule of order, law and order, was the military. After that was the civil federal agent. And the agency symbolically is still there today with the Bureau of Indian Affairs agency offices throughout Indian country.

Only in recent years has any real effort been made to deal with the individual's civil rights, of people on Indian reservations, both by the Federal Government and by tribal governments.

I think we have to look very closely at what happens here and the dynamics of tribal governments historically, and that is that tribal governments have had to follow the lead of the Federal Government because many, many years ago there was created a federal dependence, a federal economic dependence upon the Federal Government by Indian tribes.

Therefore, if there was concern by the Federal Government for individual rights, it has only been in recent years.

In 1934 when the Indian Reorganization Act was passed and many tribes organized under the Indian Reorganization Act, there was no concern about separation of powers because at that time some wise person thought that tribal governments were very small and very remote and

there was no need to deal with the formality of separation of powers.

So it has been, I think, a struggle with regard tc developing tribal governments since 1934, and we come to where we are at today.

Mr. Schermerhorn talks about 55 complaints. We have 144 tribal courts throughout the country. It seems to me that we also talk in terms of some tribes do not have these problems and others do.

I am very concerned about being able to orchestrate your study and your investigation in order to get the most genuine information in order to do something productive with regard to providing and protecting civil rights in Indian country. I think that when we get by the alarmist situation that we have very prominent in the newspapers, you will find that there are efforts afield in Indian country to develop these systems and to improve these systems.

I think one of the things that has been extremely difficult throughout this -- and it's probably something that in every area you deal with you will find the same issue -- is the issue of funding and the lack of adequate training because of funding problems.

And it is very critical with regard to Indian country because that federal dependence was created

deliberately back in the 1850s to remove Indians to isolated reservations. And if we are going to sever that economic dependence, it is going to have to be done extremely carefully. I don't think you can do it in one fell swoop with a piece of legislation.

I am very concerned about federal court review of tribal court decisions. I think perhaps when you do examine that area, if you're going to consider federal court review at all, that it be done on an limited basis.

We are dealing with tribal courts, courts of separate sovereign governments. I think we all are aware that that has been very pronounced by United States Supreme court decision historically, and I think that some of those tribal governments work very effectively today. So I don't think we can put it all into one pot when we deal legislatively with regard to developing these institutions and protecting civil rights. I think federal court review, if it is at all a consideration, has to be done on a limited basis.

The separation-of-powers issue that causes a lot of problems in Indian country, where councils interfere with tribal court operation, is a difficult situation, but I think it is a situation that has to be resolved at the local level, perhaps with some encouraging legislation, but I think it is a local governmental problem that perhaps will

emerge positively in the future.

I think one thing that Mr. Schermerhorn did not address, which I think is more appropriate for me to address, is that when we look at Indian civil rights violations in Indian country, I think we also have to look at the role of the U. S. attorney. We can look at tribal governments causing problems with regard to voting and membership issues. I think the U. S. attorney sometimes causes us some extreme frustration in Indian country when the U. S. attorney fails to prosecute certain cases.

And I think the chronic problem that many tribal court people have discussed and criticized over the years is a situation where there is an Indian versus an Indian or there is an Indian criminal and an Indian victim. Oftentimes those kinds of cases are not as enthusiastically prosecuted as where you have an Indian defendant and a white victim.

There never has been a national policy with regard to the U. S. attorney's approaches to criminal matters in Indian country, and I think that it's about time that one is created. I think it would solve many problems, many law enforcement problems in Indian country.

One thing that I think should be developed, which will enhance the competency of tribal court jurisdictional substance in the future, is the establishment of more

regional appellate systems. I know that there is one in Lorraine's area. There needs to be, throughout the country, a network that is built throughout Indian country so that this isolation that was created deliberately back in the 1850s can fall to one side and some productivity can be developed by networking the judicial systems of Indian country.

I am involved in training on a national level. We provide training to tribal court personnel with a contract through the Bureau of Indian Affairs. And we have had problems with regard to acquiring funding that would make training more meaningful.

One thing that we have attempted to do, but because of a lack of funding we have not been able to operate it thus far, is to create a certification program for tribal court personnel that would operate on a volunteer basis, whereby we would create certain levels of competency based upon experience, education, and testing. This would include judges, advocates, clerks, court administrators who wanted to be certified through this particular program. It would tie together the training that we conduct and give it some substance for the future, and I think that it would also allow more recognition by jurisdictions that surround various reservations with regard to the comptency of the people who operate these systems.

I'd like to key off one remark that Jim made with regard to the independence of the judiciary. I don't think we should lose sight of the fact that in the American system the independence of the judiciary perhaps isn't that independent. It is more prominent in Indian country because we have smaller systems and we have more pronounced incidence of nonindependence. But I'm sure that we are all aware that the political system sometimes stacks the philosophy of certain judicial systems throughout the United States, both within the state jurisdiction and within the federal system.

Basically that's all I have as far as my remarks. I will be happy to answer questions at the end of the session.

CHAIRMAN PENDLETON: Thank you, Mr. Myers.

Our next briefer is Lorraine Rousseau who is the Chief Judge in the Sisseton-Wahpeton Sioux Tribal Court. She is also the chair of the board of the Northern Plains Tribal Court Judges Association.

Welcome.

STATEMENT OF LORRAINE ROUSSEAU, CHIEF JUDGE, SISSETON-WAHPETON SIOUX TRIBAL COURT

JUDGE ROUSSEAU: Thank you. I am happy to have this opportunity to be with you today. I didn't know if I

was going to make it in to the airport -- a bit fearful -- but I am happy to be here.

I am here representing tribal judges from a five-state area: Wisconsin, Minnesota, North Dakota, South Dakota, and Nebraska.

We held a meeting in Aberdeen, South Dakota, on January 24, and at that meeting the tribal judges asked me if I would represent their interests to you people. So some of the things I'm going to be talking about are with the sanction of the judges in my area, the ones that attended the meeting.

But I do want you to know that in Indian country the tribal judges are working towards a concerted effort to correct some of the problems that are in the judicial systems on our reservations. We are aware of what those problems are, and we are in the process of attempting to correct them.

One of the problems Mr. Schermerhorn mentioned -- and Mr. Myers touched on it briefly -- is the appellate system, the appellate or review or judicial review.

On our reservation we have a separation of powers. It is a constitutional separation of powers that went out for referendun vote to the people in 1978. So we operate a completely autonomous independent court system. Not only that, but our tribe is a member of the Inter-Tribal

Court of Appeals, which includes six other tribes, four of them in the State of South Dakota, the Omahas from the State of Nebraska, and the three affiliated tribes from Fort Berthold, North Dakota. We are presently in the process of pulling in our eighth member.

Through this Court of Appeals we have had some Indian civil rights cases that came in to us. One of the issues that keeps coming up is the tribe's sovereign immunity. The Inter-Tribal Court of Appeals ruled, through a case called Miller v. Adams, that the Indian Civil Rights Act waived the tribal sovereign immunity. Most constitutions contain a provision that they have to consent to be sued.

So that took care of that problem as far as the Indian Civil Rights Act is concerned among our member tribes, the ones that belong to our Inter-Tribal Court of Appeals. Our goal is to pull in every tribal court in the Aberdeen area. And as Mr. Myers touched on, we would like to see the Bureau or someone help us set up courts of this nature throughout the nation, and possibly even a Supreme Court of Indian Nations.

We do not like the idea of judicial review by the federal court system because we see it as another chipping away at the sovereignty of tribes. Everybody gives that lip service, but when there are some problems on the reservation

it appears that that sovereignty status is ready to be jerked. And this is what we are fearful of, and this is why we are joining together to make this united effort to improve our court system by ourselves. I believe we can do it.

As Mr. Myers testified, it is something that we feel is going to resolve itself. We have to remember that the courts in the United States, the federal and state systems, are much, much older than we are. The court in the Sisseton-Wahpeton tribe is only 14 years old, and yet I believe we run a system just as competent and just as efficient as any state or federal court system there is.

Now, I'm bragging, but in light of the negative publicity that tribal courts have been receiving, I think somebody needs to stand up and brag about what some of our tribes are doing. And I give my tribe credit for having the foresight back in 1978 to take this to the people of our reservation and to create a true separation of powers on paper.

Now, I didn't come here prepared. I was asked at the last minute, yesterday afternoon, and I left for Sioux Falls last evening. So I am just going to jump around here.

CHAIRMAN PENDLETON: Excuse me. I think that's okay. If you want to send us some information later that

Exhibit No. 2 (continued)

better explains what you'd like to do, Judge Rousseau, feel free to do that. That's all right with us. This is not a matter of having something today and closing it today. But I think we need to have all we can get our hands on to understand a problem that is somewhat foreign to us, too.

MR. LATHAM: As Staff Director, let me say that I appreciate your being able to come on such short notice. I believe we had somebody snowed in.

JUDGE ROUSSEAU: That's right.

Through our organization, and through the Inter-Tribal Court of Appeals, I have had a lot of close contact with judges from South Dakota, North Dakota, Minnesota, Wisconsin, and Nebraska. And it's true the tribal courts do have some problems. Our problem is council people who get into power, who want the tribal courts under their thumb. They are not informed about the importance of an independent judiciary system. And I think that, coupled with the lack of funding to adequately pay competent judges, is a big factor in the problems that we are having on the reservations today.

Now, on my reservation I am appointed for a four-year term of office. And I just recently came up for reappointment, and I will be serving another four years. So we don't have the continuity of judges on reservations. The reason for that is, like I said, inadequate funding. If you

have to put up with the political hassle and draw $15,000 a year, how long are you going to stay?

So we have had good judges that were appointed to the bench but could not stay for those two reasons. I'm not making all that much money. My present salary is $18,750. But I stay because I care about my people, and I care about providing a good, fair justice system for our people, and I care about helping the other Indian people throughout the Indian country doing the same thing that we are doing.

I think one of the ways we can do this is by example, by getting together and sharing ideas, by training, and an adequate budget. I think that is very much a part of the problem. But I don't see where that is going to be resolved because we have never been a priority under the Bureau's funding process.

Mr. Ralph Gonzales appeared on a panel on the Rosebud Reservation, I believe it was the early part of last summer, and I was on a panel at that very same meeting in Rosebud. He told us that the Bureau didn't even know how they come up with the figures that they give to the tribal court. So it ranged anywhere from $23 per case to $2,300.

Now, this is just what I can remember. The figures might be different, but that is a great variance.

So some courts are getting adequate funding and some courts are getting inadequate funding. I believe the

Rosebud tribe can afford to pay their chief judge $30,000. I believe that the Pine Ridge Sioux tribe can afford to pay their judge $30,000. But Sisseton's chief judge gets much less than that. And Crow Creek, who handles probably 100 or 200 less cases than our reservation, has to have a part-time chief judge. They can't even afford a full-time judge. They can't afford a full-time prosecutor.

And we're much better off than the Crow Creek people because I do have a full-time prosecutor, I have an assistant prosecutor, and my court works smoothly because we have continuity of staff. Everybody has been there for a number of years, and everything functions smoothly.

But I am fortunate. I have a professional attorney in the position of prosecutor for $18,000, and everybody asks me, "How did you do that?" Well, I don't know what they pay attorneys over in Minnesota, but she's from Minnesota and we are really pleased with her.

Getting back to the violations that have occurred, we are not saying that they haven't occurred, but I don't think that it is entirely the tribe's fault, either, that some of these violations have occurred, especially in the area of election disputes.

Now, I sat on an appellate case that came from the Rosebud Sioux tribe and it was an election dispute. I wrote the opinion for the court. And there were allegations of

collusion with the Bureau superintendent. And I don't know how many of you are aware of how all this works on a reservation, but under the tribe's constitution, just about every tribe that I know of has this provision where you have to have the secretary's approval. Well, the secretary's approval means the Bureau of Indian Affairs, and it usually comes down at the local level meaning the superintendent at our agency, whatever tribe you're talking about.

So they have the approval or disapproval of power, whatever it is that the tribe wants to do. But the tribal council is involved there, too, because they have the power to get rid of superintendents.

I don't know if you see where I'm getting to. But you have the problem, then, of the superintendent getting involved with tribal election disputes or whatever. They can approve or disapprove. And they can jump on whoever is in power or whoever they think is going to be in power in order to keep their jobs because, as I know it, tribal councils can oust superintendents.

So there you have the court sitting over here trying to handle an election dispute that's a crazy mess over here because of the people in power, both in the Bureau and in the tribal government.

And I think we have handled it from the judicial standpoint very well. The election disputes that have come

through our appellate court were resolved in a neat way. The tribes that brought these election disputes abided by our opinions. We had no problems with any of the tribes when we have delivered our opinions. They didn't like it, and they threatened to withdraw, but they didn't. They stayed in. And I think they are proud of the fact that they have an independent appellate review system.

I can't think of anything else that I wanted to talk about except in the area of a position that the tribal courts did have in our area. We had a Judicial Services specialist at the Aberdeen Area Office. This lady had been in government for 20 years -- well, not in government, but she had been a tribal judge for I believe 11 years, and then another nine years with the Bureau of Indian Affairs as a Judicial Services specialist. And this lady was helping the court. She was writing codes. She was coming out acting as a mediator between tribal councils and court. We had somewhere, as judges, to go for advice.

When budget cuts first started coming down, she was out, and some of us judges wrote letters to the congressional people, and this is why I don't think the Bureau is going to make this a priority, because we want them back and I don't think anything has changed since then.

But this position was zapped. And when I received

the letters back from the congressional people that I wrote to, there was a letter attached from the Aberdeen Area director saying that due to budget constraints positions had to be cut, and so on and so forth.

Well, she was going to be demoted? She was set up. I believe she was set up. But she couldn't be demoted because she rated high enough on some point system, so she could have bumped somebody else there. What happened? The Bureau created a position. What is this? -- OEO or something like that, where they look to the Bureau employees' rights?

CHAIRMAN PENDLETON: I'm not so sure. The Department of the EEOC.

JUDGE ROUSSEAU: All right, that's what she does. She sits in her office, and if an employee is going to be terminated or suspended or whatever, she jumps in there and she advocates for them with the system. She could save them thousands of dollars, I guess, because they avoid lawsuits that way.

But this was a newly created position, so the money was moved from Judicial Services over here to this newly created position. So that leads me to believe that the Judicial Services specialist position was not cut due to the budget constraints; it was cut for some other reason that I think this lady could tell you more about.

But we wanted that position because as judges we needed somebody experienced to assist us. And that got chopped right from the word "go." And I wouldn't mind if I found out that it was chopped, period, and the money wasn't put over here like what happened down there.

But I don't have anything else that I can think of other than that, that we did have a good person in a position that was really helpful to us. But it appears that every time we get close to getting the assistance we need, somebody takes it away from us. Of course, the government giveth and the government can taketh away.

CHAIRMAN PENDLETON: Thank you very much.

Are there Commissioner questions?

Commissioner Guess, do you have a question?

COMMISSIONER GUESS: I'll listen a while, Mr. Chairman.

CHAIRMAN PENDLETON: Bob, go ahead.

COMMISSIONER DESTRO: A couple of questions.

First of all, on the question you just raised, Judge, what I hear you saying is that the administration of the courts plays second fiddle to the administration of the agency itself. Isn't that basically what you're saying?

JUDGE ROUSSEAU: That's it.

COMMISSIONER DESTRO: The agency's internal needs come over the needs of the tribe.

Exhibit No. 2 (continued)

JUDGE ROUSSEAU: I believe that's correct, because when it comes down to 638 contracts -- and our court is a 638 contract -- everybody is taken off the top before it even gets to our agency level to divide up, and then it's taken off at the agency level for the Bureau, and then the rest of the pie is given over to the tribe to divide. And we're a part of that pie.

COMMISSIONER DESTRO: Let me just ask this in relation to what both Mr. Myers and you have said -- and I'd like you both to respond.

If you could make recommendations with respect to not only what we do but with respect to what Congress would do, would you suggest that the tribal court systems be seen as separate entities and then funded accordingly on their own budget line or whatever, without having to go through the Bureau or the Bureau being instructed, "This is the appropriation for tribal court"?

JUDGE ROUSSEAU: Do you want to address that?

MR. MYERS: Well, I don't think that kind of legislation would be appropriate, the separate funding. I think if we are going to talk about self-determination in Indian country and the development of tribal governments, we have to look at the unit of government as a whole. I do think that legislation might be in order in terms of improving tribal court systems by putting certain

requirements on funding.

For instance, back in 1887 there was a general allotment act. It was called the Dawes Act. It was a negative piece of legislation for Indians in that what happened is an Indian was given 160 acres and the opportunity to become a U. S. citizen, provided he jumped through a few hoops.

Well, some of the people jumped through a few hoops but most Indians didn't. And in the process, something like 90 million acres of reservation land was lost because once the lands were divided up in allotments to heads of household, then the surplus of those reervations were opened up to homesteading for non-Indians.

Now, that same principle could be something that Congress might look to in terms of expanding the jurisdiction of tribal courts. For instance, tribal courts need to recapture this criminal jurisdiction over non-Indians. It's wrong, it is totally unreasonable, for white people to come on the Indian reservation, to commit crimes against the tribe, and get away scot-free.

We are sitting here talking about civil rights. That really flies in the face of tribal governments and Indian people, more so than the individual Civil Rights Act violations, I think, that are the run of the mill in election disputes and that kind of thing.

But I do think if we are going to talk legislation for improving tribal courts, we have to do it in a situation where there is an upgrading of the systems within that legislation. And you have to look at it as a total government. I don't think you would ever get the tribal councils nationwide to accept the situation where tribal judiciaries are going to get their separate funding, which I think is just a difficult proposition.

COMMISSIONER DESTRO: The reason I asked the question is I'm trying to understand precisely what legislation might do and to get a handle for ourselves.

I understand what you're saying about the sovereignty of the tribes and why it would be objectionable to have the federal court sit in judgment over such a sovereign court system. It would seem to me that the tribal court systems are seen as being a part of the separate sovereign government, just like the state court systems are. Then you don't have federal court sitting in judgment over state court systems, except the United States Supreme Court, of course. And you would treat them approxmately the same way. The question is how do you deal with civil rights problems within a system.

Am I misunderstanding?

MR. MYERS: Well, we have certain situations in Indian country that are very sensational. I think if you

took a negative tribal court situation and dealt with it -- I think you can find room for improvement and the ability to improve. And on the other side I think you will find positive tribal courts functioning without any procedural problems with regard to civil rights guarantees.

So I think what needs to be done is to improve the systems so that the systems are not further eroded and further elimnated. If we had legislation that would allow tribes the opportunity to improve their systems by meeting certain requirements and in doing so, lets say, gaining criminal jurisdiction over non-Indians again, maybe being able to assume the responsibilities that were more or less removed in the Major Crimes Act, and those kinds of incentives for improving the systems.

As it is right now, I think there is so much limitation on it -- a $500 maximum fine and six months in jail. You have a situation where you have a murder on the reservation, an Indian murders an Indian. If the U. S. attorney says, "No," the only way anything can be done is prosecuting that person in tribal court for unlawful discharge of firearms, if that kind of ordinance exists, and then the maximum penalty, of course, is $500 or six months in jail. And that's a joke for a murder.

COMMISSIONER DESTRO: What would you suggest, then, that we should look at? To bring up those kinds of

anomalies? To stay out somewhat of the sovereignty issue because our jurisdiction really deals more with how justice is being administered, and to recognize that it's there but to deal with ways in which the system might be improved? I'm trying to get a handle on what you think we can contribute as the Civil Rights Commission to this.

MR. MYERS: I think at the onset you have to look at tribal court jurisdiction as some 144 tribal courts out there. Now, we look at these violations as, say, 50 complaints to the Department of Justice, involving something like, I think Jim said, around 28 tribal courts. That's a minority. And I think if we can keep it in perspective -- granted there are some problems, and some serious problems, but there are also good things happening.

And too often what happens when you look into Indian country from the outside, you look at Indians as one Indian with a blanket and a feather, and that's it. And it's not that way. We're not one homogeneous group. There are something like 200 different dialects and different language groups throughout this country that are distinct and are still there. And the same with the various traditional cultures.

I guess the biggest illustration is the Bureau of Indian Affairs, one Bureau of Indian Affairs for administering Indian problems and Indian issues.

Too often you'll find that the biggest reason why we are where we are at today in terms of Indian affairs is because of the distinct, unique cultures involved in all of these societies. If we were one big homogeneous group, there would not be a United States of America.

CHAIRMAN PENDLETON: Thank you.

JUDGE ROUSSEAU: May I say something?

It seems to me that I remember somewhere when I was going to college that we were told social change comes about through turmoil. All right. That is what's happening on some of the reservations at this point in time. It happened on the Rosebud Rservation I believe two years ago, when the chief judge was thrown in jail for issuing the restraining order on an election matter.

One of the court administrators just recently got elected into office -- Alex Lunderman. He was the one that brought this meeting here to the council's attention. He wants to get the court system straightened up because he's seen some of the things that happened during the period of time when he was court administrator. By the way, he was fired from that court system. I don't know if it's justified or not.

I believe the same thing is happening on the Cheyenne River Reservation. They are another reservation that received some adverse publicity in that article in the

Minneapolis Tribune. On that reservation a committee was formed, a Committee for Clean Government. And just recently three gentlemen from the tribal council were indicted and I think they are awaiting sentence in federal court.

Now, that was through the efforts of this Committee for Clean Government. What I am trying to say is: Has not the United States been through the very same thing to bring about effective change for this country -- the riots that have occurred in the ghettos?

Well, the same thing is happening on the reservation. What we are saying is why can't we have the opportunity to bring about our own change without some legislation that is going to take away more of our sovereignty. We feel we can handle it, and we feel that we can do it. But we can't do it overnight. And I think what is happening on the reservations is the people are getting tired of having these violations occurring, and they are making some efforts to correct those problems.

That's how change comes about. You know, there is a big turmoil and the people take care of it.

MR. SCHERMERHORN: Following up on what Judge Rousseau just said, the next level of analysis is to look at the structure of tribal government, the format of tribal government, its infrastructure, to determine whether or not these checks and balances which will permit good government

are in place.

Part of the problem is that, as Joe indicated, in the past the Federal Government, I'm sure, did not pay the type of careful attention to the nature of developing tribal government as perhaps was warranted. And many, many years ago there may not have been the structures in place in tribal government or like separation of power, like pluralistic considerations that are more prominent perhaps on the federal level. And that these types of considerations, if they are absent, are going to perpetuate the types of problems that we have heard talked about. But if they are in place, perhaps then it will lead to a resolution of matters by the tribes themselves.

I think one of the things we mentioned before, one of the reasons why the federal court exercised jurisdiction for 10 years was not, I don't think, in an effort to interfere with sovereignty of tribal governments but it was a federal law, a federal act of Congress, and that is why the courts assumed until Martinez that they had authority, that because it was a federal law, normally the federal courts would have jurisdiction over it. But one of the keys is the nature and structure of the tribal governments themselves.

CHAIRMAN PENDLETON: Just let me ask the question: Your last bit of testimony is interesting. It seems as

though we have a collision course between what the Federal Government thinks is an appropriate tribal justice system and what the tribes themselves think is an appropriate tribal justice system, and it does not seem to me that the information we have before us, including the current legislation, is appropriate to resolve the differences.

What I think I hear Mr. Myers and Judge Rousseau saying is maybe they don't want what we said they should have. Does that make it necessarily wrong? And is what we have in there necessarily right?

I'm just trying to get to the issue of how all this is resolved. I read the Indian Civil Rights Act, and it reads like it would be something for those of us who are not Indians. I say that in all deference to the Act itself and the kind of work that went into it.

But, Bob, you will recall -- and this is another matter -- when we all went to Nebraska talking about the Christian school situation in Nebraska, we had to be very careful that that was what might have been Fourteenth Amendment action and that was the First Amendment kind of thing. And I began to develop at that point a better appreciation for the First Amendment, having been in that situation.

Now, it seems to me that maybe some of us who have to have these hearings -- maybe we go there with a bias as

to what it is that we are doing that you don't like, Judge Rousseau, and you, Mr. Myers, obviously don't like it because you talked about the fact that if a white man comes to the reservation, or I guess if a black man comes to the reservation, and they do something bad, there's not much you can do to us. We are extracted from the reservation and put in another court to have our cases handled.

So I don't know what we do in terms of a hearing. What do you want to see us try to resolve in this case? You've got a position; they've got a position. We are concerned about the civil rights of people in this country. How do we bounce off culture and sovereignty and all those in keeping with civil rights?

MR. SCHERMERHORN: The issue, at least from the perspective that I look at it, from my perspective, is this: Congress, when it considered for a period of seven years the Indian Civil Rights Act, considered precisely the type of concerns, Chairman Pendleton, that you have mentioned. And when it passed the Indian Civil Rights Act it made a number of very, very specific exemptions that tried to balance the types of issues that are present here.

But unless we are going to say that the Indian Civil Rights Act ought to be changed or ought to be modified, which was not the subject of the Martinez case, and which is not really something that I am aware has been

at issue -- the issue is: Is a law of Congress now being enforced? That law was passed, and you have a federal statute on the books. And the types of considerations, at least from my reading of the legislative history, were very much a part of the debate that went into that legislation.

CHAIRMAN PENDLETON: Are you going to say, then, that with the seven years of debate and the enactment of the Act, we still have problems?

MR. SCHERMERHORN: There are still differences in values and considerations between tribal governments and nontribal governments. And the two purposes of the Act that Joe Myers mentioned, to provide for civil rights and to provide for self-determination, have to be weighed and balanced. And these are the types of criteria and variables that I think the Commission would have to consider.

But what we have before us is an act of Congress.

CHAIRMAN PENDLETON: I'm clear. It looks like every time we try to legislate fairness we have problems.

MR. SCHERMERHORN: There is always going to be a debate as to the proper standards to be applied.

CHAIRMAN PENDLETON: Judge Rousseau, do you want to comment?

JUDGE ROUSSEAU: I feel in somewhat of a conflict, simply because the people are not suffering on my reservation, but on some reservations they may be. I know

what happened at Rosebud, actually happened, because I personally know Judge Garreaux. I know the things that are happening in the Cheyenne River are actually happening because my husband is a member of the Cheyenne River tribe.

So I am in a conflict. I feel that if Congress does anything, it is going to be detrimental. I mean if they decide that the Indians can't handle it and they just want to take it away with the stroke of a pen, that can happen. And they don't care that the Sisseton-Wahpeton Sioux tribe is doing a good job and is not violating anyone's rights. We are all put in the same kettle together. And if the whole soup gets thrown out, so do we, too.

But I do feel there needs to be a limited judicial review for judges that get ousted on reservations. This happened at Cheyenne River to Judge LeBeau and Judge Walter Woods simply because -- well, it's a long story, but it was adverse to the tribal government, to the chairman at that time. And they didn't have anywhere to go. They went to the U. S. District Court. They kicked it out. Then they took it on up to the appellate system. In the meantime they were working it out. By that time it's almost time for another election, and these four people were kept from taking their seats on council. And it was wrong.

I know the judge at Crow Creek Sioux tribe was

ousted without due process. He was just sent a memo saying that, "Because you disqualify from cases, we no longer want you as a judge; you are terminated." He had no due process. He wasn't even called in front of the council to be able to present his side to refute what the council was saying. And where was he going to take his case? He thought about filing it in the court where he had just been ousted from.

I guess what I'm saying is there may be a need for limited jurisdiction by the federal courts in certain cases.

CHAIRMAN PENDLETON: Mr. Myers, would you perhaps want to suggest to us, either now or later, some specific sites for hearings?

MR. MYERS: I'd just like to respond to Jim's statement that this is a federal law and we have worked with it for seven years and then we have all these violations. I'm just not so sure that that provides an answer because how long did AT&T violate the antitrust statutes before it was ever prosecuted? And there are nuclear waste regulations and so forth. Those kinds of violations have gone on for years and years.

You're dealing there with multinational corporations who have a lot of money and a lot of resources and affect governments both here in the United States and

elsewhere. You have out here in Indian country very limited resources economically and a dependence on the Federal Government. So it is very difficult to say that tribes are violating the Indian Civil Rights Act, and we need to do something about it.

I think you have to look at it in perspective because you have a minority of violations here. We have 144 operating tribal courts, and we're talking about 28 jurisdictions that are complained of. If we can stop it now and not let it increase to 48 in the future, by training, by more funds, those kinds of things -- because as I indicated before, and so did Lorraine, things are happening. You have the Plains Judges Association. You have emerging regional appellate systems. You have a developing training network. You have resources that are developing in Indian country.

And for someone to say right now with authority that, "Indians, you can't do this anymore; we're going to have to change things," I think is a terrible disservice to what this country stands for.

CHAIRMAN PENDLETON: Do you have some ideas about the sites we should go to, or do you want to write us a letter about that later? We have these questions from Rosebud. Mr. Latham would like that kind of information.

MR. LATHAM: If I may interject, Mr. Chairman, to help our panelists, we are looking on the one hand for a

site that is perceived as being a place where the tribal justice system functions relatively smoothly and in the way that it should, and we are looking for another site where it is generally perceived that the system is not functioning well. Whether Rosebud is one of those sites or not, I don't know. But I'd like to hear all three panelists' views on that.

MR. MYERS: Well, I'm not so sure the site is really the issue. I think it's who you get to these hearings, and the accessibility of the site should be an issue.

We talk about Denver as, let's say, a site where people can come who know what the issues are, those folks who have some severe problems, and those folks who have good operating systems.

I'm not so sure it is necessary to have these hearings on or near a reservation. I think you can have more representation by having it conducted at a site that is accessible by many tribes.

MR. LATHAM: If you were to name a couple of systems that on the one hand work well and on the other hand aren't perceived as working well, what would you name?

MR. MYERS: Well, of course I'd have to start with Lorraine's as working well.

(Laughter.)

The ones that are working well: Umatilla in Oregon; Warm Springs in Oregon; I think the Gila River in Arizona; Salt River in Arizona. I think the Navajo has a very good system; Colorado River in Arizona; the Acoma Pueblo in New Mexico; I think the Flathead reservation in Montana. There are many others. I'd have to look through the list.

MR. LATHAM: Feel free to supplement, if you'd like to write us a letter and suggest some additional names.

What about working poorly?

MR. MYERS: I'd rather write a letter.

CHAIRMAN PENDLETON: Please write a letter.

Judge Rousseau.

JUDGE ROUSSEAU: I would agree with Joe on the tribes that he named, with Sisseton-Wahpeton, of course, as number one. And as a representative from the Plains Tribal Court Judges Association, we would concur with Rosebud as being one of the sites you should go to. We feel, and Rosebud feels, that everything started there from the Washington Post article, and they'd like to see it finish there.

CHAIRMAN PENDLETON: Mr. Schermerhorn, if you can't tell us today, tell us later, what are the kinds of things you would like us to look at in a hearing and the

kinds of personalities you might like to see, if not just by name the types of personalities that we should have at a hearing in some locations. That is going to be critical as to how successful this whole hearing situation is. And remember, we are going to have more than one. It's a kind of a mini hearing. It would not be all Commissioners at each site, but we would share with Commissioners one or two sites, or one site at least, or however the staff sets it up, to be able to have as wide-ranging data collection and fact-finding as we can to be able to come to some decision about what kind of action we want to take on this matter.

MR. SCHERMERHORN: I do have some thoughts, Mr. Chairman, and perhaps I can supplement them, but off the top of my head I would think that it would be very important, prior to any hearing taking place, to make certain there was good staff field work done ahead of that, to interview individuals who work with the tribe -- not only tribal judges, but the tribal clerks for the court, police officers who are involved in the arrest processes and procedures, and other representatives of tribal government who are part of the process.

In addition to that, it would be very helpful to take a look at the records that are generated as a result of these matters, which would be very helpful.

One thing I would like to say on the locations of

the Commission hearings, in response to Mr. Latham's question, is that it is always going to be very much of a problem, as Joe pointed out, as to the location of the hearing. Because even if you held them on a Navajo reservation, for example -- I'm relatively familiar with Navajo -- there is no real convenient location. The capital of the Navajo Nation is in Window Rock but it's perhaps a state away. Part of the reservation is in Utah and another part is in New Mexico. You could go literally hundreds of miles and still be on the Navajo reservation. So to have people present to testify there is going to be very, very difficult.

I would think there would have to be a balance struck of who appears at the Commission hearings. For example, not only tribal government but also people who have been a part of the tribal justice process, either as plaintiffs or as defendants and so on.

MR. LATHAM: Do you agree with Mr. Myers, then, that perhaps one of these hearings should be held in some accessible place like Denver where people could come in by air or bus?

MR. SCHERMERHORN: It's accessible, Mr. Latham, for you and me. I'm not sure how accessible it's going to be for the people who are directly affected with the tribal justice system. I know for Judge Rousseau it's going to be

difficult to get from the Sisseton-Wahpeton reservation to Denver.

MR. LATHAM: This is the balance we are trying to strike of the site selection because the idea of picking a reservation is precisely for us to go to a place and hear what people have to say. On the other hand, if that means we are going to be narrowly limited to that particular location, maybe we should have one of the hearings held off the reservation.

MR. MYERS: I really think if you are looking for a broad cross-section in order to develop a record that is going to be worthwhile, one site selection or one remote site selection may be problematic. When you go to Rosebud you're doing a follow-up to the Washington Post article and the Minneapolis Star-Tribune. Whether you care to acknowledge that or not, that is going to take place.

I think where you get a broad cross-section of tribal court people to an accessible area, then you are going to, I think, dilute that kind of influence on what your efforts are going to be. And I think you get more genuine criticism both of the systems and input as to what they think are positive elements of their activities.

MR. LATHAM: Mr. Chairman, if I may, I just have a couple of follow-up questions for Judge Rousseau.

Judge, in your judgment should all the tribes

waive their sovereign immunity?

JUDGE ROUSSEAU: The major reason for a sovereign immunity clause is because you don't want to deplete the resources of that entity. And the tribe doesn't have any money -- most tribes don't. We have a few rich tribes, but the majority of our tribes are in the poverty kind of situation.

The only way I see the tribe waiving their sovereign immunity would be under the Indian Civil Rights Act when someone can be ordered to do something and there is no money damages.

That's a tough one, but we did address it through the Inter-Tribal Court of Appeals, and that is what we said.

MR. LATHAM: Let me ask you, too: What variables do you see as significant in insuring stable judicial systems that will secure due process for Indians? In other words, what variables or factors do you see as the important ones to secure due process for Indians in the tribal justice system?

JUDGE ROUSSEAU: What variables or factors do I see in ensuring a stable justice system?

MR. LATHAM: In other words, what would you say are the important things that would ensure -- Mr. Myers would like to answer, and then perhaps Judge Rousseau.

Exhibit No. 2 (continued)

MR. MYERS: The most obvious, of course, is money for developing the systems. And I think the federal trust responsibility demands that these systems of justice develop so that they can comply with the Indian Civil Rights Act.

Beyond that, if we are going to operate in the American democratic society, we are going to have to do something about separation of powers. I'm not so sure that we are going to be able to shove it down anybody's throat because some people feel there is no magic in separation of powers, and I think as a practical matter, if you look around the United States, you will find that is true. Nonetheless, in the small operating tribal governments, I think that is an issue and we have to deal with that.

Also we have to -- and this goes along with the funding -- develop criteria and perhaps so that we can encourage more and more competent career-minded people to deal with the tribal court systems. If we can develop these systems so they are recognized on and off the reservation as tribal institutions of substance across the board, then we can encourage these kinds of people and recruit these kinds of people to work within these systems.

MR. LATHAM: By "separation of power" do you mean judicial independence?

MR. MYERS: Judicial independence, judicial review. I think it's all in sort of a general category.

Exhibit No. 2 (continued)

MR. LATHAM: I take it from your prior remarks, Judge Rousseau, that those concepts are critical in your estimation.

JUDGE ROUSSEAU: Yes. I feel the reason we have a stable court system is because of the continuity of the staff and judges.

MR. LATHAM: Thank you.

CHAIRMAN PENDLETON: Thank you very much for coming here before us, and we will look forward to some very productive hearings. Thank you very much.

Mr. Roberts, come and sit up here.

It seems every time we get down to the regional director's report, everybody wants to hear something from the region, but they are seldom here to hear from the regional director.

MR. DESTRO: Well, they're in the regions.

CHAIRMAN PENDLETON: They're in the regions today, that's for sure. They're scattered far and wide.

Mr. Roberts, some of us who have braved the day are just waiting for you to take your seat and tell us what is going on in the Midwest.

MR. DESTRO: I wanted to thank you for not only the summary, but I thought the summary of one big issue in each place was really very, very useful. I thought that gave you a much better sense for what the hot issues in

Exhibit No. 3

Syllabus

SANTA CLARA PUEBLO ET AL. *v.* MARTINEZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 76-682. Argued November 29, 1977—Decided May 15, 1978

Respondents, a female member of the Santa Clara Pueblo and her daughter, brought this action for declaratory and injunctive relief against petitioners, the Pueblo and its Governor, alleging that a Pueblo ordinance that denies tribal membership to the children of female members who marry outside the tribe, but not to similarly situated children of men of that tribe, violates Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U. S. C. §§ 1301–1303, which in relevant part provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." 25 U. S. C. § 1302 (8). The ICRA's only express remedial provision, 25 U. S. C. § 1303, extends the writ of habeas corpus to any person, in a federal court, "to test the legality of his detention by order of an Indian tribe." The District Court held that jurisdiction was conferred by 28 U. S. C. § 1343 (4) and 25 U. S. C. § 1302 (8), apparently concluding that the substantive provisions of Title I impliedly authorized civil actions for declaratory and injunctive relief, and also that the tribe was not immune from such a suit. Subsequently, the court found for petitioners on the merits. The Court of Appeals, while agreeing on the jurisdictional issue, reversed on the merits. *Held:*

1. Suits against the tribe under the ICRA are barred by the tribe's sovereign immunity from suit, since nothing on the face of the ICRA purports to subject tribes to the jurisdiction of federal courts in civil actions for declaratory or injunctive relief. Pp. 58–59.

2. Nor does § 1302 impliedly authorize a private cause of action for declaratory and injunctive relief against the Pueblo's Governor. Congress' failure to provide remedies other than habeas corpus for enforcement of the ICRA was deliberate, as is manifest from the structure of the statutory scheme and the legislative history of Title I. Pp. 59–72.

(a) Congress was committed to the goal of tribal self-determination, as is evidenced by the provisions of Title I itself. Section 1302 selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique needs of tribal governments, and other parts of the ICRA similarly manifest a congressional purpose to protect tribal sovereignty from undue interference. Creation of a federal cause

Exhibit No. 3 (continued)

of action for the enforcement of § 1302 rights would not comport with the congressional goal of protecting tribal self-government. Pp. 62–65.

(b) Tribal courts, which have repeatedly been recognized as appropriate forums for adjudicating disputes involving important interests of both Indians and non-Indians, are available to vindicate rights created by the ICRA. Pp. 65–66.

(c) After considering numerous alternatives for review of tribal criminal convictions, Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments. Similarly, Congress considered and rejected proposals for federal review of alleged violations of the ICRA arising in a civil context. It is thus clear that only the limited review mechanism of § 1303 was contemplated. Pp. 66–70.

(d) By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom that tribal forums may be in a better position to evaluate than federal courts. Pp. 71–72.

540 F. 2d 1039, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, POWELL, and STEVENS, JJ., joined, and in all but Part III of which REHNQUIST, J., joined. WHITE, J., filed a dissenting opinion, *post*, p. 72. BLACKMUN, J., took no part in the consideration or decision of the case.

Marcelino Prelo argued the cause and filed briefs for petitioners.

Richard B. Collins argued the cause for respondents. With him on the brief was *Alan R. Taradash.**

*Briefs of *amici curiae* urging reversal were filed by *George B. Christensen* and *Joseph S. Fontana* for the National Tribal Chairmen's Assn.; and by *Reid Peyton Chambers, Harry R. Sachse,* and *Glen A. Wilkinson* for the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation et al.

Stephen L. Pevar and *Joel M. Gora* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Alvin J. Ziontz* for the Confederated

MR. JUSTICE MARSHALL delivered the opinion of the Court.†

This case requires us to decide whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members.

Petitioner Santa Clara Pueblo is an Indian tribe that has been in existence for over 600 years. Respondents, a female member of the tribe and her daughter, brought suit in federal court against the tribe and its Governor, petitioner Lucario Padilla, seeking declaratory and injunctive relief against enforcement of a tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe. Respondents claimed that this rule discriminates on the basis of both sex and ancestry in violation of Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U. S. C. §§ 1301–1303, which provides in relevant part that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." § 1302 (8).[1]

Title I of the ICRA does not expressly authorize the bringing of civil actions for declaratory or injunctive relief to

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Tribes of the Colville Indian Reservation; and by *Philip R. Ashby, William C. Schaab, L. Lamar Parrish,* and *Richard B. Wilks* for the Pueblo de Cochiti et al.

†MR. JUSTICE REHNQUIST joins Parts I, II, IV, and V of this opinion.

[1] The ICRA was initially passed by the Senate in 1967, 113 Cong. Rec. 35473, as a separate bill containing six Titles. S. 1843, 90th Cong., 1st Sess. (1967). It was re-enacted by the Senate in 1968 without change, 114 Cong. Rec. 5838, as an amendment to a House-originated bill, H. R. 2516, 90th Cong., 2d Sess. (1968), and was then approved by the House and signed into law by the President as Titles II through VII of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 77. Thus, the first Title of the ICRA was enacted as Title II of the Civil Rights Act of 1968. The six Titles of the ICRA will be referred to herein by their title numbers as they appeared in the version of S. 1843 passed by the Senate in 1967.

Exhibit No. 3 (continued)

enforce its substantive provisions. The threshold issue in this case is thus whether the Act may be interpreted to impliedly authorize such actions, against a tribe or its officers, in the federal courts. For the reasons set forth below, we hold that the Act cannot be so read.

I

Respondent Julia Martinez is a full-blooded member of the Santa Clara Pueblo, and resides on the Santa Clara Reservation in Northern New Mexico. In 1941 she married a Navajo Indian with whom she has since had several children, including respondent Audrey Martinez. Two years before this marriage, the Pueblo passed the membership ordinance here at issue, which bars admission of the Martinez children to the tribe because their father is not a Santa Claran.[2] Although the children were raised on the reservation and continue to reside there now that they are adults, as a result of their exclusion from membership they may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their

[2] The ordinance, enacted by the Santa Clara Pueblo Council pursuant to its legislative authority under the Constitution of the Pueblo, establishes the following membership rules:

"1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.

"2. . . . [C]hildren born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.

"3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.

"4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances."

Respondents challenged only subparagraphs 2 and 3. By virtue of subparagraph 4, Julia Martinez' husband is precluded from joining the Pueblo and thereby assuring the children's membership pursuant to subparagraph 1.

mother's death, or to inherit their mother's home or her possessory interests in the communal lands.

After unsuccessful efforts to persuade the tribe to change the membership rule, respondents filed this lawsuit in the United States District Court for the District of New Mexico, on behalf of themselves and others similarly situated.[3] Petitioners moved to dismiss the complaint on the ground that the court lacked jurisdiction to decide intratribal controversies affecting matters of tribal self-government and sovereignty. The District Court rejected petitioners' contention, finding that jurisdiction was conferred by 28 U. S. C. § 1343 (4) and 25 U. S. C. § 1302 (8). The court apparently concluded, first, that the substantive provisions of Title I impliedly authorized civil actions for declaratory and injunctive relief, and second, that the tribe was not immune from such suit.[4] Accordingly, the motion to dismiss was denied. 402 F. Supp. 5 (1975).

Following a full trial, the District Court found for petitioners on the merits. While acknowledging the relatively recent origin of the disputed rule, the District Court never-

[3] Respondent Julia Martinez was certified to represent a class consisting of all women who are members of the Santa Clara Pueblo and have married men who are not members of the Pueblo, while Audrey Martinez was certified as the class representative of all children born to marriages between Santa Claran women and men who are not members of the Pueblo.

[4] Section 1343 (4) gives the district courts "jurisdiction of any civil action *authorized by law* to be commenced by any person . . . to secure equitable or other relief under any Act of Congress providing for the protection of civil rights" (emphasis added). The District Court evidently believed that jurisdiction could not exist under § 1343 (4) unless the ICRA did in fact authorize actions for declaratory or injunctive relief in appropriate cases. For purposes of this case, we need not decide whether § 1343 (4) jurisdiction can be established merely by presenting a *substantial question* concerning the availability of a particular form of relief. Cf. *Bell* v. *Hood*, 327 U. S. 678 (1946) (jurisdiction under 28 U. S. C. § 1331). See also *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67–68 (1933) (Cardozo, J.).

theless found it to reflect traditional values of patriarchy still significant in tribal life. The court recognized the vital importance of respondents' interests,[5] but also determined that membership rules were "no more or less than a mechanism of social . . . self-definition," and as such were basic to the tribe's survival as a cultural and economic entity. *Id.*, at 15.[6] In sustaining the ordinance's validity under the "equal protection clause" of the ICRA, 25 U. S. C. § 1302 (8), the District Court concluded that the balance to be struck between these competing interests was better left to the judgment of the Pueblo:

> "[T]he equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved . . . . Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day. . . .
>
> ". . . To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it." 402 F. Supp., at 18–19.

On respondents' appeal, the Court of Appeals for the Tenth Circuit upheld the District Court's determination that 28 U. S. C. § 1343 (4) provides a jurisdictional basis for actions

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[5] The court found that "Audrey Martinez and many other children similarly situated have been brought up on the Pueblo, speak the Tewa language, participate in its life, and are, culturally, for all practical purposes, Santa Claran Indians." 402 F. Supp., at 18.

[6] The Santa Clara Pueblo is a relatively small tribe. Approximately 1,200 members reside on the reservation; 150 members of the Pueblo live elsewhere. In addition to tribal members, 150–200 nonmembers live on the reservation.

under Title I of the ICRA. 540 F. 2d 1039, 1042 (1976). It found that "since [the ICRA] was designed to provide protection against tribal authority, the intention of Congress to allow suits against the tribe was an essential aspect [of the ICRA]. Otherwise, it would constitute a mere unenforceable declaration of principles." *Ibid.* The Court of Appeals disagreed, however, with the District Court's ruling on the merits. While recognizing that standards of analysis developed under the Fourteenth Amendment's Equal Protection Clause were not necessarily controlling in the interpretation of this statute, the Court of Appeals apparently concluded that because the classification was one based upon sex it was presumptively invidious and could be sustained only if justified by a compelling tribal interest. See *id.*, at 1047–1048. Because of the ordinance's recent vintage, and because in the court's view the rule did not rationally identify those persons who were emotionally and culturally Santa Clarans, the court held that the tribe's interest in the ordinance was not substantial enough to justify its discriminatory effect. *Ibid.*

We granted certiorari, 431 U. S. 913 (1977), and we now reverse.

II

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester* v. *Georgia,* 6 Pet. 515, 559 (1832); see *United States* v. *Mazurie,* 419 U. S. 544, 557 (1975); F. Cohen, Handbook of Federal Indian Law 122–123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States* v. *Kagama,* 118 U. S. 375, 381–382 (1886). See *United States* v. *Wheeler,* 435 U. S. 313 (1978). They have power to make their own substantive law in internal matters, see *Roff* v. *Burney,* 168 U. S. 218 (1897) (mem-

bership); *Jones* v. *Meehan*, 175 U. S. 1, 29 (1899) (inheritance rules); *United States* v. *Quiver*, 241 U. S. 602 (1916) (domestic relations), and to enforce that law in their own forums, see, *e. g.*, *Williams* v. *Lee*, 358 U. S. 217 (1959).

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton* v. *Mayes*, 163 U. S. 376 (1896), this Court held that the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed" by the tribes. *Id.*, at 384. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.[7]

As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. *Ibid.* See, *e. g.*, *United States* v. *Kagama*, *supra*,

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[7] See, *e. g.*, *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F. 2d 529, 533 (CA8 1967) (Due Process Clause of Fourteenth Amendment); *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (CA10 1959) (freedom of religion under First and Fourteenth Amendments); *Barta* v. *Oglala Sioux Tribe*, 259 F. 2d 553 (CA8 1958), cert. denied, 358 U. S. 932 (1959) (Fourteenth Amendment). See also *Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915, 919 (CA10 1957), cert. denied, 356 U. S. 960 (1958) (applying *Talton* to Fifth Amendment due process claim); *Groundhog* v. *Keeler*, 442 F. 2d 674, 678 (CA10 1971). But see *Colliflower* v. *Garland*, 342 F. 2d 369 (CA9 1965), and *Settler* v. *Yakima Tribal Court*, 419 F. 2d 486 (CA9 1969), cert. denied, 398 U. S. 903 (1970), both holding that where a tribal court was so pervasively regulated by a federal agency that it was in effect a federal instrumentality, a writ of habeas corpus would lie to a person detained by that court in violation of the Constitution.

The line of authority growing out of *Talton*, while exempting Indian tribes from constitutional provisions addressed specifically to State or Federal Governments, of course, does not relieve State and Federal Governments of their obligations to individual Indians under these provisions.

at 379–381, 383–384; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 305–307 (1902). Title I of the ICRA, 25 U. S. C. §§ 1301–1303, represents an exercise of that authority. In 25 U. S. C. § 1302, Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.[8]

[8] Section 1302 in its entirety provides that:

"No Indian tribe in exercising powers of self-government shall—

"(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

"(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

"(3) subject any person for the same offense to be twice put in jeopardy;

"(4) compel any person in any criminal case to be a witness against himself;

"(5) take any private property for a public use without just compensation;

"(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

"(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

"(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

"(9) pass any bill of attainder or ex post facto law; or

"(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."

Section 1301 is a definitional section, which provides, *inter alia,* that the "powers of self-government" shall include "all governmental powers pos-

In 25 U. S. C. § 1303, the only remedial provision expressly supplied by Congress, the "privilege of the writ of habeas corpus" is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

Petitioners concede that § 1302 modifies the substantive law applicable to the tribe; they urge, however, that Congress did not intend to authorize federal courts to review violations of its provisions except as they might arise on habeas corpus. They argue, further, that Congress did not waive the tribe's sovereign immunity from suit. Respondents, on the other hand, contend that § 1302 not only modifies the substantive law applicable to the exercise of sovereign tribal powers, but also authorizes civil suits for equitable relief against the tribe and its officers in federal courts. We consider these contentions first with respect to the tribe.

III

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner* v. *United States,* 248 U. S. 354, 358 (1919); *United States* v. *United States Fidelity & Guaranty Co.,* 309 U. S. 506, 512–513 (1940); *Puyallup Tribe* v. *Washington Dept. of Game,* 433 U. S. 165, 172–173 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *United States* v. *United States Fidelity & Guaranty Co., supra,* at 512.

It is settled that a waiver of sovereign immunity " 'cannot be implied but must be unequivocally expressed.' " *United States* v. *Testan,* 424 U. S. 392, 399 (1976), quoting, *United*

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sessed by an Indian tribe, executive, legislative and judicial, and all offices, bodies, and tribunals by and through which they are executed . . . ." 25 U. S. C. § 1301 (2).

States v. *King*, 395 U. S. 1, 4 (1969). Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, see, *e. g.*, 28 U. S. C. § 2243, the provisions of § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

IV

As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit. See *Puyallup Tribe* v. *Washington Dept. of Game, supra*, at 171–172; cf. *Ex parte Young*, 209 U. S. 123 (1908). We must therefore determine whether the cause of action for declaratory and injunctive relief asserted here by respondents, though not expressly authorized by the statute, is nonetheless implicit in its terms.

In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher* v. *District Court*, 424 U. S. 382, 387–388 (1976), may "undermine the authority of the tribal cour[t] . . . and hence . . . infringe on the right of the Indians to govern themselves." *Williams* v. *Lee*, 358 U. S., at 223.[9]

[9] In *Fisher*, we held that a state court did not have jurisdiction over an adoption proceeding in which all parties were members of an Indian tribe and residents of the reservation. Rejecting the mother's argument that

A fortiori, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority. Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. Cf. *Antoine* v. *Washington,* 420 U. S. 194, 199–200 (1975); *Choate* v. *Trapp,* 224 U. S. 665, 675 (1912).

With these considerations of "Indian sovereignty . . . [as] a backdrop against which the applicable . . . federal statut[e] must be read," *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 172 (1973), we turn now to those factors of more general relevance in determining whether a cause of action is implicit in a statute not expressly providing one. See *Cort* v. *Ash,* 422 U. S. 66 (1975).[10] We note at the outset that

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denying her access to the state courts constituted an impermissible racial discrimination, we reasoned:

"The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law . . . . [E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U. S., at 390–391.

In *Williams* v. *Lee,* we held that a non-Indian merchant could not invoke the jurisdiction of a state court to collect a debt owed by a reservation Indian and arising out of the merchant's activities on the reservation, but instead must seek relief exclusively through tribal remedies.

[10] "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny

a central purpose of the ICRA and in particular of Title I was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." S. Rep. No. 841, 90th Cong., 1st Sess., 5–6 (1967). There is thus no doubt that respondents, American Indians living on the Santa Clara Reservation, are among the class for whose especial benefit this legislation was enacted. *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 39 (1916); see *Cort* v. *Ash, supra,* at 78. Moreover, we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms. See, *e. g., Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 414 n. 13 (1968); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, 238–240 (1969). See also *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971). These precedents, however, are simply not dispositive here. Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one. See *National Railroad Passenger Corp.* v. *Na-*

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one? See, *e. g., National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers,* 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e. g., Amtrak, supra; Securities Investor Protection Corp.* v. *Barbour,* 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey,* 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state [or tribal] law, in an area basically the concern of the States [or tribes], so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort* v. *Ash,* 422 U. S., at 78.

See generally Note, Implication of Civil Remedies Under the Indian Civil Rights Act, 75 Mich. L. Rev. 210 (1976).

tional Assn. of Railroad Passengers, 414 U. S. 453 (1974); *Cort* v. *Ash*, *supra*.

A

Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974); see *Fisher* v. *District Court*, 424 U. S., at 391.[11] This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself. Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed,[12] selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal gov-

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[11] One month before passage of the ICRA, President Johnson had urged its enactment as part of a legislative and administrative program with the overall goal of furthering "self-determination," "self-help," and "self-development" of Indian tribes. See 114 Cong. Rec. 5518, 5520 (1968).

[12] Exploratory hearings which led to the ICRA commenced in 1961 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. In 1964, Senator Ervin, Chairman of the Subcommittee, introduced S. 3041–3048, 88th Cong., 2d Sess., on which no hearings were had. The bills were reintroduced in the 89th Congress as S. 961–968 and were the subject of extensive hearings by the Subcommittee. Hearings on S. 961–968 and S. J. Res. 40 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965) (hereinafter cited as 1965 Hearings).

S. 961 would have extended to tribal governments all constitutional provisions applicable to the Federal Government. After criticism of this proposal at the hearings, Congress instead adopted the approach found in a substitute bill submitted by the Interior Department, reprinted in 1965 Hearings 318, which, with some changes in wording, was enacted into law as 25 U. S. C. §§ 1302–1303. See also n. 1, *supra*.

ernments.[13] See n. 8, *supra*. Thus, for example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases, cf. *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972).[14]

The other Titles of the ICRA also manifest a congressional purpose to protect tribal sovereignty from undue interference. For instance, Title III, 25 U. S. C. §§ 1321–1326, hailed by some of the ICRA's supporters as the most important part of the Act,[15] provides that States may not assume civil or criminal jurisdiction over "Indian country" without

[13] See, *e. g.*, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S. Res. 194, 89th Cong., 2d Sess., 8–11, 25 (Comm. Print 1966); 1965 Hearings 17, 21, 50 (statements of Solicitor of the Dept. of Interior); *id.*, at 65 (statement of Arthur Lazarus, Jr., General Counsel for the Association of American Indian Affairs).

[14] The provisions of § 1302, set forth fully in n. 8, *supra*, differ in language and in substance in many other respects from those contained in the constitutional provisions on which they were modeled. The provisions of the Second and Third Amendments, in addition to those of the Seventh Amendment, were omitted entirely. The provision here at issue, § 1302 (8), differs from the constitutional Equal Protection Clause in that it guarantees "the equal protection of *its* [the tribe's] laws," rather than of *"the* laws." Moreover, § 1302 (7), which prohibits cruel or unusual punishments and excessive bails, sets an absolute limit of six months' imprisonment and a $500 fine on penalties which a tribe may impose. Finally, while most of the guarantees of the Fifth Amendment were extended to tribal actions, it is interesting to note that § 1302 does not require tribal criminal prosecutions to be initiated by grand jury indictment, which was the requirement of the Fifth Amendment specifically at issue and found inapplicable to tribes in *Talton* v. *Mayes*, discussed *supra*, at 56.

[15] See, *e. g.*, 114 Cong. Rec. 9596 (1968) (remarks of Rep. Meeds); Hearings on H. R. 15419 before the Subcommittee on Indian Affairs of the House Committee on Interior & Insular Affairs, 90th Cong., 2d Sess., 108 (1968) (hereinafter cited as House Hearings). See also 1965 Hearings 198 (remarks of Executive Director, National Congress of American Indians).

the prior consent of the tribe, thereby abrogating prior law to the contrary.[16] Other Titles of the ICRA provide for strengthening certain tribal courts through training of Indian judges,[17] and for minimizing interference by the Federal Bureau of Indian Affairs in tribal litigation.[18]

Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, see *supra*, at 59–60, but it would also impose serious financial burdens on already "financially disadvantaged" tribes. Subcommittee on Constitutional Rights, Senate Judiciary Committee, Constitutional

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[16] In 25 U. S. C. § 1323 (b), Congress expressly repealed § 7 of the Act of Aug. 15, 1953, 67 Stat. 590, which had authorized States to assume criminal and civil jurisdiction over reservations without tribal consent.

[17] Title II of the ICRA provides, *inter alia*, "for the establishing of educational classes for the training of judges of courts of Indian offenses." 25 U. S. C. § 1311 (4). Courts of Indian offenses were created by the Federal Bureau of Indian Affairs to administer criminal justice for those tribes lacking their own criminal courts. See generally W. Hagan, Indian Police and Judges 104–125 (1966).

[18] Under 25 U. S. C. § 81, the Secretary of the Interior and the Commissioner of Indian Affairs are generally required to approve any contract made between a tribe and an attorney. At the exploratory hearings, see n. 12, *supra*, it became apparent that the Interior Department had engaged in inordinate delays in approving such contracts and had thereby hindered the tribes in defending and asserting their legal rights. See, *e. g.*, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S. Res. 53, 87th Cong., 1st Sess., 211 (1961) (hereinafter cited as 1961 Hearings); *id.*, at 290, 341, 410. Title V of the ICRA, 25 U. S. C. § 1331, provides that the Department must act on applications for approval of attorney contracts within 90 days of their submission or the application will be deemed to have been granted.

Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S. Res. 194, 89th Cong., 2d Sess., 12 (Comm. Print 1966) (hereinafter cited as Summary Report).[19]

Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply.[20] Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.[21] See, *e. g., Fisher* v. *District Court,* 424 U. S.

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[19] The cost of civil litigation in federal district courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums. See generally 1 American Indian Policy Review Commission, Final Report 160–166 (1977); M. Price, Law and the American Indian 154–160 (1973). And as became apparent in congressional hearings on the ICRA, many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of defending federal lawsuits. See, *e. g.,* 1965 Hearings 131, 157; Summary Report 12; House Hearings 69 (remarks of the Governor of the San Felipe Pueblo).

[20] Prior to passage of the ICRA, Congress made detailed inquiries into the extent to which tribal constitutions incorporated "Bill of Rights" guarantees, and the degree to which the tribal provisions differed from those found in the Constitution. See, *e. g.,* 1961 Hearings 121, 166, 359; Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S. Res. 58, 88th Cong., 1st Sess., 823 (1963). Both Senator Ervin, the ICRA's chief sponsor, and President Johnson, in urging passage of the Act, explained the need for Title I on the ground that few tribal constitutions included provisions of the Bill of Rights. See House Hearings 131 (remarks of Sen. Ervin); 114 Cong. Rec. 5520 (1968) (message from the President).

[21] There are 287 tribal governments in operation in the United States, of which 117 had operating tribal courts in 1976. 1 American Indian Policy Review Commission, *supra* n. 19, at 5, 163. In 1973 these courts

382 (1976); *Williams* v. *Lee*, 358 U. S. 217 (1959). See also *Ex parte Crow Dog*, 109 U. S. 556 (1883). Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. See *United States* v. *Mazurie*, 419 U. S. 544 (1975).[22] Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.

B

Our reluctance is strongly reinforced by the specific legislative history underlying 25 U. S. C. § 1303. This history, extending over more than three years,[23] indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments,

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handled approximately 70,000 cases. *Id.*, at 163–164. Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts. See, *e. g.*, *United States ex rel. Mackey* v. *Coxe*, 18 How. 100 (1856); *Standley* v. *Roberts*, 59 F. 836, 845 (CA8 1894), appeal dismissed, 17 S. Ct. 999, 41 L. Ed. 1177 (1896).

[22] By the terms of its Constitution, adopted in 1935 and approved by the Secretary of the Interior in accordance with the Indian Reorganization Act of 1934, 25 U. S. C. § 476, judicial authority in the Santa Clara Pueblo is vested in its tribal council.

Many tribal constitutions adopted pursuant to 25 U. S. C. § 476, though not that of the Santa Clara Pueblo, include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. See 1 American Indian Policy Review Commission, *supra* n. 19, at 187–188; 1961 Hearings 95. In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior.

[23] See n. 12, *supra*. Although extensive hearings on the ICRA were held in the Senate, see *ibid.*, House consideration was extremely abbreviated. See House Hearings, *supra;* 114 Cong. Rec. 9614–9615 (1968) (remarks of Rep. Aspinall).

on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people." Summary Report 11.

In settling on habeas corpus as the exclusive means for federal-court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed. Originally, the legislation would have authorized *de novo* review in federal court of all convictions obtained in tribal courts.[24] At hearings held on the proposed legislation in 1965, however, it became clear that even those in agreement with the general thrust of the review provision—to provide some form of judicial review of criminal proceedings in tribal courts—believed that *de novo* review would impose unmanageable financial burdens on tribal governments and needlessly displace tribal courts. See *id.*, at 12; 1965 Hearings 22–23, 157, 162, 341–342. Moreover, tribal representatives argued that *de novo* review would "deprive the tribal court of all jurisdiction in the event of an appeal, thus having a harmful effect upon law enforcement within the reservation," and urged instead that "decisions of tribal courts . . . be reviewed in the U. S. district courts upon petition for a writ of habeas corpus." *Id.*, at 79. After considering numerous alternatives for review of tribal convictions, Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments.

Similarly, and of more direct import to the issue in this case, Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context. As initially introduced, the Act would have required the Attorney General to "receive and investigate" complaints

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[24] S. 962, 89th Cong., 1st Sess. (1965), reprinted in 1965 Hearings 6–7. See n. 12, *supra*.

relating to deprivations of an Indian's statutory or constitutional rights, and to bring "such criminal or other action as he deems appropriate to vindicate and secure such right to such Indian." [25] Notwithstanding the screening effect this proposal would have had on frivolous or vexatious lawsuits, it was bitterly opposed by several tribes. The Crow Tribe representative stated:

> "This [bill] would in effect subject the tribal sovereignty of self-government to the Federal government. . . . [B]y its broad terms [it] would allow the Attorney General to bring any kind of action as he deems appropriate. By this bill, any time a member of the tribe would not be satisfied with an action by the [tribal] council, it would allow them [*sic*] to file a complaint with the Attorney General and subject the tribe to a multitude of investigations and threat of court action." 1965 Hearings 235 (statement of Mr. Real Bird).

In a similar vein, the Mescalero Apache Tribal Council argued that "[i]f the perpetually dissatisfied individual Indian were to be armed with legislation such as proposed in [this bill] he could disrupt the whole of a tribal government." *Id.*, at 343. In response, this provision for suit by the Attorney General was completely eliminated from the ICRA. At the same time, Congress rejected a substitute proposed by the Interior Department that would have authorized the Department to adjudicate civil complaints concerning tribal actions, with review in the district courts available from final decisions of the agency.[26]

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[25] S. 963, 89th Cong., 1st Sess. (1965). See n. 12, *supra*.

[26] The Interior Department substitute, reprinted in 1965 Hearings 318, provided in relevant part:

"Any action, other than a criminal action, taken by an Indian tribal government which deprives any American Indian of a right or freedom established and protected by this Act may be reviewed by the Secretary of the Interior upon his own motion or upon the request of said Indian. If

Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302. Although the only Committee Report on the ICRA in its final form, S. Rep. No. 841, 90th Cong., 1st Sess. (1967), sheds little additional light on this question, it would hardly support a contrary conclusion.[27] Indeed, its description of the purpose of Title I,[28] as well as the floor

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the Secretary determines that said Indian has been deprived of any such right or freedom, he shall require the Indian tribal government to take such corrective action as he deems necessary. Any final decision of the Secretary may be reviewed by the United States district court in the district in which the action arose and such court shall have jurisdiction thereof."

In urging Congress to adopt this proposal, the Solicitor of Interior specifically suggested that "Congress has the power to give to the courts the jurisdiction that they would require to review the actions of an Indian tribal court," and that the substitute bill which the Department proposed "would actually confer on the district courts the jurisdiction they require to consider these problems." *Id.*, at 23–24. Congress' failure to adopt this provision is noteworthy particularly because it did adopt the other portion of the Interior substitute bill, which led to the current version of §§ 1302 and 1303. See n. 12, *supra*.

[27] Respondents rely most heavily on a rambling passage in the Report discussing *Talton* v. *Mayes* and its progeny, see n. 7, *supra*, some of which arose in a civil context. S. Rep. No. 841, at 8–11. Although there is some language suggesting that Congress was concerned about the unavailability of relief in federal court, the Report nowhere states that Title I would be enforceable in a cause of action for declaratory or injunctive relief, and the cited passage is fully consistent with the conclusion that Congress intended only to modify the substance of the law applicable to Indian tribes, and to allow enforcement in federal court through habeas corpus. The Report itself characterized the import of its discussion as follows:

"These cases illustrate the continued denial of specific constitutional guarantees to litigants in tribal court proceedings, on the ground that the tribal courts are quasi-sovereign entities to which general provisions in the Constitution do not apply." *Id.*, at 10.

[28] The Report states: "The purpose of title I is to protect individual Indians from arbitrary and unjust actions by tribal governments. This

debates on the bill,[29] indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303.[30] These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303.

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is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government." *Id.*, at 6. It explains further that "[i]t is hoped that title II [25 U. S. C. § 1311], requiring the Secretary of the Interior to recommend a model code [to govern the administration of justice] for all Indian tribes, will implement the effect of title I." *Ibid.* (Although § 1311 by its terms refers only to courts of Indian offenses, see n. 17, *supra*, the Senate Report makes clear that the code is intended to serve as a model for use in all tribal courts. S. Rep. No. 841, *supra*, at 6, 11.) Thus, it appears that the Committee viewed § 1302 as enforceable only on habeas corpus and in tribal forums.

[29] Senator Ervin described the model code provisions of Title II, see n. 28, *supra*, as "the proper vehicle by which the objectives" of Title I should be achieved. 113 Cong. Rec. 13475 (1967). And Congressman Reifel, one of the ICRA's chief supporters in the House, explained that "by providing for a writ of habeas corpus from the Federal court, the bill would assure effective enforcement of these fundamental rights." 114 Cong. Rec. 9553 (1968).

[30] Only a few tribes had an opportunity to comment on the ICRA in its final form, since the House held only one day of hearings on the legislation. See n. 23, *supra*. The Pueblos of New Mexico, testifying in opposition to the provisions of Title I, argued that the habeas corpus provision of § 1303 "opens an avenue through which Federal courts, lacking knowledge of our traditional values, customs, and laws, could review and offset the decisions of our tribal councils." House Hearings 37. It is inconceivable that, had they understood the bill impliedly to authorize other actions, they would have remained silent, as they did, concerning this possibility. It would hardly be consistent with "[t]he overriding duty of our Federal Government to deal fairly with Indians," *Morton* v. *Ruiz*, 415 U. S. 199, 236 (1974), lightly to imply a cause of action on which the tribes had no prior opportunity to present their views.

V

As the bill's chief sponsor, Senator Ervin,[31] commented in urging its passage, the ICRA "should not be considered as the final solution to the many serious constitutional problems confronting the American Indian." 113 Cong. Rec. 13473 (1967). Although Congress explored the extent to which tribes were adhering to constitutional norms in both civil and criminal contexts, its legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice. See *ibid.*, quoting Summary Report 24. In light of this finding, and given Congress' desire not to intrude needlessly on tribal self-government, it is not surprising that Congress chose at this stage to provide for federal review only in habeas corpus proceedings.

By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts. Our relations with the Indian tribes have "always been . . . anomalous . . . and of a complex character." *United States* v. *Kagama,* 118 U. S., at 381. Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes under Art. III, *Cherokee Nation* v. *Georgia,* 5 Pet. 1 (1831), we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments. See *Elk* v. *Wilkins,* 112 U. S. 94 (1884). As is suggested by the District Court's opinion in this case, see *supra,* at 54,

[31] See generally Burnett, An Historical Analysis of the 1968 "Indian Civil Rights" Act, 9 Harv. J. Legis. 557, 574–602, 603 (1972).

efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity.[32]

As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. See *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565 (1903). Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

The judgment of the Court of Appeals is, accordingly,

Reversed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, dissenting.

The declared purpose of the Indian Civil Rights Act of 1968 (ICRA or Act), 25 U. S. C. §§ 1301–1341, is "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans." S. Rep. No. 841, 90th

[32] A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. See *Roff* v. *Burney*, 168 U. S. 218 (1897); *Cherokee Intermarriage Cases*, 203 U. S. 76 (1906). Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

Cong., 1st Sess., 6 (1967) (hereinafter Senate Report). The Court today, by denying a federal forum to Indians who allege that their rights under the ICRA have been denied by their tribes, substantially undermines the goal of the ICRA and in particular frustrates Title I's[1] purpose of "protect[ing] individual Indians from arbitrary and unjust actions of tribal governments." *Ibid.* Because I believe that implicit within Title I's declaration of constitutional rights is the authorization for an individual Indian to bring a civil action in federal court against tribal officials[2] for declaratory and injunctive relief to enforce those provisions, I dissent.

Under 28 U. S. C. § 1343 (4), federal district courts have jurisdiction over "any civil action authorized by law to be commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." Because the ICRA is unquestionably a federal Act "providing for the protection of civil rights," the necessary inquiry is whether the Act authorizes the commencement of a civil action for such relief.

The Court noted in *Bell* v. *Hood,* 327 U. S. 678, 684 (1946) (footnote omitted), that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." The fact that a statute is merely declarative and does not expressly provide for a cause of action to enforce its terms "does not, of course, prevent a federal court from fashioning an effective equitable remedy,"

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[1] 25 U. S. C. §§ 1301–1303.

[2] Because the ICRA is silent on the question, I agree with the Court that the Act does not constitute a waiver of the Pueblo's sovereign immunity. The relief respondents seek, however, is available against petitioner Lucario Padilla, the Governor of the Pueblo. Under the Santa Clara Constitution, the Governor is charged with the duty of enforcing the Pueblo's laws. App. 5.

Jones v. *Alfred H. Mayer Co.*, 392 U. S. 409, 414 n. 13 (1968), for "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 239 (1969). We have previously identified the factors that are relevant in determining whether a private remedy is implicit in a statute not expressly providing one: whether the plaintiff is one of the class for whose especial benefit the statute was enacted; whether there is any indication of legislative intent either to create a remedy or to deny one; whether such a remedy is consistent with the underlying purposes of the statute; and whether the cause of action is one traditionally relegated to state law. *Cort* v. *Ash*, 422 U. S. 66, 78 (1975). Application of these factors in the present context indicates that a private cause of action under Title I of the ICRA should be inferred.

As the majority readily concedes, "respondents, American Indians living on the Santa Clara reservation, are among the class for whose especial benefit this legislation was enacted." *Ante*, at 61. In spite of this recognition of the congressional intent to provide these particular respondents with the guarantee of equal protection of the laws, the Court denies them access to the federal courts to enforce this right because it concludes that Congress intended habeas corpus to be the exclusive remedy under Title I. My reading of the statute and the legislative history convinces me that Congress did not intend to deny a private cause of action to enforce the rights granted under § 1302.

The ICRA itself gives no indication that the constitutional rights it extends to American Indians are to be enforced only by means of federal habeas corpus actions. On the contrary, since several of the specified rights are most frequently invoked in noncustodial situations,[3] the natural assumption is

[3] For example, habeas corpus relief is unlikely to be available to redress violations of freedom of speech, freedom of the press, free exercise of religion, or just compensation for the taking of property.

that some remedy other than habeas corpus must be contemplated. This assumption is not dispelled by the fact that the Congress chose to enumerate specifically the rights granted under § 1302, rather than to state broadly, as was originally proposed, that "any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution." S. 961, 89th Cong., 1st Sess. (1965). The legislative history reflects that the decision "to indicate in more specific terms the constitutional protections the American Indian possesses in relation to his tribe." was made in recognition of the "peculiarities of the Indian's economic and social condition, his customs, his beliefs, and his attitudes . . . ." Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations pursuant to S. Res. 194, 89th Cong., 2d Sess., 25, 9 (Comm. Print 1966) (hereinafter Summary Report). While I believe that the uniqueness of the Indian culture must be taken into consideration in applying the constitutional rights granted in § 1302, I do not think that it requires insulation of official tribal actions from federal-court scrutiny. Nor do I find any indication that Congress so intended.

The inferences that the majority draws from various changes Congress made in the originally proposed legislation are to my mind unsupported by the legislative history. The first change the Court points to is the substitution of a habeas corpus provision for S. 962's provision of *de novo* federal-court review of tribal criminal proceedings. See *ante*, at 67. This change, restricted in its concern to the criminal context, is of limited relevance to the question whether Congress intended a private cause of action to enforce rights arising in a civil context. Moreover, the reasons this change was made are not inconsistent with the recognition of such a cause of action.

The Summary Report explains that the change in S. 962 was made only because of displeasure with the *degree* of intrusion permitted by the original provision:

> "No one appearing before the subcommittee or submitting testimony for the subcommittee's consideration opposed the provision of some type of appeal from the decisions of tribal courts. Criticism of S. 962, however, was directed at the bill's use of a trial *de novo* in a U. S. district court as the appropriate means of securing appellate review. . . .
>
> "There was considerable support for the suggestion that the district court, instead of reviewing tribal court decisions on a *de novo* basis, be authorized only to decide *whether* the accused was deprived of a constitutional right. If no deprivation were found, the tribal court decision would stand. If, on the other hand, the district court determined that an accused had suffered a denial of his rights at the hands of the tribal court, the case would be remanded with instructions for dismissal or retrial, as the district court might decide." Summary Report 12–13 (footnote omitted).

The degree of intrusion permitted by a private cause of action to enforce the civil provisions of § 1302 would be no greater than that permitted in a habeas corpus proceeding. The federal district court's duty would be limited to determining whether the challenged tribal action violated one of the enumerated rights. If found to be in violation, the action would be invalidated; if not, it would be allowed to stand. In no event would the court be authorized, as in a *de novo* review proceeding, to substitute its judgment concerning the wisdom of the action taken for that of the tribal authorities.

Nor am I persuaded that Congress, by rejecting various proposals for administrative review of alleged violations of Indian

rights, indicated its rejection of federal *judicial* review of such violations. As the majority notes, the original version of the Act provided for investigation by the Attorney General of "any written complaint filed with him by any Indian . . . alleging that such Indian has been deprived of a right conferred upon citizens of the United States by the laws and Constitution of the United States." S. 963, 89th Cong., 1st Sess. (1965). The bill would have authorized the Attorney General to bring whatever action he deemed appropriate to vindicate such right. Although it is true that this provision was eliminated from the final version of the ICRA, the inference the majority seeks to draw from this fact is unwarranted.

It should first be noted that the focus of S. 963 was in large part aimed at nontribal deprivations of Indian rights. In explaining the need for the bill, the Subcommittee stated that it had received complaints of deprivations of Indians' constitutional rights in the following contexts, only two of which concern tribal actions: "[I]llegal detention of reservation Indians by State and tribal officials; arbitrary decisionmaking by the Bureau of Indian Affairs; denial of various State welfare services to Indians living off the reservations; discrimination by government officials in health services; mistreatment and brutality against Indians by State and tribal law enforcement officers; and job discrimination by Federal and State agencies and private businesses." Hearings on S. 961–968 and S. J. Res. 40 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 8 (1965) (hereinafter 1965 Hearings). See also *id.*, at 86 (testimony of Arthur Lazarus, Jr., General Counsel for the Association on American Indian Affairs, Inc.: "It is my understanding . . . that the complaints to be filed with the Attorney General are generally to be off-reservation violations of rights along the lines of the provisions in the Civil Rights Act"). Given this difference in focus, the elimination of this proposal has little relevance to the issue before us.

Furthermore, the reasons for the proposal's deletion are not as clear as the majority seems to indicate. While two witnesses did express their fears that the proposal would disrupt tribal governments, many others expressed the view that the proposals gave the Attorney General no more authority than he already possessed. *Id.*, at 92, 104, 227, 319. The Acting Secretary of the Interior was among those who thought that this additional authorization was not needed by the Attorney General because the Department of the Interior already routinely referred complaints of Indian rights violations to him for the commencement of appropriate litigation. *Id.*, at 319.

The failure of Congress to adopt the Department of the Interior's substitute provision provides even less support for the view that Congress opposed a private cause of action. This proposal would have allowed the Secretary of the Interior to review "[a]ny action, other than a criminal action, taken by an Indian tribal government which deprives any American Indian of a right or freedom established and protected by this Act . . ." and to take "such corrective action" as he deemed necessary. *Id.*, at 318. It was proposed in tandem with a provision that would have allowed an Indian to appeal from a criminal conviction in a tribal court to the Secretary, who would then have been authorized to affirm, modify, or reverse the tribal court's decision. Most of the discussion about this joint proposal focused on the review of criminal proceedings, and several witnesses expressed objection to it because it improperly "mixed" "the judicial process . . . with the executive process." *Id.*, at 96. See also *id.*, at 294. Senator Ervin himself stated that he had "difficulty reconciling [his] ideas of the nature of the judicial process and the notion of taking an appeal in what is supposed to be a judicial proceeding to the executive branch of the Government." *Id.*, at 225. While the discussion of the civil part of the proposal was limited, it may be assumed that Congress was equally unreceptive to the

idea of the Executive Branch's taking "corrective actions" with regard to noncriminal actions of tribal governments.

In sum, then, I find no positive indication in the legislative history that Congress opposed a private cause of action to enforce the rights extended to Indians under § 1302.[4] The absence of any express approval of such a cause of action, of course, does not prohibit its inference, for, as we stated in *Cort:* "[I]n situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." 422 U. S.. at 82 (footnote omitted).

The most important consideration, of course, is whether a private cause of action would be consistent with the underly-

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[4] References in the legislative history to the role of Title II's model code in effectuating the purposes of Title I do not indicate that Congress rejected the possibility of a federal cause of action under § 1302. The wording of § 1311, which directs the Secretary of the Interior to recommend a model code, demonstrates that in enacting Title II Congress was primarily concerned with criminal proceedings. Thus it requires the code to include

"provisions which will (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense, (2) assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual . . . ."

The remaining required provisions concern the qualifications for office of judges of courts of Indian offenses and educational classes for the training of such judges. While the enactment of Title II shows Congress' desire to implement the provisions of § 1302 concerning rights of criminal defendants and to upgrade the quality of tribal judicial proceedings, it gives no indication that Congress decided to deny a federal cause of action to review tribal actions arising in a noncriminal context.

ing purposes of the Act. As noted at the outset, the Senate Report states that the purpose of the ICRA "is to insure that the American Indian is afforded the broad constitutional rights secured to other Americans." Senate Report 6. Not only is a private cause of action consistent with that purpose, it is necessary for its achievement. The legislative history indicates that Congress was concerned, not only about the Indian's lack of substantive rights, but also about the lack of remedies to enforce whatever rights the Indian might have. During its consideration of this legislation, the Senate Subcommittee pointed out that "[t]hough protected against abridgment of his rights by State or Federal action, the individual Indian is . . . without redress against his tribal authorities." Summary Report 3. It is clear that the Subcommittee's concern was not limited to the criminal context, for it explained:

> "It is not only in the operation of tribal courts that Indians enjoy something other than full benefit of the Bill of Rights. For example, a Navajo tribal council ordinance prohibiting the use of peyote resulted in an alleged abridgment of religious freedom when applied to members of the Native American Church, an Indian sect which uses the cactus plant in connection with its worship services.
>
> "The opinion of the U. S. Court of Appeals for the 10th Circuit, in dismissing an action of the Native American Church against the Navajo tribal council, is instructive in pointing up the lack of remedies available to the Indian in resolving his differences with tribal officials." *Id.*, at 3–4 (footnotes omitted).[5]

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[5] The opinion to which the Subcommittee was referring was *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (CA10 1959), in which the court dismissed for lack of federal jurisdiction an action challenging a Navajo tribal ordinance making it a criminal offense "to introduce into the Navajo country, sell, use or have in possession within the Navajo country, the bean known as peyote . . . ." *Id.*, at 132. It was

It was "[t]o remedy these various situations and thereby to safeguard the rights of Indian citizens . . ." that the legislation resulting in the ICRA was proposed. *Id.*, at 5.

Several witnesses appearing before the Senate Subcommittee testified concerning deprivations of their rights by tribal authorities and their inability to gain relief. Mr. Frank Takes Gun, President of the Native American Church, for example, stated that "the Indian is without an effective means to enforce whatever constitutional rights he may have in tribal proceedings instituted to deprive him of liberty or property. While I suppose that abstractedly [*sic*] we might be said to enjoy [certain] rights . . . , the blunt fact is that unless the tribal court elects to confer that right upon us we have no way of securing it." 1965 Hearings 164. Miss Emily Schuler, who accompanied a former Governor of the Isleta Pueblo to the hearings, echoed these concerns. She complained that "[t]he people get governors and sometimes they get power hungry and then the people have no rights at all," to which Senator Ervin responded: " 'Power hungry' is a pretty good shorthand statement to show why the people of the United States drew up a Constitution. They wanted to compel their rulers to

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contended that the ordinance violated plaintiffs' right to the free exercise of religion. Because the court concluded that the First Amendment was not applicable to the tribe, it held that the federal courts lacked jurisdiction, "even though [the tribal laws or regulations] may have an impact to some extent on forms of religious worship." *Id.*, at 135.

The Senate Report also made note of this decision in what the majority terms a "rambling passage." *Ante*, at 69 n. 27. In this passage the Committee reviewed various federal decisions relating to the question "whether a tribal Indian can successfully challenge on constitutional grounds specific acts or practices of the Indian tribe." Senate Report 9. With only one exception, these decisions held that federal courts lacked jurisdiction to review alleged constitutional violations by tribal officials because the provisions of the Bill of Rights were not binding on the tribes. This section of the Senate Report, which is included under the heading "Need for Legislation," indicates Congress' concern over the Indian's lack of remedies for tribal constitutional violations.

stay within the bounds of that Constitution and not let that hunger for power carry them outside it." *Id.*, at 264.

Given Congress' concern about the deprivations of Indian rights by tribal authorities, I cannot believe, as does the majority, that it desired the enforcement of these rights to be left up to the very tribal authorities alleged to have violated them. In the case of the Santa Clara Pueblo, for example, both legislative and judicial powers are vested in the same body, the Pueblo Council. See App. 3–5. To suggest that this tribal body is the "appropriate" forum for the adjudication of alleged violations of the ICRA is to ignore both reality and Congress' desire to provide a means of redress to Indians aggrieved by their tribal leaders.[6]

Although the Senate Report's statement of the purpose of the ICRA refers only to the granting of constitutional rights to the Indians, I agree with the majority that the legislative history demonstrates that Congress was also concerned with furthering Indian self-government. I do not agree, however, that this concern on the part of Congress precludes our recognition of a federal cause of action to enforce the terms of the Act. The major intrusion upon the tribe's right to govern itself occurred when Congress enacted the ICRA and man-

[6] Testimony before the Subcommittee indicated that the mere provision of constitutional rights to the tribes did not necessarily guarantee that those rights would be observed. Mr. Lawrence Jaramillo, a former Governor of the Isleta Pueblo, testified that, despite the tribal constitution's guarantee of freedom of religion, the present tribal Governor had attempted to "alter certain religious procedures of the Catholic priest who resides on the reservation." 1965 Hearings 261, 264. Mr. Jaramillo stated that the Governor "has been making his own laws and he has been making his own decisions and he has been making his own court rulings," and he implored the Subcommittee:

"Honorable Senator Ervin, we ask you to see if we can have any protection on these constitutional rights. We do not want to give jurisdiction to the State. We want to keep it in Federal jurisdiction. But we are asking this. We know if we are not given justice that we would like to appeal a case to the Federal court." *Id.*, at 264.

dated that the tribe "in exercising powers of self-government" observe the rights enumerated in § 1302. The extension of constitutional rights to individual citizens is *intended* to intrude upon the authority of government. And once it has been decided that an individual does possess certain rights vis-à-vis his government, it necessarily follows that he has some way to enforce those rights. Although creating a federal cause of action may "constitut[e] an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself," *ante,* at 59, in my mind it is a further step that must be taken; otherwise, the change in the law may be meaningless.

The final consideration suggested in *Cort* is the appropriateness of a federal forum to vindicate the right in question. As even the majority acknowledges, "we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights . . . ." *Ante,* at 61. For the reasons set out above, I would make no exception here.

Because I believe that respondents stated a cause of action over which the federal courts have jurisdiction, I would proceed to the merits of their claim. Accordingly, I dissent from the opinion of the Court.

Exhibit No. 4

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

January 24, 1989

Mr. William Howard
General Counsel
United States Commission
on Civil Rights
Room 600
1121 Vermont Avenue, N. W.
Washington, D. C. 20425

Re: Allegations of ICRA Violations Post
Santa Clara Pueblo v. Martinez

Dear Bill:

As requested, I have enclosed a summary of alleged ICRA violations contained in our files. The summary includes only those matters or allegations brought to our attention subsequent to Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). I have not included other claims of ICRA violations from sources such as the Indian Law Reporter, litigated federal cases or the available literature. I did, however, include matters reported in the news media and note that certain matters outlined below may also have been made available to the Civil Rights Commission. In addition, because we are no longer engaged in ICRA enforcement activity, the allegations contained in the summary remain unverified.

The 71 separate complaints listed below allege a total of 98 violations of the ICRA. The complaints name 32 different Indian tribes located in 12 states. Areas with the heaviest complaint activity include tribes located in South Dakota with 25 complaints, Arizona with 15 complaints and Minnesota with 10 complaints. One tribe is the subject of 14 separate complaints, some of which allege more than one ICRA violation, and 3 other tribes are the subject of 10, 7 and 6 complaints respectively. The remaining 28 tribes are named in one or two ICRA complaints.

The 98 alleged ICRA violations may be categorized as follows:

Alleged Violations	Number of Allegations
1. Tribal court practices	28
2. Voting or election complaints	25

Exhibit No. 4 (continued)

	Alleged Violations	Number of Allegations
3.	Hiring or employment irregularities	12
4.	Tribal council activity generally	11
5.	Free press infringements	5
6.	Housing assignment policies	4
7.	Right to counsel allegations	3
8.	Taking of private property without compensation	2
9.	Vague criminal statutes	1
10.	Child custody procedures	1
11.	Jail conditions	1
12.	Membership practices	1
13.	Cruel and unusual punishment	1
14.	Improper removal from the reservation	1
15.	Arrest and search procedures	1
16.	Racial discrimination	1
		98

By year, the 71 complaints of ICRA violations can be broken down as follows:

Year	Number of Complaints
1978	4
1979	6
1980	2
1981	1
1982	4

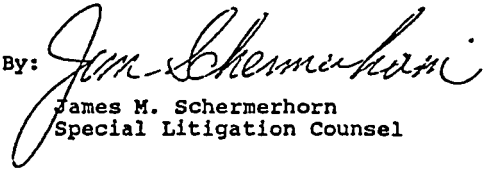
Exhibit No. 4 (continued)

Year	Number of Complaints
1983	2
1984	1
1985	6
1986	13
1887	11
1988	21

I hope you find this information useful. If you should have any questions, please call the undersigned on 633-4701.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

By: 

James M. Schermerhorn
Special Litigation Counsel

United States
Department of Justice

IRCA Complaints Post
Santa Clara Pueblo v. Martinez

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1982	1302(8)	Due process (threats & intimidation)	Tribal authorities allegedly attempted to force the complainant to leave the tribe because she complained of improper treatment of her child in the tribal day care center.
1979	1302(8)	Due process (vague criminal statutes)	Allegation that tribal "disorderly conduct" and "contributing to the delinquency of a minor" statutes are vague and, accordingly, violate due process guarantees codified in the ICRA.
1982	1302(8)	Due process (child custody)	Allegation that the complainant was unfairly treated in a child custody proceeding.
1985	1302(8)	Due process (jail conditions)	Allegation that tribal jail conditions violate due process and cruel and unusual punishment provisions of the ICRA. Specifically, the complaint alleges unhealthy, unsanitary and unsafe jail conditions.

Exhibit No. 4 (continued)

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1981	1302(8)	Due process (ex-parte tribal court proceedings).	Allegation that children were taken from parents in child custody proceedings without notice pursuant to an ex-parte court order allegedly in violation of the due process provisions of the ICRA.
1982	1302(8)	Equal protection (voting/elections)	Malapportioned tribal council election districts allegedly violate the one person/one vote equal protection standard.
1985	1302(8)	Due process (voting/elections)	Allegation of malapportioned tribal council election districts in violation of the one person/one vote equal protection standard.
1988	1302(8)	Due process (voting/election)	Allegation that a denial of the right to vote in a tribal election was motivated by a fear that the complainant may vote for a candidate not approved of by an election official.
1988	1302(8)	Equal protection (voting/elections)	Off reservation members of the tribe claim discrimination in voting in tribal elections. Allegedly only members of the tribe who live on the reservation can participate in tribal elections.
1985	1302(8)	Due process (voting/elections)	Allegation that the tribal council is unlawfully conducting business without a quorum in violation of the tribal constitution and ICRA.

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1984	1302(8)	Due process (voting/elections)	Allegation that a tribal ordinance "forever barr[ing]" individuals from running for tribal office violates the ICRA.
1985	1302(8)	Due process (interference with a tribal court order)	Tribal council allegedly voted to "wipe away and overrule the [tribal] appellate court's decision...".
1983	1302(8)	Due process (voting/elections)	Allegation that a tribal council referendum to "correct" the election district apportionment set by the federal court in Brown v. United States is "invalid because it is contrary to the Indian Civil Rights Acts".
1980	1302(8)	Due process (Voting/elections)	Tribal resolution declaring a tribal election null and void was allegedly "enacted without notice or hearing or other requirements of due process, and the winners of several individual election contests were possibly denied rights in disregard of due process required by the Indian Civil Rights Act."
1986	1302(8)	Due process (improper tribal hiring)	Allegation raises "instances wherein it appeared to me that due process and civil rights of individuals and groups were denied at the tribal level." The complaint alleging, among other things, that non-merit hiring by the tribe constituted "nepotism" and "cronyism".

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1979	1302(8)	Due process (removal from employment)	Letter alleging ICRA violations regarding the firing of a tribal employee by the tribe. Also alleged is the noncompliance with Rule 6 of the tribal code indicating a preference for the issuance of a criminal summons instead of an arrest warrant.
1979	1302(8)	Due process (abuse of tribal court authority)	Allegation that because he sought a divorce in the state court rather than the tribal court, the tribal judge awarded the complainant's property to his former wife and, acting in excess of tribal authority, threatened the complainant's welfare.
1981	1302(8)	Due process (housing assignment policies)	Allegation of improper tribal interference in a housing project assignment policies and that the tribal court process was used to silence dissent. Favoritism alleged in a housing assignment including discrimination on the basis of sex.

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1978	1302(4) 1302(6)	No assistance of counsel, failure to permit confrontation of witnesses, no compulsory process, and the failure to advise defendants of the right not to be compelled to provide evidence against themselves.	Allegation that the tribe fails to advise criminal defendants of their right to assistance of counsel at no expense to the tribe, their right to confront witnesses who may appear against them, their right to compulsory process and their right not to be compelled to provide evidence against themselves.
1978	1302(8)	Equal Protection (Voting/Elections)	Allegation that malapportioned tribal council election districts violate one person, one vote equal protection standards.
1978	1302(8)	Due process (lack of notice)	Allegation that the tribe improperly interfered with complainant's ownership of certain property and failed to notify them of court action.
1988	1302(8)	Due process (Tribal court procedure)	General allegation that the tribal court failed to follow tribal law and violated the tribal constitution.
1988	1302 (8)	Due Process (employment)	Allegation that the complainant was fired from his tribal job in violation of the tribal merit employment code.

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1986	1302(8)	Due process (Voting/elections)	Allegation that the tribal election board denied the complainant the opportunity to run for public office.
1986	1302(8)	Due process (voting/elections)	Alleged due process violations in a tribal recall election including the failure to follow tribal constitutional mandates.
1988	1302(8)	Due process (voting/elections	Allegation that a tribal faction complied with the tribal code in pressing a recall election but the tribal council and tribal court ignored the recall petitions.
1979	1302(8)	Due process (tribal employment practices)	Allegation that the clerk of the tribal court and the tribal prosecutor were fired without cause. The new chairman allegedly appointed family members to the vacant positions.
1986	1302(8)	Due process (employment)	Alleged favoritism and nepotism by tribal council in tribal hiring and employment practices. "Nepotism is bad on our res[ervation] ...".
1979	1302(5) 1302(6) 1302(7) 1302(8)	Due process (criminal procedure, cruel and unusual punishment	Complainant alleges he was illegally arrested, detained for 5 days without bond, provided no opportunity to defend himself at a hearing, and whipped by tribal authorities.

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1979	1302(8)	Due process (tribal court procedure)	Victim alleges that he was mistreated by the tribal court, specifically that he was denied an appeal and given an excessive sentence as a result of improper influence by tribal officials on the tribal judge.
1978	1302(6)	Right to counsel	Allegation that the tribe refused to allow attorneys to practice in tribal court.
1980	1302(1)	Freedom of the press	Allegedly a tribal resolution "barred and restricted" the news media from the reservation.
1979	1302(1)	Freedom of speech, freedom of assembly, Bill of Attainder	Allegation that the tribe removed the treasurer under circumstance which "were in the nature of a bill of attainder" and "so mixed with unlawful provisions so as to evidence on their face the inadequacy of the tribal council as a forum for resolving at least this particular type of dispute. The Tribal Council's resolutions seek to restrain the Treasurer's right to freedom of speech and freedom of assembly and to punish her for the exercise of those basic freedoms contrary to the provision of the Indian Civil Rights Act."
1982	1302(8)	Due Process (Voting/ Elections	Allegation of considerable controversy "surrounding the handling of absentee ballots" and other election problems.

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1988	1302(8)	Due Process (voting/ elections	Allegations of "internal strife" and "unqualified" tribal office candidates resulted in an "illegally held" election.
1986	1302(8)	Due Process (Removal from Reservation)	Allegation that the tribal council and tribal court acted to remove or exclude a non-member of the tribe from the reservation, allegedly without the opportunity to be heard.
1985	1302(8)	Due Process (voting/ elections)	Newspaper editorial (and accompanying cartoon) alleges that tribal councils have passed resolutions "forbidding certain individuals to run for office".
1987	1302(8)	Due Process (limiting tribal court jurisdiction)	Allegations that a tribal resolution "specially denies jurisdiction to the ... CFR court over any litigation that may be construed as 'internal tribal conflict' and, as a result, precludes ICRA challenges in tribal court."
1985	1302(8)	Due Process (tribal council interference with the tribal court)	Allegation of interference by tribal council in the work of the tribal court. Tribal council allegedly ordered a tribal judge to hear a case in which the judge had disqualified himself on conflict of interest grounds.

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1986	1302(8)	Due Process (tribal court procedures)	Allegation that "our Indian Civil Rights have been violated by the tribal courts ..." Specifically, the complainant alleges that the tribal court "didn't give us notice nor subpoenas to our witnesses" for a court hearing.
1986	1302(5) 1302(8)	Due Process (taking of property)	Allegation of a denial of "human rights" by the former tribal council in exercising the tribe's right of eminent domain. Allegation that those who refused to sell land for a new road were "arrested or assaulted".
1988	1302(8)	Due Process (employment and elections)	Allegation that the former chief judge of the tribal court "was replaced without cause and probable in violation of the tribal code." The complaint describes the tribal court system as one "... which [does not] presently inspire confidence." The complainant describes past tribal elections as having "an element of threat of personal harm ...".
1986	1302(8)	Due Process/Equal Protection (Voting/ Elections)	The tribal council, acting as an appellate court, allegedly overturned the decision of the tribal court and denied a women tribal member the opportunity to run for tribal office. According to the complaint, the tribal council believes the tribal "... constitution expressly denies women the right to hold office".

Exhibit No. 4 (continued)

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1987	1302(8)	Due Process (employment)	Complaint alleges that the tribal council overruled both the tribal court and the tribal appellate court's finding that the plaintiff was illegally terminated from her position as the tribe's higher education director.
1986	1302(8)	Due Process (employment)	Complaint alleges that educated Indians are "politically ... black-listed" and "discriminated against by our officials" in employment.
1986	1302(8)	Due Process (tribal court procedure)	Complaint alleges a denial a due process in tribal court. Specifically, the complaint alleges faulty extradition procedures and the failure of the tribal court to uniformly apply the tribal code.
1987	1302(8) 1302(7)	Due Process (illegal consecutive sentencing)	Allegation that a defendant was convicted of 15 criminal charges and sentenced to serve 10 consecutive sentences of six months each for a total sentence of 5 years in jail which exceeds the ICRA's one (1) year maximum sentence provision.
1987	1302(8) 1302(7)	Due Process (illegal consecutive sentencing)	Allegation that a tribal inmate is serving a six year prison sentence which exceeds the ICRA's one (1) year maximum sentence provision.

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1986	1302(8)	Due Process (Favoritism by tribal court)	Allegation that a tribal court advocate's client was treated unfairly by a tribal judge in a divorce proceeding. Specifically, the victim was forced to accept much of the financial liability resulting from the marriage with very little of the assets. Allegedly this occurred because the tribal judge was a school acquaintance of the successful party in the divorce proceeding and was biased against her client.
1979	1302(8)	Due Process (voting/ elections)	Complaint alleges that "[f]or 73 years [t]he tribe has been denied the right to a fair election" because of existing tribal elections procedures.
1986	1302(8) 1302(2)	Due Process (illegal arrest and warrantless search procedures).	Allegation that tribal police chief violates proper arrest and search procedures. Complaint asks "[h]ow much more must our civil rights be violated before he is stopped or before anyone comes to our aide."
1986	1302(8) Miscel-laneous other ICRA provisi-ons	Due Process	Complainant summarizes 10 alleged ICRA violations occurring on two reserva-tions in the southwest.
1987	1302(1)	Freedom of the Press	Allegation that a newspaper reporter was denied access to a public tribal council meeting.

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1983	1302(8)	Due Process (voting/ elections)	Allegation that black "freedman" tribal members are not permitted to vote or run for tribal office. elections.
1988	1302(8)	Due Process (tribal council procedures)	Allegation that "tribal officials, including tribal police, have been ignoring restraining orders" issued by [a] tribal judge.
1988	1302(8)	Due Process	Allegations of civil rights abuse by tribal officials. Specifically, Indians complain of "[t]he abusive use of authorities and the usurping of powers ... by common and non-elected tribal officials ...".
1988	1302(1)	Free Press	Newspaper allegation of tribal interference with the editorial content of a newspaper serving the Indian and non-Indian community. According to the article, many Indian operated newspapers "suffer from censorship, tribal nepotism ..." and other problems. The article references similar problems elsewhere in Indian country.
1986	1302(8)	Due Process (voting/ elections)	Allegations include that it is "... common knowledge that the election process was abused and that large scale Absentee Ballots were bought and paid for by the incumbent". Complaint concludes by stating that most reservation residents "feel that their civil rights have been violated under the Indian Civil Rights Act".

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1987	1302(8)	Due Process/Equal Protection (employment and housing)	Allegation that a tribe discriminates on the basis national origin in housing and employment.
1987	1302(8)	Due Process (voting and election)	Allegation that an individual was improperly removed as tribal chairman of the Shakopee Sioux Community.
1988	1302(1)	Freedom of the Press	Newspaper notes that "[f]reedom of the press on Indian reservations is such a rare thing it is nearly non-existent." The article goes on to say, among other things, that "incoming tribal chairman may engage in whole sale firings of the editor and staff, budget cuts that force the newspaper out of business or demands for total editorial control over the newspaper. Only 10 of 306 Indian newspapers are "independently owned".
1988	1302(8)	Due process (employment)	News article concerning tribal employment practices noting that no tribal employees are in merit positions but are rather "political appointees" who can be fired by the tribal chairman without cause.
1988	1302(8)	Due Process (tribal court procedure)	Allegation that a tribal court judge refused to set a hearing date in violation of tribal law and impermissibly confiscated the collateral of a party to a tribal court proceeding.

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1988	1302(8)	Due process (tribal council interference with tribal court)	Recommendation concerning changes in tribal law so the "Chief Judge cannot be fired by the tribal council for up holding the law of our tribe." Alleges a need by the tribe to have "separation of powers." According to the material," right now the tribal council serves as judge, jury and executioner".
1988	1302(8)	Due Process/Equal Protection (housing)	Allegation that tribal representatives, "discriminate against their own people [. ... T]he Full Bloods are treated differently and that their basic needs such as decent housing are not met."
1988	1302(8)	Due process (hiring practices)	A tribal council representative complains that he has observed "injustices committed against our people by tribal council members, program directors, supervisor, the tribal court and tribal court personnel." Among other problems are non-merit hiring practices by the tribal council.
1988	1302(8)	Due Process (land lease) Equal Protection (voting and elections)	Allegation of several ICRA violations including the failure to permit the complainant the opportunity to run for tribal office and a violation of Indian preference provisions in the lease of Indian lands.

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1987	1302(8)	Due Process (employment practices)	A former tribal judge complains that he was suspended without pay by the tribal council a matter of days after he made an unpopular ruling permitting a finance company to repossess a car located on the reservation.
1987	1302(8)	Due Process (criminal sentencing procedures)	Allegation that an individual convicted on several tribal charges was sentenced to a 390 day jail term or 25 days in excess of the ICRA one (1) year maximum sentence.
1987	1302(8)	Due Process (tribal court procedures)	Attorney that alleges "my client was restrained of liberty," when the tribal court issued an order without allowing her an opportunity to be heard in a child custody matter.
1988	1302(8)	Due Process	Allegation of a "mass violation of people's rights" on an Indian reservation and that a "majority of the people affected are helpless because the tribal courts cannot take civil cases that involve a tribal organization".
1988	1302(8)	Equal Protection (racial discrimination)	Allegation of a non-Indian attorney that a tribal official took action against him in tribal court "because I am caucasian" and in an effort "to retaliate" for a previous complaint filed by the victim against the subject with the tribal Bar's Disciplinary Committee.

Exhibit No. 4 (continued)

Date of Incident	ICRA Section	Alleged Violation	Summary of Incident
1988	1302(8)	Due Process/Equal Protection (tribal court procedures)	Allegation that a tribal court child custody action constituted "interference in civil rights due to conspiracy and class based animas".
1987	1302(8)	Equal protection	Allegation that because of the complainant's challenge to how the tribe was conducting its affairs, she was the subject of verbal and physical threats and denied protection from the reservation criminal justice system.

Exhibit No. 4 (continued)

Exhibit No. 5

COPY

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Greg Good and Douglas Neadeau, Civil File No. 6-85-508

Petitioners,

v. ORDER

Gary Graves, Prosecuting Attorney for the Red Lake Indian Tribal Court, and Wanda Lyons, Clerk of Court and Acting Magistrate of the Red Lake Indian Tribal Court,

Respondents.

A hearing was held before the undersigned on April 15, 1985 upon petitioners' application for a writ of habeas corpus. Petitioners were represented by Richard Heshbesher, Esq. Respondents Gary Graves and Wanda Lyons were represented by Kent Tupper, Esq., and Bernard Becker, Esq. Respondents Rex Mayotte and Robert Moran were represented by John Lee, Esq.

This action involves the arrest and subsequent conviction of Douglas Neadeau and Greg Good, two enrolled members of the Red Lake Band of Chippewa Indians. Good and Neadeau were convicted by the Red Lake Court of Indian Offenses, a court established pursuant to an Act of Congress. See 25 U.S.C. § 1311 et. seq.

In 1968 Congress passed the Indian Civil Rights Act, 25 U.S.C. § 1301 et. seq. The Act established a system of tribal courts funded by the Bureau of Indian Affairs and set forth certain rights guaranteed to tribal members which are similar to

the rights found in the Constitution's Bill of Rights. Specifically, the Indian Civil Rights Act provides that no Indian tribe shall:

> (6) deny to any person in a criminal proceeding the right to ... at his own expense to have the assistance of counsel for his defense;
>
> (7) require excessive bail ...
>
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302. The rights guaranteed by § 1302 of the Indian Civil Rights Act may be enforced by resort to a writ of habeas. 25 U.S.C. § 1303 (statutory provision authorizing writ for person testing legality of tribal detention); see also 28 U.S.C. § 2241(c)(1)&(3) (writ available to person in custody in violation of Constitution and laws of the United States); Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980).

Greg Good and Douglas Neadeau were on the Red Lake Reservation traveling in a car when they were arrested by Red Lake police officers and brought to the Red Lake Police Department on March 7, 1985.[1] Douglas Neadeau was arrested for not having a driver's license and for possession of marijuana. Greg Good was arrested for one count of illegally selling marijuana and three counts of possession of marijuana.

---

1 Neither Good nor Neadeau challenge the validity of their arrest.

On March 8, 1985 Good and Neadeau were arraigned before Associate Magistrate Wanda Lyons of the Red Lake Court of Indian Offenses. Douglas Neadeau, without the assistance of counsel, agreed to plead guilty to a charge of driving without a license but entered a plea of not guilty on the charge of unlawful possession of marijuana. Neadeau specifically requested that he be released on bail pending the trial of his case. Magistrate Lyons denied the request for bail stating: "they haven't been giving bonds for possession, that's the way it has to be."

Greg Good was charged with four separate offenses. He entered a plea of not guilty on all of the charges. Magistrate Lyons refused to set bail for Good and ordered that he be held pending trial. At the hearing before this court Magistrate Lyons offered no explanation as to why she denied the petitioners their right to bail. The conduct of the Magistrate was in clear violation of the express language of the Indian Civil Rights Act, 25 U.S.C. § 1302(7), which prohibits excessive bail.

On March 13, 1985 Good and Neadeau appeared before Magistrate Lyons and, without any assistance of counsel, agreed to plead guilty to certain charges. Greg Good was sentenced to six months in jail while Douglas Neadeau was sentenced to three months. The evidence brought forth at the trial indicates that the Red Lake Tribal Council has a policy of not permitting lawyers to practice before the Red Lake Court of Indian Offenses. Good and Neadeau were aware of that policy and believed they could not have the assistance of counsel. This policy, which

prohibited Good and Neadeau from obtaining the advice of counsel prior to trial, is in direct violation of 25 U.S.C. § 1302(6) which provides that no Indian Tribe shall deny a person in a criminal proceeding the right to counsel.

Prior to entering a plea of guilty both Good and Neadeau were informed that if they wanted a jury trial they would have to pay for it. The testimony of the Red Lake prosecutor and the former prosecutor indicates that in the past several years there has been only one jury trial granted to a criminal defendant. By telling Good and Neadeau that they would have to pay for a jury trial, the Red Lake Court of Indian Offenses denied petitioners their right to a trial by jury which is specifically guaranteed by 25 U.S.C. § 1302(10).

All of the constitutional and statutory violations noted above occurred prior to the time that Good and Neadeau entered into their guilty pleas. Both men were threatened with relatively long prison sentences and were then offered the opportunity to enter into a "plea bargain." Neither petitioner, however, was in a position to determine if the prosecutor's offer was, in fact, a bargain. The coercion inherent in keeping a person confined prior to trial and denying him any assistance in preparing a defense is reason enough to strongly question the voluntariness of any plea bargain. The live testimony by Good and Neadeau confirmed this court's suspicion that their guilty pleas were not entered into voluntarily.

The evidence in this case leads this court to the inescapable conclusion that the rights guaranteed petitioners by the Indian Civil Rights Act were trampled upon by the officials of the Red Lake Court of Indian Offenses. Whether the actions of the Red Lake Court of Indian Offenses were intentional or simply the result of unfamiliarity with the obligations incident to running a court is of no concern to this court at this time. It is sufficient to state that Greg Good and Douglas Neadeau did not receive the minimum procedural protections required by the Indian Civil Rights Act and the U. S. Constitution. For those reasons, the court will grant the petition for a writ of habeas corpus.

Accordingly, IT IS ORDERED that:

1. The petition of Greg Good for a writ of habeas corpus is granted.

2. The petition of Douglas Neadeau for a writ of habeas corpus is granted.

Dated: May 20, 1985.

Paul A. Magnuson
United States District Judge

Exhibit No. 6

IN THE WHITE MOUNTAIN APACHE TRIBAL COURT

WHITERIVER, ARIZONA

JUDY DEHOSE, Plaintiff, vs. RENO JOHNSON, SR., Chairman of the White Mountain Apache Tribe, ALVINO HAWKINS, Vice Chairman, MATTHEW NOSIE, Councilman; HERBERT TATE, Councilman, in their official and individual capacities. Defendants.	NO. C-89-04 Pre-hearing Conference and Hearing on Plaintiff's Request for Preliminary Injunction

BEFORE THE HONORABLE JAY NATOLI

JUDGE OF THE SUPERIOR COURT, NAVAJO COUNTY,

STATE OF ARIZONA,

SITTING AS A VISITING TRIBAL

JUDGE OF THE WHITE MOUNTAIN APACHE TRIBAL COURT

Thursday, February 2, 1989

received
in Tribal
Court
3-2-89

REPORTED BY:

KELLY E. PALMER
Official Reporter

Exhibit No. 6 (continued)

A P P E A R A N C E S

For the Plaintiff: CAROL J. WILLIAMS
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Whiteriver, Az. 85941

For the Defendants: CLAUDEEN BATES ARTHUR,
SCOTT CANTY
General Counsel
WHITE MOUNTAIN APACHE TRIBE
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Exhibit No. 6 (continued)

P R O C E E D I N G S

(Whereupon, the following proceedings were held in chambers between Court and counsel.)

THE COURT: This is Cause Number, White Mountain Apache Tribal Court, C-89-04, Judy Dehose, Plaintiff, versus Reno Johnson, Senior, et al.

Carol, you're here on behalf of the plaintiff?

MS. WILLIAMS: Yes. Carol Williams, Legal Counsel representing Judy Dehose.

MR. CANTY: Scott Canty, Associate Defender for the defendants.

MS. ARTHUR: Claudeen Bates, General Counsel for the White Mountain Apache Tribe, and here representing the Chairman, and the counsel persons who were sued as defendants.

THE COURT: The reason why I wanted to visit with you all before we started the hearing was to clear up any confusion relative to what we're going to hear. It's my intention to do nothing today other than hear the plaintiff's request for preliminary injunctive relief.

Exhibit No. 6 (continued)

I received just yesterday the motion to dismiss, and the motion to invoke the formal rules, filed by defendants. Obviously, we're not going to hear anything relative to those motions today for the simple reason that the defendant needs to have -- excuse me, the plaintiff needs to have an opportunity to respond, which would then also allow for an opportunity for the defendants to reply, after which I'll set the matter for a hearing.

MS. ARTHUR: We would like oral argument on the motion to dismiss.

THE COURT: Right, I saw your request. So the only thing we're going to be hearing is the request for injunctive relief, and because of that it seems apparent to me that there may or may not be any -- well, there may not be any issues of fact relative to that request. So with that in mind I wanted to ask you all some questions to find out whether or not that's the case.

Let me first ask, I have to believe that there's no disagreement between both sides -- well, let me lay out another ground rule that's pretty typical in any proceeding, so I don't think that I differ from it. As between you two, you need to select who is going to be the spokesperson because

there's only going to be one, so whoever you determine is going to carry the ball that's fine with me, but that's a decision you all will have to make.

MS. ARTHUR: Okay. I guess that I would request -- are you saying that for the entire proceedings? If we could, we address at times different issues if that's not confusing to the Court, I would like to be able to do that; for example, the motion to dismiss --

THE COURT: Oh, no, certainly at a different hearing if you wish somebody else to handle that aspect of it that's fine. My point is once we go into the courtroom and begin hearing a particular motion only one of you is going to carry the ball.

MS. ARTHUR: You don't want too many attorneys jumping up and down?

THE COURT: Exactly. That's purely for purposes of order, but that doesn't commit you throughout the entire case. My first question is -- what I need to know is it agreeable with all of you, or both sides, that Ms. Dehose, at least prior to her suspension, was and still is a duly elected member of the Tribal Council?

MS. ARTHUR: We don't dispute that.

MS. WILLIAMS: No.

THE COURT: The second question then is, I guess we can also all agree that she has been charged with a criminal offense. Now, identify for me, is it an assault; what was the exact offense?

MS. WILLIAMS: Assault with a deadly weapon.

THE COURT: That she has been charged with the offense of assault with a deadly weapon, but as of yet she's not been convicted?

MS. WILLIAMS: That's correct.

MS. ARTHUR: Correct.

THE COURT: Next, on November 22nd of 1988, the Tribal Council discussed and deliberated, and passed a resolution excluding the plaintiff from sitting as a voting member of the Tribal Council?

MS. WILLIAMS: Yes.

MS. ARTHUR: We would describe it as having suspended her from her seat on the Council.

THE COURT: All right, fine. But in any case that's --

MS. ARTHUR: She was suspended, yes.

THE COURT: All right. Now, with or

without pay? Has she been drawing the pay of a regular council member or not?

MS. ARTHUR: Yes.

MS. WILLIAMS: Yes, she has been receiving pay.

THE COURT: My last question is as far as formal rules and/or regulations relative to the removal and/or suspension of a Tribal Council Member. The Tribal Constitution, Section IX, or Article IX, Sections 1 and 2; are they the only rules, written rules, currently in effect that speak to that issue?

MS. WILLIAMS: Yes, those are the only ones. That Constitution is the only authority that the Council has to use as a direction in what to do in removing a council member.

THE COURT: I don't want to get argumentative. My simple question is: Is that, at present, the only written rule or regulation?

MS. WILLIAMS: Yes.

THE COURT: Relative to the removal or suspension of a council member?

MS. WILLIAMS: Yes.

MS. ARTHUR: It is the -- we would characterize it as the Constitution addressing,

specifically, removal in one section, and specifically the authority of the Tribal Council in another section to govern it's own actions.

THE COURT: Is your answer yes? Again, I don't want to get argumentative.

MS. ARTHUR: I understand that, but I think there are two different sections of the Constitution involved, not only the removal section, because my point --

THE COURT: Well, my question to that might well be the case, but my question to you is, I think very concise, are there any other specifically drafted rules or regulations that deal with the issue of removing a council member, other than Article IX, Sections 1 and 2 of the -- setting forth the procedures?

MS. ARTHUR: Articles 1 and 2. Let me see what they are.

MR. CANTY: The other is a clarification for elections of council members.

MS. ARTHUR: My answer to that is, no, that Articles 1 and 2 are not the only sections dealing with this.

THE COURT: That deal with the procedure to remove a council member?

MS. ARTHUR: That's correct.

THE COURT: Okay. What other rules, regulations, Constitutional provisions then?

MS. ARTHUR: The other section is under the Artile V, Powers of the Council, Section 1 (A), the power to act in all matters concerning the welfare of the tribe.

THE COURT: So Article V, Section 1 (A), in addition to Article IX, Sections 1 and 2?

MS. ARTHUR: Yes.

THE COURT: Okay. Any others?

MS. ARTHUR: And the same sections, or same Article, Article V, Section S.

THE COURT: Is that a subsection to 1, Number 1?

MS. ARTHUR: Yes, 1 (S).

THE COURT: S.

MS. ARTHUR: The power of the Tribal Council to regulate it's own procedures.

THE COURT: Is that still -- at this point just give me your sections.

MS. ARTHUR: And U.

THE COURT: And U, okay. Anything else that you can think of?

MS. ARTHUR: No.

MS. WILLIAMS: I disagree with that.

THE COURT: Well, I'll explain where I'm coming from. What I'm trying to do here is that for purposes of the preliminary injunctive relief, the substance of the discussions at the Council meeting as I see it aren't relevant.

There may be legal arguments to be made by either of you as to which rules, regulations, or sections of the Constitution apply, but those aren't issues of fact; in other words, when we get in the courtroom, Ms. Arthur may argue that the sections she's enumerated apply. Ms. Williams, you may argue, well, Judge, I don't think certain of those sections do apply to this situation, just these sections that I've noted apply. But that isn't a factual dispute, that's simply a matter of law. Because, again, you both have told me, correct me if I'm wrong, that she has not been -- the plaintiff has not been, by the resolution which I have read, has not been permanently ejected from the Council?

MS. ARTHUR: She's not been removed, no, she's been suspended.

THE COURT: Well, I don't want to get into a symantical game, but she has not been

permanently removed by that resolution?

MS. WILLIAMS: Right.

THE COURT: Okay. We all agree on that?

MS. ARTHUR: Yeah, she has not been permanently removed.

MS. WILLIAMS: Yes.

THE COURT: Okay. Now, the reason why I bring this all up is it seems to me that those are the only facts that are relevant to determine whether or not it's appropriate to issue injunctive relief to maintain the status quo as it was prior to the removal or the suspension, whatever word you like to use.

The issue of the substance of the meeting, and an alleged conspiracy, the various other items in the complaint, the substance of the meeting I can see where there may be some relevance to it, and there may be some factual disputes over that, I don't know, but once again, for purposes of you all making legal arguments as to whether or not those facts give rise to irreparable harm, no adequate remedy at law, a balancing of the public interest, you know the classic things that I have to think about to determine whether or not injunctive relief is appropriate are there.

What I need to find out at this point is whether or not you think that there are other facts which either can be agreed to that are relevant to whether or not injunctive relief should issue, as well as whether or not you think there are any facts that are in dispute that are relevant to that issue?

I can't think of any and, again, understand we're talking about a very limited issue here. We're not talking about making findings that are finally determinative of anybody's position on the case; least of all issues involving an alleged conspiracy and/or whether or not damages are appropriate.

MS. WILLIAMS: One thing that I would like, within the realm of what you just said, I think that the defendants would have to agree that even if Ms. Dehose were found guilty of the assault with a deadly weapon, under the Constitution that's not grounds to remove her from the Council.

THE COURT: I'm inclined to think you're not going to get an agreement on that but, again, I don't think it's relevant in terms of determining whether or not a preliminary injunction to maintain the status quo should issue. I certainly think

that's an issue in the case; however, I don't believe that's an issue at this point in time.

MS. ARTHUR: Your Honor, two things: One, I fail to understand how the Court can proceed to hear a request for preliminary injunction if the Court has not already determined that it has jurisdiction with respect to this matter. Second of all --

THE COURT: Well, let me answer that question for you. I recognize that the first and foremost thing I've got to do when I get into that courtroom, and the point that I'm going to let you both argue, is this issue of sovereign immunity. So if that's what you mean by jurisdiction, I recognize that I have to determine -- if I determine that sovereign immunity applies we all go home in a very short period of time.

MS. ARTHUR: So you intend to -- I guess you intend to address the jurisdictional issue prior to any preliminary injunctive hearing?

THE COURT: I've got to.

MS. ARTHUR: Okay. I didn't understand that. I kind of got backwards on it.

THE COURT: My fault, I should have indicated that all this nice discussion predisposes

that I'm going to determine that I have jurisdiction; or stated otherwise, there's no problem of sovereign immunity under the facts in this case, and me sitting under the posture of a Tribal Judge.

I'm going to give you both a chance to address me on that issue first, and I'll give you a decision on that before we even get on to this preliminary injunction. That's my fault, I didn't make that clear to you both. So, anyway, that aside, are you aware of any other facts you think we either need tc agree on for you all to make your arguments on the respective points that would determine whether or not a preliminary injunction should issue, or aware of any facts that you think are relevant to that consideration that are at issue?

MS. ARTHUR: Just a second.

THE COURT: Sure.

MS. ARTHUR: No, I don't think there are any other factual matters. I think it's legal -- it's a question of whether the facts that you've stated would rise to meet the requirements of a preliminary injunction.

THE COURT: Okay. And, of course,

that's what I'm going to let you both argue, provided we, again, after we deal with this initial jurisdiction issue of immunity.

I just think it's real useful before a hearing, so that we're all on the same wavelength in the courtroom, to set out some basic ground rules, and let you know where I'm coming from, and get input from you all, because you all know a lot more about the facts of the case than I do.

MS. ARTHUR: Other than the preliminary injunctive relief, presuming that you decided that you have jurisdiction to go forward, you don't -- then I take that to mean that there would be no evidentiary hearing at all, and you didn't intend for there to be one, in which case subpoenas that were issued yesterday and today ought to be quashed and people that -- I mean --

THE COURT: Yes. Again, I was not sure since you all know a lot more about the facts of the case than the Judge, that's the hardest transition to make going from a lawyer to a Judge. When you're a lawyer you make it a point to know all the facts of your case. When you're a Judge the only facts you know are what the lawyers chose to let you know.

So I couldn't indicate to all of you ahead of time: Hey, you don't need witnesses because, again, whether or not we needed testimony today depended purely on whether or not -- on you all, on how you all answered my questions, Number One; and Number Two, whether or not you felt there were additional facts, some of which may have been in dispute, that were relevant to just the preliminary injunction.

Based upon what we've agreed to here, yes, I agree with you all that the subpoenas could be quashed, and anybody who doesn't want to stay and listen is welcome to go home. So if you two are comfortable that we don't need any evidence to be presented, and we're reduced to you all making your legal arguments, and you want to request an order to quash the subpoenas, I'll surely do it.

MS. WILLIAMS: Well, I do have one comment in that respect. I did subpoena the -- I did subpoena the Tribal Council minutes of November 11th, and wait, I did subpoena the minutes of the last Council meeting where Judy was ordered to leave.

The reason why I did that was because when we were before Judge Reinhold, Ms. Arthur told

the Judge that she was not suffering any harm because she was allowed to be on the Council, and be able to perform her duties, and that was not so. She was ordered off the Council, and she was told that her votes did not count even during the times that she was present.

THE COURT: Well, I think that's kind of covered in one of my earlier questions, but let me repeat it and make clear, since passage of the Resolution on 11-20 of '88, she's not been allowed to sit?

MS. WILLIAMS: That's right.

MS. ARTHUR: That's correct.

THE COURT: Okay. I think based upon that fact -- well, let me ask you again. I guess as a subpart to that: She was not allowed to stay at this most recent Council meeting; is that your point?

MS. WILLIAMS: Yeah, she was not allowed to.

THE COURT: To?

MS. WILLIAMS: To remain in the Council chambers.

THE COURT: So she was told to remove herself from her seat at the Council --

MS. WILLIAMS: Yeah, at the Council --

THE COURT: But she could stay in the chambers and listen?

MS. WILLIAMS: I advised her she could stay.

THE COURT: Again, I think that's the same thing you both agreed to. Ms. Arthur, anything you want to add to that?

MS. WILLIAMS: Well, I would stipulate that we would quash the order, the subpoena on Ms. Arthur, I did subpoena her.

THE COURT: I don't think the Judge signed it.

MS. WILLIAMS: Okay.

THE COURT: Is there anything you wanted to add?

MS. ARTHUR: I would like to make a motion that the subpoenas be quashed.

THE COURT: Ms. Williams, do you have any objection?

MS. WILLIAMS: The only objection that I have is that the -- I would request that the minutes, that Ms. Craig is bringing, she's the Tribal Council Secretary, be made available. If those are the same minutes that were attached to

the motion to dismiss filed by Ms. Arthur, than I would object to submission of that because we have the tape recording.

THE COURT: Well, that's not at issue here.

MS. ARTHUR: I think part of that means --

THE COURT: Excuse me, I made it clear at the beginning the substance of what went on at that meeting is just not relevant to whether or not a preliminary injunction should issue. I can see how the substance of that meeting is relevant to your other claims; for example, the conspiracy, the alleged conspiracy, and damages but, again, the only fact that's relevant here is, and you've agreed to it, is there was a vote taken, and there was a resolution passed that removed her.

So I don't want to create any misconceptions on anybody's part. It's just that for purposes of this hearing I don't think the minutes and, you know, because Ms. Arthur in her motion to dismiss has asked to strike yours and, again, for purposes of what we're doing here today I don't believe it's in any way relevant. Now, Ms. Arthur?

MS. ARTHUR: I would suggest that if the Court has determined that it has jurisdiction, and goes ahead -- intends to go ahead, that there needs to be some type of, I guess, what I would view as another pretrial conference to narrow the issues, talk about depositions, and witnesses, and discovery, and set time schedules, and those things, for those kinds of things. The case is complicated enough that we need to understand what the ground rules are going to be, and to set those things.

THE COURT: I think that's probably true, but I wouldn't think before the hearing on your motion to dismiss, which is saying to me that there's no -- summary disposition is appropriate for this case, Judge, because there's no factual -- even if you take all the facts in a light most favorable to the plaintiff's position, is plead, we're entitled to judgment as a matter of law.

MS. ARTHUR: That's precisely what we're arguing. I was only raising that to perhaps narrow, Ms. Walker -- Williams' concern about the evidence, that if this thing goes forward there will be plenty of time to make sure everybody has all the evidence that either side has, and the

witnesses. I mean I wasn't making a motion for that. I was simply trying to be explanatory, and maybe it was inappropriate.

THE COURT: No, I think if what you're -- well, let me ask you this and, again, I don't want to get into argument, but to help you all out. There has been a motion to amend here to your Formal Rules. My understanding is that your Formal Rules, with some exceptions, basically track with the State Rules Of Civil Procedure; am I correct?

MR. CANTY: That's right.

MS. ARTHUR: Yes.

MS. WILLIAMS: Yes.

THE COURT: I asked for Vincent Craig to provide me with a -- no, he didn't, but I want to get a copy of your rules. Do you object to that?

MS. WILLIAMS: Oh, no, no.

THE COURT: Well, if you have no objection to their motion we can put a lot of those concerns to rest by simply granting that motion. You have no problem with it? See I don't grant motions until the other side has an opportunity to respond.

MS. WILLIAMS: No, I don't mind doing it by the Formal Rules at all.

THE COURT: All right. I'll give you a ruling. The motion to invoke the Formal Rules of the Tribal Court is granted, and it's ordered that we'll follow those rules.

MS. ARTHUR: Would you like us to submit an order on that?

THE COURT: I think a minute entry from the Clerk will be fine. I'll advise the Court of that and get a minute entry out.

There may be some discovery that you want to do certainly prior to the hearing on the Motion to Dismiss, and you know that's up to you in how you plan to manage your case. So that at least will allow you to go forward and do that. The facts may arise that may result in a request to amend a pleading. I mean typically, I don't think I've ever had a hearing on 12 (B)6 motion, whether it's 12 (B)6 or becomes a Rule for motion for summary judgment, where along with the argument there isn't a request to amend the pleadings to avoid the potential remedies to. So certainly you may want to forge ahead with some discovery, and at least now you have the ground rules to do that.

What I intend to do after you've had a chance to respond, and you all have had an

opportunity to reply, I'll then set an oral argument on your Motion to Dismiss. Okay, let's go in, and as I said the first thing I'm going to do is let you each in five minutes or less convince me that on the one hand there's sovereign immunity here, and I have no jurisdiction; or that for whatever reason sovereign immunity does not apply, and I do have jurisdiction, and then let you go ahead and move on with your arguments.

Let me ask you this. The argument that you give me on the sovereign immunity question may spill over into the same arguments you'd make on the issue of whether or not injunctive relief is appropriate. Is that a fair perception on my part, or am I all wet?

MS. ARTHUR: I guess you need to explain how you see that to me. I don't follow.

THE COURT: Well, for example, I think one of the issues with respect to sovereign immunity given the case law and the Indian Civil Rights Act is -- you know when you've got a body, a political body that's purportedly acting within the scope of their authority versus outside the scope of their authority, that's an issue germane to whether or not sovereign immunity could attach, and

I can see how that gets into the substance of your argument, and whether or not injunctive relief is appropriate. And that's only one thing that comes to the top of mind, you may think of others.

This is your case, you certainly know more about it than I do. If that's the case though, what I'd be inclined to do is give you each 20 minutes to argue the whole ball of wax. When I go to make my decision, obviously, if I decide in the defendant's side on the issue of sovereign immunity I'm not even going to get to deciding the issue on injunctive relief. If I do, however, rule in favor of the plaintiff on the sovereign immunity issue, I'll go ahead and determine whether or not injunctive relief should issue. But for purposes of discussion, for both sides, in your argument you can each take 20 minutes, and hit the sovereign immunity issue first, and recognizing it might flow into the substance of your other argument, just go ahead and continue your argument.

I'm going to let Ms. Williams proceed first. She has the burden, it's her motion, and then I'll let you all respond, and then I'm going to give Ms. Williams time to reply, if you reserve some time for reply. As I said, I'll give you each

20 minutes. I think that will be a sufficient amount of time.

I make it a point to study before I get on the bench, so you don't need to worry about educating me to the basics, believe me I know them. I've read all your pleadings, and as far as what's required for issuance of injunctive relief, I know what it is, so you don't need to worry about educating me on that, and just sell me on whether it applies here, and conversely for the defendants. We'll all setup in the courtroom now.

(Whereupon, the in camera discussion was concluded, and the following proceedings were held in open court.)

THE COURT: This is Tribal Court C-89-04, Judy Dehose, plaintiff, versus Reno Johnson, Senior, Chairman of the White Mountain Apache Tribe, et al.

Counsel, are you ready to proceed on argument on the plaintiff's request for preliminary injunction?

Ms. Williams: Yes, Your Honor, I am.

MR. CANTY: Yes, Your Honor.

Exhibit No. 6 (continued)

THE COURT: Mr. Canty, are you going to be carrying the ball?

MR. CANTY: Yes, Your Honor, I am.

THE COURT: Very well. Ms. Williams, it's your motion, therefore it's your burden. As we discussed in chambers you have the initial issue of jurisdiction; specifically, the sovereign immunity question which I believe has to be determined. So, again, I want to afford you each 20 minutes. If either one of you, or both of you, can convince me that that's an insufficient amount of time to argue the law than I'm certainly receptive to bend on that.

Ms. Williams, you certainly can reserve part of your 20 minutes for rebuttal after Mr. Canty proceeds, if that's your wish. I think we've already made a sufficient record at our prehearing conference relative to the agreed upon facts, and have also agreed that those are the only facts that are relevant to the issue of whether or not preliminary injunctive relief would be appropriate. I don't see any need to go through and repeat those; do either of you?

MS. WILLIAMS: No, I don't.

THE COURT: Mr. Canty?

MR. CANTY: No.

THE COURT: Ms. Williams, you may proceed.

MS. WILLIAMS: Thank you, thank you, Your Honor. I'd like to thank the Court for giving us an opportunity to present our case today.

Your Honor, we address this Court, firstly, that this Court has the jurisdiction to hear this matter. And the reason why this Court has the jurisdiction to hear this matter is because this action arises out of the Constitution of the White Mountain Apache Tribe. On there it says that the people will have a right to make their redress for their grievances, and this is a grievance. This is a violation of my client's rights to be -- to be a duly, full participating member of the White Mountain Apache Tribal Council.

My client is Judy Dehose. She is the Councilman duly elected to represent District 1 of the -- for the Apache Indian Reservation. And she was elected, and the authority which gives her the powers to act is in the Constitution. The authority that took -- the so-called ported authority that took her duties and rights away were done by the Tribal Council. And what we want to

tell the Court is that the Tribe -- the Tribal Court has to hear this because the Tribal Council and the defendants named in this lawsuit violated the -- did the alleged suspension under what they call their authority in the Constitution.

The Constitution gives this Court authority to hear the matters, to hear this matter before the Court, and also the Indian Civil Rights Act which gives my client a right to due process, and that's tied-in with our Constitution. Due process here is applied through the requirements in the Constitution. Sovereign immunity can be applied if they -- if the acts were not within -- were within the scope of their official capacities -- no, I take that back. The Tribal Council is subject to this Court under the Constitution.

THE COURT: Ms. Williams, let me interrupt you, and question you on this issue of sovereign immunity. Talk to me about the Santa Clara Pueblo Case, you know the case I'm speaking of, tell me how our situation here is different from what was presented there.

MS. WILLIAMS: Okay. There the Tribe already had regulations on how the memberships were

suppose to be done, and the arrangement was that the member -- that that membership rule was in itself a violation of the Indian Civil Rights Act. Our contention here is that the rules, if followed by the Council, would not have violated my client's due process; that there are already rules within the Constitution that says: Upon these grounds shall removal be done.

And it does not address the suspension, but says: Upon these shall -- addressing a matter these things shall be done this way. The Tribal Council did not follow those rules. Under the Santa Clara case the rules were followed. And there the objection was to the rule itself. Here we're saying that there was no rule, and they acted beyond, they went beyond what the rules had given them authority to do.

THE COURT: Well, there is a rule, but your position is the rule was not followed, therefore, proper due process was denied?

MS. WILLIAMS: Right, right.

THE COURT: You're not arguing to me that this Council, the Tribal Council, under no circumstances can exclude a member from participating in the governmental process?

MS. WILLIAMS: Right. Okay, thank you, Your Honor. Also, the Indian Civil Rights Act was not implemented just so people can hear about it. There was a reason why the Indian Civil Rights Act was established. The Indian Civil Rights Act says no government shall, and it goes on to say that due process shall not be denied by a government, no government. It does not exclude Tribal Government. And raising sovereign immunity under that, especially in this case, has no grounds. Also the --

THE COURT: Are you essentially telling me than that if we allow sovereign immunity to attach here, a Tribal Governmental Entity could then, in effect, act with impunity; in other words, the congressional act of passing the Indian Civil Rights Act, specifically Section 1302, Sections 1 through 10, would have been just an exercise in futility?

MS. WILLIAMS: That's right, Your Honor.

THE COURT: Okay.

MS. WILLIAMS: And also about this Court does have jurisdiction because where else can we -- where else can my client be able to correct a wrong that the Tribal Government has done to her? There

has to be a forum, and this Court would be the first step in providing my client a forum to address her grievances, because if not than the Tribal Council, you know, it would deem the Tribal Council has authority exceeding what the Tribal Constitution has provided and, therefore, we contend that this Court does have jurisdiction.

The Tribal Constitution itself limits the powers of the people. It also limits the powers of the Government.

THE COURT: Doesn't it really -- well, it seems to me what the Constitution does is the latter point you raised, it limits the power of the forum, the Government.

MS. WILLIAMS: Right.

THE COURT: The Constitution, the Tribal Constitution seems to me, does what, for example, our Federal Constitution does?

MS. WILLIAMS: Right.

THE COURT: It protects the citizenry from an over zealous Government.

MS. WILLIAMS: Yes, so therefore, our Constitution, the Tribal Constitution, was adopted, and it does provide in there that she is allowed a form of redress, and therefore based upon the

stated facts, Your Honor, we contend that this Court does have jurisdiction to hear this. Thank you.

THE COURT: Do you want to continue with your argument?

MS. WILLIAMS: Yes, I want to save the rest. I think I have several minutes for rebuttal.

THE COURT: I think you do. Mr. Canty.

MR. CANTY: Thank you, Your Honor. For the record, my name is Scott Canty, and I represent the White Mountain Apache Tribal Government, and the named defendants in their official capacity as members of the Tribal Council of the White Mountain Apache Tribal Government.

At the very heart of the plaintiff's complaint, and her allegations, is her contention that the White Mountain Apache Government does not have authority to impose sanctions on a member of of that Tribal governing body who has been adjudged to have gone beyond the bounds of propriety, and what is expected of a Tribal Council member. Plaintiff's --

THE COURT: Let me stop you right there for a moment, because I didn't read that. What I read was that the procedures that were employed in

this case don't comport with due process, not that the Tribal Council has no authority to sanction one of its members. I think that's more than just a slight distinction.

MR. CANTY: Yes, it is. And I was under the assumption we were going to save the arguments on the merits of the case for a later date. If we were going to argue due process -- the argument when we get past the jurisdiction argument, and get to the merits of the preliminary injunction. The standards don't call into question the propriety, or the due process that was given or not given in the proceeding. It just addresses itself to whether or not irreparable harm is going to occur if this injunctive relief is going to be granted.

THE COURT: Likelihood of success on the merits is certainly germane to the issue of injunctive relief, whether or not due process was followed in this case is in keeping with the rules cited by both of you. Both sides have agreed that certain portions of the Constitution govern this situation. The defendants have argued that in addition to some of the sections cited by the plaintiff there are some additional sections. So the issue, the legal issue is whether or not, given

those various sections, was the plaintiff's due process rights, where they impeded in any way?

MR. CANTY: Okay.

THE COURT: But, again, I don't believe that entails getting into the substance of the discussions at the meeting.

MR. CANTY: Right, exactly, neither do I. Stated another way, the relief that plaintiff seeks in this case, injunctive relief would be against the Government, White Mountain Apache Tribe. It would be an injunction prohibiting the Council from enforcing its own resolution. In effect it would take effect against the White Mountain Apache Tribal Government, and in that sense it seeks to prohibit the Council from acting and carrying out its own directions.

There is ample Federal law which goes to the proposition that Indian Tribes are immune from suit in either State, Federal, or Tribal Court, absent an express waiver of sovereign immunity. The White Mountain Apache Tribe has expressed that law under its Tribal Code, Section 1.7, which provides -- may I read it into the record, Your Honor?

THE COURT: I don't think there's any

reason to read it into the record. I think a reference to it. I have it.

MR. CANTY: Section 1.7 of the White Mountain Judicial Code refers to the sovereign immunity of the White Mountain Apache Tribe, and provides that the Tribe is not subject to suit. Our argument is that the actions taken by the Tribal Council on November 22nd, in suspending plaintiff from her seat on the Tribal Council, were actions taken by the Tribal Government.

THE COURT: Let me ask you this. Assume only for purposes of argument, because I'm not asking you to concede anything. Assume with me though that the Tribal Council did not adhere to its own rules and regulations and, in effect, exceeded its authority when it passed that Resolution excluding the plaintiff from the Council, suspending her.

Now, assume that situation for me, and let me ask you this question: Do you think under those circumstances that the Tribe can raise the shield of sovereign immunity and isolate itself from suit?

MR. CANTY: I have a difficult time assuming that, Your Honor, because the plaintiff

has not cited any rules or regulations that should have applied.

THE COURT: Well, I'm going to make it easy for you, and you won't have any difficulty assuming it. I'm directing you to assume it, purely for purposes of argument, to respond to my question, recognizing that you're not conceding, you're not acknowledging by assuming that the Council did, in fact, act outside the scope of its authority. I want you to assume that it did. My question to you is: Do you think they can isolate themselves from suit by raising sovereign immunity?

MR. CANTY: Plaintiff hasn't shown that they were actually -- plaintiff hasn't exhausted remedies in applying to the Council for a waiver the sovereign immunity.

THE COURT: Mr. Canty, one thing that does not work with me is trying to evade my very direct questions. I asked you: Assuming the Council acted outside the scope of its authority and --

MR. CANTY: You're asking for a legal conclusion.

THE COURT: You're a lawyer Mr. Canty. You're a student of the law. My question to you

is: Given that assumption, do you think that the Tribal Council can raise sovereign immunity and isolate itself from suit?

MR. CANTY: I think sovereign immunity is an absolute bar to that lawsuit.

THE COURT: Even if you agree, for purposes of argument, that the Council has acted outside the scope of its authority, you believe that in Tribal Court, they can raise sovereign immunity?

MR. CANTY: I'll say it again, I think sovereign immunity is an absolute bar.

THE COURT: Do you think that if a member of the Tribe attends a Council meeting, comes in, sits, does nothing, just sits, is not disruptive at all, and there is a resolution passed to take that person into custody; are you telling me, Mr. Canty, that if that person attempts to seek legal remedies through the Courts against the Tribe for that action, that the Tribe, again under those facts can raise sovereign immunity and isolate itself from suit?

MR. CANTY: Unless the Tribal Council, as the governing body, express cause of action or has waived its immunity expressly, not impliedly,

that immunity is a bar.

THE COURT: So your answer is still, yes?

MR. CANTY: That's a fact of Federal Indian law.

THE COURT: Now, what of democratic principle? Are you telling me that this Tribe is not really governed by any form of representative democracy; that it's simply a tyranny?

MR. CANTY: No, they're governed by an evolving form of Tribal Government, and an evolving form of democracy, which has a perfect right to evolve along the lines it chooses to evolve, and the speed it chooses to evolve, and it need not adopt the principles which are common place under the Federal Constitution.

THE COURT: Now, I'm fully cognizant that the Bill of Rights does not apply here; the Tribal Constitution applies.

MR. CANTY: Exactly.

THE COURT: And the Indian Bills of Rights applies, but it applies tempered by Tribal custom and law which I think is critical for any Judge presiding as a Tribal Judge to take into account. I find your responses to be interesting.

I think they are tantamount to a tyrannical form of Government, which is not contemplated by the White Mountain Apache Tribe when their Tribal Constitution was enacted.

What you're telling me, sir, is a member of the Tribe, who at the hands of Tribal Government suffers a violation of rights set forth under either the Tribal Council or the Indian Civil Rights Act, has absolutely no means to redress their grievances?

MR. CANTY: Now, they could -- for instance, they could approach the Council for a waiver of that sovereign immunity. Address the Council, petition them --

THE COURT: What if the Council says: No, we won't waive it.

MR. CANTY: Well, we haven't got to that. Plaintiff hasn't got to that point.

THE COURT: Assume for purposes of argument.

MR. CANTY: I can't assume that the Council will do that.

THE COURT: Yes, you can. I'm solely directing you to for the purposes. You can assume the Council was approached, and they do not waive

sovereign immunity. Is there any forum to which that individual can turn to redress their grievance?

MR. CANTY: Yes, the plaintiff has political alternatives. She can seek to change the Government, she has that alternative. She can claim pain. She can petition. She can seek to put in candidates that will be more favorable to her position in the next elections.

Those viable alternatives, political alternatives, she could seek, and then she could seek to amend the laws of the White Mountain Apache Tribe, which will provide cause of action, which will waive sovereign immunity in cases like this, or provide a remedy for any number of given things. There are ways to address the issue.

THE COURT: Okay. Continue.

MR. CANTY: The sovereign immunity of the White Mountain Apache Tribe extends to officials, Tribe Officers of the Tribe acting in the scope of their authority. Plaintiff has alleged, and admitted in her opening argument here that the actions she complains of were taken by the Tribal Council of the White Mountain Apache Tribe.

In her complaint she names four members

of the Tribal Council, although if asked it would probably be conceded that the action was taken after a full debate, and after a full vote by the Tribal Council, and not by only those four named individuals who have been named as defendants in this lawsuit.

THE COURT: I think we agreed that the Resolution was deliberated on and passed. I think that then presumes that those other factors you're speaking of transpired.

MR. CANTY: Then I won't quote the law, and I won't recite the cases. I'm sure you've read them, and you're aware that sovereign immunity extends to those Tribal Officials when they act.

The Tribal Council, on that date, on November 22nd, acted as the Tribal Council. They acted in carrying out their duties pursuant to Article V, Section 1 (A) of the Tribal Constitution, which provides that they represent the White Mountain Apache Tribe, and they act in all matters that concern the welfare of the Tribe, and in that capacity they acted when they voted; when they debated; when they discussed the issue; when they took all actions that led up to the final passage of that Resolution. They acted as the

White Mountain Apache Tribe. They spoke for the Tribe in their representative capacity; therefore, the officials, not only those that have been named as defendants in this action, but every member of that Tribal Council enjoys the sovereign immunity, and is entitled to its protection in the same respect as the White Mountain Apache Tribe is entitled to the protection of that sovereign immunity.

Plaintiff has raised some arguments concerning the Indian Civil Rights Acts, and alleges that it provides jurisdiction in this matter. Santa Clara Pueblo, and an entire litany of cases that come after Santa Clara, clearly establish that the I.C.R.A., does not waive the sovereign immunity of indian tribes, does not provide causes of actions, that only express cause of action is for writ of habeas corpus. There are no implied causes of actions. This Court has never held that there are implied causes of action.

THE COURT: Well, I don't believe, you can convince me otherwise, that the plaintiff needs for purposes of a preliminary injunction, needs to rely on the Indian Civil Rights Act.

MR. CANTY: I'm merely responding to her

argument.

THE COURT: I guess I say that to encourage you to perhaps not be so concerned about just responding to every argument she makes. You might want to consider pointing out to me -- I can see allegations in the complaint, and the stipulated matters that led to previously -- that may give rise to preliminary injunctive relief. That doesn't have anything whatsoever to do with the Indian Civil Rights Act. It has to do with what I call good old fashion notice pleading, and the circumstances particular to this case.

MR. CANTY: Okay. The hurdle that plaintiff has to overcome is the sovereign immunity in order to even get a preliminary injunction. The Court will have no authority whatsoever to issue any sort of order in this case unless plaintiff can demonstrate that the White Mountain Apache Tribe, through its Tribal Council, has waived the sovereign immunity of the Tribe, and its officials.

THE COURT: That's assuming that I agree with you that sovereign immunity attaches to every single case that could conceivably be brought against a Tribal govenmental entity.

MR. CANTY: Well, I'll cite it, again,

the Tribal Council itself in Tribal legislation has provided that the Court is without jurisdiction over the Tribe, except as expressly provided by the Tribal Council. They have not expressly provided that the Court has jurisdiction over this matter and --

THE COURT: See, where I think you and I disagree, is I don't agree there is an absolute automatic immunity situation that can be raised under every conceivable set of facts when a Tribal member chooses to sue a Tribal governmental entity in Tribal Court to redress an alleged grievance.

MR. CANTY: An analogy is the Federal system. The Federal Government is absolutely immune from lawsuit, from any of its citizens, any of the entities action. A Federal tort claims act is sovereign waiver of that immunity. The Federal Court allows private citizens to come in and file lawsuits against the Government, without that there's -- so that before the Federal Tort Claim was act, private citizens could not have that relief. They did not have --

THE COURT: Torts do not deal with basic fundmental rights though. Do you think that the traditional kind of authorities we think of, you

know, somebody gets in a wreck with a Federal Fish and Game truck, for example?

MR. CANTY: The prinicple is the same though, absent action by the Tribal Council as governing body of the Tribe who speaks for the Tribe, and sets the policy, and says, in effect, determines what the White Mountain Apache people would like to see as their legislation, and what they would like to see as proper causes of action on Tribal Courts, on even Civil Rights matters.

The bottom line is that the Tribal Council has not taken action. Plaintiff is a member of the Council. She could have put forth legislation handling this if it were such a serious thing.

THE COURT: Certainly she couldn't do that after the fact. The four members of the Council carried the vote to preclude her from participating in the governmental process.

MR. CANTY: But she had, I think, eight years before that to, as a sitting member of the Tribal Council, to take some action.

THE COURT: The situation never came up though, did it?

MR. CANTY: I'm not aware if it did.

THE COURT: As a matter of fact there's a situation alluded to in the complaint. I believe it was the complaint or the memo of the plaintiff, that this situation did apparently come up in the past involving a Councilwoman, Gertie Lupie, as a similar situation.

MR. CANTY: I'm not fully aware of the facts of that case.

THE COURT: Well, based upon the facts set out in the case, it appears to be an identical situation that was procedurely handled in a very different fashion, but those again -- again, that information was gleaned from the memo.

MR. CANTY: Again, that goes to the issue of what actually occurred in the process meeting: Was there due process that occurred on that day, and I suppose we may get to that issue at some point down the road.

THE COURT: So you're willing, I guess, to put all your aces in the basket of sovereign immunity as a bar to this action, so the jurisdictional question basically takes care of itself?

MR. CANTY: Yes, unless plaintiff can show that she has overcome the bounds of that

sovereign immunity, and has obtained an express waiver from the Tribal Council allowing this law suit to proceed, than the Court has no choice but to dismiss this action.

THE COURT: I understand that, but you may want to assume that I rule against your position, and get to the merits.

MR. CANTY: We're prepared to argue on the preliminary injunction as well.

THE COURT: Now is the time.

MR. CANTY: Would you like her to go first on that issue?

THE COURT: She's reserved her opportunity for -- I'll tell you what I'll let her -- Ms. Williams, why don't you argue positions so that the defendants can respond on the merits of the preliminary injunction.

MS. WILLIAMS: Okay. My understanding was that we had 20 minutes to address the sovereign immune --

THE COURT: I guess I miscommunicated, 20 minutes was the total allotment of time on both of the issues. Go ahead and talk about the preliminary injunction.

MS. WILLIAMS: Okay. Your Honor, we ask

that this Court grant my client the preliminary injunction enjoining the Tribal Council from enforcing the Resolution 11-88-297, and the reason why is that it is wrong. The Resolution 11-88-297 goes beyond the authority that the Tribal Council has, and that's cited in our pleadings. Also that the Resolution 11-88-297, you know, is a violation of the Indian Civil Rights Act, because that Resolution passed by the four members of the Tribal Council who are named as defendants in this case.

I think the court paper will show that the -- that in the minutes in both, one submitted by myself, and the defendants, that only these four members voted against it -- voted for it. The other -- there were three that voted against it, and there were three that abstained, and we feel that this Resolution --

THE COURT: Let me ask the defendants, at that point, if you agree with that in any case? Four defendants voted in favor of the Resolution, three abstentions, and three against?

MR. CANTY: Was that the vote?

MS. WILLIAMS: Yes, yes, it is.

MS. ARTHUR: Some people weren't there, so I don't know if you can call people that weren't

there abstentions.

THE COURT: I understand that. I know what abstention means.

MS. ARTHUR: Four in favor, three against.

THE COURT: You're saying there were no abstentions?

MS. ARTHUR: There were three people that wanted this Court to hear it first.

THE COURT: So the four defendants voted for the Resolution, three voted against the Resolution, but there were no abstentions.

MS. ARTHUR: There were three that were counted as abstentions, yes.

MS. WILLIAMS: So I assume they agree with me?

THE COURT: Sounds like it to me. Believe me, with the understanding that an abstention is considerably different from an absence, just so it's clear because I guess I didn't communicate on your time. I'll give you each ten minutes to argue the injunctive side of it.

MS. WILLIAMS: Okay. If I could start over, Your Honor. Like I said, these four members of the Tribal Council voted for the Resolution,

that Resolution, Your Honor, is in violation of the Tribal Council Constitution Article IX, Section 1, and also Article IX, Section 2, and Article II, Section 1 of the By-laws addresses what is, what powers or what rules the Tribal Council has in addressing matters such as -- it says here, crimes involving moral integrity, than the only crimes that the By-laws of the a Constitution addresses, and plaintiff in this case was not charged, or was she convicted of any of the crimes that the Constitution addressed.

The Constitution says only certain crimes and convictions of certain crimes shall be grounds to remove. It does not state that there should be grounds for suspension. It doesn't even address suspension, only removal. But my client was not charged, nor was she convicted of any of the crimes listed that involved moral integrity, and because of that she cannot be removed from the Tribal Council, even if she was convicted. The Tribal Council --

THE COURT: Where is the irreparable harm to her?

MS. WILLIAMS: The irreparable harm, I think, is where she has been denied her voice. You

know, there is a freedom of speech in this country, and part of her freedom of speech is -- whereas a duly elected officer she has a right to speak for the area, for the voters of her district.

THE COURT: So I guess the irreparable harm, and the inadequate remedy at law, is we have a group of folks out there that are without representation now in the Tribal Governmental system?

MS. WILLIAMS: The required representation set by the Constitution, the Constitution says that there shall be two representatives from District 1. Right now the Tribal Council has only -- has only one.

THE COURT: Does that then purportedly upset the the normal workings of the Tribal Council?

MS. WILLIAMS: I would assume so, because if you were to take -- if the Constitution says that a certain number of people in Cibecue are to be represented buy two representatives, and then they're only allowed one, and then that means that the people are being hurt.

THE COURT: So those people without representation, dollars and cents later on in this

case, assuming that would be appropriate, and that's a big assumption, that doesn't help any; is that what you're telling me?

MS. WILLIAMS: Yes, Your Honor, and the Tribal Council in December got petitions that were signed by the voters of District 1, and they are here, I'm sure they have copies, but they are here, and they're verified District 1 voters that signed the petition, that demand that there be a special Council meeting be held in the community at Cibecue, and that the purpose for that meeting was to address the Tribal Council's action on November 22nd, where they removed their representation of one of the Tribal Council, and that it says we demand the suspension be vacated.

THE COURT: Ms. Williams, I don't think you need to argue that. I think the inference can fairly be drawn that you have a group of folks out there that aren't represented.

MS. WILLIAMS: Right, and that's where Council, her freedom of speech on there. You know she is entitled to voice her own opinions on the Tribal Council, that has been denied, and that in itself, I think, proves irreparable harm when you take the basic freedom of speech away from a

person, you have a irreparable harm because you cannot say that if I were to tell this -- if we were to tell this one person you cannot talk about this, you cannot talk about that, than that's taking away from the basic right, and that's a harm that cannot be corrected later on. We cannot say: Well, we're sorry you can talk now. But what about back then? I think it's very basic when you look at it.

THE COURT: Money doesn't take care of that problem as well; that's what you're telling me?

MS. WILLIAMS: Yes, and also we think that just by the Resolution itself proves that there is irreparable harm, and that this Court should address that, and should enjoin the Council from enforcing that Resolution so we can --

THE COURT: Wait, wait. How can I enjoin the Council when the parties to this lawsuit are four Council members?

MS. WILLIAMS: I'm sorry, Your Honor, I meant the four defendants who voted.

THE COURT: There's absolutely no question that I don't have jurisdiction -- there's no argument I don't have jurisdiction over any of

the other Council members that aren't parties to this.

MS. WILLIAMS: Right, well, the four defendants should be enjoined from enforcing that Resolution. You know there is a violation of -- there is a violation of freedom of speech and due process. I think that's where we prove there is irreparable harm, but there is public interest that I think I addressed a little bit before.

THE COURT: I'll help you out, I don't have any trouble seeing the public interest aspect of it. The irreparable harm, adequate remedy at law, they are so inextricably entwined in this whole case that it applies to all, so I don't have a difficulty with that. I'd like to help you out when I can, and save you time. Your pleadings covered that particular area -- well, your memoranda, and as I indicated, I've studied it. Your time is about up.

MS. WILLIAMS: Well, Your Honor, we ask that the Court issue a preliminary injunction enjoining the defendants from keeping my client off the Council. Thank you.

THE COURT: Very well. Mr. Canty, you want to address the issue of the appropriateness or

inappropriateness of injunctive relief?

MR. CANTY: Yes, Your Honor. Before I do, however, I'd like to move the Court for a ruling on the jurisdictional issue before we even get to that.

THE COURT: I'm going to take it under advisement.

MR. CANTY: Okay. In order to prevail on an action for injunctive relief the plaintiff in this case must, among other things, so that there will be irreparable harm if the injunction is not granted. Among her arguments plaintiff has alleged that the people of Cibecue are without representation. I don't think that's a matter that plaintiff has standing to raise at this point. That's a matter for the people of Cibecue to raise. The irreparable harm must go to the plaintiff, and it does not have anything to do with outside third parties. The people of Cibecue should raise that on their own in another lawsuit.

THE COURT: Let's assume you're right. You see some irreparable harm to the plaintiff though as a duly elected official charged with the responsibilites to participate in the governmental processes of the Tribe and, in effect, at this

point, or since November 22nd, she has been unable to do so?

MR. CANTY: The plaintiff's major argument on that point is that she's been deprived of her freedom of speech. I haven't heard any specific allegations. She's perfectly free to talk on any topic she wishes.

THE COURT: At the Council meeting?

MR. CANTY: Except at the Council meeting.

THE COURT: Except at the Council meeting.

MR. CANTY: Except as a sitting member on the Tribal Council. Has a member of the public she can come in as does the public council.

THE COURT: You don't think a vote is a form of expression?

MR. CANTY: She has not shown that her vote is going to be dispositive on any given issue at all. She has not raised any matter that's come before the Tribal Council where her vote would be dispositive one way or the other. She's not alleged that, therefore, she cannot argue that irreparable harm is being suffered.

The other element of irreparable harm

that was addressed is the matter of Council pay. The Resolution specifically provides that Council member Dehose will continue to receive Council pay at the same rate of Council members.

THE COURT: I don't think that's an issue -- you both agreed that by stipulation that she's drawing the same pay as the others, so you're absolutely correct in that regard, that's not an issue.

MR. CANTY: All right. Plaintiff has also raised the issue of public policy, which is another element, weighing the public policy in favor or not in favor of granting the injunctive relief. Two competing things come into play here: One is the public policy which weighs against having a Council member sit in Council meetings and make decisions when that Council member has admitted to criminal conduct. When that --

THE COURT: Mr. Canty, I trust your Tribal Constitution somewhere has, and I studied it, does it have somewhere something that's a counter part to our 5th Amendment Right, the presumption of innocence?

MR. CANTY: No, it doesn't.

THE COURT: Nothing in the Tribal

Criminal Justice Code Rules, Regulations relative to presumption of innocence?

MR. CANTY: Not in the Constitution.

THE COURT: I didn't limit my question to the Constitution. I'm asking you relative to your Tribal Criminal Code, or any other?

MR. CANTY: These were separate proceedings, Your Honor. There is a member by the Tribal Council on one hand criminal --

THE COURT: Once again, it's not going to serve any purpose to evade my question.

MR. CANTY: It's not an attempt to evade, it's an attempt to explain.

THE COURT: All right. Your explanation is noted. Now, answer my question: In your Tribal Criminal Code is there something that's analogous to the presumption of innocence in the Federal Constitution?

MR. CANTY: Well, the whole procedures in Tribal Code -- there's an inherent presumption that a person is allowed to come, they put on witnesses. Yes, there is a presumption.

THE COURT: Okay. Very --

MR. CANTY: In criminal cases -- in criminal matters, Your Honor.

THE COURT: So Ms. Dehose has been charged with a crime; is she not entitled to that same presumption of innocence?

MR. CANTY: In the Council meeting that day, the charges were laid out before her. She addressed them.

THE COURT: Mr. Canty, a Council meeting is not a proceeding whereby guilt or innocence of a crime is determined; would you agree with that?

MR. CANTY: Not in all cases, no, I wouldn't.

THE COURT: In this particular case, if Ms. Dehose has been -- agreed has been charged with a criminal offense; are you telling me, sir, that in that Council meeting, regardless of what she did or didn't do, there is a finding of guilt relative to that charged offense; is that what you're telling me?

MR. CANTY: There is not a judicial finding of guilt.

THE COURT: In view of that, is that she's not entitled to the presumption of innocence, which is part of your Criminal Justice Code?

MR. CANTY: I think the Council presumed that she would have her day in Court. The

Resolution recites that she would have her day in Tribal Court, to have the criminal charges completely reviewed, and the matters would then come back before the Tribal Council for further discussion and disposition as necessary.

There was no attempt to address the criminal charges. The matter was public knowledge. What had occurred was public knowledge. Everyone on the Council knew about it, discussions had been rampant around town here. The Tribal Council had been made aware of certain communications that Ms. Dehose had made to the Tribal Police Department.

THE COURT: Didn't any voluntariness determination of any statements that she made --

MR. CANTY: Pardon me?

THE COURT: Been any determination with respect to the issue of voluntariness of any statements that she's made?

MR. CANTY: That's a matter for the Courts to decide, right. This is something that the Council addressed purely has a matter of Tribal Council dealing with a problem of the Tribal Council, something that came within --

THE COURT: But did they do it within

the parameter of their own rules and regulations, sir?

MR. CANTY: Yes, they did.

THE COURT: Okay. What rules and regulations do you think they did it within?

MR. CANTY: To act as the governing body of the White Mountain Apache Tribe; to represent the Tribe in every matter, they did that.

THE COURT: So that general grant of authority is what allowed them to suspend Ms. Dehose; is that what you're telling me?

MR. CANTY: The authority to regulate their own procedures, which is provided in the Constitution. The authority to speak for the Tribe, and to do all things --

THE COURT: What about did they adhere to the specific sections? I know you're going to have to assume.

MR. CANTY: They're cited in the Resolution. I assume they did.

THE COURT: You're going to have to assume this with me. Again, Article IX, Sections 1 and 2, I don't see that there's any difference between removal and suspension. The practical effect of each is the same. One is just more

long-term perhaps -- and I understand that's your argument -- than the other.

But I want you to assume with me that we have -- that for all intents and purposes since November 22nd, Ms. Dehose has been removed, whether you call it suspension or not, she's been removed from the Tribal Council. Is it your position that Article IX, Sections 1 and 2 of your Constitution were either, Number One, adhered to in removing her; or that for some reason they don't apply?

MR. CANTY: Article IX, Section 1 and 2?

THE COURT: I apologize for my compound question. My first question to you: Do you think those procedures set forth in Article IX, Sections 1 and 2 were adhered to when this Resolution was debated, and then passed?

MR. CANTY: Well, again you're drawing the distinction that I can't draw. This is a suspension and not a removal. This addresses specifically removal. It's captioned "removal from office."

THE COURT: When I preface my remark, I see no practical difference for you to assume, for the purposes of my question, that they're one in the same and, again, by assuming, you're not

conceding anything. Were those procedures in this case adhered to, and I understand it's your position that they don't apply, but assume they do: Were they adhered to?

MR. CANTY: You're asking me to assume there's a conviction. I can't assume that that's inherent in the Article itself.

THE COURT: So your answer is that Article IX, Section 1 and 2 were not adhered to?

MR. CANTY: No, that's not my answer. My answer is you're asking a question that does not relate to the substance of the things we're dealing with. We're dealing with suspension.

THE COURT: Well, assume they're one in the same for purposes of my question.

MR. CANTY: What relevancy does that have to this case?

THE COURT: I guess I'll decide that. I'm the guy that makes the decision of what is or isn't relevant, Mr. Canty.

MR. CANTY: The only way I can answer that is she has not been convicted of a crime.

THE COURT: So I guess under Article IX, Sections 1 and 2 were not adhered to in this case?

MR. CANTY: Because they were not

applicable.

THE COURT: That's your position, I understand.

MR. CANTY: Yes, and I have to stick to that position. I can't, even impliedly, concede --

THE COURT: I'm not asking. Mr. Canty, obviously, you don't understand the significance of when you're posed a question. I'm asking you to assume purely for purposes of argument. You're not conceding by responding to the question. You're not serving your client's position well by making an effort, a continued effort, to continue to evade my question.

The way Judges make decisions is with tools given during the course of a hearing. If you chose not to respond you do so at your client's peril, because you deprive me of information that I believe I need to factor in to help make my decision.

MR. CANTY: I think I'm representing my client as zealously as possible, Your Honor, and I have to present this thing in the best possible light for my client.

THE COURT: I understand that and, again, I emphasize to you that you're not conceding

a thing by responding to a question were you're asked to assume for purposes of argument various facts and, again, I ask you: Assume, purely for purposes of argument, that Ms. Dehose was removed from the Council, so assume that Article IX, Sections 1 and 2 would have been required procedurally for the Council, in terms of removing her; were those procedures adhered to?

And, again, I understand that your position is that they don't apply because we're not dealing with removal. So I want you to assume this is a removal; were they adhered to?

MR. CANTY: There was no, no conviction. Article -- Section 1, Article IX --

THE COURT: So they weren't adhered to because those provisions don't kick in unless there has been a conviction; is that correct?

MR. CANTY: That's right, right.

THE COURT: Again, understand that I'm not saying to you that I believe those Sections apply. I have not made that preconceived finding. I don't have that preconceived notion, but in the event that the -- in the course of my studing and deliberation that I determine it does; that's why my question and your answer to it, I believe, is

important.

MR. CANTY: Okay. Are we through with that line of thought?

THE COURT: Yes.

MR. CANTY: All right. Back to the issue of public policy. The public policy of the White Mountain Apache Tribe waives against having a Council member, and sit in Council, and make decisions on important matters that come before the Council, when that Council member has been charged with criminal conduct and when her presence on the Council brings into question the integrity, not only of herself but of the entire Tribal Council the entire Tribal governing body.

THE COURT: Isn't that an assumption?

MR. CANTY: No, that's -- well, something the Council assumed when they passed this Resolution that her presence there was offensive to them, and to the people of the community. They -- there's no need to go into the merits underlying that decision, but that was their decision, that was there assumption that it was offensive.

So the public policy heavily waives against having a Council member, sitting in that governmental -- that decision making position, when

those charges were still pending. The Council clearly says that once the charges have been heard the matter will then be referred back to the Tribal Council for further discussion and action.

THE COURT: You know what bothers me about that line of thought, it gets back to that old presumption of innocence. What's to it?

MR. CANTY: It's in fact.

THE COURT: Is that just a hollow concept?

MR. CANTY: No, it's intact.

THE COURT: How is it intact? She's been prejudged, hasn't she? Wasn't the action the Council -- wasn't the basis for the passage of the Resolution, the bottom line, I mean regardless of all the verbiage in the Resolution that she was involved in allegedly criminal behavior that gave rise to criminal charges against her; wasn't the bottom line basis that generated or started the ball rolling for the vote to suspend her?

MR. CANTY: That there has been charges filed?

THE COURT: Yes.

MR. CANTY: Yes, tempered with other facts that were made.

THE COURT: I'm just curious what happens. Consider it a rhetorical question. I just wonder what happens to the presumption of innocence?

MR. CANTY: It's intact. The Council has presumed it. It's presumed the Court will handle the criminal plan, and they'll take steps to reinstate.

THE COURT: In the interim though, she's been sanctioned, has she not?

MR. CANTY: She has, by the Council, which she's a member of. They -- the body has a right to sanction members of the whole. She's a member of the Council, they have the right to sanction its member.

THE COURT: I tell you I couldn't agree with you more that this Tribal Council, under its laws, rules, regulations, has the right to sanction, provided, provided, it adheres to its own rules, and regulations, By-laws, Constitutional provisions that apply.

MR. CANTY: And our argument is that they have.

THE COURT: All right. I understand that. Absent that though, I guess you have to

agree with me, they just can't, after something has transpired which they think justifies sanctioning, one of their members conjure up their own rules, regulations, after the fact, and then impose a sanction; would you agree with that?

MR. CANTY: I wouldn't agree that things have been conjured up, no.

THE COURT: All right. You misunderstood my question to you. Certainly if this body abides by its own rules and regulations, assuming they've been properly legislated, they have, I agree with you, they have the right to sanction; we on the same wavelength?

MR. CANTY: Yes, Your Honor, except that you're importing principles from the Federal Constitution.

THE COURT: No, I'm not.

MR. CANTY: You're totally disallowing custom decision, those things which have been inherent of Tribal Government since it began. You're attempting to bring in foreign elements.

THE COURT: You haven't pointed out any custom to me that's indicated --

MR. CANTY: We haven't got to the merits yet. We will do that.

THE COURT: How can you assume what I'm doing?

MR. CANTY: The Council refers to custom and tradition in the Resolutin as a basis for making this decision.

THE COURT: That's a conclusory statement, is it not?

MR. CANTY: And the fact supporting that, if necessary, will be brought out.

THE COURT: All right. So you agree with me. Anything else you want to add to this injunction question?

MR. CANTY: That plaintiff has not demonstrated irreparable harm, and has not overcome the burden of public policy, and has not shown --

THE COURT: Is there an adequate remedy at law, Mr. Canty, available to her?

MR. CANTY: Yes, the remedy lies with the Tribal Council. She can go back and request that this be rescinded, that she be reinstated.

THE COURT: So you're telling me she has some administrative remedies is that what you're telling me?

MR. CANTY: Political -- or that's not a remedy before the Court, yeah, you're right.

THE COURT: Does she need to exhaust an administrative remedy before she seeks injunctive relief? Surely when we're talking about mandamus prohibition I'd be inclined to agree with you, but do we have that requirement here? Has she got to exhaust administrative remedies?

MR. CANTY: I didn't say. I said there were other remedies available. Arguably, not at all --

THE COURT: Okay. All right. Anything else you want to add? I think you probably got about a minute.

MR. CANTY: The facts that we recited, the law that we recited, weigh heavily against granting an injunctive relief the plaintiff seeks. The relief would go directly against the Tribal Council, and the jurisdictional issue should be dispositive. If it is not than the plaintiff has not met her burden on the elements for injunctive relief, and the relief requested should be denied.

THE COURT: Okay. I appreciate both your arguments. I am going to take the matter under advisement. The council meets on a weekly basis, does it not?

MS. WILLIAMS: There's a meeting next

week.

THE COURT: Monthly or weekly?

MR. CANTY: Monthly.

THE COURT: Let me tell you what my concern is. You all, in your Motion to Dismiss have briefed the issue of sovereign immunity, among others things, and you're to be complimented for that. I think you briefed it well. The plaintiff has not yet had an opportunity to brief that issue, and, naturally, as well as the other matters raised in your Motion to Dismiss, but the only part that applies to the whole case is the issue of sovereign immunity. What I'd like to do is give you the opportunity, Ms. Williams, to respond at least to that, or to that issue before I rule because that's obviously a critical issue.

Mr. Canty is absolutely correct when he says if you haven't gotten over that burden than you are -- I'm without jurisdiction to even consider whether or not to give you any relief.

MS. WILLIAMS: Right.

THE COURT: There is the kind of a situation -- well, I can tell you with any case I handle, I don't sit on things very long. I think parties to lawsuits have a right to have decisions,

and get on with their day-to-day lives, and be free of the burdens and anxieties that attach to being involved in litigation. You all have a certain period of time under the Rules to respond to their motion. What you might want to consider doing is getting in a quick response, or at least a memo, for purposes of this hearing on the issue of sovereign immunity.

I have to believe that what you provide me with on that issue would be the same now as it would be in responding to the motion to dismiss because it's clear that -- let me ask if I can get agreement from both sides. If I determine that sovereign immunity bars this suit, than we're finished, whether we're talking about preliminary injunction, permanent injunction, money damages, we're done, is that agreed?

MS. WILLIAMS: Yes.

THE COURT: Mr. Canty?

MR. CANTY: Agreed.

THE COURT: So I think it's important to get that issue briefed by you Ms. Williams, and let me decide that, because again my ruling on that will conceivably make or break the whole case.

MS. WILLIAMS: All right.

THE COURT: So if you can get that issued briefed and to me. Could you do that -- I don't know when you were served with the --

MS. WILLIAMS: Yesterday, I got a copy in the mail.

THE COURT: It was mailed to you, was it?

MS. WILLIAMS: Yes, it was.

THE COURT: So you have five days plus 15 to respond. I trust your Rules are the same?

MR. CANTY: Right.

THE COURT: What I'd like to do is -- could you have that issue briefed and something to me by a week from Tuesday?

MS. WILLIAMS: Would that be on the 14th?

THE COURT: And I'll tell you why. The 10th I'm going to be in Phoenix all day, and I wouldn't be able to study it anyway, and the 13th is a holiday, it's some kind of a State holiday, I don't know if it is for you folks or not --

MR. CANTY: It is.

THE COURT: They lock up the building. Does that give you a sufficient amount of time? Now, obviously, if you can get it to me sooner I

can get on with studing it and ruling. I'm going to take the matter under advisement from the date I receive your memo, and I'll give on or before the 14th to get it in.

MR. CANTY: And we get a chance to reply to her response?

MS. ARTHUR: Five days, under the Rules, which would be the 20th.

THE COURT: Yes, but understand what I'm doing here. I'm not talking about a response to your motion for summary disposition. I'm talking about -- I'll tell you what I'll do, I'll allow you to submit simultaneous memos on the 14th. If there's any additional materials you want to submit on the issue of sovereign immunity you may do so that way.

MR. CANTY: Limited solely to the preliminary injunction the sovereign immunity issue?

THE COURT: Yes, I mean the issue of sovereign immunity I don't think is going to change regardless of what particular issue we're dealing with on this case, whether it's your 12 -- well, your Motion to Dismiss, or the request for preliminary injunction. So, again, I want these

posthearing memos strictly limited to the issue of jurisdiction, vis-a-vis sovereign immunity.

And you both can submit on or before the 14th. From the 14th on I will take the issue of the jurisdictional issue, as well as the appropriateness of injunctive relief, under advisement.

MR. CANTY: Will we still have response and reply on the Motion to Dismiss at a later date?

THE COURT: Yes, yes, stick with your briefing schedules on that, unless I get a request from either one of you to altering that time frame, which I'll consider if and when I get it, because I don't want to alter the proceedings with respect to the Motion to Dismiss, again, unless you request it, and I think it's appropriate.

MS. WILLIAMS: Okay. Thank you, Your Honor.

THE COURT: Thank you all.

C E R T I F I C A T E

STATE OF ARIZONA)

) ss.

COUNTY OF NAVAJO)

I, KELLY E. PALMER, Official Reporter, do hereby certify that the foregoing pages 2 through 76, inclusive, dated Thursday, February, 2, 1989, constitute a full, true and accurate transcript of all the proceedings had in the above-entitled matter, all done to the best of my skill and ability.

DATED this 28th day of February 1989.

KELLY E. PALMER

Official Reporter

Exhibit No. 6 (continued)

RECEIVED FEB 2 8 1989

IN THE WHITE MOUNTAIN APACHE TRIBAL COURT

Whiteriver, Arizona

JUDY DEHOSE,

Plaintiff,

vs.

RENO JOHNSON, SR., Chairman of the White Mountain Apache Tribe, ALVINO HAWKINS, vice chairman of the White Mountain Apache Tribe, MATTHEW NOSIE, councilman, HERBERT TATE, councilman, in their official and individual capacities,

Defendants.

No. C-89-04

O R D E R

Re: Preliminary Injunctive Relief

Based upon the stipulations of record, argument of counsel, pleadings and relevant authority, the Court finds as follows:

1. The White Mountain Apache Tribe and tribal officials, acting within the scope of their authority as limited by the Tribal Constitution, By-Laws, customs and traditions of the White Mountain Apache Nation, are entitled to soverign immunity unless expressly waived.

2. Specific provisions of the Tribal Constitution, the supreme law of the White Mountain Apache Tribe pursuant to Section 2.2 A of the White Mountain Apache Tribal Judicial Code, controls more general provisions. Article 5, Sections (a), (s) and (u) set forth in general terms, the powers of the Tribal Council. (It is important to note that Article 5, Section (a) requires the Tribal Council to make decisions which are not inconsistent with, or contrary to the Constitution or By-Laws.) Article 9, Sections 1 and 2 of the Tribal Constitution and Article 2, Section 1 of the By-Laws are specific provisions and the only regulations setting forth the basis and procedure for removing a member of the

Tribal Council, whether temporarily as here, or on a permanent basis.

3. The defendants, sued in their individual as well as official capacities, did not adhere to these provisions when Resolution No. II-88-297 suspending the Plaintiff from her position as a duly elected member of the Tribal Council was enacted. [1] The defendants' conduct was, therefore, outside the scope of their authority. (The procedures used were not in compliance with the tribe's soverign powers as set forth in the Constitution and By-Laws cited hereinabove relative to removal of a Council member. This contravenes the mandate of Article 5, Section (a) of the Tribal Constitution requiring the Council to make decisions in conformance with its Constitutional provisions and By-Laws.)

4. The defendants, having acted outside the scope of their authority, are not protected from suit by soverign immunity. Actions outside the scope of their authority are not deemed a lawful exercise of power to which soverign immunity attaches. Therefore, the Tribal Court has jurisdiction and the power to review and check any alleged abuse of power committed outside the scope of a duly elected official's authority.

5. The Plaintiff, having been deprived of her seat on the Tribal Council, has been precluded from exercising her lawful powers as a duly elected representative which, most importantly, has resulted in her inability to exercise her freedom of expression, guaranteed by Article 7, Section I of the Tribal Constitution, in the form of casting votes on any issues raised during

---

[1] Plaintiff has not been convicted of a felony or misdemeanor involving moral integrity, which offenses are specifically enumerated in Article 2, Section I of the By-Laws, or any other of the proscribed behavior set forth in Article 9, Section I of the Tribal Constitution. Therefore, even if Plaintiff were convicted of the pending criminal charge, it would not fall within that class of offenses involving moral integrity.

council meetings. Irreparable injury is compounded by the absence of an adequate legal remedy for the Plaintiff's deprivation.

6. Given the basis for the Court's decision and the findings set forth herein, there is a reasonable probability of success at the final hearing relative to injunctive relief.

7. Members of the White Mountain Apache Nation have a significant interest in their governmental officials acting within the scope of and adhering to the supreme law of their land embodied in the Tribal Constitution and its By-Laws and benefiting from full representation by their duly elected officials. In balancing these interests against the Plaintiff's exclusion from her place on the Tribal Council, the Court determines the former to be more compelling.

IT IS THEREFORE ORDERED preliminarily enjoining the defendants from precluding or interfering with the Plaintiff's right to sit as a duly elected member of the Tribal Council or from depriving her from exercising any rights, powers and/or benefits which attach to said service effective immediately and retroactive to the date of her suspension. As Plaintiff is a duly elected tribal official, there is no security required by the applicant.

Acting Tribal Judge

Copy of the foregoing mailed this 22nd day of February, 1989 to:

Claudeen Bates Arthur
General Counsel
White Mountain Apache Tribe
P. O. Box 700
Whiteriver, AZ 85941

Carol J. Williams
Attorney at Law
P. O. Box 1119
Whiteriver, AZ 85941

Judicial Secretary

-3-

Exhibit No. 6 (continued)

IN THE WHITE MOUNTAIN APACHE TRIBAL COURT

Whiteriver, Arizona

JUDY DEHOSE, Plaintiff, v. RENO JOHNSON, SR., Chairman of the White Mountain Apache Tribe, ALVINO HAWKINS, SR., Vice-Chairman of the White Mountain Apache Tribe, MATTHEW NOZIE, Councilman, HERBERT TATE, Councilman, in their official and individual capacities. Defendants.	)	No. C-89-04 ORDER

This court having received notice and a copy of the defendants, now petitioners, petition for Writ of Prohibition in the above-captioned matter and having reviewed the petition and applicable provisions of the Tribal Judicial Code, the court finds as follows:

1. As Chief Judge of the Tribal Court, it is my responsibility to preside over the trial court and to act as Chief Administrative Officer of the court pursuant to §2.8 of the Tribal Judicial Code;

2. Defendants petition for Writ of Prohibition has been filed with the Court of Appeals of the White Mountain Apache

Tribe and seeks an order from that court directing the trial court to take no further actions in the above-referenced case because of a lack of jurisdiction on the part of the trial court.

3. The Tribal Court of the White Mountain Apache Tribe, as presently constituted, does not have a sitting Court of Appeals who can speedily and expeditiously hear this matter.

4. The Judicial Code of the White Mountain Apache Tribe at §2.9 requires that "the Chief Justice and the Associate Justice of the Court of Appeals, . . . shall each be selected by a majority vote of the Tribal Council . . .". Thereby requiring that this matter be referred to the Tribal Council advising them that a matter for the consideration of the Court of Appeals has been lodged with this court and therefore requires the appointment of a Court of Appeals to hear the matter and as Chief Judge and administrator of the Tribal Court, it is my responsibility to bring this matter before the Tribal Council and to take all other actions as are deemed necessary to protect the interest of the parties involved pending the appointment of a Court of Appeals and actual disposition of defendants pending Petition for Writ of Prohibition.

IT IS THEREFORE ORDERED that the Order issued by Acting Tribal Court Judge Jay Natoli on February 22, 1989, in the above captioned case No. C-89-04 is hereby arrested and stayed and shall be of no force or affect and shall not be enforced pending final disposition of the defendants Petition for a Writ

of Prohibition now pending before the Court of Appeals of the White Mountain Apache Tribe. Plaintiff, her counsel, and any of Plaintiffs agents, and the Trial Court shall refrain from taking any further action in reliance on the Trial Court's order referenced herein of February 22, 1989 and from taking any further action whatsoever except for the filing of further responses and replys as made necessary by the pleadings now on file.

This matter will be referred to the Court of Appeals of the White Mountain Apache Tribe as expeditiously as possible.

Marvin Ethelbah

The Honorable Marvin Ethelbah
Chief Judge, White Mountain
Apache Trial Court

COPY of the foregoing
mailed this 27th day of
February 27, 1989 to:

Honorable Jay Natoli
Superior Court of Navajo County
Navajo County Governmental Center
P.O. Box 668
Holbrook, AZ 86025

Claudeen Bates Arthur
General Counsel
White Mountain Apache Tribe
P.O. Box 700
Whiteriver, AZ 85941

Carol J. Williams
Legal Counsel
P.O. Box 1119
Whiteriver, AZ 85941

Exhibit No. 6 (continued)

IN THE COURT OF APPEALS

OF THE WHITE MOUNTAIN APACHE TRIBE

Whiteriver, Arizona

The White Mountain Apache Tribe, as the real party in interest, RENO JOHNSON, SR., Chairman of the White Mountain Apache Tribe, ALVINO HAWKINS, SR., Vice-Chairman of the White Mountain Apache Tribe, MATTHEW NOZIE, Councilman, HERBERT TATE, Councilman, in their official and individual capacities, Petitioners, V. THE HONORABLE JAY NATOLI, Acting Judge of the Tribal Court of the White Mountain Apache Tribe, JUDY DEHOSE, Respondent, Defendants.	NO. C-89-04 ORDER AND OPINION

The White Mountain Apache Tribe as the real party in interest in conjunction with the Defendant Council members in the action below petition this Court for a Writ of Prohibition directing respondent Judge Jay Natoli and the Court below to refrain and desist from any further proceeding in Case No. C-89-04 and requests that Ms. Dehose's petition in that action be dismissed. In accordance with relevant authority, and, upon the stipulation of record, arguments of counsel and pleadings filed the Court of Appeals of the White Mountain Apache Tribe grants a Writ of Prohibition in the Matter of White Mountain Apache Tribe v. The Honorable Judge Jay Natoli. The Court further Orders the dismissal of Ms. Dehose's petition in Case No. C-89-04 filed in the Tribal Court of the White Mountain Apache Tribe.

FACTS

Council member Judy Dehose was suspended with pay by the Tribal Council of the White Mountain Apache Tribe on November 22, 1988, as a disciplinary action, in response to the filing of criminal charges against Ms. Dehose for assault with a deadly weapon. The alleged crime took place on the White Mountain Apache reservation and involved a victim who also is a member of the Tribe. The suspension was effected by the passage of Resolution No. 11-88-297. Ms. Dehose was present during the discussion of her suspension by the Tribal Council and voted against the suspension.

Ms. Dehose subsequently filed suit in Tribal Court alleging that the Tribal Council had no authority to suspend one of its members naming the four Council members who voted in favor of Resolution 11-88-297 as defendants. In this action numbered Case No. C-89-04, Ms. Dehose sought declaratory and injunctive relief and damages asking the Court below to restrain the Defendants from precluding or interferring with her right to sit as a council member. The Honorable Jay Natoli, sitting as a tribal court judge, ordered injunctive relief finding Resolution 11-88-297 unconstitutional and in contravention of Ms. Dehose's freedom of expression, guaranteed by Article 7, Section I of the Tribal Constitution. Judge Natoli also held that the defendants, having acted outside the scope of their authority, were not protected by sovereign immunity. This Court does not agree and finds as follows in this Opinion.

OPINION

MANUEL, H., Chief Justice

Jurisdictional Issue

It is true that Section 2.1 J of the White Mountain Apache Judicial Code contains an affirmative grant of "exclusive original jurisdiction

. . .to construe that meaning of the tribal laws, and to determine the legality, under the Constitution and the Civil Rights Act . . . of any action or enactment of the Tribal Council, or any other agent, department, officer, or enterprise of the tribe, and the application of any such action or enactment to any person or situation." Nevertheless, this grant of jurisdiction is foreclosed by a finding of sovereign immunity which renders the jurisdictional issue moot as it deprives the court of the authority to order or enforce a judgement against the sovereign. The Judicial Code expressly recognizes this principle in the very provision in which it grants jurisdiction by stating that "this subsection shall not be construed to effect a waiver of sovereign immunity." Section 2.1 J. Therefore, the Tribal Court and the Honorable Judge Jay Natoli did not and does not now have subject matter or personal jurisdiction in Case No. C-89-04.

Sovereign Immunity Issue

It is well-established that the internal sovereignty of Indian tribes is subject to qualification only by treaties and express legislation of Congress. F. Cohen, Handbook of Federal Indian Law, 231-32 (1982); United States v. Wheeler 435 (U.S.) 313, 323 (1978) The sovereignty of tribes predates the Constitution, deriving not as a result of a delegation of federal power but rather an an incident of the tribes' status as "distinct, independent political communities" with inherent powers of self-govenment. United States v. Wheeler, 435 U.S. at 323-28. Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

As separate sovereigns, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Santa Clara Pueblo v. Martinez, 436 U.S. 47, 56 (1977). The doctrine of sovereign immunity prevents a

court from issuing orders taking effect against the Tribe in the absence of a waiver of that immunity. Puyallup Tribe, Inc. v. Washington Game Department, 433 U.S. 165, 173 (1977). A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. United States v. Testan, 424 U.S. 392, 399 (1976). Moreover, the immunity from suit enjoyed by the Tribe and its elected officials extends not only to a suit for injunctive and declaratory relief but also to one for monetary damages. Brunette v. Knope, 544 F. Supp. 301, 304 (E.D. Wis. 1983).

There is nothing in the record that even remotely suggests that the White Mountain Apache Tribe waived its sovereign immunity and consented to suit in this matter. Where no express waiver is found, Section 1.7 of the White Mountain Apache Judicial Code controls:

> The White Mountain Apache Tribe, as a sovereign government, is absolutely immune from suit, and its Tribal Council, officers, agents, and employees shall be immune from any civil or criminal liability arising or alleged to arise from their performance or non-performance of their official duties. Nothing in this Code shall be deemed to constitute a waiver of the sovereign immunity of the White Mountain Apache Tribe except as expressly provided herein or by action of the Tribal Council.

Under this provision of the Judicial Code and the relevant case law, it is clear that the White Mountain Apache Tribe enjoys sovereign immunity from suit in Case No. C-89-04. Accordingly, the Tribe's sovereign immunity deprived the court below of jurisdiction to proceed in Case No. C-89-04, thereby rendering Judge Natoli's Order of Preliminary Relief invalid.

The Indian Civil Rights Act of 1968

The Indian Civil Rights Act (ICRA) cannot be held to have waived the Tribe's immunity. In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the United States Supreme Court squarely held that the passage of the

ICRA does not waive tribal sovereign immunity. Santa Clara Pueblo, 436 U.S. at 58. The Court further ruled that the federal courts have no jurisdiction to review tribal actions which allegedly violate the ICRA. Id. at 70. Instead, the only federal review the ICRA authorizes is in response to a writ of habeas corpus.[1] (Id. at 66-67) Because the ICRA does not waive the White Mountain Apache Tribe's sovereign immunity and would provide Plaintiff Dehose no relief in case No. C-89-04, it is irrelevant to the case at bar.

When consent of the sovereign to suit is not available, the only remedy of the party alleging an injury is by an appeal to the governing legislature. It is obvious that Ms. Dehose is well-acquainted with the political process on the White Mountain Apache reservation, it is through this mechanism that she must find her relief.

Immunity of Defendant Tribal Council Members

In her Response in Opposition to Writ of Prohibition [hereinafter entitled "Response"], Ms. Dehose emphatically states that she "did not file any action against the White Mountain Apache tribe through acts of its officials." Response, at 3. Instead, Dehose argues that she seeks relief only against the three defendant councilmembers who voted in favor of Resolution No. 11-88-297.

Defendants' actions are clearly indivisible from those of the Tribal Council and thus come within the embrace of the sovereign immunity of the White Mountain Apache Tribe. The defendants, as Tribal Councilmembers,

[1] The Indian Civil Rights Act extends the writ of habeas corpus "to any person, in a federal court, "to test the legality of his or her detention by order of an Indian tribe." 25 U.S.C.]1303, Ms. Dehose has not been detained, does not seek habeas corpus relief, and is not in federal court.

voted in favor of Resolution No. 11-88-297 in a duly convened council meeting of which Ms. Dehose had notice and at which Ms. Dehose was present. See Article III of the White Mountain Apache Tribe Constitution. The Councilmembers in attendance constituted a quorum, discussed Resolution No. 11-88-297 at length before voting, and gave Ms. Dehose ample opportunity to speak in her own behalf. Moreover, the minutes of the November 22nd Council meeting plainly reveal that Tribal Councilmembers understood that any action taken would be taken by the entire Council and not by any individual or any group of individuals.

Ms. Dehose cannot overcome the principle of sovereign immunity simply by bringing an action nominally against individual tribal officers, when in fact, the White Mountain Apache Tribe is the interested party. The relief sought by Ms. Dehose in Case No. C-89-04 would take effect against the White Mountain Apache Tribe as it would restrain the Tribe's ability to act through its governing body.

As the petitioners correctly point out, the test of whether an action is against a tribal officer or the Tribe is not whom the plaintiff chooses to name as party defendant but whether the relief sought operates against the individual or against the sovereign. See Larson v. Domestic & Foreign Commerce Corp. 337 U.S. 682, 687 (1949) rehearing denied 338 U.S. 840 (1949). Where the relief sought in an action nominally against a tribal officer is the prevention or discontinuance of an alleged wrong and the remedy which the plaintiff asks the court to impose would, in effect, operate against the Tribe, in the absence of consent, the action is barred for lack of jurisdiction under the doctrine of sovereign immunity as the action, in substance, is against the Tribe. Larson, 337 U.S. at 687-89. Generally, a suit is deemed one against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere

with the public administration, or if the effect of the judgment would be to restrain the government from acting, or compel it to act. Dugan v. Rank, 372 U.S. 609, 619 (1963) (emphasis added).

Applying this legal doctrine to the facts at bar gives rise to the inevitable conclusion that although Ms. Dehose has individually named as Defendants those Tribal Councilmembers who voted in favor of Resolution No. 11-88-297, the relief she seeks in Case No. C-89-04 would operate against the Tribal Council as a political subdivision of the White Mountain Apache Tribe. Because the Tribe's sovereign immunity protects it from suit, this relief must be denied.

Applicability of the Indian Civil Rights Act

Nothing in the ICRA and the cases construing that Act suggests that the Act waives sovereign immunity protection for tribal officers acting within the scope of their authority. Wells v. Philbrick, 486 F. Supp. 807 (D.S.D. 1980) is persuasive authority in this respect.

In Wells, the plaintiff alleged that the Tribal Council acted in bad faith when it failed to appoint certain judges to the tribal court system. The plaintiff argued that the proper remedy was to bring a claim for damages under the Indian Civil Rights Act. The court, in Philbrick, relying on Santa Clara Pueblo v. Martinez, held that the ICRA does not provide a plaintiff with a remedy or cause of action for damages even when the plaintiff brings the claim against individual members of the Tribal Council. Philbrick, 486 F. Supp. at 809. The court pointed out that under the holding of Santa Clara Pueblo, the only remedy available to enforce the rights created under the ICRA is a writ of habeas corpus even if "it may be argued that the effect, after Santa Clara Pueblo, of the ICRA is to create rights while withholding any meaningful remedies

to enforce them." Id. at 809. The Supreme Court, itself, has stated that the ICRA does not impliedly authorize private actions for declaratory or injunctive relief against either the tribe or its officers. Santa Clara Pueblo, 436 U.S. at 61.

The principles set forth in Philbrick and Santa Clara Pueblo are clearly applicable in the instant case. Insofar as Ms. Dehose bases her claim in Case No. C-89-04 on the Indian Civil Rights Act, it must be dismissed. The only remedy that Act would afford her is habeas corpus relief.

The Scope of Defendant Tribal Council Members' Authority

Respondent Dehose seeks to refute the sovereign character of the Defendant Tribal Council Members' actions by contending that the Defendants acted outside the scope of their authority. While the legal principles Ms. Dehose cites to support this claim are incontrovertible, they are inapplicable here.

Ms. Dehose, herself, admits that Resolution No. 11-88-297 had the effect of "suspending her from her council seat on the Tribal Council." Response, at 3. Dehose candidly observes that "[t]here are no provisions in the Tribal Constitution for suspension of members on the Tribal Council." Response, at 3. The constitutional provisions Dehoses claims the Defendants violated clearly apply only to Removal.[2] By her own admission, Dehose has not been permanently removed from the Council but has instead been temporarily suspended with pay pending the outcome of the criminal charges

[2] Article IX of the Constitution of the White Mountain Apache Tribe sets forth the provisions for Removal from Office. It contemplates permanent removal from the Tribal Council and provides no guidelines for temporary suspensions such as Ms. Dehose's.

against her.[3] Because there are no provisions in the Tribal Constitution addressing the suspension of a Tribal Council Member, there were no provisions for the defendants to violate when they voted in favor of Ms. Dehose's suspension. Thus, their actions were not outside the scope of their authority but came within the White Mountain Apache Constitution's broad grant of authority to the Tribal Council in Article V Section 1 (a)[4] and Article V Section 1 (s)[5].

Tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority. Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985). When Tribal Councilmembers vote in a duly convened Council meeting they act in a legislative capacity as the governing body of the Tribe. See Runs After v United States, 766 F.2d 347 (8th Cir. 1985). Indeed, the only manner in which a Tribal Council can act is through its members. Accordingly, the Defendant Tribal Councilmembers in the case at bar share in the Tribe's legislative and judicial immunity from suit in Case No. C-89-04 as their authorized and official actions cannot be divorced from those of the Council. Section 1.7 of the White Mountain Apache Judicial Code, set forth supra, codifies this principle.

[3] This renders the procedures which governed the case of former Council member Gertie Lupe irrelevant. It is undisputed that the Lupe case dealt with Removal.

[4] Article V, Section 1 (a) of the White Mountain Apache Tribal Constitution empowers the Tribal Council.

[5] Article V, Section 1 (s) describes the scope of the Tribal Council's powers as follows:

To regulate its own procedures, to appoint subordinate committees, commissions, board, advisory or otherwise; tribal officials and employees not otherwise provided for in this Constitution and Bylaws, and to regulate subordinate organizations for economic and other purposes.

The Conspiracy Claim

Moreover, because the Defendant Councilmembers' official, authorized actions are inseparable from those of the Tribal Council, there can be no conspiracy. The decision in Runs After v. United States, 766 F.2d 347 (8th Cir. 1985) is directly on point.

The plaintiffs in Runs After challenged the validity of two tribal resolutions which "forever barred" the plaintiffs from holding appointed or elected office because of their "past misconduct in office." Like Ms. Dehose, the Runs After plaintiffs contended that tribal council members acted in conspiracy when they voted in favor of the resolutions. The Eighth Circuit rejected this claim, holding:

> The tribal Defendants are all members of the Tribal Council, the governing body of the tribe, who acted, in passing the two tribal council resolutions at issue, in their official capacities as tribal council members. The Tribal Council as an entity, or governmental body, cannot conspire with itself. Citing CF Girard v. 94th Street and 5th Avenue Corp., 530 F. 2d 66, 70-72, (2d Cir. 1976), cert. denied, 425 U.S. 974, (1976). Runs after, 766 F.2d at 354.

The Runs After court further observed:

> [I]ndividual members of the tribal council, acting in their official capacity as tribal council members, cannot conspire when they act together with other tribal council members in taking official actions on behalf of the Tribal Council. 'There is no conspiracy if the conspiratorial act conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees each acting within the scope of his or her employment.' Citing Herrmann v. Moore, 576 F.2d 459 (2d Cir. 1978). cert. denied, 439 U.S. 1003 (1978), Runs After, 766 F.2d at 354.

We find the Runs After court's reasoning with regard to the plaintiffs' conspiracy claim in that case highly persuasive. The facts in Runs After are not unlike the facts at bar. In each case, the plaintiff or plaintiffs attempt to skirt the Tribe's sovereign immunity by alleging that tribal councilmembers' actions are somehow independent from those of the

tribal council even where the actions performed are clearly within the councilmembers' representative capacity. This distinction is fallacious and cannot be sustained. We find no merit in Plaintiff Dehose's conspiracy claim and hold that it must be dismissed.

Dismissal of Plaintiffs' Claim

The Plaintiff has failed to state a claim upon which relief can be granted under the Indian Civil Rights Act. The ICRA does not provide an implied cause of action for injunctive and declaratory relief, or for monetary damages.

The Plaintiff's conspiracy theory also fails to state a claim upon which relief can be granted. Tribal Council members who vote in favor of a Council resolution do not act in conspiracy when they vote in a duly convened Council Meeting and take official actions on behalf of the Tribal Council. These actions are shielded from suit by the Tribe's sovereign immunity.

Finally, Plaintiff Dehose's claim under the due process clause also fails to state a claim upon which relief can be granted.[6] The sovereign immunity of the White Mountain Apache Tribe and its duly elected Tribal

[6] We do emphasize one vital point. Ms. Dehose does have constitutional rights and, we readily acknowledge that she is entitled to "due process". It therefore, behooves the Tribal Council that adequate rules and procedures be adopted to govern disciplinary proceedings of tribal council members. And, while this Court does not have the power to interfere or supervise such proceedings, it can ensure that the tribal council exercise its powers in conformity with the Constitution of the Tribe. We certainly do not indulge the presumption that the tribal council will ignore or violate its own procedures or even adopt procedures fundamentally unfair. But, adequate procedures should be in place to govern disciplinary proceedings.

Council Members renders this claim moot as it deprives the courts of jurisdiction to hear it. Accordingly, Ms. Dehose's remedy must be through the political process.

Judges LESLIE and McCORD, concur.

Exhibit No. 6 (continued)

IN THE WHITE MOUNTAIN APACHE TRIBAL COURT

Whiteriver, Arizona

JUDY DEHOSE, Plaintiff, v. RENO JOHNSON, SR., Chairman of the White Mountain Apache Tribe, ALVINO HAWKINS, SR., Vice-Chairman of the White Mountain Apache Tribe, MATTHEW NOZIE, Councilman, HERBERT TATE, Councilman, in their official and individual capacities. Defendants.	No. C-89-04 ORDER DISMISSING ACTION PURSUANT TO PEREMPTORY WRIT OF PROHIBITION

Pursuant to the command of the permanent Writ of Prohibition dated March 10, 1989, issued to this court by the Court of Appeals of the White Mountain Apache Tribal Court, whereby this court is permanently prohibited and restrained from proceeding with the above entitled action or against the defendants, Petitioners to said Appeals Court,

IT IS ORDERED:

1. That the above-entitled action be, and it hereby is, dismissed as against Reno Johnson, Sr., Chairman of the White Mountain Apache Tribe, Alvino Hawkins, Sr., Vice Chairman of the White Mountain Apache Tribe, Matthew Nozie, Councilman, and

Herbert Tate, Councilman, in their official and individual capacities, with prejudice.

2. All orders issued by the lower court in the case are hereby vacated.

DATED this 3rd day of May, 1989.

Judge, White Mountain Apache Tribal Court

COPY of foregoing mailed this 3rd day of ~~March~~ May 1989 to:

Claudeen Bates Arthur, General Counsel
White Mountain Apache Tribe
P.O. Box 700
Whiteriver, AZ 85941

Carol J. Williams, ~~Legal Counsel~~
P.O. Box 1119
Whiteriver, AZ 85941

Exhibit No. 7

A-CV-16-85

SUPREME COURT OF THE NAVAJO NATION

Daisy Johnson, as Guardian of Clifford Gould and Clifford Gould, Plaintiffs-Appellants,

vs.

The Navajo Nation, John Doe and Other Unknown Individual Police Officers of the Navajo Nation, Individually, Defendants-Appellees.

OPINION

Before TSO, Chief Justice, BLUEHOUSE and AUSTIN, Associate Justices.

Appealed from the Shiprock District Court, the Honorable Harry D. Brown presiding.

F.D. Moeller, Esq., Farmington, New Mexico for the Appellants; Joseph L. Rich, Esq., Gallup, New Mexico for the Appellees.

Opinion delivered by AUSTIN, Associate Justice.

The plaintiffs, Daisy Johnson and Clifford Gould, appealed the Order entered by the Shiprock District Court which dismissed their suit against the defendants, the Navajo Nation and other unknown Navajo Police Officers, on sovereign immunity grounds. The numerous issues raised on appeal can be summarized as follows: (1) whether the Navajo Nation can be sued pursuant to the insurance exception of the Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 854(c) (1980), where

the insurance carrier becomes insolvent after suit is filed; and (2) whether the Indian Civil Rights Act, 25 U.S.C. Sec. 1301 et seq. (1968), is explicit federal law which authorizes suit against the Navajo Nation pursuant to the Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 854(a) (1980).

On November 15, 1983, the plaintiffs sued the Navajo Nation and unidentified Navajo Police Officers on a theory of gross negligence. The plaintiffs alleged that the incidents resulting in physical injuries to plaintiff Gould occurred on or about September 10, 1983. The plaintiffs alleged district court jurisdiction pursuant to the insurance exception of the Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 854(c) (1980), and under the Indian Civil Rights Act, 25 U.S.C. Sec. 1301 et seq. (1968), which the plaintiffs alleged was explicit federal law allowing suit against the Navajo Nation pursuant to the Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 854(a) (1980).[1]

On January 5, 1984, the defendants filed a motion to dismiss the complaint by alleging that: "There is a

1. The plaintiffs also alleged district court jurisdiction under the "1850" and "1868" Treaties between the United States and the Navajo Nation. We will not address whether these theories grant jurisdiction to the district court over the Navajo Nation, because the appeal can be decided on the issues identified above.

The plaintiffs also alleged that "42 US Code 1983 [and] 28 US Code 1301" also are federal statutes "which give explicit authorization to sue the Navajo Tribe." Brief of Plaintiffs at 3, 4. We disagree with the plaintiffs on these arguments.

reservation of rights by the insurance carrier in which they deny such coverage in any claim asserting punitive damages. Under such reservations of rights the Navajo Nation is immune." Defendants's Memorandum in Support of Motion to Dismiss at 1, 2. The court denied the motion to dismiss on January 10, 1984. The defendants then filed a notice of appeal of the denial of their motion to dismiss on February 16, 1984. The appeal was denied on June 25, 1984, because "the order appealed from is not a final order or judgment." Order of Navajo Court of Appeals, No. A-CV-06-84 (1984).

Ambassador Insurance Company, a Vermont Corporation, had been the insurance carrier for the Navajo Nation at the time the plaintiffs's cause of action accrued and at the time the plaintiffs's suit was filed. On November 10, 1983, the Vermont Commissioner of Banking and Insurance was appointed receiver of Ambassador. On March 30, 1984, the receiver filed in the Vermont state court an "Application For An Order Of Liquidation Of Ambassador Insurance Company." Ambassador Insurance Company was determined to be insolvent, as of March 31, 1984, without reasonable prospects for rehabilitation. In Re: Ambassador Insurance Company, Inc., No. S444-83 Wn C. (Washington Superior Court, State of Vermont).

On January 2, 1985, the defendants again filed a motion to dismiss, based upon sovereign immunity grounds, by alleging that the district court had no jurisdiction under any of the theories alleged by plaintiffs in their complaint.

The defendants argued that the plaintiffs had not cited any federal law or regulation, or tribal law or regulation, which explicitly allowed an exception to the Navajo Sovereign Immunity Act. The defendants further argued in their motion that the Navajo Nation's insurance carrier, Ambassador Insurance Company, Inc., had become insolvent and was in liquidation, thereby foreclosing district court jurisdiction under the insurance exception to sovereign immunity.

The defendants's motion to dismiss was granted on July 1, 1985. The district court found that it had no jurisdiction over the Navajo Nation without its expressed consent, and that the Navajo Nation may be sued in Navajo courts only pursuant to the expressed exceptions under the Navajo Sovereign Immunity Act. The court also found that the plaintiffs had not cited any federal law or regulation, or tribal law or regulation, which explicitly allowed suit against the Navajo Nation. The court further found that the Navajo Nation's insurance carrier was insolvent thereby the plaintiffs had no insurance claim.

On July 29, 1985, the plaintiffs filed this appeal by essentially raising the issues identified above. The appeal was granted and the case was scheduled for oral arguments to be heard on October 10, 1986. However, the plaintiffs's counsel requested a continuance due to scheduling conflicts with a jury trial so oral arguments was rescheduled for October 17, 1986. On October 7, 1986, the defendants

filed a motion to continue the case "indefinitely" until after the Navajo Tribal Council had taken the opportunity to act upon proposed amendments to the Navajo Sovereign Immunity Act. The defendants argued that the proposed amendments would materially affect the issues on appeal to this Court. The plaintiffs joined in the motion to continue. We granted the defendants's motion to continue indefinitely on October 13, 1986. The parties were ordered to submit their notices of readiness for oral arguments when they were ready.

On December 11, 1986, the proposed amendments to the Navajo Sovereign Immunity Act was passed by the Navajo Tribal Council. See Navajo Tribal Council Resolution, CD-60-86. The amendments essentially allowed suit against the Navajo Nation for wrongful deprivation or impairment of civil rights guaranteed under the Navajo Bill of Rights, 1 N.T.C. Sec. 1 et seq. (1986 Amendment).

On February 19, 1987, the plaintiffs filed a motion for setting a hearing on appeal. On April 28, 1987, the defendants concurred in the motion for setting the hearing on appeal. On May 5, 1987, we requested supplemental memorandums from the parties. Oral arguments were heard on June 12, 1987.

I.

The right of the Navajo Nation to assert a defense of sovereign immunity whenever it is sued is beyond question. The Navajo Nation retains all those attributes of sovereignty

which has not been taken away by Congress or ceded by Treaties between the Navajo Nation and the United States. The power to raise a defense of sovereign immunity, and to waive the doctrine of sovereign immunity, is still within the inherent sovereign powers of the Navajo Nation. The Navajo Tribal Council exercised this power in 1966, when in the course of enacting laws pertaining to housing projects, it expressed the Navajo Nation's right "to assert the defense of sovereign immunity in any lawsuit against the Navajo Tribe." 6 N.T.C. Sec. 616(b)(1) (1978).

The doctrine of sovereign immunity received little attention in Navajo courts prior to the 1980 Navajo Sovereign Immunity Act. It was mentioned in Tapaha v. The Navajo Housing Authority, 1 Nav. R. 5 (1969), but nothing else. The Court first recognized that the Navajo Nation possessed sovereign immunity in Dennison v. Tucson Gas and Electric Co., 1 Nav. R. 95 (1974). That case also implied that tribal officials who acted outside the law were not protected by the doctrine. This implication took root in Halona v. MacDonald, 1 Nav. R. 189, 202 (1978), where the Court stated that the "doctrine [of sovereign immunity] does not protect wrongdoing." Accord Davis v. The Navajo Tribe, 1 Nav. R. 379, 381 (Crownpoint Dist. Ct. 1978). Otherwise the Court acknowledged that the Navajo Nation and its governing body enjoyed the protections of sovereign immunity. Halona, 1 Nav. R. at 202.

The most vigorous discussion of the doctrine of sovereign immunity occurred in Keeswood v. The Navajo Tribe, 2 Nav. R. 46 (1979). That decision established a number of important principles which we must consider in each case raising the issue of sovereign immunity in Navajo courts. First, the Court recognized that the doctrine of sovereign immunity is judicially created and the courts have power to waive the doctrine. However, the Court declined to waive the doctrine, but instead urged the Navajo Tribal Council to act on the subject. Second, the Court recognized that tribal officials are immune from suit only when they are acting within the scope of their official capacities. Finally, the Court held that "the Navajo Tribe cannot be sued without its consent." Keeswood, 2 Nav. R. at 55.

Sovereign immunity is jurisdictional, therefore the Navajo Nation's defense of sovereign immunity automatically raises questions concerning the district court's jurisdiction over the Navajo Nation. The general rule in federal and state courts is that an Indian Tribe is immune from suit, unless Congress has explicitly authorized suit against an Indian Tribe. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); See also United States v. United States Fidelity & Guaranty Company, 309 U.S. 504 (1940). It is also now known that an Indian Tribe, in the exercise of its inherent sovereignty, can consent to be sued. United States v. Oregon, 657

F.2d 1009 (9th Cir. 1981); See also Puyallup Tribe v. Department of Game of the State of Washington, 433 U.S. 165 (1977); Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968).

Within the Navajo Nation, the courts are created by the Navajo Tribal Council. 7 N.T.C. Sec. 253 (1959). Jurisdiction of the Navajo courts is also established by the Navajo Tribal Council. 7 N.T.C. Sec. 253 (1959) (district court jurisdiction); 7 N.T.C. Sec. 302 (1985) (Supreme Court jurisdiction). But neither of these jurisdictional statutes deal with suits against the Navajo Nation.

It was not until 1980, perhaps at the "urging" of the Court in Keeswood, 2 Nav. R. at 55, that the Navajo Tribal Council passed the Navajo Sovereign Immunity Act. In that Act, the Navajo Tribal Council had made it plain that: "Jurisdiction of the Trial Court of the Navajo Tribe shall not extend to any action against the Navajo Nation without its expressed consent." 7 N.T.C. Sec. 257 (1980). The Navajo Tribal Council then created certain exceptions through which it expressed the Navajo Nation's consent to suit. 7 N.T.C. Sec. 854 (1980). These Navajo statutes are consistent with the rule established by federal case law that a sovereign's expressed consent will give jurisdiction to a court over the sovereign. United States v. King, 395 U.S. 1 (1969); United States v. Testan, 424 U.S. 392 (1976). In addition, the statutes are also in harmony with the rule that

an Indian Tribe may consent to suit. United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981).

Initially, we studied the Navajo Nation's general jurisdiction statute, 7 N.T.C. Sec. 253, to see if that statute gave the Navajo district courts jurisdiction over the Navajo Nation. We conclude that the Navajo Nation has not expressed its consent to be sued under 7 N.T.C. Sec. 253. Otherwise that statute empowered the district courts with civil jurisdiction over suits in which the express consent of the Navajo Nation to suit is not required. Indeed Section 253 would give the district courts jurisdiction over ultra vires actions of tribal officials without running afoul of the sovereign immunity doctrine.

A.

With this background established we now turn to the first issue on appeal. That issue concerns the insurance exception in the Navajo Sovereign Immunity Act which reads as follows: "The Navajo Nation may be sued in the Courts of the Navajo Nation with respect to any claim for which the Navajo Nation carries liability insurance." 7 N.T.C. Sec. 854(c) (1980). By this law the Navajo Nation has expressly waived its immunity. A Navajo court would have jurisdiction over the Navajo Nation in a case which falls within this exception. See Keeswood v. The Navajo Tribe, 2 Nav. R. 46 (1979); United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981).

Exhibit No. 7 (continued)

The Navajo Sovereign Immunity Act was passed to insure that people having legal claims against the Navajo Nation would have a means of presenting those claims in Navajo courts. Otherwise legislative inactive might have compelled creating judicial waivers to the Navajo Nation's sovereign immunity. See Keeswood v. The Navajo Nation, 2 Nav. R. 46 (1979).

Essentially, the insurance exception to sovereign immunity has been enacted for the benefit of injured parties and thus it must be interpreted to the benefit of the injured plaintiff. This is supported by the record of the Navajo Tribal Council debate preceeding passage of the Navajo Sovereign Immunity Act. The record is clear that a person injured by the Navajo Nation has "the right to sue the Navajo Nation" under the insurance exception. Record of the Navajo Tribal Council Minutes, page 343, April 30, 1980.

The intent behind the insurance exception led us to conclude that sovereign immunity is waived and the court has jurisdiction under Section 854(c) if there is evidence that the Navajo Nation was insured for plaintiffs's claim when suit was filed. It is immediately after suit is filed that the court is best able to determine whether it has jurisdiction over the Navajo Nation. Mere evidence of insurance does not give the district court jurisdiction. The law requires that the plaintiffs's claim be covered under the insurance policy before the court can assert jurisdiction over the Na-

vajo Nation. See 7 N.T.C. Sec. 854(c) (1980). This is consistent with the principle that the sovereign can impose conditions upon the manner in which it can be sued. Beers v. Arkansas, 20 How. 527, 15 L.Ed 991 (1857); See also The Navajo Housing Authority v. Howard Dana and Associates, A-CV-34-86 (1987); Lee v. Johns, 3 Nav. R. 229 (Shiprock Dist. Ct. 1982).

Once the court has obtained jurisdiction under the insurance exception, that jurisdiction cannot be defeated by a later insolvency of the insurance company. At least that is how we construe Section 854(c) of the 1980 Navajo Sovereign Immunity Act. Jurisdiction over the Navajo Nation is based upon a finding that the Navajo Nation is insured at the time of suit and that the insurance covers the claims presented by the plaintiff.

Jurisdiction of the court is not dependent upon the question of whether the insurance company is able to pay. This is how 7 N.T.C. Sec. 854(c) (1980), must be construed, otherwise the rights of injured claimants to have their cases heard in Navajo courts will be denied solely upon the financial irresponsibility of the Navajo Nation's insurance carrier. In addition, any other construction will defeat the very purpose for creating an insurance exception to the Navajo Nation's defense of sovereign immunity.

The expressed intent of the Navajo Tribal Council is to redress injuries caused by the Navajo Nation. We

refuse to believe that this intent can be voided by the actions of third parties unconnected to the Navajo Nation and who have no responsibility in formulating government policy for the Navajo people.

It is the responsibility of the Navajo Nation, and not the plaintiffs, to screen and hire reputable insurance companies. The Navajo Nation must not be allowed to divest the district court of jurisdiction simply because it has made a poor selection of an insurance company.

In this case both parties agree that the Navajo Nation was insured at the time of the incidents giving rise to the suit, and at the time suit was filed. We are not sure whether the plaintiffs's claims were covered by the policy then in effect. That is a matter for the district court to decide. We hold that in this case, under 7 N.T.C. Sec. 854(c) (1980), the district court has jurisdiction over the Navajo Nation if the Navajo Nation was insured at the time suit was filed and if the insurance policy covered the claims presented by the plaintiffs.

B.

The second issue is whether the Indian Civil Rights Act (ICRA), 25 U.S.C. Sec. 1301 et seq. (1968), explicitly authorizes suit against the Navajo Nation in Navajo courts under the explicit federal law exception to the Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 854(a) (1980). Like the insurance exception, this issue also concerns the district

court's jurisdiction over the defendant Navajo Nation.

The plaintiffs argue that the ICRA is federal law which authorizes suit against the Navajo Nation in Navajo courts pursuant to 7 N.T.C. Sec. 854(a) (1980). Furthermore, according to plaintiffs, the United States Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), has made it plain that Indian Tribes can be sued in tribal courts for violations of the ICRA. Plaintiffs want us to hold that the ICRA has waived the sovereign immmunity of the Navajo Nation in Navajo courts. For the reasons set forth below, we will not so hold.

It has been said that Congress has plenary authority over Indian Tribes. United States v. Kagama, 118 U.S. 375 (1886); Lonewolf v. Hitchcock, 187 U.S. 553 (1903). But our stance is that Congress has "broad" authority over Indian Tribes and that authority is subjected to the limitations imposed by the United States Constitution.[2] Under its broad authority, Congress has the power to waive the Navajo Nation's sovereign immunity.

A congressional waiver of an Indian Tribe's sovereign immunity must be unequivocally expressed and not implied. Santa Clara Pueblo v. Martinez, 436 U.S. at 58, 59. Has Congress in the ICRA unequivocally expressed that the Navajo Nation's sovereign immunity be waived for suits alleging

2.- See AMERICAN INDIAN RESOURCES INSTITUTE, INDIAN TRIBES AS SOVEREIGN GOVERNMENTS (1987).

violations of the ICRA? This question has been decided by the United States Supreme Court: "[T]he provisions of [25 U.S.C.] Section 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit." Santa Clara Pueblo v. Martinez, 436 U.S. at 59. We agree with the United States Supreme Court that the ICRA does not expressly waive the sovereign immunity of Indian Tribes, including the Navajo Nation in any court.

The plaintiffs concede that the ICRA lacks express provisions waiving an Indian Tribe's immunity from suit. Nonetheless, the plaintiffs argue that Santa Clara Pueblo v. Martinez, 438 U.S. 49 (1978), requires that the Navajo Nation waive its immunity in Navajo courts for suits brought against it under the ICRA. Implicit in plaintiffs's position is that the Navajo Nation should be held responsible for monetary damages if found guilty of ICRA violations.

Plaintiffs read Santa Clara Pueblo v. Martinez, Id., too broadly. Nowhere in the decision did the Supreme Court say that Congress, in the ICRA, has waived the sovereign immunity of Indian Tribes in tribal courts. To the contrary, following application of the rules for congressional waiver of tribal sovereign immunity, the Supreme Court concluded that suits against Indian Tribes under the ICRA were

barred by its sovereign immunity from suit. Santa Clara Pueblo v. Martinez, 436 U.S. at 59. Likewise, if the ICRA does not waive tribal sovereign immunity in federal courts, then under the same analysis, it does not waive the sovereign immunity of the Navajo Nation in Navajo Courts, unless the Navajo Nation has expressed its consent to be sued under the ICRA.

Absent express congressional waiver of tribal sovereign immunity, the decision to waive the immunity of the Navajo Nation for civil rights actions rests entirely with the Navajo Nation.[3] A decision to waive sovereign immunity is an exercise of sovereignty by the Navajo Nation for the benefit of its citizens and for the good of the Navajo government. After carefully studying the ICRA, we conclude that the ICRA does not explicitly authorize suit against the Navajo Nation in Navajo courts, under Section 854(a) of the 1980 Navajo Sovereign Immunity Act.

The Navajo people are entitled to a representative and accountable Navajo Tribal Government. For this reason, important decisions having direct consequences on the Navajo tribal treasury should be made by the elected representatives of the Navajo people. If we hold that the ICRA has waived the sovereign immunity of the Navajo Nation in Navajo courts,

3. On December 11, 1986, the Navajo Tribal Council amended the Navajo Sovereign Immunity Act to allow for suits against the Navajo Nation for wrongful deprivation or impairment of civil rights. Navajo Tribal Council Resolution, CD-60-86.

we will be sanctioning an attack on the tribal treasury. Such decisions are best made by elected Navajo representatives after consultation with their constituents.

In addition, the funds of the Navajo Nation are not unlimited. Each year the funds maintained by the Navajo Nation for the operation of the Navajo Tribal Government is exceeded by the people's demands for more governmental services. ICRA suits which result in money damages against the Navajo Nation will only divert funds allocated for essential governmental services.[4]

Santa Clara Pueblo v. Martinez, Id., does instruct us that Indian Tribes should provide forums "to vindicate rights created by the ICRA." 436 U.S. at 65. Indian Tribes may have to amend their laws, or enact laws, which will conform to the rights created by the ICRA, because the ICRA "has the substantial and intended effect of changing the law which [tribes] are obliged to apply." 436 U.S. at 65. The Navajo courts have always been available for the enforcement of civil rights created by the ICRA and the Navajo Bill

4. The recent amendment to the Navajo Sovereign Immunity Act allows certain suits against the Navajo Nation for civil rights violations, and money damages, if awarded, are covered by the Navajo Nation's insurance. Navajo Tribal Council Resolution, CD-60-86, December 11, 1986.

of Rights, 1 N.T.C. Sec. 1 et seq. (1986 amendment).[5] Enforcement has generally been through suits against tribal officials for acting outside the scope of their authorities.[6] The laws protecting the civil rights of citizens in Navajo Country have been in effect even prior to enactment of the 1968 ICRA. Navajo Bill of Rights, 1 N.T.C. Sec. 1 et seq. (enacted October 1, 1967). Finally, the Navajo Bill of Rights contains substantially the same rights as those found in the ICRA.

The Order of the district court on the issue of the insurance exception is reversed. The Order of the district court on the issue of the Indian Civil Rights Act is affirmed. The case is remanded to the district court for proceedings consistent with this Opinion.

5. The following is a partial list of cases in which civil rights have been enforced by the Navajo courts: Halona v. MacDonald, 1 Nav. R. 189 (1978); Yazzie v. Board of Election Supervisors, 1 Nav. R. 213 (1978); Navajo Nation v. Browneyes, 1 Nav. R. 300 (1978); Desvood v. Navajo Board of Election Supervisors, 1 Nav. R. 306 (1978); Gudac v. Marianito, 1 Nav. R. 385 (1978); George v. The Navajo Tribe, 2 Nav. R. 1 (1979); Navajo Nation v. Bedonie, 2 Nav. R. 131 (1979); Nez v. Bradley, 3 Nav. R. 126 (1982); Help v. Silvers, 4 Nav. R. 9 (1983); Navajo Housing Authority v. Betsoi, A-CV-37-83 (1984); McCabe v. Walters, A-CV-07-85 (1985); Mustache v. The Navajo Board of Election Supervisors, A-CV-22-86 (1987); Chavez v. Tome, A-CV-10-87 (1987).

6. The ICRA and the Navajo Bill of Rights may also be enforced against Navajo Nation officials under the Navajo Sovereign Immunity Act. See 7 N.T.C. Sec. 854(d) (1980).

Exhibit No. 7 (continued)

A-CV-16-85

SUPREME COURT OF THE NAVAJO NATION

Daisy Johnson, as Guardian of Clifford Gould and Clifford Gould, Plaintiffs-Appellants,

vs.

The Navajo Nation, John Doe and Other Unknown Individual Police Officers of the Navajo Nation, Individually, Defendants-Appellees.

ORDER

Before TSO, Chief Justice, BLUEHOUSE and AUSTIN, Associate Justices.

Appealed from the Shiprock District Court, the Honorable Harry D. Brown presiding.

F.D. Moeller, Esq., Farmington, New Mexico for the Appellants; Joseph L. Rich, Esq., Gallup, New Mexico for the Appellees.

It is hereby ordered by the Court that the Opinion of this Court filed October 20, 1987 in the above captioned case is amended as follows:

1. On page 13, second complete paragraph, the following sentences are deleted:

> But our stance is that Congress has "broad" authority over Indian tribes and that authority is subjected to the limitations imposed by the United States Constitution.[2] Under its broad authority, Congress has the power to waive the Navajo Nation's Sovereign immunity.

In its place the following sentences shall be inserted:

> But our stance is that Congress has special authority relating to Indian affairs, in fulfillment of its unique trust obligations to protect and preserve the inherent attributes of Indian tribal self-government, consistent with the sovereign status of Indian tribes as recognized by the treaties, policies, decisions, Constitution and other laws of the United States.[2] Under this special authority, Congress has the power to consent to the waiver of sovereign immunity by an Indian tribe and in specific instances may waive a tribe's sovereign immunity.

2. On top of page 17, the following sentence is deleted: "Enforcement has generally been through suits against tribal officials for acting outside the scope of their authorities.[6]" In its place shall be inserted the following sentence: "Enforcement has generally been through suits against tribal officials for violations of tribal laws.[6]"

Dated this 21st day of December, 1987.

Chief Justice of the Navajo Nation

Associate Justice

Associate Justice

CERTIFY THAT THIS IS A
D CORRECT COPY OF
UMENT ON FILE IN THE
F THE NAVAJO TRIBE.

REME COURT OF
E NAVAJO TRIBE

Dated this 20th day of October, 1987.

Chief Justice of the Navajo Nation

Associate Justice

Associate Justice

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE INSTRUMENT ON FILE IN THE COURTS OF THE NAVAJO TRIBE.

CLERK, SUPREME COURT OF THE NAVAJO TRIBE

Exhibit No. 7 (continued)

Exhibit No. 8

A-CV-28-85

SUPREME COURT OF THE NAVAJO NATION

TBI Contractors, Inc.,
an Arizona Corporation, Plaintiff-Appellant,

v.

The Navajo Tribe of Indians, et al.,
Defendants-Appellees.

OPINION

Before BLUEHOUSE, Acting Chief Justice, AUSTIN and CADMAN (sitting by designation), Associate Justices.

Appealed from the Window Rock District Court, the Honorable Harry D. Brown presiding.

Robert J. Wilson, Esq., Gallup, New Mexico, for the Appellant; Herb Yazzie, Esq., Navajo Nation Department of Justice, Window Rock, Arizona, for the Appellees.

Opinion delivered by CADMAN, Associate Justice.

This matter comes before the Supreme Court on appeal from the lower court's order dismissing the appellant's action with prejudice for lack of jurisdiction.

This Court must address three issues in this appeal. The first issue is whether the district court had subject matter jurisdiction over this cause of action pursuant to one of the exceptions set forth in the 1980 Navajo Sovereign Immunity Act. The second issue is whether the Navajo Nation's filing of a compulsory counterclaim in its answer waives its sovereign immunity from suit. The

third issue is whether the Navajo Nation violated the appellant's civil rights by dismissing the suit.

I.

Statement of the Facts

On November 17, 1981, the Navajo Nation drafted a contract with Mandan-TBI (joint venture partners) to have a shopping center built in Tuba City, Arizona for $2,639,000.00. On January 5, 1982, the Budget and Finance Committee of the Navajo Tribal Council passed resolution BFJA-5-82, approving the contract between the Navajo Nation and Mandan-TBI to construct the Tuba City Shopping Center.[1] Chairman Peter MacDonald signed the contract on January 8, 1982.

After TBI began construction, the Navajo Nation discovered an error in the topographical elevation of the shopping center.[2] On March 3, 1982, the Navajo Nation

1. The resolution also set forth the funding for the Tuba City Shopping Center. The Economic Development Administration (EDA) granted $1,464,000.00; the Department of Housing and Urban Development (HUD) awarded a block grant of $903,820.00; Bashas Market, Inc., the anchor tenant for the shopping center, contributed $44,000.00; and the Navajo Tribal Council allocated matching funds of $174,180.00.

2. The Navajo Nation asserts that a third party (Parker, Johnson and Associates, Consulting Engineers, Inc.) is responsible for the topographical error. And that the third party's error in surveying the construction site, preparing the topographical map and staking out the field resulted in the issuance of the change order.

authorized a "Change Order" directing TBI to raise the elevation of the shopping center by four (4) feet.[3] TBI corrected the elevation as directed by the Navajo Nation. TBI alleges that the Navajo Nation also directed additional testing and removal of concrete. However, the record shows no change order for the additional testing and removal of concrete alleged by TBI.

TBI requested additional payments of $140,453.00 for the change in the topographical elevation and $62,300.37 for the additional testing and removal of concrete. The Navajo Nation refused to make additional payments for the change order due to the surveying error on the part of a third party subcontractor hired by Mandan-TBI. The Navajo Nation refused to make additional payments for TBI's alleged testing and removal of concrete as there was no change order made or approved.

After the Navajo Nation refused to make additional payments for the change order, TBI filed the first case (WR-CV-174-84) on April 25, 1984, in the Window Rock District

3. The "Change Order" signed on March 3, 1982, stated:
> You are directed to make the following changes in this Contract:
> 1. Change all elevations as indicated on the revised site plan dated 1/5/82 as prepared by Parker, Johnson & Associates on sheet C-5. Please proceed with the work immediately. Additional cost will be determined after proper negotiations on earthworks have been justified.

Court of the Navajo Nation. On July 2, 1984, the Navajo Nation filed an answer and a compulsory counterclaim. The counterclaim alleged that TBI had breached the contract by unsatisfactorily performing numerous items.[4] The Navajo Nation also claimed that due to TBI's breach and inability to complete the construction within the time authorized, the Navajo Nation lost rent, suffered damage to its reputation with numerous funding sources, was forced to retain other firms to test TBI's work and will be forced to spend more money to correct the defective work and complete the job as was required by the contract. The Navajo Nation prayed for $176,612.00 in damages in its counterclaim.

On August 16, 1984, the district court scheduled a hearing for October 3, 1984; notice was sent to both parties. On October 3, 1984, neither party appeared for the scheduled hearing. The court then dismissed the first case and the counterclaim with prejudice. On October 15, 1984, TBI filed a motion to reopen the case which had been dismissed on October 3, 1984. On November 27, 1984, the Navajo Nation filed a motion to dismiss the first case for lack of jurisdiction. The Navajo Nation claimed in its motion that the case was barred by the Navajo Sovereign Immunity Act.

4. Among the items that the Navajo Nation claimed were defective are: heaved floors, cracks in masonry, leaks in the roof, and un-square door jambs.

On July 2, 1984, TBI filed the second case (WR-CV-274-84) alleging that the Navajo Nation failed to pay for the additional testing and removal of concrete performed by TBI. On October 5, 1984, the tribe filed an answer and a compulsory counterclaim. The compulsory counterclaim in the second suit was substantially the same as in the first case. On November 21, 1984, the Navajo Nation filed a motion to dismiss the second case for lack of jurisdiction, claiming that the case was barred by the Navajo Sovereign Immunity Act.

On December 5, 1984, the court, by stipulation of the parties, entered an order consolidating the two cases. The court also set aside the order dismissing the first case.

On September 6, 1985, the court scheduled a pre-trial conference for October 10, 1985; notice was sent to both parties. TBI failed to appear at the October 10, 1985, pre-trial conference. On October 14, 1985, the court dismissed the consolidated action with prejudice for lack of jurisdiction and dismissed the counterclaims without prejudice. The district court found that the action was barred by the 1980 Navajo Sovereign Immunity Act. The record shows no reason given for TBI's failure to appear at the October 14, 1985, pre-trial conference.

TBI received notice of the dismissal on October 18, 1985, and filed both a motion for reconsideration with the

district court, and a notice of appeal with this Court on November 14, 1985. On November 15, 1985, the district court denied the motion for reconsideration.

II.

This Court recognizes the right of the Navajo Nation to assert the defense of sovereign immunity in suits brought against it. Dennison v. Tucson Gas and Electric Co., 1 Nav. R. 95 (1974); Halona v. MacDonald, 1 Nav. R. 189 (1978); Keeswood v. The Navajo Tribe, 2 Nav. R. 46 (1979). This Court also recognizes certain exceptions to the defense of sovereign immunity. Sovereign immunity does not extend to protect tribal officials who act outside the law. Halona, 1 Nav. R. 189 at 202.

In this case, originally filed in the district court on April 25, 1984, the 1980 enactment of the Navajo Sovereign Immunity Act, 7 N.T.C. Secs. 851 et seq., will determine whether the Navajo Nation waived its immunity from suit. Under the 1980 Navajo Sovereign Immunity Act, the Navajo Nation may be sued in Navajo courts: (1) when explicitly authorized by Federal Laws or regulations; (2) when explicitly authorized by Resolution of the Navajo Tribal Council; (3) with respect to any claim for which the Navajo Nation carries liability insurance; (4) to compel any officer, employee or agent of the Navajo Nation to perform

his or her responsibility under the laws of the United States and the Navajo Nation; and (5) for attorney malpractice if authorized by the Advisory Committee of the Navajo Tribal Council. 7 N.T.C. Sec. 854(a), (b), (c), (d), and (e) (1983 Supp.). The appellant relies only on Sec. 854(a), (b), and (d) in this appeal.

A.

TBI first argues that it should be allowed to sue the Navajo Nation under the federal laws or regulations exception to the Navajo Sovereign Immunity Act. 7 N.T.C. Sec. 854(a). TBI claims that the Indian Civil Rights Act (ICRA), 25 U.S.C. Sec. 1301, et seq., is the federal law which authorizes this suit against the Navajo Nation. TBI's claim has, however, been considered and rejected by both this Court and the United States Supreme Court.

In Santa Clara Pueblo v. Martinez, the United States Supreme Court ruled that the ICRA did not waive a tribe's immunity from suit. 436 US. 49, 59, 56 L.Ed. 2d 106, 115 (1978). Although Martinez, Id., dealt with a suit against a tribe in federal court, we found the reasoning sound and followed it in Johnson v. The Navajo Nation, 5 Nav. R. ___ (1987), A-CV-16-85 (1987). In Johnson, Id. we "agree[d] with the United States Supreme Court that the ICRA does not expressly waive the sovereign immunity of the Indian Tribes, including the Navajo Nation in any court." The ICRA

is federal law, which is applicable to the Navajo Nation, but it does not expressly waive the Navajo Nation's immunity from suit as required by our statute. Our statute requires the federal law or regulation relied upon to explicitly state that the Navajo Nation may be sued. 7 N.T.C. Sec. 854(c).

The ICRA is applicable to civil rights grievances brought against an Indian tribe. In this case, TBI's suits were brought as breach of contract actions against the Navajo Nation. Because this case is strictly a breach of contract action, TBI's argument that the tribe took its property without due process of law in violation of the ICRA is misplaced. Even TBI, in its brief, has reiterated numerous times that this is a breach of contract action. We hold that there has been no explicit congressional waiver of the Navajo Nation's sovereign immunity in this suit, and therefore the suit may not proceed under 7 N.T.C. Sec. 854(a).

B.

TBI next contends that it can sue the Navajo Nation because this suit is explicitly authorized by resolution of the Navajo Tribal Council. 7 N.T.C. Sec. 854(b). TBI claims that the Navajo Bill of Rights, 1 N.T.C. Sections 1-9 (1967), authorizes this suit. In addition TBI cites 7 N.T.C. Sec. 204(a) (1977) as authorizing actions for violations of civil rights. 7 N.T.C. Sec. 204(a) states that:

In all civil cases, the Court of the

> Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the Tribe, not prohibited by such Federal laws.

We disagree with TBI's position that 7 N.T.C. Sec. 204(a) authorizes suits against the Navajo Tribe if a violation of civil rights is asserted. Neither the Navajo Bill of Rights, 1 N.T.C. Sections 1-9, nor 7 N.T.C. Sec. 204(a) explicitly authorizes suits against the Navajo Nation. We must follow the intent of the Navajo Tribal Council when interpreting the Navajo Tribal Code. As such, we may not construe the word "explicitly" as meaning anything other than an unambiguous expression, clear in understanding.

As we have already stated, this is a breach of contract action brought against the Navajo Nation, therefore, arguments of civil rights abuse under the Navajo Bill of Rights is inappropriate. TBI also did not sue for civil rights claims. Instead of arguing civil rights violations, TBI should have argued whether any provisions in the contract waived the tribe's immunity from suit.

We hold that, in this case, the Navajo Tribal Council has not waived the Navajo Nation's immunity from suit under the Navajo Bill of Rights, or 7 N.T.C. Sec. 204(a), and therefore, the suit may not proceed under 7 N.T.C. Sec. 854(b).

C.

TBI finally contends that the Navajo Nation's sovereign immunity was waived pursuant to 7 N.T.C. Sec. 854(d), which states "[a]ny officer, employee or agent of the Navajo Nation may be sued in the Courts of the Navajo Nation to compel him/her to perform his/her responsibility under the laws of the United States and the Navajo Nation." The relief under this section of the Navajo Tribal Code is limited to declaratory or injunctive relief. TBI prays for money damages in its complaint, therefore, this section is inapplicable to the case at bar. We hold that, as this is a breach of contract action for money damages, the suit may not proceed under 7 N.T.C. Sec. 854(d).

III.

The second issue raised in this appeal is whether the Navajo Nation's filing of a compulsory counterclaim in its answer waived its immunity from suit. We hold that it did not. The 1980 Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 851 et seq., does not allow implied waivers of the Navajo Nation's immunity from suit. Only an unequivocally expressed waiver is allowed by the 1980 Navajo Sovereign Immunity Act.

We hold that, in accordance with the 1980 Navajo Sovereign Immunity Act, the waiver of Navajo immunity from suit must always be unequivocally expressed. See Santa Clara

Pueblo, 436 U.S. 49, 56 L.Ed. 2d 106; United States Fidelity & Guaranty Co., 309 U.S. 506, 84 L.Ed. 894. In the absence of expressed authorization, the doctrine of sovereign immunity should prevail. See United States Fidelity & Guaranty Co., 309 U.S. 506, 84 L.Ed. 894. Therefore, the filing of a compulsory counterclaim by the Navajo Nation does not waive its immunity from suit.

IV.

The final issue in this appeal is whether the Navajo Nation violated the appellant's civil rights by asserting the defense of sovereign immunity, and thus barring the appellant's suits and any possible form of judicial relief. Just because TBI's suits are barred by the Tribe's immunity from suit does not turn these actions into a suit for violation of civil rights. The actions presented by TBI were strictly based upon an alleged breach of contract by the Navajo Nation. Neither have we found law that would allow this suit to proceed simply because TBI has asserted that because immunity from suit is a bar, its civil rights are violated. Even our review of the record has not turned up any civil rights violations. We hold that these actions were brought upon an alleged breach of contract therefore alleged violations of civil rights are meritless.

V.

We would like to conclude that the Navajo Tribal

Council must look forward to the goal of economic development in future amendments to the Navajo Sovereign Immunity Act. One of the most severe problems facing the Navajo Nation is that of unemployment caused by the lack of economic development within the Navajo Nation. One path in which the Navajo Nation may strengthen its economic base is by drawing companies onto Navajo Indian Country. If the Navajo Nation is to compete with the states for industrial and business contracts, the Navajo Tribal Council must allow for contractual waivers of the tribe's immunity from suit. The Navajo Tribal Council may achieve this contractual waiver of immunity from suit through an amendment to the Navajo Sovereign Immunity Act, or through the inclusion of individual waivers written into each contract. The Navajo Nation must realize that private corporations will not choose Navajo Indian Country to do business on, unless they know that they will have a forum in which they will receive a fair hearing in the event of a contract dispute.

The order of the district court dismissing the appellant's action, with prejudice for lack of subject matter jurisdiction, is affirmed.

Dated this 12th day of August, 1988.

Acting Chief Justice
of the Navajo Nation

Associate Justice

Associate Justice

RTIFY THAT THIS IS A
CORRECT COPY OF
MENT ON FILE IN THE
THE NAVAJO TRIBE.

E COURT OF
NAVAJO TRIBE

Exhibit No. 9

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Lucille Anderson, Roderick Sayers, Sr., Myron Neadeau, Melvin May, Jr., Donald Rossbach, Sr., and Mitchell Lussier, Petitioners,	File No: 6-87-3
vs.	AFFIDAVIT OF RICHARD MESHBESHER
Julius Schoenborne, in his official capacity as Chief Law Enforcement Officer of the Red Lake Law Enforcement Services, and Royce Graves, Sr., in his official capacity as Secretary of the Red Lake Tribal Counsel, Respondents.	

* * *

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

Richard Meshbesher, being first duly sworn, and upon oath, deposes and states as follows:

1. That he is an attorney duly licensed to practice law before this Court.

2. That he is the attorney for each of the Petitioners above named, and as such, has sufficient personal knowledge of the facts and circumstances of this case to enable him to testify to the matters contained herein.

3. That in the latter half of October, 1986, your Affiant was contacted by the above named Petitioners, who requested that your Affiant represent them in various criminal charges pending against them in the Red Lake Court of Indian Offenses on the Red Lake Indian Reservation in Minnesota.

Exhibit No. 9 (continued)

4. That as a result of your Affiant's conversations with the Petitioners herein, your Affiant sent a letter to the Clerk of Court of the Red Lake Court of Indian Affairs on November 26, 1986, indicating his representation of the various Petitioners and requesting both jury trials on behalf of the various Petitioners, and further information regarding their Court hearing dates. A copy of said letter, marked Exhibit A, is attached hereto and made a part hereof by reference.

5. That your Affiant also telephoned the Clerk of Court for the Red Lake Court of Indian Offenses requesting further information by telephone regarding the scheduling of their next Court appearances. During this telephone conversation, your Affiant was informed that no further information was available regarding Court dates for these Petitioners.

6. That on or about December 4, 1986, your Affiant received correspondence back from Ms. Marilyn J. Johnson, the Clerk of Court of the Red Lake Court of Indian Offenses. A copy of this correspondence, marked Exhibit B, is attached hereto and made a part hereof by reference. Pursuant to this correspondence, your Affiant was informed that any Defendant in the Red Lake Court of Indian Offenses who requests counsel must have their counsel licensed by the Red Lake Tribe, and that no further information would be given to your Affiant regarding the Petitioners until a document is presented to the Red Lake Court of Indian Offenses indicating that your Affiant is licensed by the Red Lake Tribe to practice in the Red Lake Tribal Court. Said correspondence went on to indicate that any questions regarding this matter should be directed to the Secretary of the Red Lake Tribal Counsel, Mr. Royce Graves, Sr., who would provide information and instruction on how to receive a license to practice in the Red Lake Tribal Court.

Exhibit No. 9 (continued)

7. That shortly thereafter, your Affiant contacted Mr. Royce Graves, Sr., the Secretary of the Red Lake Tribal Counsel, to request information and instruction on how to receive a license to practice in the Red Lake Tribal Court.

8. That your Affiant was informed by Mr. Royce Graves, Sr., that there is no mechanism in place by which he could apply for or receive a license to practice in the Red Lake Tribal Court. Further, your Affiant was informed by Mr. Royce Graves, Sr., that the Red Lake Tribe had no plans or intentions of formulating a procedure by which such a license could be obtained.

9. That based upon the aforegoing allegations, your Affiant submits that all of the Petitioners are effectively being denied the assistance of counsel in their criminal cases. The Red Lake Court of Indian Offenses will not allow an attorney to practice until his is licensed to practice before their Court, and they have no mechanism or procedure by which an attorney can be licensed to practice before their Court.

10. That your Affiant alleges, upon information and belief, that the Red Lake Tribal Counsel has, in the past, imposed unreasonable restrictions on attorneys seeking to practice before the Red Lake Court of Indian Offenses, including the following qualifications:

a. Residence on the Red Lake Indian Reservation for a period of one year.

b. Fluency in the Chippewa Indian language.

c. Schooling or education in the Chippewa Indian laws.

d. Licensing by the Red Lake Tribe.

Exhibit No. 9 (continued)

11. That your Affiant submits that the restrictions imposed on attorneys wishing to practice before the Red Lake Court of Indian Offenses in the past have been unduly burdensome, restrictive and unconstitutional.

12. That in addition to being denied their constitutional right to be represented by legal counsel in these criminal proceedings, your Affiant also submits that each of the Petitioners is being denied his or her constitutional right to a speedy public trial, and to a trial by jury of six, this allegation based upon the information your Affiant has received from the Clerk of Courts of the Red Lake Court of Indian Offenses.

FURTHER YOUR AFFIANT SAYETH NAUGHT, except that this Affidavit is submitted in support of his Petition for Writ of Habeas Corpus on behalf of each of the above named Petitioners.

Richard Meshbesher

Subscribed and sworn to before me
this 31st day of December, 1986.

Carol A. Seeley
Notary Public

CAROL A. SEELEY
NOTARY PUBLIC MINNESOTA
HENNEPIN COUNTY
My Commission Expires Sept 13, 1988

Exhibit No. 9 (continued)

November 26, 1986

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Clerk of Court
Red Lake Court of Indian Affairs
Red Lake, Minnesota 56671

Dear Clerk:

I have been hired, together with my associate, William Kueffner, to represent Lucille Anderson and Roderick Sayers, Sr., and will probably be representing Myron Neadeau, Melvin May, Jr., and Donald Rossbach, Sr.

We formally request a jury trial on behalf of the above defendants. Further, we request that you send to the above address notice of all hearing dates for these defendants and a statement of what the charges are against them. We would also like to have a copy of the jury list so that we know who the potential jurors are prior to trial.

Sincerely yours,

Richard Meshbesher

RM:gd

cc: William Kueffner

EXHIBIT A

Exhibit No. 9 (continued)

RED LAKE COURT OF INDIAN OFFENSES

RED LAKE, MINNESOTA 56671

*Ponemah

*Redby

*Red Lake

December 2, 1986

Richard Meshbesher
Meshbesher, Meshbesher, & Bauer
Attorney at Law
701 Fourth Avenue South
Suite 500
Minneapolis, Minnesota

Mr. Meshbesher:

This is in response to your letter dated November 26, 1986.

In your letter you're requesting information and a jury trial on the following persons, Roderick Sayers Sr., Lucille Anderson, Myron Neadeau, Melvin May Jr., and Donald Rossbach.

Presently, all persons that request counsel, their counsel has to be licensed by the Red Lake Tribe.

So at this time, I will not be able to give you any of the information you requested until a document is presented to the Red Lake Court of Indian Offenses showing that you are licensed by the Red Lake Tribe to practice in the Red Lake Tribal Court.

Any questions regarding this matter, you can contact Secretary of the Red Lake Tribal Council, Royce Graves Sr., who will give you information and instruction on how to receive a license to practice in the Red Lake Tribal Court.

MARILYN J. JOHNSON, CLERK OF COURT
COURT OF INDIAN OFFENSES

EXHIBIT B

Exhibit No. 10

Deseret News, Jan. 11, 1989, p. B1
"Firing of Ute judge a part of civil rights crisis"

By Robert Rice
Deseret News staff writer

When a Ute tribal judge made the unpopular decision last summer of finding the eastern Utah tribe's ruling Business Committee in contempt of court, the committee fired him, dismissing him on grounds of gross misconduct.

Judge Larry Yazzie, now a Yaqui tribal judge in Arizona, called his dismissal a flagrant breach of the concept of separation of powers — a notion considered fundamental to the Constitution of the United States of America.

But the fact is, the U.S. Constitution doesn't apply on the Ute Reservation or any other U.S. Indian reservation, giving tribes free rein to cross lines that for two centuries have balanced power in the U.S. government.

While Ute officials say the Yazzie affair was lawful under Ute statutes, some state and federal Indian law experts say Yazzie's dismissal is part of a larger civil rights crisis affecting Indian governments throughout the nation.

Like all other U.S. Indian tribes, the Ute Tribe has sovereign immunity. Sovereign immunity means tribes have an exclusive right to govern themselves — without intervention from federal courts or other U.S. agencies.

Without the U.S. Constitution, tribal government — its council and judicial system — has nearly complete power over reservation affairs under the Indian Civil Rights Act of 1968, the equivalent of the Constitution on reservations.

U.S. courts only have jurisdiction over reservations if Congress grants it, which it has on a limited basis. Killers of two Navajo policemen were convicted under such powers. But Congress is loath to interfere on reservations.

Power on Ute land has been further

Please see JUDGE on B2

Tribal ruling panel ousted from office

By Robert Rice
Deseret News staff writer

All six members of the Ute Tribe's ruling Business Committee were ousted from office during a daylong meeting Tuesday, but the tribe's attorney said the informal recall election violated the tribe's Constitution.

In a 119-5 vote, the six were removed from office after grievances were raised by a dissident group of Utes calling themselves Concerned Tribal Members, tribal attorney Steve Boyden said.

The complaints included alleged misuse of tribal funds, 85 percent unemployment on the Uintah-Ouray Reservation, education problems, law and order difficulties and a recent Business Committee law exempting itself from tribal court jurisdiction, Boyden, a Salt Lake attorney, said.

"It's very difficult to say that this Business Committee is responsible for all the underlying problems on the reservation," Boyden said.

"People are unhappy with what's going on and they expressed it... I think yesterday's action has to be viewed in that light."

Boyden said the Ute Constitution requires that a petition process followed by a formal recall election among the 3,000 Ute tribal members be conducted before a member of the committee can be removed from office.

Meanwhile, three members appointed by the dissident group to serve as the acting Business Committee demanded keys to the Business Committee offices on Tuesday but were refused, Boyden said.

Exhibit No. 10 (continued)

Ute Business Committee Tribal Chairman Lester Chapoose says Ute courts are under the purview of the committee.

Court decisions and legal entities that affect tribal government:

—**The Indian Civil Rights Act of 1968** is, in effect, a Tribal Constitution or Bill of Rights giving tribes the right to extend certain civil rights to tribal members.

—**Santa Clara Pueblo vs. Martinez** is a 1978 U.S. Supreme Court ruling prohibiting federal courts from enforcing the Indian Civil Rights Act, leaving its enforcement up to tribal governments.

—**Sovereign Immunity** is enjoyed by all Indian tribes, giving them the right to govern themselves, just as the United States has sovereign immunity to govern itself.

—**The Ute Business Committee** is a tribal council made up of six elected Ute tribal members. Most Indian governments are lead by a tribal council like the Business Committee.

JUDGE

Continued from B1

concentrated by a new law prohibiting legal action against the tribal government in tribal court. U.S. citizens can sue their government under civil rights legislation.

The result of sovereign immunity and the new law, state and federal legal experts say, is that in many cases, those living on the Ute Indian Reservation and other Indian lands have few, if any, civil rights.

Ute officials and their legal experts, though, say their government effectively grants civil rights and is more benevolent than Indians would find off their reservation, the largest in Utah and second largest in the nation.

The Ute law preventing legal action against the tribal government is one of many problematic signs across the country indicating the dismal status of civil rights on Indian reservations, said William Howard, general counsel for the U.S. Commission on Civil Rights.

"If it is an ordinance preventing Indians and non-Indians living on the Ute Reservation from seeking redress against the tribe for violation of their civil rights under the Indian Civil Rights Act, that is a problem," Howard said.

Although a similar version of the law curbing adjudication against the tribe already existed, the new law came partly in response to the Yazzie affair, stopping future judges from holding the Business Committee in contempt.

Last summer, Yazzie found the Business Committee in contempt of court for failing to pay more than $500 million in back dividends to new tribal members. The committee's response to the ruling was to remove him from the bench.

Yazzie told the Deseret News he wasn't allowed to defend himself from the committee and that, in firing him, the Ute Business Committee had become "a law unto itself. They think they are the Supreme Court," he fumed.

Under the U.S. federal system, Yazzie's demise likely would have been considered tantamount to Congress meddling with the Supreme Court, a breach of separation of powers. But not on the Ute and other U.S. Indian Reservations.

"There is no separation of powers in our Constitution," said Ute Business Committee Tribal Chairman Lester Chapoose, explaining that Ute courts are under the purview of the ruling Business Committee.

The committee lawfully fired Yazzie, Chapoose said, after he failed to take into account a referendum vote invalidating the dividend payments.

But the lack of traditional separation of powers doesn't mean the Ute Tribe and other Indians act without a system of checks and balances, Ute Tribal Attorney Steve Boyden said.

Tribal members have the power to recall any of the six Business Committee members and bring any of their decisions to a referendum vote. Recently, for example, Ute voters overturned a Business Committee decision to repay the back dividends Yazzie demanded be repaid, Boyden noted.

A vote by members of the Ute Indian Tribe to oust the tribe's governing council Tuesday, however, is in dispute.

"All their (the Business Committee's) actions are reviewable by the people themselves," said Boyden, who said Tuesday's action was not binding. (See related story.).

Although the Ute people, according to Boyden, have the privilege of

reviewing Business Committee decision, U.S. courts are, in most cases, banished from Indian affairs.

"It has been at the total discretion of the tribes as to whether or not meaningful civil rights will be acknowledged on the reservation," said Dennis Ickes, a former director of the Office of Indian Rights at the U.S. Justice Department.

On the Ute Reservation, even Chapoose agrees that sovereign immunity means if someone's civil rights are violated, judicial redress simply can't be sought.

"I would have to agree with that," Chapoose said, "but then again, I'm not an attorney."

Boyden, the tribe's attorney, said that although no judicial redress is available on the Ute Reservation, the Business Committee itself is a "strong and healthy" remedy for someone whose civil rights have been violated.

Boyden argued that sovereign immunity has permitted the Utes to institute a government more benevolent than the state and federal governments that surround their Uintah Basin reservation.

"They (the Business Committee) give out literally millions of dollars for people with hardship cases. The Business Committee has an easy touch," he said.

"When you tell people the Constitution doesn't apply on Indian Reservations, they sit up and say 'what!' But they don't write their congressmen," Ickes said. "It hasn't gotten to that level, emotionally."

But the situation has gotten the attention of Sen. Orrin Hatch, R-Utah, who plans to introduce an amendment to the Indian Civil Rights Act to establish separation of powers in tribal government and expand federal court jurisdiction over tribal affairs, an aide said.

Navajo Times, Aug. 27, 1987, p. A-1

Tribe's Legal Aid eyes long jail term loophole

By BILL DONOVAN
Navajo Times

WINDOW ROCK — The Navajo Tribe's legal aid department is looking into the practice of tribal judges issuing long-term sentences to Navajos convicted in tribal courts.

Wesley Adaikai, a legal aid advocate, said the department is considering filing a motion to get Wilbur Hardy out of tribal jail on the basis that the tribal courts gave him too long a sentence.

Hardy was convicted of 15 criminal charges in connection with at three separate crimes. The exact nature of his charges have not been released but he was convicted by a judge in Chinle District Court and sentenced to serve 10 consecutive sentences of six months in jail for a total of five years.

He isn't the only one given such a sentence. Window Rock jail offiials say that there is another man in that jail serving a six year sentence in connection with 25 charges.

Under the Indian Civil Rights Act, tribal courts can give sentences of up to six months and/or a fine of up to $500. In recent years, however, tribal judges have been interpreting that to mean that they can give up to six months on each charge."

Adaikai said he isn't sure that this interpretation is correct. If the legal aid department does decide to go ahead and file a mo-

Exhibit No. 11

Long jail term loophole

From Page 1

tion, the matter may finally go to the Navajo Supreme Court for a decision.

Apparently one of the reasons Hardy was given such a long sentence was that he went to tribal court and, without advice from an attorney or advocate, he pleaded guilty.

"He probably thought he only faced the possibility of six months in jail," said Adaikai, who added he felt it was the judge's responsibility to warn defendants that they were facing, not months, but years in a tribal jail if they plead guilty.

Bill Kellogg, director of public safety for the tribe, said both men are currently trustees in the Window Rock jail which means that their sentence will be cut in half. Still, he added, prisoners should not be held in tribal jails for this long.

"The tribal jails were never made for long-term imprisonment," he said, adding that because of their long-tern status, both men are being held in the Window Rock jail, which is considered a better facility than any of the other tribal jails for the long-term prisoner.

Kellogg also pointed out that the tribal jail's budget was never meant to provide for long-term prisoners. The cost for providing food for one prisoner for one day, he pointed out, is currently $10.

The Lakota Times, Jan. 17, 1989, p. 1
"OST Council overrides court decision on lease issue"

By Ivan Star Comes Out
Times Staff Writer

PINE RIDGE — The Oglala Sioux Tribal Council overturned the appellate court's ruling against Loren "Bat" Pourier's lease for a convenience store in Pine Ridge. After more than three hours of discussion Thursday, the Council voted to support Special Judge Patrick Lee's original decision.

It then ordered the Appellate Court to cease all hearings immediately until the tribal Law and Order Committee completed a council report on the status of the three empaneled appellate judges.

In his opinion of Nov. 22, 1988, Lee found that the plaintiffs, Shirley Bettleyoun, Annette Matt, Richard Shangreaux and Darrell Steele, were asking the court to prohibit further construction on the lots until federal authorities could determine whether or not the land lease was valid.

The principle issue before the court was whether the defendant should be permanently enjoined "...from committing any waste on the three tribal lots pending exhaustion of federal administrative remedies."

His dismissal of their complaint was based on the requirements for issuing a permanent injunction. Would the plaintiffs suffer irreparable harm if the construction at the site continued, and are the plaintiffs likely to prevail on the merits of their appeal?

He said the court's decision recognized the basic right of Pourier to enjoy his property rights and did not result in irreparable harm to the plaintiffs.

In a memorandum to Paul Iron Cloud January 10, Lee said the Court of Appeals Order was not a proper judicial review of his previous decision due to the fact that the court did not address the same issues.

His tribunal was under orders of the tribal council to address the plaintiffs' application for a permanent injunction.

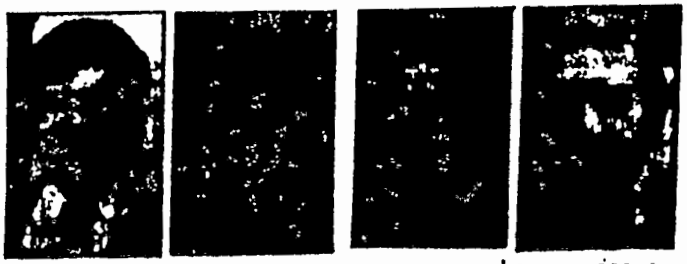
The council motion to support the decision of the lower court passed 10 for, 5 against and 1 not voting.

Another motion directed the Appeals Court to immediately cease all court activity and authorized the tribal Law and Order Committee to look into the validity of the judge's terms of office and to file a report with the council. It passed 14 for and 1 against.

Gerald "Jump" Big Crow, Pine Ridge Village Councilman, said the appellate court had approached the council requesting permission to hire a special judge to hear the case and the council had given its approval.

He said the court did not want to hear the case for fear of repercussions.

The appeals court did not deal with the same issues the lower court dealt with, he said. "They dealt with dif-



(L-R) Loren 'Bat' Pourier, Judge Pat Lee, Charlie Bettelyoun and Mario Gonzalez.

Exhibit No. 12

Exhibit No. 12 (continued)

ferent issues and a different case. This council has got to deal with the right issues right here and I say we support the special judge's decision."

Steve Hawk, White Clay District councilman, asked the purpose of placing this issue on the agenda.

He said he had no personal interest in the case, but to be placed in the position of second-guessing the tribal high court was not right. "The option to overrule the courts is once again on the floor," he said.

Dave Pourier, councilman, asked if the appeals court had the authority to do what they did. He said, "To my knowledge the judges have not been appointed or approved by this council."

"It seems to me we don't have any control now," he said.

Melvin Cummings, Wounded Knee District councilman, said the council should not overturn the appeals court's decision. He said, "They did the overturning themselves [on] special judge Lee's decision."

Big Crow said the appeals court had asked the council to hire a special judge — then they (the appeals court) overturned his decision. "You've got to understand people, the three powers [legislative, executive and judicial] have never been separated since the Indian Reorganization Act was established in 1934."

He said the council, as the governing body, should have been appealed to. "There's no doubt in my mind", he said, "this body has got to deal with it."

He said Attorney Mario Gonzalez, representing the plaintiffs, fought for the Black Hills on behalf of the tribe and is now, in the present case, fighting his own governing body for some federal reserve land.

Charles Bettleyoun, Lacreek District Councilman, said both sides should be heard before any decisions were made.

He said, "Those of us who served on the last administration are to blame for letting this get out of hand. Personally, I wasn't looking at the legal aspects of it then and was more involved with the emotional side of things."

Wilbur Between Lodges, Eagle Nest District councilman, said council should make efforts to correct the situation, "...so we can go on and avoid similar situations in the future."

Hawk said if the tribe overturned the appeals court's decision it would be a boost for PL-280 or state jurisdiction. The council would then have to start hearing every civil appeals case on the docket and then begin hearing criminal cases. "It is highly irregular for us to assume judges' roles," he said.

Loren "Bat" Pourier, owner of the new convenience store, said he knew this would come back to the council floor for it had become a political issue.

He explained that all the businesses on the reservation had gone through the same process as he had to obtain their leases.

He said everybody has rights and when the courts go wrong there has to be some recourse.

There should have been a hearing with both parties present. A temporary restraining order is only good for 72 hours, he contended, since there is no provision in the tribal codes for a permanent stay.

"I'm convinced I will win in federal court but I'd rather we settle it here," he said.

G. Wayne Tapio, Pine Ridge village president, said that in his lifetime he has never seen anyone beg to bring a business onto the reservation.

He said the constitution is fine and he believes in it. But added that if the appeals court decision stands, then all the other businesses on the reservation are going to have to reclaim the land they are on before moving out.

With "950 names from the village want[ing] that store here," he said, referring to a petitionary drive, "...some corrections have to be made here."

Royal Bull Bear, president of the Grey Eagle Society, said Friday afternoon, *"Takomni piya yasu wicunkiyapi kta heca. Wicohan wan econpi ki he hecetu unlapi sni.* (We are going to have to appeal this. We don't agree with what they (the

Exhibit No. 12 (continued)

council) has done.)

"Lena tokel wastanpi ehantans itacan hena ahopapi kta heca." (When the appeals court makes a decision the council should respect it.)

Owayasu wankatuya hci ki ecetkiya unyanpi eyas tokeya igluotanpi kta unkapepi. (We are headed for federal court but we are waiting for them (the council) to straighten up.)

"Wokiconze ki le ungnunipi kte. Woope ki lena ipayehya iyangkiyapi. Wanna unkojujuwahanpi." (We are going to lose this government. They (the council) are running this government in violaton of laws. We are now falling apart.)

Oliver Red Cloud said, *"Lakota ki wanna tokcinyan unkokuwapi. ohounlapi sni."* (They (the council) have little regard for the Lakota now. They have no respect for us.)

"Oyate ki tawatelyapi sni eyas wacante ognakapi canke takuni eyapi sni. Tokata lena toksa owayasu wan el igluotanpi kte." (People have had enough but since they are kind and generous they will not say anything. They (council) will have to answer for themselves in a federal court.)

Mario Gonzalez, Black Hawk attorney, said Paul Iron Cloud and the tribe have been getting bad legal advice because neither the tribal constitution, nor any existing ordinance, allows them to "...come in and overrule the appeals court."

"The ten councilmen who voted for this are in violation of their constitution, their oaths of office and tribal laws," he said.

The Oglala Sioux Tribe was at one time noted for its stability in government, Gonzalez said. But it is now "...acting like a totalitarian government."

Exhibit No. 13

Washington Post, Jan. 14, 1989
"Va. Indian Wives Fight to Stay on Reservation"
"Pamunkey Women Who Marry Outsiders Must Give Up Residency"

By Hilary Appelman
Associated Press

KING WILLIAM, Va.—Two sisters who grew up on the Pamunkey Indian Reservation in southern King William County are challenging a tribal law that requires their expulsion from the reservation because they married outside the tribe.

Kim Cook Taylor and Cam Cook Porter, whose grandfather was chief of the Pamunkey for 42 years, would like to build houses and raise families on the reservation, but because the 23-year-old twins recently married white men, they were asked to leave the 1,250-acre site nestled in a bend of the Pamunkey River.

"That's the way the law reads," said William (Swift Eagle) Miles, the Pamunkey chief.

The women are challenging the law, and Thursday night the seven-member Tribal Council agreed to meet with the sisters when their petition is complete.

Currently, Pamunkey women who marry outside the tribe give up their right to live on the reservation. Men in the tribe never lose that right. Non-Indian women may live on the reservation with their husbands, although like the Pamunkey women, they have no say in the tribe's government.

About 60 people live on the reservation, one of two remaining in Virginia. Most are retired, getting up in years and starting to wonder who will keep the tribe going when they're no longer around.

Despite the financial incentives—there is no property tax on the reservation and residents don't have to buy the land they live on—it's hard to keep young people there. The nearest town is 15 miles away, and it's 40 miles to Richmond, where about a dozen residents work.

The law banning non-Indian husbands from the reservation is having a drastic effect on the reservation's population, Miles said. The Mattaponi Indians, who live on a much smaller reservation nearby, have a similar rule about women who marry outside the tribe, but it's "not a perfect strict rule," said Mattaponi Chief Walter Custalow, and the reservation has several young families.

One problem, Miles said, is that most of the older Pamunkey had daughters, and most of those young women married outside the tribe, whether out of preference or necessity.

"They want you to marry a Pamunkey Indian," Taylor said. "That's impossible. They're all girls or they're my cousins."

The sisters say they've been aware of the law since they were children. "If I dated a white guy, I used to say, 'I can't marry you 'cause I want to live on the res-

ervation,' " Porter said. "But you can't help who you fall in love with. I just figured we'd change the law."

The sisters are urging Pamunkey women on and off the reservation to sign their petition asking the tribe to change the law.

"I want to live here," Taylor said. "It's a special place for me. I've got a lot of family and we're all real close. Part of me belongs here. This is my land, really my land."

Taylor said many of their sisters and female cousins also married outside the tribe and would come back to the reservation if they could. But she said the petition drive is going slowly, partly because tribe members are so spread out, and because some residents oppose the change. "They're real old, real old-fashioned," she said.

The sisters' cause has won the support of a few influential members of the tribe, including their grandfather, the former chief, and Miles.

"I think they realize they don't have much choice," Taylor said. "There will be no reservation."

Miles said that he believes tribal leaders will go along with the women's demand to remain on the reservation with their husbands. "Personally, I have no objection to white men living on the reservation," the chief said.

"If we don't change that, we're going to disappear."

Exhibit No. 14

Star Tribune/Tuesday/January 26/1988 7B

"Red Lake newspaper typifies troubles of Indian press"

By Robert Franklin
Staff Writer

When the Red Lake Times began publication in Bemidji, Minn., last June, it had friendly relations with tribal officials: The first issue carried a profile and several photos of Tribal Chairman Roger Jourdain, and an account of publisher Tim Giago receiving a sacred pipe from the Tribal Council.

Since then, however, Giago and Jourdain have had differences over firing, hiring and the proposed sale of the paper to the tribe. The Tribal Council has withdrawn its advertising and asked for the return of its $25,000 investment in the paper. And last week the paper issued its first edition under a new name, the Ojibwe Times, hoping to attract business from other reservations.

"Roger Jourdain seems to feel that he can be editorially responsible for everything that goes into the paper, and that's not the way it works in a free press," Giago said.

"We never said what he could print, what he can't print," Jourdain said. "We figured that he was an honorable person. . . . It began to appear to us that his professionalism is not what it's cracked up to be."

Across the country, Indian-operated newspapers have run into problems of staffing, finances and relations with tribal authorities.

There are 482 Indian newspapers published across the country. Many suffer from censorship, tribal nepotism, factionalism, the scattered nature of reservations and a shortage of trained journalists, according to an article by Jenny Tomkins in the current Wisconsin Journalism Review. Some examples:

■ The Circle, monthly newspaper of the Minneapolis American Indian Center, went for nearly three months without an editor until University of Minnesota graduate Gordon Regguinti started work this week. Juanita Corbine Espinosa, a center board member, said she inherited five months of unbilled accounts, ran the paper in the interim with part-time staff members, and was unable to distribute about 30 percent of last month's 10,000-copy press run.

But the Circle is almost breaking even and the center will stand behind it, she said.

■ In northern Wisconsin, the tribal-backed Lac Courte Oreilles Journal became the independent Journal, News for Indian Country, last year. After 10 years, "the tribe ran out of money" for the publication, said Paul DeMain, co-chairman of the publishing board.

■ In Arizona, the nation's only Indian daily newspaper, the Navajo Times Today, criticized a candidate for tribal chairman and was shut down last year after he won. Tribal officials said the newspaper was deep in debt, including a $189,000 lien for nonpayment of federal taxes.

In the Red Lake case, Jourdain became upset when the tribal council received complaints after all five employees of the paper left in October. Giago said he fired two editorial employees who were "reporting more to Roger than to me," and the other three quit.

Plans called for the tribe to buy the paper after it got going, but negotiations broke down by year's end.

Giago said his Native American Publishing Inc., which publishes the Lakota Times in South Dakota, invested more than $100,000 in the Red Lake newspaper, and his asking price was $250,000. (Tribal authorities "feel like Tim tried to rip them off," said tribal attorney Margaret Treuer.)

The tribe offered to take over the paper for its $25,000 investment plus outstanding liabilities, which Giago put at $11,000 ("totally ridiculous," he said). The circulation of the Red Lake paper is 1,700 a week.

Jourdain said he may sue Giago for libel for criticisms in the Ojibwe Times. The Tribal Council wants its $25,000 back. Giago said he may sue if tribal authorities try to discourage subscribers or advertisers from doing business with the Ojibwe Times. Jourdain said that won't happen.

Exhibit No. 15
The Independent
Gallup, N.M.
Thursday, October 13, 1988

Independent opinion

Navajo courts get slap in face

It was only one sentence, but it showed how little regard Navajo Chairman Peter MacDonald has for his tribe's courts.

In an interview with the *Independent* earlier this year, MacDonald was asked: What will you do if the Supreme Court rules against you in the Navajo Education and Scholarship Foundation case?

His answer: "We'll just have to review the court." Not review the court's *ruling* — which would be a sensible step. No, instead the chairman said that he would review the *court* itself.

In many ways, that is a chilling statement because it shows that the tribe's courts cannot stop MacDonald if he decides to do something. What he was saying was that if the court ruled in his favor, great, he would assume control of the foundation. But if the court didn't rule his way, well, he would still take the foundation over.

And so he has. Despite a decision by a lower court that the foundation is a non-tribal, private entity; and the fact that the tribe's Supreme Court has yet to hand down a ruling, MacDonald's administration continues on its takeover path. In May, the administration kicked the foundation's officers out of the Navajo Education Center. Now it is taking steps to wipe the foundation out of existence.

For example, it was learned last week that the foundation has been moved under the wings of the new Navajo Education Services Division and given a new name — The Navajo Nation Higher Education Scholarship Fund. And on Tuesday, the administration moved the foundation's records and belongings out of the Navajo Education Center so that the offices could be

used for the new home of the Office of Youth and Child Development.

In other words, as far as the administration is concerned, the foundation — ruled private by the courts but said to be a tribal entity by MacDonald — is no more, though it continues to maintain offices out of the home of former Navajo tribal chairman and chief fund raiser Peterson Zah in Window Rock. The chairman has spoken and that settles it — no matter what the courts have said.

There are two lessons that must be learned from all of this.

First, the Navajo people must clearly see the arrogance of the current tribal administration. The courts have ruled that the foundation is *not* a tribal enterprise. So at this moment, the *law* says that the tribe does *not* have any control over the foundation.

Yet the MacDonald administration has decided it is above the law, that it does not have to pay attention to what the court has said. That is arrogance — raw arrogance — and a slap in the face to the tribal courts.

Apparently the administration has decided that the judges are correct only when they come down on MacDonald's side, which brings us to the second lesson: The tribe's courts are never going to be effective in enforcing the laws of the Navajo Nation until a new form of government is established, one in which the judicial branch has the final say on legal matters.

As it currently stands, there may as well not even be any tribal courts when issues involving the chairman or his administration arise. If the chairman always has the final say, even when the courts rule against him, then the judges may as well pack up their robes and go home; their jobs are meaningless and they only are serving to perpetuate the lie that they actually do have some authority on administration-related issues.

It is obvious from MacDonald's blatant disregard for the courts that the Navajo people must begin to move toward a constitutional, three-branch form of government. This has been talked about for years and many people oppose it, including the chairman, who knows that he would lose much power under such a system. But it must be done to protect the Navajo people from abuses such as the current farce, which is being played out right before their eyes.

We urge the Tribal Council to begin, even in its fall session, to initiate discussions on developing a tribal constitution. It will be a long, hard battle, but one that will be well worth the fight once proper protections are placed on the laws of the Navajo people.

And the MacDonald administration must stop — now — its abuse of the lower courts by its ruthless takover of the scholarship foundation. Let the Supreme Court rule, then take action. That's the proper order, and even the chairman of the Navajo Tribe is not above the law.

Exhibit No. 16

A-CV-03-89

SUPREME COURT OF THE NAVAJO NATION

Marshall Plummer, et. al.,

Petitioners,

v.

Honorable Judge Harry Brown, Kayenta District Court,

Respondent.

OPINION

Before BLUEHOUSE, Acting Chief Justice, and AUSTIN, Associate Justice.

Albert Hale, Esq., Window Rock, Arizona, for the Petitioners Navajo Tribal Council Delegates; Britt E. Clapham, II, Assistant Attorney General, Stanley M. Pollack, Acting Assistant Attorney General, David P. Frank, Esq. and Violet A. P. Lui, Esq., Navajo Nation Department of Justice, Window Rock, Arizona, for the Petitioner Navajo Tribal Council; Geoffrey Standing Bear, Esq., for Honorable Peter MacDonald Sr.

Per curiam.

I.

A motion has been filed with this Court to disqualify the Honorable Tom Tso, Chief Justice of the Supreme Court, from participating in any proceeding before this Court involving Chairman Peter MacDonald Sr. and the parties to the above entitled action.

The motion alleges the Chief Justice, by administering the oath to Mr. Leonard Haskie, interim Chairman, and Mr. Irving Billy, interim Vice-Chairman, has

taken sides in the current dispute between members of the Navajo Tribal Council and Chairman Peter MacDonald Sr.

II.

Parties to a case have a basic right to a fair and impartial judge. See McCabe v. Walters, 5 Nav. R. 43, 50 (1985). A judge should be disqualified if he has an interest in the case, is biased or prejudiced, or has some relationship to a party in the case. In re: Estate of Peshlakai, 3 Nav. R. 180 (Shiprock Dist. Ct. 1981).

Rule 16, Navajo Rules of Civil Appellate Procedure, provides that:

> Any Justice may be disqualified on motion of one of the parties or on his own motion.... The motion shall state specifically the grounds on which it is based and it shall be supported by affidavit or other satisfactory evidence.

One ground for the motion is that the Chief Justice must be disqualified from this case and other future related cases, because the Chief Justice administered the oath to two members of the Navajo Tribal Council who were appointed as interim officials by their peers. The issue is whether, by administering the oath, the Chief Justice has shown that he is biased or prejudiced against either side in the current dispute between the Chairman and certain members of the Navajo Tribal Council.

The administration of an oath is nothing more than a ministerial act. 58 Am. Jur. 2d Oath And Affirmation §6 (1971). A ministerial act is,

> One which a person or board performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his or their own judgment upon the propriety of the act being done. (Citations omitted). (Emphasis added).

Black's Law Dictionary 899 (5th ed. 1979).

Navajo judges and justices routinely administer oaths to chapter officials, tribal council delegates, the chairman, vice-chairman, members of boards and commissions, and admittees to the Navajo Nation Bar Association (NNBA). To do what one routinely does is not a decision. By simply administering an oath, a judge does not pass judgment on the legality of the underlying circumstances that brought the individual to the judge for an oath. For example, when an oath is administered to admittees to the NNBA, this Court is not passing judgment on the fitness of a person to practice law.

In administering the oath, the Chief Justice was merely performing a ministerial act. The Chief justice did not exercise any judgment as to whether the action of the majority of the council delegates to appoint interim officials was proper or not. Neither did the Chief Justice, by giving an oath, pass judgment on the legality of the March 10, 1989 council session. This is further supported by the Chief Justice's statement, prior to administering the oath, that he was performing a ministerial act which should not be construed as support of either faction or "as a judicial decision on the propriety of any actions taken by the Navajo

Tribal Council." We cannot detect any bias or prejudice on the part of the Chief Justice simply from his administration of an oath.

Another ground for the disqualification of the Chief Justice is that the above entitled case is still pending before this Court. We disagree. This Court issued its final decision on the Petition for a Writ of Prohibition on March 2, 1989. In that order we stated that "an Opinion will be filed at a later date explaining the Court's decision."

By leaving room for an opinion we did not indicate that the March 2, 1989 order will be modified by the opinion. The issues brought before the Court have been argued, considered and disposed of; therefore there are no issues still pending in this Court in the above entitled case.

For these reasons the motion to disqualify the Chief Justice is denied and dismissed.

Filed this 15th day of March, 1989.

Acting Chief Justice of the Navajo Nation

Associate Justice

Exhibit No. 16 (continued)

A-CV-03-89

SUPREME COURT OF THE NAVAJO NATION

Marshall Plummer, et. al.,

Petitioners,

v.

Honorable Judge Harry Brown, Kayenta District Court,

Respondent.

OPINION

Before TSO, Chief Justice, BLUEHOUSE and AUSTIN, Associate Justices.

Albert Hale, Esq., Window Rock, Arizona, for the Petitioners Navajo Tribal Council Delegates; Britt E. Clapham, II, Esq., Assistant Attorney General, Stanley M. Pollack, Esq., Acting Assistant Attorney General, David P. Frank, Esq. and Violet A. P. Lui, Esq., Navajo Nation Department of Justice, Window Rock, Arizona, for the Petitioner Navajo Tribal Council; Geoffrey Standing Bear, Esq., for Honorable Peter MacDonald Sr.

Opinion delivered by Austin, Associate Justice.

A petition for a writ of prohibition was filed in this Court seeking to prohibit the Honorable Judge Harry Brown, Judge of the Kayenta District Court, from exercising jurisdiction in the action titled Peter MacDonald Sr., Chairman of the Navajo Tribal Council, Chief Executive Officer of the Navajo Nation and as an Individual v. Marshall Plummer, et al., No. KY-CV-019-89 [MacDonald suit]. On March 2, 1989, we issued a permanent writ of prohibition.

I.

On February 21, 1989, Chairman Peter MacDonald Sr. filed the MacDonald suit against the Navajo Tribal Council and certain named delegates to the Navajo Tribal Council. The MacDonald suit sought declaratory and injunctive relief. The suit was filed in the Kayenta District Court, where the Honorable Judge Harry Brown is the presiding judge.

On the same date, February 21, 1989, Judge Brown issued a temporary restraining order enjoining the defendants from enforcing a Tribal Council resolution (CF-4-89) placing Chairman MacDonald on administrative leave with pay and removing all legislative and executive authority from the Chairman. In addition, Judge Brown issued an order setting a hearing on the temporary restraining order for February 24, 1989.

A petition for a writ of prohibition to stop Judge Brown from conducting the hearing set for February 24, 1989, was filed on February 23, 1989. On February 24, 1989, we issued an alternative writ of prohibition directing Judge Brown not to proceed with the hearing. We also ordered Judge Brown to show cause on February 28, 1989, why the alternative writ should not be made permanent.

We heard arguments on February 28, 1989. On March 2, 1989, we ordered the following: (1) the writ of prohibition is made permanent; (2) the temporary restraining order is vacated; (3) the MacDonald suit is dismissed; (4) Judge Brown is permanently prohibited from presiding over any

proceeding, whether for injunctive relief, declaratory relief or otherwise, involving any suit where Peter MacDonald Sr. has an interest; and (5) an opinion is to be filed explaining the Court's decision.

II.

The issues presented to this Court are as follows: (1) Whether the Kayenta District Court has jurisdiction to decide the MacDonald suit; (2) Whether the Honorable Judge Harry Brown had a duty to disqualify himself from the MacDonald suit because of his familial relationship to Chairman MacDonald; (3) Whether the Navajo Tribal Council had authority to place Chairman MacDonald on administrative leave; (4) Whether the resolution placing Chairman MacDonald on administrative leave is in effect a bill of attainder; and (5) Whether Chairman MacDonald's civil rights were violated by the Navajo Tribal Council.

Prior to our decision on the merits we will quote a source from "Respondent's (Chairman MacDonald's) Supplemental Brief to Writ of Prohibition": "There are laws and procedures but these are only technical in nature. In order for the laws to work, we, the people must make it work." Statement of Daniel Peaches, March 1, 1989. This Court will decide the case based upon the law.

III.

A.

A proceeding for a writ of prohibition is used essentially to test the jurisdiction of a court. Yellowhorse

v. Window Rock Dist. Ct., 5 Nav. R. 85 (1986); McCabe v. Walters, 5 Nav. R. 43 (1985). A writ of prohibition will be issued as a matter of right if it is clear the district court is without jurisdiction and the petitioner has no other remedy available. Yellowhorse, 5 Nav. R. at 87. It is important to examine the history of the Navajo courts to find the source of Navajo court jurisdiction.

The courts of the Navajo Nation were created by the Navajo Tribal Council. Johnson v. Navajo Nation, 5 Nav. R. 192, 195 (1987). The whereas clauses in a 1958 resolution state the following:

> 1. The Navajo Tribal Council has heretofore attempted to provide for the appointment of a Chief Judge of the Tribal Courts, with responsibility for organizing the work of the Navajo Tribal Courts, and for the establishing of an appellate court of three judges to consist of the Area Director, the Area Counsel, and one of the Tribal attorneys (Resolutions Nos. CJ-4-53 and CJ-5-53, January 8, 1953); but these resolutions were disapproved by a former Commissioner of Indian Affairs, Dillon S. Myer, in a letter of March 3, 1953 (Law and Order 879-53, 880-53), holding that judges on the Navajo Reservation are not Tribal judges, but are judges of courts established by the Department of the Interior, and that their authority to act is derived from the regulations of the Department of the Interior, without objection, however, if the Tribal Council wished to undertake a complete revision of the law enforcement activity on the reservation by enacting ordinances which would establish Tribal courts in lieu of the Courts of Indian Offenses theretofore established. (Emphasis added).
> ....
>
> 3. With the assumption of complete responsibility for enforcement of law and order on the Navajo Indian Reservation (Resolution No. CJ-45-58), it is appropriate

> at this time that the Council declare and seek the concurrence of the Commissioner of Indian Affairs that the courts of justice existing on the Navajo Indian Reservation are courts of the Navajo Tribe and not of the Department of the Interior, and that these courts be made effective and respected instruments of Justice.

Navajo Tribal Council Resolution CO-69-58 (October 16, 1958). (Emphasis added). In this same resolution the Navajo Tribal Council gave the district courts original jurisdiction over certain actions, Id. at § 4, and gave the appellate court appellate jurisdiction, Id. at § 6.

History shows that the Navajo Tribal Council gave the Navajo courts their jurisdiction. Consequently, the Navajo courts can exercise only that jurisdiction granted by the Navajo Tribal Council. Nez v. Bradley, 3 Nav. R. 126, 129 (1982). In recent amendments to the Navajo Sovereign Immunity Act, 1 N.T.C. § 351 et seq., [Act], the Navajo Tribal Council made clear that

> The Courts of the Navajo Nation are created by the Navajo Tribal Council within the government of the Navajo Nation and the jurisdiction and powers of the Courts of the Navajo Nation, particularly with regard to suits against the Navajo Nation, are derived from and limited by the Navajo Tribal Council as the governing body of the Navajo Nation.

1 N.T.C. § 353 (c) (1988); Navajo Tribal Council Resolution CMY-28-88 (May 6, 1988).

B.

The Act controls suits against the Navajo Nation. The Act provides that "Navajo Nation means: (1) The Navajo Tribal Council;... [and] (4) The Delegates to the Navajo

Tribal Council." 1 N.T.C. § 352(1) and (4). The MacDonald suit alleged a cause of action predicated upon actions taken by the Navajo Tribal Council and the council delegates while performing legislative functions. The suit challenges certain resolutions passed by the Navajo Tribal Council. When the Navajo Tribal Council and the delegates to that body are performing legislative functions they fall within the definition of Navajo Nation and the Act applies.

Identifying the true defendant does not depend upon how Chairman MacDonald names the defendants in the heading of his complaint. The general rule, which we adopt today, is that if the ultimate relief sought is relief against the sovereign, then the suit cannot proceed without the consent of the sovereign. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); Dugan v. Rank, 372 U.S. 609, 620 (1963). Chairman MacDonald seeks to restrain the Navajo Tribal Council and its members from taking legislative action and from carrying out such action. The effect is to prevent the Navajo Tribal Council from carrying out essential government functions. The relief sought is ultimately against the Navajo Nation; therefore, the Act applies.

C.

A review of the Act's history shows that it was first passed by the Navajo Tribal Council by a vote of 50 in favor and 12 opposed. Chairman MacDonald signed the original Act. Navajo Tribal Council Resolution CMY-42-80 (May 6, 1980). The first amendments to the Act passed the Navajo Tribal Council

by a vote of 67 in favor, 3 opposed and 2 abstaining; the resolution was signed by Vice Chairman Edward T. Begay. Navajo Tribal Council Resolution CJY-55-85 (July 25, 1985). The next amendments were passed by a vote of 54 in favor, 5 opposed and 2 abstaining. Chairman Peterson Zah signed this resolution. Navajo Tribal Council Resolution CD-60-86. (December 11, 1986). The latest major amendments to the Act took place in 1988. The "Resolved" portion of that resolution specifically states that:

> 2. The Navajo Tribal Council as the governing body of the Navajo Nation further affirms that the jurisdiction and powers of the Courts of the Navajo Nation derive from the Navajo Tribal Council as the governing body of the Navajo Nation and that the courts are without jurisdiction or power to waive the sovereign immunity of the Navajo Nation or that of its authorized officials, representatives, or employees acting within the scope of their official duties and authority.

This resolution passed the Navajo Tribal Council by a vote of 67 in favor and 0 opposed. The resolution was signed by Chairman MacDonald. Navajo Tribal Council Resolution CMY-28-88 (May 6, 1988). These resolutions show that the Navajo courts did not enact the Navajo Sovereign Immunity Act, but the courts are required to apply it, and that these resolutions were passed with almost no opposition from either the current majority or minority faction of the Navajo Tribal Council or the presiding Chairman.

Several laws in the Act control our decision in this case. They are the following. The Navajo district courts have no jurisdiction in suits against the Navajo Nation

without its express consent. 7 N.T.C. § 257. The Navajo Nation is a sovereign nation which is immune from suit. 1 N.T.C. § 353(a). Public officials or agents of the Navajo Nation may not be sued for injury or damage alleged to have been sustained by "[l]egislative or judicial action or inaction or administrative action or inaction of a legislative or judicial nature, such as adopting or failure to adopt a law or by failing to enforce a law." 1 N.T.C. § 354(f)(4)(C). As a jurisdictional condition precedent to suit against the Navajo Nation, the plaintiff must comply with the conditions set forth at 1 N.T.C. § 355. Any officer, employee or agent of the Navajo Nation may be sued in Navajo court to compel compliance with the law by use of declaratory or prospective mandamus or injunctive relief, but "[t]his subsection [g] shall not apply to the Chairman of the Navajo Tribal Council, the Vice Chairman of the Navajo Tribal Council, or the delegates to the Navajo Tribal Council." 1 N.T.C. § 354 (g)(1) and (3).

Petitioners argue that the Kayenta District Court has no jurisdiction because Chairman MacDonald has not complied with the requirements for suing the Navajo Nation under the Act and that the Act prohibits any plaintiff from making the Navajo Tribal Council and the delegates to the Navajo Tribal Council defendants in any suit. On the other hand, Chairman MacDonald argues that the Act does not apply because this is an action between the Chairman of the Navajo Tribal Council and the Navajo Tribal Council and named delegates to the

Navajo Tribal Council. Chairman MacDonald argues that this is a unique case which falls outside the Act because the Navajo Nation is suing itself. Chairman MacDonald further argues that he, in an individual capacity, is suing the Navajo Tribal Council and named delegates to the Navajo Tribal Council.

We agree with petitioners that the Kayenta District Court has no jurisdiction over the MacDonald suit. We will not adopt Chairman MacDonald's argument that, because this is a unique case where the Navajo Nation has sued itself, we must ignore express tribal code law on suits against the Navajo Nation. If we ignore the provisions in the Act, in effect the Navajo courts would be creating their own jurisdiction - a power Navajo courts do not have. Navajo code law expressly provides that Navajo courts can exercise jurisdiction over suits against the Navajo Nation only where authorized by the Navajo Tribal Council. 1 N.T.C. § 353(c); 1 N.T.C. § 354(c).

Furthermore, we cannot in good conscience allow Chairman MacDonald to sue the Navajo Nation without complying with the Act, while simultaneously requiring other private plaintiffs to comply with the Act. That would indeed be a gross violation of equal protection under the law. A Navajo tribal official, simply because he or she is an official, enjoys no greater rights under our law than ordinary Navajo Nation citizens.

The law is clear that neither Chairman MacDonald, nor

any plaintiff can make the Navajo Tribal Council a defendant in a suit of this type. 1 N.T.C. § 354 (g)(3). Nor can the Navajo Tribal Council or its delegates be sued based upon their actions in performing legislative functions. 1 N.T.C. § 354 (f)(4)(C). The reason is that the Navajo government must "function without undue interference in furtherance of the general welfare and the greatest good of all the people." 1 N.T.C. § 354(a). Chairman MacDonald has failed to satisfy the jurisdictional conditions precedent to suing the Navajo Nation. 1 N.T.C. § 355. Every person suing the Navajo Nation must satisfy the conditions to obtain court jurisdiction.

The Kayenta District Court has no jurisdiction over the MacDonald suit; therefore, we are precluded from addressing issues numbered 3, 4 and 5. A court that decides an issue over which it has no subject matter jurisdiction enters an invalid decision.

By this decision, the Court does not hold that Chairman MacDonald has no recourse through the courts. Chairman MacDonald has ample opportunity to sue the proper officials and obtain a ruling on the validity of any Navajo Tribal Council resolution that he alleges to be invalid. The Court simply holds that this particular suit is not properly brought.

IV.

As the above effectively disposes of the petition for a writ of prohibition, the only other issue we will address

concerns the Honorable Judge Harry Brown's failure to disqualify himself from presiding over the MacDonald suit.

Canon 3C of the American Bar Association Code of Judicial Conduct, as adopted by the judiciary of the Navajo Nation, provides that:

> C. Disqualification.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
> ....
>
> (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (1) is a party to the proceeding, or an officer, director, or trustee of a party....

Judge Brown clearly had a duty to disqualify himself from the MacDonald suit at the outset due to his familial relationship to a party in the suit. We hold that a writ of prohibition can be issued to stop a district judge from presiding over a case if the situation from the outset clearly denies the defendant an unbiased and impartial tribunal. There is clear bias here, where Judge Brown is Chairman MacDonald's brother-in-law. Petitioners need not exhaust remedies in the district court.

V.

For the reasons given, the alternative writ of prohibition is made permanent; the temporary restraining order issued by the Kayenta District Court is vacated; the

suit entitled MacDonald v. Plummer, et al., No. KY-CV-019-89, filed in the Kayenta District Court, is dismissed; and the Honorable Judge Harry Brown is permanently prohibited from presiding over any proceeding, whether for injunctive relief, declaratory relief, or otherwise, involving any suit where Chairman Peter MacDonald Sr. has an interest. SO ORDERED.

Chief Justice Tso and Associate Justice Bluehouse concur.

Filed this 23rd day of March, 1989.

Chief Justice of the Navajo Nation

Associate Justice

Associate Justice

eby certify that this is a true and ect copy of the instrument on file e Supreme Court of the Navajo on.

Clerk of the Supreme Court

Exhibit No. 16 (continued)
A-CV-08-89

SUPREME COURT OF THE NAVAJO NATION

Peter MacDonald Sr., et al.,
Petitioners,

v.

Honorable Robert Yazzie,
Judge of the Window Rock District Court, et al.,
Respondents.

OPINION

Before TSO, Chief Justice, BLUEHOUSE and AUSTIN, Associate Justices.

Thomas Hynes, Esq., Farmington, New Mexico, for the Petitioners; Stanley Pollack, Esq., Pamela S. Williams, Esq., Violet A. Po Lui, Esq., Navajo Nation Department of Justice, Window Rock, Arizona for the Respondents.

Per curiam.

After hearing oral arguments of the parties, and after studying the briefs and the applicable law, the Court files this decision.

I.

The petition for writ of prohibition filed in this Court seeks to prohibit the Honorable Judge Robert Yazzie, Judge of the Window Rock District Court, from exercising jurisdiction in the action titled The Navajo Nation et al. v. Peter MacDonald Sr., et al., No. WR-CV-89-89 [Navajo Nation v. MacDonald]. This suit seeks declaratory and injunctive relief.

Judge Yazzie entered a temporary restraining order against the defendants on March 22, 1989. A further hearing for a preliminary injunction is scheduled for 10:30 A.M. on March 24, 1989.

II.

The primary issue is whether an alternative writ of prohibition should be granted to prohibit the Window Rock District Court from exercising jurisdiction in Navajo Nation v. MacDonald.

A writ of prohibition is used essentially to test the jurisdiction of a court. Yellowhorse v. The Window Rock Dist. Ct., 5 Nav. R. 85 (1986); Plummer v. Honorable Judge Harry Brown, A-CV-03-89 (March 23, 1989). A writ of prohibition will be issued as a matter of right if the lower court clearly has no jurisdiction. Yellowhorse, 5 Nav. R. at 87. In cases where it is not clear that the district court is without jurisdiction, we are inclined to deny the petition. Yellowhorse, 5 Nav. R. at 86-87. Issuance of a writ of prohibition in such a situation is within the sound discretion of the Court. Yellowhorse, 5 Nav. R. at 86.

Petitioners argue that a writ should be issued because the Navajo Sovereign Immunity Act, 1 N.T.C. §351 et seq., [Act] bars Navajo Nation v. MacDonald. Petitioners further argue that this case is exactly like Plummer v. Honorable Judge Harry Brown, A-CV-03-89. On the other hand, Respondents argue that this case is not like Plummer because the defendants in Navajo Nation v. MacDonald are sued in

their non-official capacities. Respondents argue that the defendants have absolutely no authority to act as Navajo Nation officials.

We agree with the Respondents. In Plummer, Id., it was very clear that MacDonald v. Plummer, KY-CV-019-89, was against the Navajo Tribal Council as a body and against the council delegates performing legislative functions. All allegations in the MacDonald complaint were based upon actions taken by the Navajo Tribal Council and its delegates while engaged in legislative duties (debating and voting on resolutions). There was absolutely no doubt that the MacDonald suit was against the Navajo Nation. On the contrary, the named defendants in Navajo Nation v. MacDonald, WR-CV-99-89, are sued because they are alleged to be exercising duties as Navajo Nation officials when they have absolutely no authority to do so. The clarity we found in the MacDonald suit is not present in Navajo Nation v. MacDonald.

Whether the Act applies is not determined by who the plaintiffs are, but by who the defendants are and in what capacity the defendants are acting. The Petitioners assert that the defendants are acting in non-official capacities. The defendants assert that they are acting in their official capacities. Whether the Act will bar Navajo Nation v. MacDonald depends upon a determination as to what capacity the defendants are acting. In addition, to find whether the suit ultimately seeks relief against the Navajo Nation

depends upon a district court determination of capacity. This determination requires fact finding which this Court is not empowered to do.

The district court must find these facts and make a decision on capacity after carefully reviewing documents, legal arguments, witness testimony, and possibly Navajo cultural and traditional factors, and the public interest in having the dispute resolved.

We exercise our discretion not to issue an alternative writ in this case. The parties have a further remedy of appeal available from the final decision of the district court.

The petition for an alternative writ of prohibition is denied. The hearing on the request for a preliminary injunction shall proceed as scheduled.

Filed this 24th day of March, 1989.

Chief Justice of the Navajo Nation

Associate Justice

Associate Justice

I hereby certify that this is a true and correct copy of the instrument on file in the Supreme Court of the Navajo Nation.

Clerk of the Supreme Court

Exhibit No. 16 (continued)

A-CV-13-89

SUPREME COURT OF THE NAVAJO NATION

In the Matter of: Certified Questions I

WR-CV-99-89

The Navajo Nation, et al.,

v.

Peter MacDonald, et al.

OPINION

Before TSO, Chief Justice, BLUEHOUSE and AUSTIN, Associate Justices.

Question Certified from the Window Rock District Court, the Honorable Robert Yazzie presiding.

Per curiam.

This is a decision on one of the four questions certified to this Court by the Window Rock District Court. The question is whether the Chairman of the Navajo Tribal Council has the legal authority to appoint judges solely on his own initiative. The answer is no.

I.

On March 29, 1989, Judge Robert Yazzie of the Window Rock District Court certified four questions to this Court for decision. On March 30, 1989, we discussed the four questions and accepted them as proper questions for decision in light of Navajo Housing Authority v. Betsoi, 5 Nav. R. 5 (1984).

We also agreed that the question set forth above can

be decided without benefit of briefs from the parties. The law necessary to answer the question is clear on its face.

II.

The laws needed to answer the question, and specifically the laws governing appointment of judges to the Navajo bench, are as follows:

> **§ 251. Appointment**
> The District Courts of the Navajo Nation shall consist of such judges as shall be appointed by the Chairman of the Tribal Council, with confirmation by the Tribal Council. 7 N.T.C. § 251.
>
> **§ 355. Appointment; term of office**
> (a) The Chairman of the Tribal Council shall appoint the Chief Justice, Associate Justices, and District Court Judges with confirmation by the Navajo Tribal Council from among those recommended by the Judiciary Committee of the Navajo Tribal Council. 7 N.T.C. § 355.
>
> **§ 354. Qualifications for judicial appointment**
> The following standards and qualifications shall apply to all judicial appointments to the Courts of the Navajo Nation:
> (1) Member of Navajo Tribe and Age. An applicant shall be an enrolled member of the Navajo Tribe of Indians and shall be over thirty (30) years of age.
> (2) Criminal Convictions. An applicant shall have never been convicted of a felony, or within the year just past, of a misdemeanor.
> (3) Education/Training. Each applicant shall be a high school graduate. Higher education or technical training with A.A., B.A., or B.S. degrees shall be preferred.
> (4) Experience. Each applicant shall have at least two (2) years work experience in law related area and have a working knowledge of Tribal, federal and state laws. Those applicants with experience working with the Navajo Nation Courts or with state and federal courts will be preferred.
> (5) Knowledge in Navajo Culture and Tradition. Each applicant must be able to

speak both Navajo and English, and have some knowledge of Navajo culture and tradition. The applicant must be able to demonstrate:

(A) an understanding of the clan system; and

(B) an understanding of religious ceremonies; and

(C) an appreciation of the traditional Navajo life-style.

(6) Health. Each applicant shall produce a certificate of good health from a licensed physician.

(7) Driver's License. Each applicant shall possess a valid driver's license.

(8) No Physical Addictions. In addition to the requirement of a medical examination pursuant to subsection (6) above, each applicant must attest that he or she has no physical addictions.

(9) Writing Sample. Upon initial screening of applicants by the Judiciary Committee, those applicants selected shall submit a writing sample that illustrates the applicant's ability to clearly show organization and communicative abilities.

(10) Ethics. Each applicant shall show that he or she has neither present nor past conflicts of interests that would have the appearance of partiality or bias in cases brought in the courts of the Navajo Nation. Each applicant must demonstrate an impartial background that will indicate neutrality and fairness for proper decision making.

(11) References. Each applicant must be of good moral character and shall submit letter of reference regarding his or her application. Such letters shall outline the applicant's motivation and employment performance, and the applicant's character and capacity for honesty and impartiality.

(12) Management Ability. Each application shall show managerial skills necessary for the smooth operation of a Court. Such information as the applicant's record of supervising staff, coordinating budget and personnel requirements and verbal communication and writing abilities shall be carefully reviewed by the Judiciary Committee.

(13) Probationary Status Evaluations. A probationary judge shall submit to periodic evaluation of work performance as designated by the Judiciary Committee of the Navajo Tribal Council.

(14) Political Appointments. Each

applicant shall be selected and evaluated without regard to political affiliation or association. 7 N.T.C. § 354.

III.

The appointment of judges to the Navajo Nation bench is governed by the Navajo Tribal Code. Once a judicial vacancy is declared to exist by the Judicial Branch, a public announcement is made for submission of applications. The contents of the application, including the supporting documents, must conform to 7 N.T.C. § 354. The initial screening of applicants, which includes review of qualifications pursuant to 7 N.T.C. § 354 and interviews, is conducted by the Judiciary Committee of the Navajo Tribal Council. The power of initial screening is given to the Judiciary Committee by 7 N.T.C. §§ 355, 354(a) and 2 N.T.C. § 572(1).

The Judiciary Committee then submits a list of names of the most qualified applicants to the Chairman of the Navajo Tribal Council, Pursuant to 7 N.T.C. § 355, the Chairman of the Navajo Tribal Council must appoint the potential judge "from among those recommended by the Judiciary Committee of the Navajo Tribal Council." See also 2 N.T.C. § 572(1).

The Chairman has no independent authority to appoint a person as judge who has not been screened and recommended by the Judiciary Committee. As a collateral matter, the Advisory Committee has absolutely no authority to either recommend, not recommend, confirm, or on its own appoint a

person as judge of the Navajo Nation. All recommendations for appointment of judges are initiated by the Judiciary Committee. 2 N.T.C. § 572(1) and § 574(b)(1).

The Advisory Committee at one time had the power "to give final confirmation of appointments to ... Courts and all the other appointments which by existing law must be confirmed by the Navajo Tribal Council...." 2 N.T.C. § 343(b)(17); Navajo Tribal Council Resolution CJA-1-81 (Jan. 28, 1981). This power, as it relates to the courts, however, was superceded by the Judicial Reform Act of 1985, 7 N.T.C. § 101 et seq. 7 N.T.C. § 852 specifically repealed 2 N.T.C. § 343(b)(17). The confirmation of judges now rests exclusively with the Navajo Tribal Council pursuant to the Act.

The Chairman's appointee from the list recommended by the Judiciary Committee is sent to the Navajo Tribal Council for confirmation. 7 N.T.C. §§ 251, 355(a). Confirmation by the Navajo Tribal Council is complete when the judge receives a majority vote from those delegates voting during a duly called session of the Navajo Tribal Council. See 2 N.T.C. § 172.

The Navajo Tribal Code clearly gives the Navajo Tribal Council, and not the Chairman or Advisory Committee, the final say on which individuals are to serve as judges of the Navajo Nation. The Navajo Tribal Council also has the power to deny a judgeship to any person that the Chairman appoints as a judge. Any judge appointment made by the Chairman or the Advisory Committee without following the laws

contained in the Navajo Tribal Code is illegal and shall not be recognized as valid.

The Chairman and the Advisory Committee also have no authority to recall retired or removed judges back to service. The legally appointed Chief Justice has the authority to recall only retired judges to the bench temporarily to help relieve congestion in the courts. 7 N.T.C. § 353(i). This is part of the Chief Justice's administrative duties as supervisor of Navajo Nation judges and as the head of the Judicial Branch. 7 N.T.C. § 371.

Judges who have been removed for misconduct have no status as retired judges. Thus, they can not be recalled for temporary duty on the Navajo Nation bench. 7 N.T.C. § 353(c) and (j). A probationary judge who has been removed by the Chairman upon recommendation of the Judiciary Committee also has no status as retired judge and cannot be recalled to service. 7 N.T.C. §355(d).

The law is clear that the Chairman and the Advisory Committee have no authority to appoint judges to the Navajo bench solely on their own initiatives.

Filed this 31st day of March, 1989.

Chief Justice of the Navajo Nation

Associate Justice

Associate Justice

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Exhibit No. 16 (continued)

A-CV-09-89

SUPREME COURT OF THE NAVAJO NATION

In the Matter of J. Tonny Bowman

Navajo Nation, et al.,

v.

Peter MacDonald Sr., et al.,

OPINION

Before TSO, Chief Justice, BLUEHOUSE and AUSTIN, Associate Justices.

Per curiam.

This is a contempt proceeding arising out of willful and intentional misconduct by a member of the Navajo Nation Bar Association.

I.

1. On March 24, 1989, this Court issued an alternative writ of prohibition sua sponte to Mr. J. Tonny Bowman ordering Mr. Bowman to desist and refrain from acting as a purported judge of the Navajo Nation. The alternative writ was served on Mr. Bowman.

2. Mr. Bowman was further ordered to refrain from interfering with the work of any court of the Navajo Nation, any judge of the Navajo Nation, or staff of any court of the Navajo Nation.

3. Mr. Bowman was ordered to show cause on March

29, 1989, why the alternative writ should not be made permanent.

4. Despite the orders in the alternative writ, and on March 24, 1989, Mr. Bowman interfered with the operation of the Window Rock District Court, intimidated court staff of the Window Rock District Court, stated that he was the new Window Rock District Court judge and proceeded to hold a sham hearing in the case of Navajo Nation v. MacDonald, WR-CV-99-89.

4. Following this sham hearing Mr. Bowman entered a purported judgment dismissing the action in Navajo Nation v. MacDonald, WR-CV-99-89.

5. On March 27, 1989, this Court ordered Mr. Bowman to show cause on April 3, 1989, why he should not be held in ontempt of this Court for disobeying the alternative writ of prohibition.

6. Mr. Bowman failed to appear at his scheduled March 28, 1989 show cause hearing on why the alternative writ of prohibition should not be made permanent.

7. On March 28, 1989, this Court issued a permanent writ of prohibition to Mr. Bowman. The permanent writ found that Mr. Bowman had absolutely no authority under Navajo law to act as a judge of the Navajo Nation. Mr. Bowman's purported appointment by Advisory Committee I and by Chairman Peter MacDonald Sr. was declared illegal and held to be null and void.

8. The permanent writ of prohibition ordered Mr.

Bowman not to take any action that purports to be those of a judge exercising judicial authority and Mr. Bowman was further ordered not to interfere with the work of any court of the Navajo Nation, any judge of the Navajo Nation, or staff of any court of the Navajo Nation.

9. Despite being properly served with the notice of contempt hearing, Mr. Bowman refused to appear stating in a letter through Mr. Nelson J. McCabe that this Court had no authority to make him appear at an illegally set hearing.

10. Despite being properly served with the permanent writ of prohibition, Mr. Bowman continued to act as a purported judge of the Window Rock District Court. On April 4, 1989, Mr. Bowman issued another order purporting to remove certain non-Indian attorneys from the Navajo Reservation. The order purports to find these attorneys "misadvising, misbehaving and not conducting themselves in a professional manner." The order purports to be from the Window Rock District Court and is signed by Mr. Bowman. The order further purports to bar these attorneys from giving legal advise to their clients and generally barring these attorneys from practicing law within the Navajo Nation.

II.

The Navajo Nation Supreme Court has ultimate authority to grant or deny a person the privilege to practice law within the Navajo Nation. Courts have inherent authority to regulate attorney practice within their jurisdictions and the Navajo courts are no exception. In re Practice of law .

in Navajo Court, 4 Nav. R. 75 (1983); In re Practice of Battles, 3 Nav. R. 92, 96 (1982).

The Navajo Nation Bar Association (NNBA), pursuant to delegated power, will usually review complaints for discipline of bar members. In re Practice of Law in Navajo Courts, 4 Nav. R. 75 (1983). However, if gross misconduct occurs in proceedings before this Court, or when the member participates in a scheme to interfere with the operation or proceeding of any court of the Navajo Nation, this Court will immediately discipline the attorney. Even Navajo court rules provide for discipline by this Court:

> The Supreme Court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested by the offending counsel, take any appropriate action (including... disbarment) against any attorney or advocate ... for conduct unbecoming a member of the bar, or for failure to comply with any order of the Supreme Court.

Rule 30, NRCAP. Mr. Bowman is a prime example of when this Court must use its disciplinary power without deferring to the NNBA.

NNBA members are held to very high standards of professional conduct. This Court has held that "the advocates and counsellors practicing before the Navajo Courts are held to the same high standards of professional conduct required of lawyers under the court decisions and the rules of conduct of the American Bar Association." In re Daniel Deschinny in Contempt of Court, 1 Nav. R. 66 (1972); See also, In re Contempt of Sells, 5 Nav. R. 37, 39 (1985). Mr.

Bowman, as a member of the NNBA, is held to the standards of professional conduct set forth by the American Bar Association.

By pretending to be a district judge, holding a sham hearing, intimidating court personnel, interfering with court operations and issuing illegal and invalid orders, and disobeying this Court's orders, Mr. Bowman has violated Canon One of the Rules of Professional Responsibility. That rule directs a lawyer to assist in maintaining the integrity and competence of the legal profession. Specifically, Mr. Bowman violated this disciplinary rule:

> DR-1-102 Misconduct:
>
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> (2) Circumvent a Disciplinary Rule through actions of another.
> (3) Engage in illegal conduct involving moral turpitude.
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
> (5) Engage in conduct prejudicial to the administration of justice.
> (6) Engage in any conduct that adversely reflects on his fitness to practice law.

Mr. Bowman has also violated Canon Eight which directs Mr. Bowman to "assist in improving the legal system." Specifically, Mr. Bowman violated this disciplinary rule:

> DR-8-102 Statements concerning Judges and other Adjudicatory Officers.
> ....
> (B) A lawyer shall not knowingly make false accusations against a judge or other judicial officers.

Mr. Bowman made a statement through Mr. Nelson J. McCabe in a

letter that this Court had no authority to preside over his contempt hearing and the justices of this Court were engaged in setting illegal hearings. Mr. Bowman further intimidated Window Rock District Court staff by stating that he was the new district judge and not Judge Robert Yazzie, and he expects their cooperation.

Mr. Bowman directly violated Canon Nine which directs him to "avoid even the appearance of professional impropriety." Specifically, Mr. Bowman violated the disciplinary rule which states:

> DR-9-101 Avoiding Even the Appearance of Impropriety.
> ....
> (C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

Mr. Bowman engaged in conduct showing extreme examples of impropriety. Mr. Bowman held himself out as a judge of the district court when he was not. Mr. Bowman took over the district judge's chair and held a sham hearing which resulted in a purported judgment favoring the parties who purported to appointed him to the bench. Mr. Bowman clearly stated through his conduct that he is able to influence the outcome of the proceedings in the Window Rock District Court.

It is appropriate here to remind every member of the NNBA of their duty as set forth in Ethical Consideration 9-6, American Bar Association Code of Professional Responsibility.

> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and judges thereof; to observe the

Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

III.

Mr. J. Tonny Bowman's activities is a prime example of conduct unbecoming a member of the Navajo Nation Bar Association. For these reasons it is the order of this Court that Mr. J. Tonny Bowman is permanently disbarred from the Navajo Nation Bar Association effective this date. The Navajo Nation Bar Association is directed to notify the members of the Bar and the district courts of this Court's order.

Filed this 6th day of April, 1989.

Chief Justice of the Navajo Nation

Associate Justice

Associate Justice

Exhibit No. 16 (continued)

A-CV-13-89

SUPREME COURT OF THE NAVAJO NATION

In the Matter of: Certified Questions II

WR-CV-99-89

The Navajo Nation, et al., Plaintiffs,

v.

Peter MacDonald, et al., Defendants.

OPINION

Before TSO, Chief Justice, BLUEHOUSE and AUSTIN, Associate Justices.

Questions Certified from the Window Rock District Court, the Honorable Robert Yazzie presiding.

Per curiam.

This is a decision on the final three questions certified to this Court by the Window Rock District Court. The questions are: (1) Is the Chairman empowered to terminate a probationary judge by action of the Chairman alone; (2) Is the probationary judge required to disqualify himself from a proceeding over which the judge is presiding and in which the Chairman is a party defendant when, subsequent to the commencement of the action and entry of a restraining order by the judge against the Chairman, the Chairman purports to remove the judge and declares his intention to refuse permanent appointment to the judge; and

(3) Does the Navajo Tribal Council have the authority to relieve the Chairman of the Navajo Tribal Council and the Vice Chairman of the Navajo Tribal Council of their executive and legislative authority and place them on administrative leave with pay.

I.

On March 29, 1989, Judge Robert Yazzie of the Window Rock District Court certified four questions to this Court. On March 30, 1989, we accepted the four questions as proper questions for decision pursuant to Navajo Housing Authority v. Betsoi, 5 Nav. R. 5 (1984).

On March 31, 1989, we decided one of the four questions certified. In re: Certified Questions I, A-CV-13-89 (March 31, 1989). This Court may decide certified questions without benefit of briefs, but in this case we exercised our discretion and allowed briefs from the parties. As the temporary restraining order (TRO) entered by the Window Rock District Court was set to expire on April 6, 1989, we ordered all briefs be filed by 5:00 P.M., April 3, 1989.

On April 3, 1989, five briefs were filed with this Court. On the same date Mr. Thomas Hynes filed a "Notice of Intent to Withdraw" as counsel for the defendants. Several defendants then filed requests for an extension of time to file briefs citing Mr. Hynes' withdrawal. This Court extended the time for filing of briefs for all parties to 5:00 P.M., April 10, 1989. Under the provisions of Rule 18

of the Navajo Rules of Civil Procedure the TRO was extended for another fifteen days.

II.

Certified Question one is: Is the Chairman empowered to terminate a probationary judge by action of the Chairman alone? The answer is no. The Chairman of the Navajo Tribal Council is not empowered to act alone in either removing a probationary judge or denying a permanent appointment to a probationary judge.

The Navajo Tribal Code laws on the Judicial Branch provide two ways by which a probationary judge can be terminated. The first is by removal and the second is by denial of permanent appointment. In either case the Chairman cannot act until after the Judiciary Committee of the Navajo Tribal Council has formally acted by recommendation.

A.

The law governing removal of a probationary judge is 7 N.T.C. § 355 (d).[1]

> At any time during the probationary term of any Chief Justice, Justice or judge, regardless of the length of service of such judge, the Judiciary Committee may recommend to the Chairman of the Navajo Tribal Council that the probationary judge be removed from office. The Chairman of the Navajo Tribal Council, pursuant to such recommendation, may remove such probationary judge from office.

If a probationary judge is to be removed prior to the expiration of the probationary period, the Judiciary

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1. A construction of 7 N.T.C. § 352 is not necessary to a decision on the questions certified.

Committee must make a recommendation of removal to the Chairman. Pursuant to such recommendation, the Chairman must remove the probationary judge. No further removal proceeding is required. The removal is final.

The statute reads that "[t]he Chairman of the Navajo Tribal Council, pursuant to such recommendation, may remove such probationary judge from office." The use of the word "may" appears to give the Chairman discretion to deny the recommendation of removal; however, the actual word used in the statute is not necessarily controlling when determining whether a duty of a public official is discretionary or mandatory. If a statute directs the doing of something for the public good or for the benefit of a third person, even though worded as discretionary, it will be considered mandatory. Supervisors of Rock Island County v. United States, 71 U.S. 419 (1867); Brooke v. Moore, 60 Ariz. 551, 142 P.2d 211 (1943); State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974).

The statute providing for removal of a probationary judge is not discretionary because the statute gives the public an overwhelming and compelling interest in insuring that only qualified and ethics conscious individuals become judges. The Navajo public has an interest in a strong and independent judiciary. Navajo sovereignty is strengthened by a strong independent judiciary. For these reasons a probationary judge who has been determined to be unfit for office by the Judiciary Committee must be removed by the

Chairman. The public is protected by the removal of the judge.

B.

The law governing denial of permanent appointment to a probationary judge is 7 N.T.C. § 355 (a), (c), and (d).

> (a) The Chairman of the Tribal Council shall appoint the Chief Justice, Associate Justices, and District Court Judges with confirmation by the Navajo Tribal Council from among those recommended by the Judiciary Committee of the Navajo Tribal Council.
>
> ....
>
> (c) A probationary Chief Justice, Justice or Judge shall not be recommended for permanent appointment unless he or she has successfully completed a course of training accredited for judges and he or she has a satisfactory performance evaluation as determined by the Chief Justice and the Judiciary Committee of the Tribal Council.
>
> (d) .... At the conclusion of the two-year probationary term, the Judiciary Committee shall review the record and qualifications of each probationary judge and shall recommend to the Chairman whether or not each probationary judge has satisfactorily completed the probationary term and should be appointed to a permanent position. The Chairman shall not appoint to a permanent position any judge not recommended by the Judiciary Committee, but the Chairman, at his discretion, may appoint any judges recommended by the Judiciary Committee to permanent positions. The appointments shall be submitted to the Navajo Tribal Council for confirmation.

Upon initial appointment as a probationary judge, the judge serves a probationary term of two years. 7 N.T.C. § 355 (b). During the probationary term the judge must successfully complete a course of training accredited for judges and have a satisfactory performance evaluation as

determined by the Chief Justice and the Judiciary Committee. 7 N.T.C. § 355 (c). At the conclusion of the probationary period the judge is evaluated and recommended for or against permanent appointment.

The process for either appointment to permanent judge or denial of appointment to permanent judge begins with the Chief Justice. A recommendation either for appointment or denial of appointment to permanent judge is made by the Chief Justice pursuant to 7 N.T.C. § 371. The Chief Justice has first hand knowledge of the work of the probationary judge during the probationary term. The Chief Justice's recommendation will be based upon the training requirement and the performance evaluation required under 7 N.T.C. § 355 (c).

The Chief Justice's recommendation for either appointment or denial of appointment proceeds to the Judiciary Committee. The Committee makes an independent determination of the training requirement and whether the probationary judge has performed satisfactorily over the two year probationary term. 7 N.T.C. § 355 (c) and (d). The Judiciary Committee then makes either (1) a recommendation for appointment of the probationary judge as permanent judge or (2) a recommendation that the probationary judge be denied permanent appointment.

If the Judiciary Committee recommends that the probationary judge be denied permanent appointment, the Chairman must deny the appointment. This directive flows

from a provision in 7 N.T.C. § 355 (d) which states that "[t]he chairman shall not appoint to a permanent position any judge not recommended by the Judiciary Committee." This provision mandates a Chairman to deny an appointment to a judge recommended for denial by the Committee, because the law requires a Chairman to appoint judges to permanent positions "from among those recommended [for appointment] by the Judiciary Committee of the Navajo Tribal Council." 7 N.T.C. § 355 (a).

The Chief Justice and the Judiciary Committee have seen the performance of a probationary judge during the probationary term. The Chairman has not. The Chief Justice and the Judiciary Committee have conducted periodic evaluations of the probationary judge while on probation. The Chairman has not. The Chief Justice and the Judiciary Committee are in prime position to determine if a probationary judge is fit for continued service as permanent judge. The Chairman is required to follow the Judiciary Committee's recommendation of denial.

Different events occur if the Judiciary Committee recommends a probationary judge to a permanent position. Upon receiving the recommendation for appointment, "the Chairman, at his discretion, may appointment [the] judge recommended by the Judiciary Committee to [a] permanent position[]. The appointment[] shall be submitted to the Navajo Tribal Council for confirmation." 7 N.T.C. § 355 (d).

The words "at his discretion" seems to imply that the

Chairman can overrule the Judiciary Committee's recommendation for appointment at the outset. However, the legislative scheme for this particular statute, and others in the Judicial Reform Act of 1985, does not allow for that interpretation.

History proves that the Navajo Tribal Council intended the Navajo court system to be strong and independent. For example, in 1958, the Council stated:

> (4) In order to give adequate authority to the judges, obtain the best qualified personnel for the courts and to remove the judges, insofar as possible, from the pressure of politics in making decisions and enforcing the law, it is essential that Navajo Tribal judges hereafter be appointed rather than elected.

Navajo Tribal Council Resolution CO-69-58 (October 16, 1958). In 1985, in the Judicial Reform Act, the Council again stated:

> (9) If the Navajo Nation is to continue as a sovereign Nation and to move forward toward the reality of a three branch form of government, the Supreme Judicial Council must cease to exist, as Tribal sovereignty requires strong and independent Tribal courts to enforce and apply the law.
>
> ....
>
> (13) In furtherance of the goal of strengthening the Courts of the Navajo Nation, the Judicial Branch must have a court which will hear cases on appeal and render a final judgment based on law, equity, and tradition. The Supreme Court will be that court, a court which will have final appellate jurisdiction.
>
> (14) Title 7 of the Navajo Tribal Code must be amended in order to carry out the intent of strengthening the Navajo Nation Courts by providing for the redesignation of the Navajo Tribal Court of Appeals as the Supreme Court of the Navajo Nation.

permanent appointment the Chairman must forward that appointment to the Navajo Tribal Council for its decision.

The Chairman's discretion is limited to making known his reasons why the Judiciary Committee's recommendation for appointment must not be granted. The Chairman must send the Committee's recommendation and his reservations to the Council. The Navajo Tribal Council will make a final decision as to whether to grant permanent status to this type of probationary judge. This is how the laws governing appointment of permanent judges must be interpreted so that the checks and balances implicit in these laws will work.

This certified question concerns a letter dated March 16, 1989, wherein Chairman Peter MacDonald Sr. declined to appoint Judge Robert Yazzie as permanent judge of the Navajo Nation. Judge Yazzie has been recommended for a permanent appointment as district judge of the Navajo Nation by the Chief Justice and the Judiciary Committee of the Navajo Tribal Council. Chairman MacDonald's denial of appointment to Judge Yazzie is not final under Navajo law. The final decision rests with the Navajo Tribal Council. In addition, there is still the question of whether Chairman MacDonald has legal authority to review the appointment of Judge Yazzie. For these reasons Judge Robert Yazzie is still a valid judge of the Navajo Nation until denied appointment by the Navajo Tribal Council.

III.

Certified question two is: Is the probationary judge

required to disqualify himself from a proceeding over which the judge is presiding and in which the Chairman is a party defendant when, subsequent to the commencement of the action and entry of a restraining order by the judge against the Chairman, the Chairman purports to remove the judge and declares his intention to refuse permanent appointment to the judge? The answer is no. Like certified question one, this question arises out of a particular set of facts.

A.

On January 10, 1989, the Chief Justice recommended probationary Judge Robert Yazzie for permanent appointment. On January 13, 1989, the Judiciary Committee recommended Judge Yazzie for permanent appointment. Both recommendations were conveyed to Chairman Peter MacDonald Sr. on January 20, 1989. On March 22, 1989, Navajo Nation v. MacDonald, WR-CV-99-89, was filed in Window Rock District Court and a TRO (Temporary Restraining Order) requested. Judge Yazzie granted the TRO. On March 23, 1989, Chairman MacDonald and the other defendants filed a petition for a writ of prohibition arguing that the Navajo Nation Sovereign Immunity Act barred the action and therefore the District Court lacked jurisdiction. At the insistence of defendants' counsel, oral arguments on the alternative writ were heard at 4:00 P.M. on March 23, 1989. At approximately 5:05 P.M. on March 23, 1989, a letter dated March 16, 1989, and signed by Chairman MacDonald was delivered to the Office of the Chief Justice. The letter stated that Chairman MacDonald was declining Judge

Yazzie's permanent appointment and that from March 16, 1989, he was no longer a judge.

B.

On February 6, 1978, the judges of the Navajo Nation agreed to abide by the Code of Judicial Conduct as promulgated by the American Bar Association. Canon 3C is that part of the Code setting standards for disqualification. It states:

> **3C: Disqualification.**
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) is a party to the proceeding,

or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Although this is a certified question from the district court, where certification was consented to by counsel for the plaintiffs and counsel for Chairman MacDonald and other defendants, the Court will examine the question from the perspective of the parties.

The answers to certified questions numbers one and three makes it clear that the Chairman is only one step in the process of appointing or terminating a judge. The same is true for the Navajo Tribal Council. Thus, the interests of both parties are balanced. We will not hold that a probationary judge must disqualify himself in all matters in which any person or entity involved in his tenure as probationary judge and the permanent appointment process is a party. That will defeat the intent and legislative scheme of Title 7. The intent and legislative scheme of Title 7 is to guarantee an independent judiciary. We will not hold that intent and scheme ineffective.

If a moving party acts deliberately with an ulterior motive to provoke a judge to become biased or prejudiced against that party, the judge will not be disqualified.

Smith v. Smith, 115 Ariz. 299, 564 P. 2d 1266 (1977). "A party cannot engage in conduct which has the outward appearance of being improper, and then complain of the consequences when its conduct is taken at face value." In re Union Leadership Corp., 292 F. 2d 381, 391 (1st Cir. 1961).

The personal bias or prejudice concerning a party which is sufficient to disqualify a judge must arise from ".... an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563 (1966). "A judge's reasonable belief that a party was acting with a purpose of disqualifying him, his conclusion that such action was contemptuous and reprehensible, and even a very considerable showing of irritation, is in no way equivalent to personal bias and prejudice." In re Union Leadership Corp., Id. at 390.

Waiver of disqualification will be found where a party having knowledge of the facts upon which disqualification would be grounded asks the court to rule on material issues. State v. Chavez, 45 N.M. 161, 113 P. 2d 179, 187 (1941). In this situation the existence of the March 16, 1989 letter was unknown to this Court, to Judge Robert Yazzie and presumably to the plaintiffs at the time of the hearing on the TRO and the hearing on the request for an alternative writ. The only conclusion that the Court can reach is that defendants have waived disqualification on the

grounds that the defendants failed to move for disqualification at the outset.

It is puzzling why defendants did not ask for a writ of prohibition to Judge Yazzie on the grounds that he had been terminated as a judge and therefore had no jurisdiction to act. Instead the defendants asserted only the bar of the Sovereign Immunity Act.

If any grounds for disqualification exists, they must be asserted to Judge Robert Yazzie and ruled upon by him. In the answer to the first certified question the Court has concluded that Judge Robert Yazzie has not been terminated as judge and that he does not lack jurisdiction to hear the case of Navajo Nation v. MacDonald, WR-CV-99-89. This does not foreclose any motions for disqualification which any party may properly make to the district court.

IV.

The final certified question is: Does the Navajo Tribal Council have the authority to relieve the Chairman of the Navajo Tribal Council and the Vice Chairman of the Navajo Tribal Council of their executive and legislative authority and place them on administrative leave with pay? The answer is yes, but after certain conditions are met. The Court will approach this question as proposed by defendants' counsel, Mr. Thomas Hynes:

> The defendants would ask this Court to forget about the political ramifications of its decision. Forget about what is in the best interests of Peter MacDonald and Johnny R. Thompson. Forget about what is in the best interests of Leonard Haskie and Irving

> Billie. Forget about what is in the best interests of various members of the Tribal Council. Forget about what is in the best interests of all the politicians who are jockeying for position on the Navajo Reservation, and rather think about what is in the best interests of the Navajo People.... (Emphasis added).

Defendants' Brief on Certified Question Four at 27 (Filed April 10, 1989).

A.

What authority the Navajo Tribal Council has and what authority the Chairman and Vice Chairman have is best answered by reviewing the history of the Navajo Tribal government, the creation of the Offices of Chairman and Vice Chairman, and the allocation of powers within the Navajo government. The briefs for the parties argued these points.

We initially reject the defendants' argument that "[t]he relationship between the Chairman and Vice Chairman and the Tribal Council must be viewed in the light in which it existed in February of 1989." Defendants' Brief at 6. The Navajo government has operated in varying forms over the centuries and the history of the Navajo people goes even further back in time. It would be a mistake to consider only a minute fraction of Navajo governmental existence.

The first attempt to form a centralized government for the Navajo people occurred at Fort Sumner, New Mexico. On May 29, 1868, ten (10) Navajo men were selected by the Navajos then in captivity to serve as their delegates in consummating a treaty with the United States. One of the ten men, Barboncito, was selected by the delegates as their

Chief. General William Sherman, on behalf of the United States, recognized Barboncito as the Chief of all the Navajos. Whatever power Barboncito had over the Navajo people at that time was apparently given by General Sherman. General Sherman said:

> We will now consider these ten men your principal men and we want them to select a chief, the remaining to compose his Council for we can not talk to all the Navajos. Barboncito was unanimously elected Chief - now from this time out you must do as Barboncito tells you, with him we will deal and do all for your good. When we leave here and go to your own country you must do as he tells you and when you get to your country you must obey him....

Record of the Navajo Treaty - 1868 at 7 (K.C. Publications 1968).

In 1923, the present Navajo Tribal Council was established by regulations promulgated by the Commissioner of Indian Affairs and approved by the Assistant Secretary for Indian Affairs. The Navajo Tribal Council was "created [as] a continuing body to be known as and recognized as the 'Navajo Tribal Council' with which administrative officers of the [United States] government may directly deal in all matters affecting the tribe." Regulations Relating to the Navajo Tribe of Indians § 3 (January 7, 1923).

The original Tribal Council was selected to act on behalf of the Navajo people in approving mineral leases on Navajo lands. R.W. Young, A Political History of the Navajo Tribe (1978); see also, Brief of Carol K. Retasket at 13; Brief of Amicus Curiae on Behalf of Plaintiffs at 4. The

regulations further established the positions of Chairman and Vice Chairman of the Navajo Tribal Council. The Chairman was to be elected by the Council delegates by majority vote from outside the Council membership, and the Vice-Chairman was to be elected from the Council membership. Regulations at § 10.

In the summer of 1923, the newly created Tribal Council adopted the form of government proposed by the Commissioner's regulations and thereby agreed to the creation of the Offices of Chairman and Vice Chairman. The original Tribal Council elected its first Chairman, Chee Dodge, from outside its membership on July 7, 1923. The Vice-Chairman was not elected until 1928. The first public election of the Chairman and Vice Chairman was not until 1938. R.W. Young, A Political History of the Navajo Tribe (1978).

The original Navajo Tribal Council wasted no time in exercising authority as the governing body of the Navajo Nation. In 1923, the Council gave the Commissioner to the Navajo Tribe broad power of attorney to sign oil and gas leases on behalf of the Navajo Nation. The Council revoked this power in 1933. R.W. Young, A Political History of the Navajo Tribe (1978).

In the ensuing years the Council gave the Office of Chairman authority to appoint executive committees to oversee routine tribal matters, to sign business documents on behalf of the Council, and to create plans of operations and approve modifications to tribal enterprises to facilitate tribal funds. Salaries were even approved for the Chairman and Vice

Chairman. Navajo Tribal Council Resolutions of April 10, 1937; July 19, 1937; October 14, 1949; and May 8, 1951.

The Council's delegation of authority to the Office of Chairman increased substantially since the 1930s. The Navajo Tribal Code is replete with laws proving the source of power to be exercised by the Chairman and Vice Chairman is the Navajo Tribal Council as the governing body of the Navajo Nation. Some examples are: (1) 2 N.T.C. § 343 (c)(1) which allows the Chairman to chair the Advisory Committee; (2) 2 N.T.C. § 374 (b) (5) which empowers the Chairman and the Budget and Finance Committee to review and approve contracts, subcontracts, and agreements which do not exceed $50,000.00; and 2 N.T.C. § 1001 which outlines the powers and duties of the Chairman and Vice Chairman as follows:

> (a) The Chairman of the Navajo Tribal Council shall preside over the deliberations of the Council and shall also act with full authority as the chief executive officer of the Tribe's administrative organization in the conduct, supervision, and coordination of Tribal programs as approved by the Council. He shall have ultimate responsibility for the proper and efficient operation of all Tribal executive divisions and departments. He shall represent the Tribe in negotiations with governmental and private agencies and meet with many Off-Reservation organizations and groups in order to create favorable public opinion and good will toward the Navajo Tribe. The Chairman shall appoint various standing Committees, including the Advisory Committee,, within the Council, boards and commissions within and outside the Council, to help in determining Tribal policy and procedures and to suggest appropriate action on resolutions.
>
> The Chairman's functions include but are not limited to those set out in this subsection.
>
> (b) The Vice-Chairman of the Tribal

> Council, during the absence of the Chairman, shall preside over Tribal Council meetings and when so directed by the Chairman, perform designated duties of the chief executive officer. The Vice-Chairman may preside over meetings of the Advisory Committee and can sign documents on behalf of the Tribe when authorized by the Tribal Council.

Even the statutes say that the Chairman is "Chairman of the Navajo Tribal Council" and not of the Navajo Nation. 2 N.T.C. § 281 (a). The same is true for the Vice Chairman of the Navajo Tribal Council. 2 N.T.C. § 282 (a).

After reviewing the history of the relationship between the Council and the Chairman and Vice Chairman we conclude all authority of the Offices of Chairman and Vice Chairman are derived from the Council. The powers are incumbent in the Offices to be exercised by those people elected by the Navajo people to these two Offices. The powers are there to be exercised in the best interests of the Navajo people.

There is nothing in either the history of the present Navajo government or in the Tribal Code to support the argument that the source of the Chairman's and Vice Chairman's governmental authority is the voting public. In addition, there is nothing to support the argument that the Offices of Chairman and Vice Chairman are independent and separate from the Navajo Tribal Council. They all live in the same hogan and need each other to function.

The Navajo Tribal Council clearly has authority to withdraw, limit, or supervise the exercise of power it gives to the Offices of Chairman and Vice Chairman. The power to

create an office and delegate authority to that office includes the power to abolish, withdraw, limit, or supervise exercise of those powers by the office holder. The Navajo Tribal Council can prevent a Chairman or Vice Chairman from exercising certain powers it has delegated to the Offices of Chairman and Vice Chairman and the Council can specify how those powers can be exercised. The latter has frequently been done by the Council as shown by the history of the Navajo government.

B.

The question then arises whether the Navajo Tribal Council can place a Chairman or Vice Chairman on administrative leave with pay. The answer is yes, because the power to place these officials on leave is a part of the power the Council has to withdraw, limit, or supervise the exercise of powers it has bestowed on the Offices of Chairman and Vice Chairman.

Arguments are made that a Chairman or Vice Chairman cannot be put on administrative leave with pay because there are no provisions in the Navajo Tribal Code for placing these public officials on leave. True, such provisions are not in the Code, but to so hold ignores the fact that the Offices of Chairman and Vice Chairman were created by the Council and whatever powers are incumbent in those Offices were placed there by the Council. Without the Council giving and defining those powers the Chairman's or Vice Chairman's powers would not exist. If a Chairman or Vice Chairman is

not exercising powers as defined by the Council, or if the powers are not exercised in the best interests of the Navajo people, or if the powers are being used to provide for personal gain or profit, then surely the Council can restrict use of those powers.

Arguments are also made that placing a Chairman or Vice Chairman on administrative leave with pay is the same as removal of these officials from office. We disagree.

The Navajo Personnel Policies and Procedures, appended as Memorandum No. 1 to Title Two of the Navajo Tribal Code, is instructive on administrative leave. Section 14, labeled administrative detail, states:

> In unusual circumstances, involving expediency or necessity, it may be necessary for an employee to absent himself from his regular duties and enter upon a period of administrative detail for such purposes and duties as may be determined to be in the best interest of the Tribe.... After completing this special administrative detail to the fullest satisfaction of the Tribe, the employee shall be entitled to return to his same job with commensurate fringe benefits.

The test for whether the official is on administrative leave is as follows. Within the Navajo Nation, administrative leave is invoked in unusual circumstances, involving expediency or necessity, for such purposes as may be determined to be in the best interests of the Navajo Nation. The leave must be for a specified period of time, and during this time the employee is to absent himself from his regular duties. Administrative leave does not remove a person from his position. The person is

entitled to return to his same job with commensurate fringe benefits after the Tribe is fully satisfied that the person may resume his duties.

In contrast to administrative leave, removal is the dismissal of an official from office. Black's Law Dictionary 1164 (5th ed. 1979). The official removed has no further ties to the office from which removed, no right to exercise powers of the office, no position or title, and no attendant pecuniary benefits. The removed official is not entitled to return to his same job and he cannot assume and exercise the powers incumbent in the office.

Although the Chairman and Vice Chairman receive pecuniary and other fringe benefits from their positions, this Court is not holding that the Navajo Personnel Policies and Procedures apply to these officials. Section 14 of the Personnel Policies is used only to establish the test to be used by the district court in determining whether an official is on administrative leave or is in fact removed.

C.

Certain grounds must exist before the Navajo Tribal Council can consider placing a Chairman or Vice Chairman on administrative leave. No Chairman or Vice Chairman should be placed on leave simply because a majority of the Tribal Council disagree with his policies or because of a personality conflict between these officials.

Public officials serving in the Navajo government, no matter what position they hold, are trustees of the Navajo

people. These government officials occupy a fiduciary relationship to the Navajo people. The Navajo people have placed a high degree of trust in these officials, therefore, Navajo government officials owe an undivided duty to the Navajo people to serve the best interests of the Navajo people.

All Navajo government officials are obligated to exercise the powers of their offices honestly, faithfully, legally, ethically, and to the best of their abilities, in a way which is beyond suspicion of irregularities. In short, these officials are obligated to perform primarily in the best interests of the Navajo people. The Navajo people do not expect their officials to exercise powers corruptly or use powers for personal gain or profit. In fact, 2 N.T.C. § 1001 places a duty on the Chairman to "represent the Tribe in negotiations with governmental and private agencies and meet with many off-reservation organizations and groups in order to create favorable public opinion and good will toward the Navajo Tribe." (Emphasis added).

The Navajo traditional concept of fiduciary trust of a leader (naat'aanii) is just as relevant here. After the epic battles were fought by the Hero Twins, the Navajo people set on the path of becoming a strong nation. It became necessary to select naat'aaniis by a consensus of the people.

A naat'aanii was not a powerful politician nor was he a mighty chief. A naat'aanii was chosen based upon his ability to help the people survive and whatever authority he

had was based upon that ability and the trust placed in him by the people. If a naat'aanii lost the trust of his people, the people simply ceased to follow him or even listen to his words. The naat'aanii indeed was expected to be honest, faithful and truthful in dealing with his people.

The Navajo Tribal Council can place a Chairman or Vice Chairman on administrative leave with pay if they have reasonable grounds to believe that the official seriously breached his fiduciary trust to the Navajo people and if the leave will be in the best interests of the Navajo Nation. Leave which is in the best interests of the tribe will serve to protect the tribe against conduct which threatens or has some direct effect on the property and resources of the tribe, or the political integrity, economic security or health, safety, and welfare of the tribe.

Serious allegations pointing to breach of fiduciary duties of the Chairman or Vice Chairman solicited under oath by a properly authorized investigatory body qualify as grounds for placing the official on administrative leave with pay. These allegations of misconduct may involve fraud, bribery, receipt of kickbacks, or of the official's involvement in a conspiracy to coverup misconduct, or to personally profit from transactions involving Navajo public property. A Chairman or Vice Chairman may be put on administrative leave if serious allegations of criminal activity are lodged against him which if brought in a state or federal tribunal would be charged as a felony.

Serious allegations of any of the factors given in 11 N.T.C. § 211 combined with some evidence of those allegations are also grounds for placing a Chairman or Vice Chairman on administrative leave. Administrative leave may be an option prior to initiating proceedings for removal under this section. Serious allegations combined with some evidence that a Chairman or Vice Chairman may have violated a tribal law which if proven true would subject the official to removal is another ground.

If a felony charge is actually brought against a Chairman or Vice Chairman in a federal or state court, or if either a criminal charge or civil suit stemming from violation of the public trust is brought against these officials in Navajo court, then those grounds may be used to place the official on administrative leave.

D.

The question finally posed is what are the due process requirements, if any, attendant to the process of putting a Chairman or Vice Chairman on administrative leave. The Navajo Nation Bill of Rights, 1 N.T.C. § 3 (1986), states:

> Life, liberty and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law. Nor shall such rights be deprived by any bill of attainder or ex post facto law.

Navajo law governs the interpretation of due process under the Navajo Bill of Rights and the Indian Civil Rights Act, 25 U.S.C. § 1302 (8) (1968). Billie v. Abbott, A-CV-34-87 (November 10, 1988). Due process under the Navajo Bill of Rights and the Indian Civil Rights Act

> must be interpreted in a way that will enhance Navajo culture and tradition.... To enhance the Navajo culture the Navajo courts must synthesize the principles of Navajo government and custom law. From this synthesis Navajo due process is formed.
>
> When Navajo sovereignty and cultural autonomy are at stake, the Navajo courts must have broad based discretion in interpreting the due process clauses of the ICRA and NBR, and the courts may apply Navajo due process in a way that protects civil liberties while preserving Navajo culture and self-government.

Billie v. Abbott, Id at 20.

The right to a due process hearing is required only upon a showing of governmental action which adversely affects a person's life, liberty or property interest. Yazzie v. Jumbo, 5 Nav. R. 75, 76 (1986). Procedural due process requires notice, an opportunity to be heard and to defend before a tribunal with jurisdiction to hear the matter. Yazzie, Id at 76.

Any due process requirements attendant to placing a Chairman or Vice Chairman on administrative leave will depend upon a finding that the official's life, liberty or property interest has been adversely affected by Navajo governmental action. In a prior case involving an elected official we said, "an elected official does not have a property right in

public office." In re Removal of Katenay, A-CV-26-88 (March 14, 1989), at 8.

However, as in Katenay, a statutory scheme can be the source of due process rights for an elected official. Id at 8. There are a number of basic protections which the Navajo Tribal Council should afford while placing a Chairman or Vice Chairman on administrative leave. These are: (1) the Navajo Tribal Council must act in a properly convened session with a quorum as established in the Navajo Tribal Code; (2) an agenda must be properly adopted by the Council although procedures for presentation of resolutions and for voting on resolutions are within the power of the Tribal Council; (3) the resolution placing a Chairman or Vice Chairman on administrative leave must pass by a majority vote of the Navajo Tribal Council present, see 2 N.T.C. § 172 (b); and (4) the resolution placing a Chairman and Vice Chairman on administrative leave must not be a bill of attainder.

A bill of attainder is apparently unknown to traditional Navajo culture. The parties did not argue anything from Navajo culture or tradition which would satisfy the elements of a bill attainder as commonly defined by American law.

We adopt the common definition of bill of attainder, therefore, under the Indian Civil Rights Act and Navajo Bill of Rights, a bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable person or group without the protections of trial in the

Navajo courts. This definition has two elements: first, an element of punishment must be inflicted by some tribal authority other than tribal judicial authority; and second, an element of specificity, that is, a singling out of an individual or identifiable group for infliction of punishment.

Nixon v. Administrator of General Services, 433 U.S. 425 (1977), recognizes three tests for determining whether punishment is present. These tests are adopted by this Court. The first test is the historical experience test. This test determines punishment in terms of what historically has been regarded as punishment for purposes of bills of attainder and bills of pains under the law of England and the United States. The historical test may include what historically has been regarded as punishment under Navajo common law. See In re Estate of Belone, 5 Nav. R. 161 (1987), for discussion of Navajo common law. The second test is the functional test. This test considers the extent to which a law challenged as a bill of attainder furthers any nonpunitive purposes underlying the law. The third test is the motivational test. The inquiry here is whether the legislative record evinces a legislative intent to punish.

The district court will determine whether a resolution passed by the Navajo Tribal Council placing a Chairman and Vice Chairman on administrative leave with pay is a prohibited bill of attainder. The district court will use the elements set forth above to make that determination.

Exhibit No. 16 (continued)

Filed this 13th day of April, 1989.

Chief Justice of the Navajo Nation

Associate Justice

Associate Justice

By the order of and
for the Supreme Court
the Navajo Nation

the Supreme Court

Exhibit No. 17

E-12
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USCR

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January 16, 1990

Brian Miller
U. S. Commission on Civil Rights
1121 Vermont Avenue, NW, Room 800
Washington, D.C. 20425

Dear Brian:

In response to your recent inquiry, yes, the ACLU does receive on a regular basis complaints against tribes for violating the Indian Civil Rights Act. I know of at least six such requests within the past 12 months. I will list them for you briefly.

1. A tribal member in eastern Washington called my office in October and alleged harassment by police and discriminatory actions by the tribal courts. When I asked if a letter to the tribal chairman might help, the caller asked me not to send such a letter because it probably would result in this person's termination from tribal employment.

2. A tribal member in South Dakota wrote my office in August complaining about a wrongful termination from tribal employment.

3. A tribal member from a Wyoming tribe claimed that he was impermissibly denied bail by a tribal court judge. The caller asked whether he could sue for damages now that he had been released.

4. A tribal member in Oklahoma claimed that a tribal court wrongfully had given his land assignment to another person.

5. A tribal member in South Dakota wrote my office alleging that she had been terminated from her tribal employment in retaliation for exercising her free speech.

6. A tribal member in Wyoming wrote a few weeks ago alleging that she had been terminated from her tribal employment for exercising her free speech and in violation of the tribe's own grievance procedures.

Brian Miller
January 16, 1990
Page Two

I'm enclosing a copy of the ACLU National Board's resolution regarding the ICRA.

Sincerely yours,

Stephen L. Pevar

Stephen L. Pevar

SLP:cmd

Enclosure

5. Richard Zacks currently occupies all three positions -- Treasurer of the ACLU; Treasurer of the ACLU Foundation; and Chairman of the BAI Committee. If he resigns as Treasurer of the ACLU, that vacancy may be filled for the remainder of his term (until October 1989) by the ACLU Board of Directors (Section 8 (A) of the ACLU Constitution). We propose that James C. Calaway, a member of the Union, be elected to fill that term in the event of Richard Zacks' resignation.

5. Consolidation of Organizational Committees

The Board adopted the following proposals:

1. The Ad Hoc Development Committee be terminated;

2. The Affiliate-Chapter Committee be terminated;

3. The proposal to create a Long-Range Planning Committee be withdrawn;

4. The new committee to review fundraising rules proceed with an expanded agenda; and

5. The Executive Committee should review the list of items proposed in 1988 by Fred Epstein as an agenda for the Long-Range Planning Committee to decide whether any specific item or items justifies further study at this time.

6. Report of the Indian Rights Committee on Proposed Legislation to Extend Jurisdiction of Federal Courts over Indian Tribes and Tribal Courts.

The Board adopted the following resolution:

"The ACLU, consistent with its support of both tribal rights and individual rights as set out in Policy #313, supports legislation and programs aimed at assisting tribes to improve their judicial systems and the enforcement of Section 1302 of the Indian Civil Rights Act, assisting the tribes which desire constitutional revision and reform of their tribal governments.

"The ACLU reiterates its support for some form of federal judicial review for violations of the ICRA but does not support the Hatch Bill as introduced.

"The Board requests that the Indian Rights Committee and the staff consider the policy issues involved in judicial review and report back to the Board with recommendations."

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