

**2003 TRIBAL LAW & GOVERNANCE CONFERENCE
CASE RECONSIDERATION**

**BEFORE THE SUPREME COURT OF
THE AMERICAN INDIAN NATIONS**

**Julia Martinez,
Petitioner**

v.

**Santa Clara Pueblo,
Respondents.**

2003 Term

*First Decided by the
Supreme Court of the United States of America
on May 15, 1979
436 U.S. 49 (1979)*

*To be reargued and re-decided by the
Supreme Court of the American Indian Nations*

DECISION AND ORDER OF THE COURT

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CHIEF JUSTICE

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This case arises on Motion for Rehearing granted August 15, 2003 for the purpose of reconsidering the decision of the Supreme Court of the United States, first rendered in this case on May 15, 1978.¹

The facts of the case are straightforward. The Santa Clara Pueblo enacted an ordinance denying tribal membership to female members who marry outside the tribe. Male members who marry outside the tribe are entitled to tribal membership.

The sole legal question presented is whether federal courts may grant relief under the equal protection guarantees of the Indian Civil Rights Act of 1968 (ICRA). The Supreme Court of the United States held that the Act did not waive tribal sovereign immunity for suit in federal courts.² For the reasons set forth below, we affirm.

I. BACKGROUND

On December 15, 1939, the Santa Clara Pueblo legislature passed the following ordinance:

Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo.

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. That Children 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.³

As a result of the 1939 enactment, Appellant Audrey Martinez and her siblings were not eligible for membership because their mother, Appellant Julia Martinez, married a Navajo man.

Appellants filed a lawsuit in the United States District Court for New Mexico after unsuccessful attempts to convince the Santa Clara Pueblo to change its law. The District Court reviewed the case on the grounds that the ICRA authorized civil suits in federal court for declaratory and injunctive relief. Proceeding to the merits of the case,

the District Court held that the tribal ordinance did not violate Appellants' civil rights.

The United States Court of Appeals for the Tenth Circuit upheld the District Court's determination that the ICRA provided a jurisdictional basis for federal review. The Supreme Court of the United States reversed, holding that the Santa Clara Pueblo enjoyed sovereign immunity from suit, which was not abrogated by the ICRA.

II. THE INDIAN CIVIL RIGHTS ACT

In 1968, the Congress of the United States enacted the ICRA.⁴ The ICRA provides in 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." As Appellants note, the manifest purpose of the ICRA was to impose enumerated standards of the United States Constitution on Indian tribes. Such a purpose is paternalistic, at best, and presumes that all Indian tribes provide inferior civil rights protections.

The ICRA contains only one express federal court remedy -- the writ of *habeas corpus* from tribal custody.⁵ The Supreme Court of the United States aptly held this remedy exclusive to all others as far as federal court jurisdiction is concerned.

III. RATIONALE FOR THE 1978 DECISION AND ANALYSIS

Before turning to the question presented, it is first necessary to review the decision rendered in this case by the Supreme Court of the United States in 1978, and the arguments now presented by counsel urging reversal and affirmance of the decision.

The initial line of inquiry of the Supreme Court of the United States was whether a federal court may pass on the validity of a tribal law. Because federal courts are courts of limited jurisdiction, a federal statute must provide the basis for federal jurisdiction.

In the present case, the Defendant at the District Court level was an Indian tribe, immune from suit under the well-established doctrine of sovereign immunity. Therefore, the Supreme Court examined the ICRA to determine whether Congress had expressly abrogated tribal sovereign immunity. Although we agree with the ultimate conclusion of the Supreme Court, we disagree with this rationale.

The Supreme Court failed to question the source of congressional authority to pass the ICRA in the first instance. Further the Supreme Court failed to question how Congress derives the power to waive a tribe's sovereign immunity to suit in any court.

The Supreme Court correctly noted that "Indian tribes are 'distinct, independent political communities, retaining their natural rights' in matters of local

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self-government.”⁶ The Supreme Court correctly characterized the power of tribal self-government when it noted that tribes “have power to make their own substantive law in internal matters . . . and to enforce that law in their own forums.”⁷ Tribes pre-existed the United States and have been regarded as unconstrained by the United States Constitution.⁸

The Supreme Court incorrectly assumed in this case, and countless others, that the Congress of the United States “has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”⁹ In this instance, the Supreme Court reviewed the ICRA to find a waiver of sovereign immunity, with the assumption that Congress possesses the authority to waive a tribe’s immunity.¹⁰

In previous decisions, this Court has considered whether other acts of the United States Congress were constitutional. In this Court’s previous decisions in *Lone Wolf v. Hitchcock*,¹¹ and *Kagama v. United States*,¹² it was decided that interpretations of the United States Constitution rendered by the U.S. Supreme Court were final and not within the purview of this Court.¹³

We held that, just as the highest court of any tribe is the final authority on the law of that tribe and should not be reviewed by other sovereigns on the meaning of tribal law, so the United States Supreme Court is the highest authority on United States domestic constitutional law.

Nonetheless, with respect to *Lone Wolf* and in *Kagama*, the American Indian Nations Supreme Court reviewed the question of whether the United States possessed “plenary power” over Indian nations under the United States Constitution, in the spirit of creating a legal dialogue between sovereigns regarding the continued vitality of the so-called plenary power doctrine of Federal Indian Law.¹⁴ In that same spirit, we proceeded to resolve the question of whether the United States Constitution vests authority in the United States Congress to enact the ICRA.

We noted that it is a well-established principle of American law that any Congressional enactment must be based on the enumerated powers in the Constitution.¹⁵ A review of the Supreme Court’s decision below indicates that Congress’s power to enact this statute was and continues to be presumed as a matter of fact. This has been the norm of Supreme Court precedent since *Kagama*. In *Kagama*, the Supreme Court noted that neither the Indian Commerce Clause nor the “Indians not taxed” provisions provide Congress with the authority to broadly enact legislation in Indian country.¹⁶

Nonetheless in *Kagama*, and the cases that followed through to *United States v. Lara*, the Supreme Court permits Congress full discretion to legislate in Indian affairs under the highly suspect doctrine of plenary power.¹⁷ The plenary power doctrine is a colonial myth rooted in imperialist history of the late nineteenth century policies of the

United States with respect to Indian and foreign relations that should be, for that reason, rejected and abandoned.¹⁸

In the Supreme Court's decision below, the federal courts lacked jurisdiction on the sole basis of statutory interpretation. Because the Supreme Court interpreted the ICRA as providing only habeas review of tribal governmental actions, the case below was dismissed. The Supreme Court's approach to this case continues a long pattern of the federal courts ignoring the sovereignty of indigenous nations.

In passing the ICRA, Congress is purporting to "extend" certain civil rights to individuals who come within the power of tribal governmental action. Congress ignores in the passage of the ICRA that tribal governments operate under their own laws, many of which include civil and community rights guarantees. In reviewing the legality of the ICRA and interpreting whether ICRA extends jurisdiction to federal courts, the Supreme Court should have addressed the impact of congressional action and subsequent federal review in light of tribal self-determination. At a base level, the ICRA's interference with tribal self-governance is yet another reason Congress lacked authority in this matter.

We do agree with the Supreme Court's emphasis, in dicta, on the importance of ensuring that determinations of tribal citizenship are retained exclusively in the tribal government. The Supreme Court rightly noted that "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."¹⁹

IV. CONCLUSION

The U.S. Supreme Court reached a conclusion in this case that this Court affirms: the federal courts lack jurisdiction to review tribal governmental actions. We depart significantly from the U.S. Supreme Court on the reasons for this conclusion. The foremost factor for consideration in this instance is the self-determination of the Santa Clara Pueblo. Any federal review of tribal decisions is an unlawful intrusion on the sovereignty of indigenous nations. Only indigenous nations possess the authority to consent to suit.

Notes

- * The composition of the Court for the 2003 Term includes: Chief Justice Stacy L. Leeds (Cherokee), Justice for the Cherokee Nation and Chief Justice, Kickapoo Tribe of Oklahoma; Associate Justice JoAnn Cook (Little Traverse Band), Chief Judge for the Little Traverse Band of Ottawa and

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Chippewa Indians; Associate Justice Gloria Valencia-Weber, Professor of Law, University of New Mexico; Associate Justice Sarah Deer (Muscogee Creek), Staff Attorney, Tribal Law & Policy Institute; Associate Justice Angela Riley (Citizen Potawatomi Nation), Justice, Supreme Court of the Citizen Potawatomi Nation.

1. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
2. *Id.* at 59.
3. Cited as “The 1939 Ordinance” in briefs submitted to the United States Supreme Court; *see* Brief for the Petitioner at *4, *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978) (No. 76-682); Brief for the Respondent at *3, *Santa Clara Pueblo*, 436 U.S. 39.
4. 25 U.S.C. §§ 1301-1303 (1968).
5. *Id.* § 1303.
6. *Santa Clara Pueblo*, 436 U.S. at 55.
7. *Id.* at 55-56.
8. *Talton v. Mayes*, 163 U.S. 376 (1896).
9. *Santa Clara Pueblo*, 436 U.S. at 56.
10. *Id.*
11. 187 U.S. 553 (1903); *see also* *Lone Wolf v. Hitchcock*, 8 KAN. J.L. & PUB. POL’Y 174 (1999).
12. 118 U.S. 357 (1886); *see also* Robert B. Porter, *The 4th Annual Tribal Law & Governance Conference: October 12-14, 2000, University of Kansas, Lawrence, Kansas: Decision from the American Indian Nations Supreme Court*, 10 KAN. J.L. & PUB. POL’Y 465 (2001).
13. *See Lone Wolf*, 187 U.S. 553 ; *Kagama*, 118 U.S. 357.
14. *See Lone Wolf v. Hitchcock*, 8 KAN. J.L. & PUB. POL’Y 174 (1999); Robert B. Porter, *supra* note 12.
15. *U.S. v. Lopez*, 514 U.S. 549, 552 (1995).
16. *Kagama*, 118 U.S. at 387.
17. *See generally id.*; *U.S. v. Lara*, 124 S. Ct. 1628 (2004).
18. *See generally* G. William Rice, C.J., *Johnson v. M’Intosh Reargument: Joshua Johnson & Thomas J. Graham’s Lessee, Plaintiff, v. William M’Intosh, Defendant: No. 99-01*, 9 KAN. J.L. & PUB. POL’Y 889, 192 (2000).
19. 436 U.S. 49, 70.