SUPREME COURT OF THE UNITED STATES

No. 99–1994

NEVADA, ET AL., PETITIONERS *v.*
FLOYD HICKS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2001]

JUSTICE STEVENS, with whom JUSTICE BREYER joins, concurring in the judgment.

While I join the Court's disposition of the case for the reasons stated by JUSTICE O'CONNOR, I do not agree with the Court's conclusion that tribal courts may not exercise their jurisdiction over claims seeking the relief authorized by 42 U. S. C. §1983.[1] I agree instead with the Solicitor General's submission that a tribal court may entertain

[1] As an initial matter, it is not at all clear to me that the Court's discussion of the §1983 issue is necessary to the disposition of this case. *Strate* v. *A–1 Contractors,* 520 U. S. 438 (1997), discusses the question whether a tribal court can exercise jurisdiction over nonmembers, irrespective of the type of claim being raised. See *id.*, at 459, n. 14 ("When . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by [the main rule in] *Montana* [v. *United States,* 450 U. S. 544 (1981)], . . . it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct"). Cf. *El Paso Natural Gas Co.* v. *Neztsosie,* 526 U. S. 473, 482, n. 4 (1999) ("*Strate* dealt with claims against nonmembers arising on state highways, and 'express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation'"). Given the majority's determination in Part II that tribal courts lack such jurisdiction over "state wardens executing a search warrant for evidence of an off-reservation crime," *ante*, at 3, I fail to see why the Court needs to reach out to discuss the seemingly hypothetical question whether, if the tribal courts *had* jurisdiction over claims against "state wardens executing a search warrant," they could hear §1983 claims against those wardens.

such a claim unless enjoined from doing so by a federal court. See Brief for United States as *Amicus Curiae* 24–30.

The majority's analysis of this question is exactly backwards. It appears to start from the assumption that tribal courts do not have jurisdiction to hear federal claims unless federal law expressly grants them the power, see *ante*, at 13, and then concludes that, because no such express grant of power has occurred with respect to §1983, tribal courts must lack the authority to adjudicate those claims. *Ibid.* ("[N]o provision in federal law provides for tribal-court jurisdiction over §1983 actions"). But the Court's initial assumption is deeply flawed. Absent federal law to the contrary, the question whether tribal courts are courts of general jurisdiction is fundamentally one of *tribal* law. Cf. *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 478 (1981) (State-court subject-matter jurisdiction is "governed in the first instance by *state law*" (emphasis added)).[2] Given a tribal assertion of general subject-matter jurisdiction, we should recognize a tribe's authority to adjudicate claims arising under §1983 unless federal law dictates otherwise. Cf. *id.*, at 477–478 ("[S]tate courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication").[3]

– – – – –

[2] This principle is not based upon any mystical attribute of sovereignty, as the majority suggests, see *ante*, at 12, but rather upon the simple, common-sense notion that it is the body creating a court that determines what sorts of claims that court will hear. The questions whether that court has the power to compel anyone to listen to it and whether its assertion of subject-matter jurisdiction conflicts with some higher law are separate issues.

[3] The majority claims that "*Strate* is [the] federal law to the contrary'" that explains its restriction of tribal court subject-matter jurisdiction over §1983 suits. *Ante*, at 13, n. 7. But *Strate* merely

I see no compelling reason of federal law to deny tribal courts the authority, if they have jurisdiction over the parties, to decide claims arising under §1983. Section 1983 creates no new substantive rights, see *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 617 (1979); it merely provides a federal cause of action for the violation of federal rights that are independently established either in the Federal Constitution or in federal statutory law. Despite the absence of any mention of state courts in §1983, we have never questioned the jurisdiction of such courts to provide the relief it authorizes.[4]

Moreover, as our decision in *El Paso Natural Gas Co.* v.

– – – – – –

concerned the circumstances under which tribal courts can exert jurisdiction over claims against nonmembers. See 520 U. S., at 447–448. It most certainly does *not* address the question whether, assuming such jurisdiction to exist, tribal courts can entertain §1983 suits. Yet the majority's holding that tribal courts lack subject matter jurisdiction over §1983 suits would, presumably, bar those courts from hearing such claims even if jurisdiction over nonmembers would be proper under *Strate*. Accordingly, whatever else *Strate* may do, it *does not* supply the proposition of federal law upon which the majority purports to rely.

Of course, if the majority, as it suggests, is merely holding that §1983 does not *enlarge* tribal jurisdiction beyond what is permitted by *Strate*, its decision today is far more limited than it might first appear from the Court's sometimes sweeping language. Compare *ante*, at 15 ("[T]ribal courts cannot entertain §1983 suits"), with *ante*, at 12, n. 7 ("We conclude (as we must) that §1983 is not . . . an enlargement [of tribal-court jurisdiction]"). After all, if the Court's holding is that §1983 merely fails to "enlarg[e]" tribal-court jurisdiction, then nothing would prevent tribal courts from deciding §1983 claims in cases in which they properly exercise jurisdiction under *Strate*.

[4] The authority of state courts to hear §1983 suits was not always so uncontroversial. See, *e.g.*, Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv. L. Rev. 1486, 1497, n. 62 (1969) ("State courts have puzzlingly hesitated on whether they have jurisdiction over §1983 claims as such, and no case has been found in which a state court granted relief under the section. In one case a state supreme court adopted the expedient of disavowing a position on jurisdiction while denying recovery on the merits").

Neztsosie, 526 U. S. 473 (1999), demonstrates, the absence of an express statutory provision for removal to a federal court upon the motion of the defendant provides no obstacle whatsoever to the granting of equivalent relief by a federal district court. See *id.*, at 485 ("Injunction against further litigation in tribal courts would in practical terms give the same result as a removal . . ."). "Why, then, the congressional silence on tribal courts? . . . [I]nadvertence seems the most likely [explanation] . . . . Now and then silence is not pregnant." *Id.*, at 487. There is really no more reason for treating the silence in §1983 concerning tribal courts as an objection to tribal-court jurisdiction over such claims than there is for treating its silence concerning state courts as an objection to state-court jurisdiction.

In sum, I agree with the interpretation of this federal statute that is endorsed by the Solicitor General of the United States.