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TRIBAL SOVEREIGNTY AND CIVIL RIGHTS ENFORCEMENT

Briefing Paper Prepared for the U.S. Commission on Civil Rights
by the Office of the General Counsel
February 3, 1986

I. Introduction

Indian tribes are unique in the American legal and political systems. They are semi-sovereign nations that happen to be located within the territorial borders of the United States and, at the same time, they are also political entities that are subordinate to the Federal government and subject to Congressional directives.

The policy that the government should pursue with regard to Indians varies radically depending on which of the above two paradigms one favors. In one case, if Indian tribes should be treated as semi-sovereign nations, then policies leading to greater Indian self-determination and autonomy are appropriate. If Indian tribes are better viewed as dependent political entities, however, then policies encouraging tribes to conform to political and judicial standards found in non-Indian contexts are more desirable.

United States policies towards Indians have vacillated greatly between these two models over time, and statutes enacted during different periods reflect the prevalent beliefs of their eras. The body of Federal Indian law is thus complex and often internally inconsistent.

The application of Federal civil rights to Indians is no exception to the confusing state of affairs. On one hand, the desire to let Indians govern themselves leads to the conclusion that Indian tribes should determine what civil rights exist in lands under their jurisdiction. On the other hand, however,

many people find repugnant the idea that there should be territorial enclaves in the United States in which the Bill of Rights does not exist. Obviously, both concepts have merit, and equally obviously, they are difficult to reconcile.

The Indian Civil Rights Act of 1968 (hereafter referred to as the "ICRA") attempted such a reconciliation. Since the ICRA's passage, however, there have been no hearings by Congress or any other systematic attempt to assess how the ICRA has worked. The U.S. Commission on Civil Rights is now undertaking this long-overdue examination, and this briefing paper is an introduction to the ICRA in the context of the Indian legal system.

The paper is divided into five sections. Section I is the introduction. Section II describes the legal status of Indian tribes and pays particular attention to the manner in which the Federal government may restrict tribal sovereignty. Section III summarizes the provisions and the debates surrounding the enactment of the Indian Civil Rights Act of 1968, the law that extended most Bill of Rights protections to tribal members. Section IV reviews court interpretations of the ICRA. Finally, Section V explores a variety of problems that hamper the Indian tribal court system.

II. The Legal Status of Indian Tribes

The Supreme Court has long accepted the sovereign status of Indian tribes. 1/ In its 1832 Worcester v. Georgia 2/ decision, the Court characterized Indian tribes as "distinct, independent, political communities, retaining their original natural rights" 3/ in matters of self-government, and in United States v. Kagama, 4/ an 1886 decision, the Court spoke of Indians as a "separate people, with the power of regulating their internal and social relations. . . ." 5/

The Supreme Court, however, has also long recognized the plenary authority of Congress to regulate Indian lands. The Court first addressed the status of Indian tribes and their

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1/ "Tribe" is both a political and a legal term and is also used in an ethnological sense. For ethnological purposes, Indian tribes have the power to determine questions of their own membership. In the legal sense, an Indian is defined as a person: (a) with ancestors who lived in what is now the United States before its discovery by Europeans, and (b) who is recognized as an Indian by his or her tribe or community. Felix S. Cohen, Handbook of Federal Indian Law (1982 ed.) pp. 3, 19-20, 51 (hereafter cited as Handbook of Federal Indian Law).

The Department of the Interior has also considered what groups constitute a tribe. Guidelines governing Department of the Interior determinations are specified in the 1934 Indian Reorganization Act. See generally ibid., pp. 13-16, 147-51.

2/ 31 U.S. (6 Pet.) 515 (1832). This decision held that tribal law, not the law of the State of Georgia, governed non-Indians living on tribal land.

3/ Id. at 559-60.

4/ 118 U.S. 375 (1886).

5/ Id. at 381-82.

unique relationship with the United States in Cherokee Nation v. State of Georgia, 6/ an 1831 decision. Indian tribes were not foreign nations, the Court found, but were "domestic dependent nations," 7/ occupying territories in which the United States asserted a title independent of their will. Explaining the relationship between the Indian and Federal governments, Chief Justice John Marshall further stated:

> [The Indians'] relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; [and] appeal to it for relief for their wants. . . . 8/

Courts that have recently attempted to define the status of tribes have used this doctrine of limited sovereignty as a starting point in their analyses. In McClanahan v. Arizona Tax Commission, 9/ decided in 1973, the Supreme Court found the doctrine relevant because it provided a historical context

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6/ 30 U.S. (5 Pet.) 1 (1831). Indians are singled out in two sections of the Constitution. The first, the Commerce Clause, empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In the second section, Indians are excluded from the definition of persons to be taxed by the government or to be counted to determine apportionment of representatives among the States. U.S. Const., art. I, §8, cl. 3 and §2, cl. 3.

7/ 30 U.S. at 17.

8/ Id.

9/ 411 U.S. 164 (1973).

in which to review applicable treaties and Federal laws. Acknowledging the sovereignty of the Navajo tribe, subject to the supervision of the Federal government, the Court found that the State of Arizona had no jurisdiction to tax the Indians. 10/ Confronted two years later with the question of whether tribes are governments, 11/ the Supreme Court stated, "[i]t is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." 12/

The first significant case concerning the Federal civil rights of Indians is Talton v. Mayes 13/ (1896), where the Court held that the Fifth Amendment did not operate upon "the powers of local self-government enjoyed" 14/ by the tribes. Citing Talton in 1978 in Santa Clara Pueblo v. Martinez, the Supreme Court reasoned:

10/ Id. at 175.

11/ United States v. Mazurie, 419 U.S. 544 (1975).

12/ Id. at 557. The Tenth Circuit, which was unanimously reversed by the Supreme Court, had found that the tribe could not exercise governmental authority to regulate liquor licenses. Id. at 556.

13/ 163 U.S. 376 (1896).

14/ Id. at 384. A Cherokee Indian who had been tried and convicted of murder by a tribal court argued that his Fifth Amendment rights had been violated because he had not been indicted by a grand jury. He was ultimately executed.

> As separate sovereigns preexisting the Constitution, tribes . . . [are] unconstrained by those constitutional provisions framed specifically as limitations on Federal or state authority. 15/

In accordance with this ruling, lower Federal courts have refused to extend the Bill of Rights and Fourteenth Amendment to tribal governments. 16/ Talton and its progeny thus stand for the proposition that Federal law is only "binding upon Indian nations where it expressly binds them, or is made binding by treaty or some act of Congress." 17/

15/ Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

16/ See id. at 56 n.7. Indians, however, exercise rights as State citizens or residents. After World War I, Congress enacted the Indian Citizenship Act, which provided that "all non-citizen Indians born within the territorial limits of the United States [are] declared to be citizens of the United States." Pub. L. No. 68-175, 43 Stat. 253 (1924). The 1924 Act was superseded by the Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137-38 (formerly codified at 8 U.S.C. §601) and was replaced in 1952 by Pub. L. No. 82-414, 66 Stat. 163, 235 (1952) (codified as amended at 8 U.S.C. §1401 (1982)). Moreover, Indians are citizens of the State where they reside, a derivation of national citizenship applicable to the States through the Fourteenth Amendment. Handbook of Federal Indian Law, p. 279; Vince Deloria, Jr., and Cufford M. Lytle, American Indians, American Justice (Austin, Tex.: University of Texas Press, 1983), pp. 2-4 (hereafter cited as American Indians, American Justice).

17/ Native American Church v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959); See also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15-16 (1831); Talton v. Mayes, 163 U.S. 376 (1896); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958). It should also be noted that, since the Federal government has Federal trust control over Indian property and many other aspects of reservation life, the United States is an indispensable party for judicial relief in actions to resolve disputes over various property rights. In such matters, most forms of relief are available only in Federal courts. Handbook of Federal Indian Law, p. 343.

Congress, in response to the courts' deference to tribal sovereignty, has enacted legislation designed to extend Federal and state law to Indian tribes. 18/ For example, in response to Federal authorities' perception that the Indian form

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18/ In addition to the legislation mentioned in this discussion, it should be noted that Senator Melcher has introduced bills which would create a special magistrate with jurisdiction over Federal offenses within Indian country. S. 2832, 96th Cong., 2d Sess. (1980) and S. 1177, 99th Cong., 1st Sess. (1985). Under his concept the magistrates would conduct trials regarding:

> 1) misdemeanors alleged to have been committed by an Indian against the person or property of a non-Indian within Indian country;
> 2) misdemeanors alleged to have been committed by a non-Indian against the person or property of an Indian within Indian country;
> 3) victimless misdemeanors alleged to have been committed by a non-Indian which directly or indirectly threaten or jeopardize the security of the person or property of an Indian within Indian country;
> 4) misdemeanor offenses set forth in Chapter 53, Title 18 U.S.C.

Jurisdiction on Indian Reservations: Hearing Before the Select Committee on Indian Affairs, 96 Cong., 2d Sess. 35 (1980). Misdemeanors referred to in the last section include "liquor sale violations, destruction of posted signs, and trespass on tribal lands for purposes of hunting or fishing without tribal permission." Id. According to staff of the Senate Select Committee on Indian Affairs, the bill has been "back-burnered" for lack of tribal support. Telephone interview with Catherine Wilson, staff attorney, Senate Select Committee on Indian Affairs, November 5, 1985 (hereafter cited as Wilson Interview).

of justice was too lenient, 19/ Congress enacted the Major Crimes Act (1885), 20/ which extended Federal jurisdiction to certain major crimes committed by Indians on the reservation, thereby ending exclusive tribal jurisdiction in those matters. 21/ In 1953, Congress helped erode the proscription against State jurisdiction in Indian country further by enacting Public Law 83-280, 22/ a statute which granted five States jurisdiction over most crimes and many civil matters on

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19/ National American Indian Court Judges Association, Indian Courts and the Future/Report of the NAICJA-Long Range Planning Project (1978), p. 9 (hereafter cited as Indian Courts and the Future). In 1883 a Sioux Indian named Crow Dog killed Spotted Tail and traditional Indian justice required him to pay restitution to Spotted Tail's family. Because the Federal authorities thought that the sentence was inadequate, they arrested and prosecuted him under Federal law. American Indians, American Justice, p. 168. He appealed his Federal murder conviction, and the Supreme Court reversed the lower court's decision, finding that there was no jurisdiction to apply Federal law in this case. Ex Parte Crow Dog, 109 U.S. 556, 572 (1883).

20/ Act of March 3, 1885, ch. 341, §9, 23 Stat. 362, 385, as amended, 18 U.S.C. §1153 (1982).

21/ Indian Courts and the Future, pp. 10-11.

22/ Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C §1162, 25 U.S.C. §1360 (1982)).

most of the Indian country within their borders. 23/ This statute and other grants of State jurisdiction in Indian land have permitted States to continue to exercise jurisdiction on Indian land. 24/

On occasion, courts will find that Congress, through implicit custom, not explicit legislation, intended to restrict tribal sovereignty. For example, in 1978, the Supreme Court ruled in Oliphant v. Suquamish Indian Tribe 25/ that the Suquamish Indian Tribal Court was without jurisdiction to try non-Indians for crimes committed on reservation land, despite the fact that Congress did not preclude explicitly such tribal jurisdiction. Instead, the Oliphant Court held that its decision would "make express our implicit conclusion of nearly a century ago that Congress consistently believed . . . [such preclusion] to be the necessary result of its repeated legislative actions." 26/

23/ Other States were given the option of accepting the jurisdiction. Id.

24/ For example, Pub. L. No. 80-881, 62 Stat. 1224 (1948) (codified at 25 U.S.C. §232 (1982)), grants New York criminal jurisdiction over offenses committed by or against Indians on all State reservations. Moreover, in 1929, a law was enacted to permit State officers to enter Indian lands to inspect health and education conditions and to enforce sanitation and quarantine regulations. See Pub. L. No. 77-760, 62 Stat. 1185 (1929).

25/ 435 U.S. 191 (1978).

26/ Id. at 204.

The Oliphant Court's recognition of implicit legislative intent to deny jurisdiction to Indian tribes over matters arising on reservations is the exception, however, not the rule. In another 1978 decision, Santa Clara Pueblo v. Martinez, 27/ the Court refused to find implicit legislative intent to extend Indian Civil Rights Act coverage to equal protection challenges filed in Federal court. More recently, the Supreme Court held in National Farmers Union Insurance Companies v. Crow Tribe 28/ (1985) that it would not consider whether an insurance company could invoke Federal common law jurisdiction in Federal court until the company had exhausted all possibilities of relief through the tribal court system. 29/ The National Farmers Court reasoned that, since Congress did not preclude explicitly such tribal jurisdiction, "the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians . . . is not automatically foreclosed." 30/ Furthermore, the Court noted:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been

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27/ 436 U.S. 49 (1978). For further discussion, see pp. 19-22.

28/ 105 S. Ct. 2447 (1985). For discussion of the Indian Civil Rights Act holding in this case, see note 73.

29/ The Court did recognize, however, that the issue of "whether a tribal court has exceeded the lawful limits of its [common law] jurisdiction" is subject to Federal court resolution. 105 S. Ct. at 2454.

30/ Id. at 2453.

> altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. 31/

In the context of civil rights, these considerations affecting the jurisdiction of Indian tribal courts are of utmost importance. Before the enactment of the Indian Civil Rights Act, there were no Federal statutes that specifically addressed the civil rights of persons living under tribal jurisdiction. 32/ Consequently, with respect to each piece of civil rights legislation, Congressional intent must be scrutinized to determine whether the laws are applicable to Indian tribes. Scholarship on this matter concludes that the anti-slavery laws governing private discriminatory conduct probably apply to the actions of members of tribes, but that the other anti-discrimination laws, however, would not apply to the internal affairs of tribes. 33/

31/ Id. at 2454. The Court felt that, in the first instance, the tribal court should make this determination. Id.

32/ Handbook of Federal Indian Law, p. 670. Laws were enacted, however, to carry out the mandate of the Thirteenth Amendment. These laws prohibited private discrimination in making contracts (42 U.S.C. §1981) and in property transactions (42 U.S.C. §1982), peonage (42 U.S.C. §1994), and slavery and involuntary servitude (18 U.S.C. §§1581-88). The Civil Rights Act of 1964 also prohibits discrimination in the operation of public accommodations that "affect commerce" (42 U.S.C. §§2000a-2000a-6) and in any program or activity receiving Federal assistance (42 U.S.C. §§2000a-2000d-6).

33/ Handbook of Federal Indian Law, pp. 671-73. This understanding of the application of Federal civil rights laws to Indian tribes is further supported by the language used in

FOOTNOTE CONTINUED ON NEXT PAGE

To summarize: Federal courts, recognizing the sovereign status of Indian tribes, are reluctant to interfere with tribal court jurisdiction. Generally, Congress must explicitly seek to limit tribal sovereignty. On occasion, however, Federal courts have inferred legislative intent to restrict the sovereign power of a tribe. But such court action is rare, for Federal courts demand a near unequivocal demonstration that Congress intended tribal sovereignty to be limited or nonexistent on a particular issue.

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several Supreme Court decisions: Ex Parte Crow Dog, 109 U.S. 556 (1883); Byrand v. Itasca County, 426 U.S. 373 (1976); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). It is also supported by the lack of an indication of a Congressional intent to interfere in the internal affairs of Indian tribes. Handbook of Federal Indian Law, pp. 671-73.

One exception to this interpretation might be Title II of the Civil Rights Act of 1964 (prohibiting discrimination in the operation of public accommodations that "affect commerce"), 42 U.S.C. §§2000a-2000a-6 (1982). Since the Constitution empowers Congress to "regulate Commerce. . . with the Indian Tribes," U.S. Const., art. I, §8, cl. 3, Title II's "affect[ing] commerce" language can be viewed as constitutionally authorized Congressional regulation. Furthermore, other Congressional action based in the Commerce Clause might also be extend to Indian tribes.

III. Indian Civil Rights Act of 1968

The Indian Civil Rights Act of 1968 is a result of Congressional concern that members of Indian tribes did not enjoy basic constitutional freedoms. 34/ At the same time, by reserving the bulk of ICRA enforcement for tribal courts, Congress intended to preserve the tribes' capacity to function as autonomous governmental units. 35/

During the 1960's, Judiciary subcommittees in both Houses held hearings to investigate and collect data on civil rights problems confronting Indians living on reservations. 36/ Testimony received at the hearings revealed that few tribal courts allowed attorneys to appear before them, judges seldom

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34/ Although many complaints were made that State and local governments violated the civil liberties of Indians in communities near the reservation, it was evident from the beginning of the hearings that Congress' major concern was the procedural protections available to persons in tribal courts. National Indian Center, Indian Civil Rights Act/Training Manual (Sept. 26-28, 1984) p. 8 (hereafter cited as Indian Civil Rights Act); Note, The Indian Bill of Rights and the Constitutional Status of Tribal Government, 82 Harv. L. Rev. 1343, 1356 (1968-69) (hereafter cited as The Indian Bill of Rights and the Constitutional Status of Tribal Government).

35/ The Indian Bill of Rights and the Constitutional Status of Tribal Governments, p. 1359; Indian Civil Rights Act, p. 10.

36/ U.S. Congress, Senate Committee on the Judiciary, Subcommittee On Constitutional Rights, Hearings on Constitutional Rights of the American Indian, 87th Cong., 1st Sess., pt. 1 (1962), 87th Cong., 1st Sess., pt. 2 (1963), 87th Cong., 2d Sess., pt. 3 (1963); Constitutional Rights of the American Indian/Summary Report of Hearings and Investigations, 88th Cong., 2d Sess., 1964, S. Res. 265, pp. v, 8-24 (hereafter cited as Hearings on Constitutional Rights of the American Indian); Indian Civil Rights Act, p. 8; The Indian Bill of Rights and the Constitutional Status of Tribal Government, pp. 1356-58.

had any legal training, written records were not kept, and few defendants exercised their right to a trial by jury or to an appeal. Testimony also indicated that some courts did not inform defendants of their right not to incriminate themselves. 37/

During the hearings, Subcommittee members expressed concern that Indians were not protected by the Constitution against arbitrary or discriminatory actions of their tribal governments. As Senator Clinton Anderson noted:

> An Indian citizen has all the constitutional rights of other citizens while he [or she] is off the reservation, but on the reservation (in the absence of Federal legislation) he [or she] has only the rights given to him [or her] by the tribal governing body. 38/

In 1965, Senator Sam Ervin introduced legislation for the protection of the constitutional rights of the American Indian, stating:

> Full protection of the constitutional rights and privileges enjoyed by other Americans has long been overdue for the American Indian. It is my hope that these hearings will give full recognition to the need for guaranteeing to the first Americans the rights and privileges to which they, as citizens, are justly entitled. 39/

37/ Burnett, An Historical Analysis of the 1968 'Indian Civil Rights' Act, 9 Harv. J. on Legis. 557, 579 (1971-72).

38/ U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings on Constitutional Rights of the American Indian, 89th Cong., 1st Sess., 1965, p. 4. (remarks of Sen. Clinton Anderson).

39/ U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings to Protect the Constitutional Rights of the American Indian, 89th Cong., 1st Sess., 1965, p. 1.

The legislation introduced by Senator Ervin served as the basis for the Indian Civil Rights Act of 1968. 40/ The ICRA enumerates particular rights that should not be abridged by Indian tribal governments; specifically, it provides:

> §1302
> 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 seizure, 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;

40/ 25 U.S.C. §§1301-03 (1982).

> (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.
>
> §1303
> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe. 41/

Although many Indians had clamored for relief from civil and individual rights violations, they did not embrace the legislative proposals wholeheartedly. Some viewed the ICRA as yet another assault on the concept of tribal self-determination, while others objected to the imposition of traditionally Western procedural requirements on the tribes. 42/ Still others feared that the legislation would ultimately be interpreted by Federal courts to impose non-Indian legal standards on tribal governments. 43/ Although the legislation was passed in spite of objections to it and without the consent of tribal governments, it was revised to reflect some of the concerns raised. The Indian Civil Rights Act incorporated many provisions of the Constitution, but several significant constitutional prohibitions against actions of the State and Federal

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41/ Id. §§1302-03.

42/ Indian Civil Rights Act, pp. 9-10.

43/ Richard West, Jr., and LeRoy Wilder, "Recent Case Law on Tribal Justice," reprinted in Justice in Indian Country, p. 161.

governments were omitted. These omissions included the guarantee of a republican form of government, the prohibition against the establishment of religion, the requirement of free counsel for indigent accused, the right to trial by jury in civil cases, the provisions broadening the right to vote, and the prohibition against denial of the privileges and immunities of citizens. 44/

IV. Federal Court Interpretations

Under the provisions of the Indian Civil Rights Act, Federal courts were specifically granted jurisdiction to review tribal court actions in the limited context of writs of habeas corpus. 45/ A habeas corpus petition to a court is used in a situation in which an individual is being detained by a court, police officer, or other official body. In other words, the ICRA explicitly provides for Federal court jurisdiction only in a limited number of circumstances, mainly those involving detention for alleged crimes.

44/ American Indians, American Justice, p. 138; Handbook of Federal Indian Law, p. 667.

45/ 25 U.S.C. §1303 (1982). The jurisdiction of Federal courts in criminal cases has had the same interpretation since the passage of the Indian Civil Rights Act. Federal courts may review criminal cases of tribal courts when a person accused of a crime is detained by a tribal court or other tribal official and seeks to challenge the legality of the detention. In such cases, courts have held that before a habeas corpus petition may be brought to a Federal court under the Act, the petitioner must first exhaust his or her tribal remedies. Indian Civil Rights Act, pp. 22-23.

After enactment of the ICRA, however, attempts were made to expand Federal court review to include not only tribal court orders, but to contest the validity of tribal council policies as well. Initially, lower Federal courts entertained such cases, 46/ thus "open[ing] the door to challenges to tribal government decisions by a variety of civil remedies, such as injunction and declaratory judgments, and the like." 47/

In resolving these cases, courts applied legal principles carefully to minimize their interference with intratribal matters, and devised certain rules of interpretation of the ICRA to limit their involvement in the tribes' judicial affairs. 48/ The legal principles included: (1) the recognition that, although the ICRA is patterned after the U.S. Bill of Rights, the same language does not necessarily have to be interpreted in the same way; (2) the ICRA does not require that Indians and non-Indians always have to be treated the same way by the tribal government; (3) tribal customs and culture

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46/ See Indian Civil Rights Handbook, p. 20. Federal courts had reviewed about 80 cases involving the application of the Indian Civil Rights Act before the Martinez decision. These cases included disputes involving tribal elections; reapportionment of voting districts on reservations; tribal government employee rights; land use regulations and condemnation procedures; criminal and civil proceedings in tribal courts; tribal membership and voting, tribal police activities, conduct of tribal council members and council meetings; and standards for enforcing due process of law and equal protection in the tribal settings. Ibid.

47/ American Indians, American Justice, p. 132.

48/ Indian Civil Rights Handbook, p. 20.

must be considered in interpreting and applying the ICRA; and (4) most importantly, tribal remedies must first be exhausted before a dispute can even be brought to Federal court. 49/

A. Santa Clara Pueblo v. Martinez

In 1978, the Supreme Court in Santa Clara Pueblo v. Martinez 50/ made its first decision interpreting the jurisdiction of Federal courts to review tribal government decisions under the Indian Civil Rights Act. In Martinez, the Court reversed the previous trend to allow Federal court review of alleged violations of Title II of the Indian Civil Rights Act of 1968 (ICRA). 51/

The Santa Clara Pueblo had enacted a tribal ordinance under which children born of marriages between male members of the tribe and non-members became members of the tribe, but children born of female members and non-members could not become members of the tribe. Exclusion from membership denied affected children the right to vote in tribal elections or to hold office in the tribe, to stay on the reservation after the death of the mother, or to inherit the mother's home or interest in communal lands. A female member of the tribe who married a

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49/ Ibid.

50/ 436 U.S. 49 (1978).

51/ 25 U.S.C. §§1301-03 (1982).

non-member, and her daughter, filed suit in Federal district court seeking declaratory and injunctive relief against enforcement of the ordinance. They alleged that the ordinance discriminated on the basis of sex and ancestry in violation of the ICRA. 52/

The district court found jurisdiction and no tribal immunity from suit, although the ICRA does not expressly provide access to Federal courts to redress violations of its civil provisions. 53/ The district court, however, found the ordinance lawful. The court of appeals agreed on the jurisdictional issue, but reversed on the merits. 54/ The Supreme Court reversed, holding (1) that the ICRA does not provide a Federal forum to redress violations of civil rights and (2) that tribes retain their sovereign immunity and therefore are not subject to suit.

In so ruling, the Court first addressed the issue of the sovereign immunity of Indian tribes, acknowledging that "[I]ndian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers . . . subject to the superior and plenary

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52/ 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." Id. at §1302(8).

53/ 402 F. Supp. 5 (D.N.M. 1975).

54/ 540 F.2d 1039 (10th Cir. 1976).

control of Congress." 55/ Noting that such sovereign immunity cannot be waived by implication, but requires an unequivocal expression, the Court examined the ICRA and found no waiver of the tribe's immunity. The Court's holding on the issue was unambiguous: "suits against the tribe under the ICRA are barred by its sovereign immunity from suit." 56/

Finding that one of the defendants, an officer of the Pueblo, was not entitled to the tribe's immunity, 57/ the Court went on to determine whether the ICRA provided a cause of action for declaratory and injunctive relief in a Federal forum. The Court found a need to "tread lightly" in this area in order to give effect to a "proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area." 58/

The Court looked to the factors customarily used to determine if a cause of action can be implied from a statute which does not expressly create one. While recognizing that the statute was enacted for the special benefit of the class of people to which the plaintiff belonged and that it addressed civil rights, for which causes of action in a Federal forum are typically implied, the Court concluded that these factors were

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55/ 436 U.S. 49, 58.

56/ Id. at 59.

57/ Id. at 59.

58/ Id. at 60.

not dispositive. Instead, the Court found that the structure of the statutory scheme and the legislative history of Title I suggested that Congress' failure to provide remedies other than habeas corpus was a deliberate one. The Court found "[t]wo distinct and competing purposes" behind the ICRA: "strengthening the position of individual tribal members vis-a-vis the tribe" and "promot[ing] the well-established Federal 'policy of furthering Indian self government.'" 59/ Finding that tribal forums were available to address violations of the ICRA, the Court decided it was not necessary to imply a Federal cause of action to give effect to the statute. 60/

In the Court's view, the legislative history of the statute reinforced this conclusion. Several provisions establishing various enforcement mechanisms had been suggested and rejected during the legislative process. 61/ The failure to provide a Federal forum for the redress of civil grievances under the ICRA struck the Court as deliberate. 62/

59/ Id. at 62 (citations omitted).

60/ Id. at 65-66.

61/ Id. at 66-70.

62/ Id. at 66-72.

B. Subsequent Judicial Interpretations

The courts of appeals that have addressed the issue have uniformly and automatically applied Martinez. 63/

The Fourth Circuit, which in Crowe v. Eastern Band of Cherokee Indians 64/ was the first to face the issue, dismissed the case, stating simply that in Martinez the Court decided "that suits against a tribe under the ICRA are barred by its sovereign immunity." 65/

Similar deference to Martinez was accorded by the Tenth Circuit Court in White v. Pueblo of San Juan. 66/ That case involved non-Indians alleging an ICRA violation which arose in matters unrelated to tribal government (the allegation

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63/ District courts in the District of Columbia and Eleventh Circuits have also followed Martinez. See United Nuclear Corp. v. Clark, 584 F. Supp. 107 (D.D.C. 1984); Stroud v. Seminole Tribe of Florida, 606 F. Supp. 678 (S.D. Fla. 1985).

64/ 584 F.2d 45 (4th Cir. 1978).

65/ Id. at 45-46.

66/ 728 F.2d 1307 (10th Cir. 1984). The Tenth Circuit, in an earlier ruling, sought to limit Martinez. In that case, Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), the appellate court found distasteful the implication of Martinez--that a person may have no effective remedy to redress wrongs under the ICRA--and found the facts in Dry Creek different enough from those of Martinez to reach a different conclusion. In Dry Creek, a non-Indian had attempted to pursue a tribal remedy but was denied access to the court. His claim involved an issue that was not a matter of tribal government (the tribe had closed an access road to a hotel he had built on the reservation). The Tenth Circuit decided that, under the circumstances, "[t]he limitations and restrictions present in Santa Clara should not be applied. There has to be a forum where the dispute can be settled . . . . There must exist a remedy. . . . To hold that they have access to no court is to hold that they have constitutional rights but have no remedy." Id. at 685.

was that the tribe intimidated the plaintiffs until they consented to sell the tribe a parcel of land at a price well below its value). These plaintiffs had not sought relief from the tribal court, but alleged that to do so would be futile. In rejecting this claim, the White court simply found the Supreme Court's decision in Martinez to be dispositive of the jurisdictional issue of sovereign immunity. 67/

The Eighth Circuit, in Shortbull v. Looking Elk, 68/ also relied on Martinez when it confronted the sovereign immunity issue. Shortbull was a non-enrolled member of the tribe, and wanted to run for president. The Tribal Election Board refused his request to place his name on the ballot, citing an ordinance requiring that the president be an enrolled member. The Tribal Council then passed a resolution directing the Board to certify him as a candidate. Days later the Council passed another resolution which was interpreted to rescind the earlier one. The next day the Chief Tribal Court Judge disagreed that the second resolution had that effect and ordered the Board to certify Shortbull. When they did not do so, the Chief Judge held certain tribal officials in contempt. Because of this action, the Tribal Executive Committee suspended the Chief Judge and replaced him with another judge who quashed the

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67/ Id. at 1312-13.

68/ 677 F.2d 645 (8th Cir. 1981).

earlier orders. Shortbull then filed a claim. 69/ The appellate court, relying on Martinez, held that plaintiff could not maintain a claim on ICRA grounds. The court found that "[s]uch actions raise serious questions under the Indian Civil Rights Act, but because the Supreme Court determined in Martinez that there is no private right of action under the ICRA, Shortbull has no remedy." 70/

Finally, the Ninth Circuit has addressed Federal court jurisdiction under the ICRA. In Snow v. Quinault Indian Nation, 71/ businesses were taxed by the tribe at a higher

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69/ Shortbull's claim was based primarily on 42 U.S.C. §1985(c), which prohibits conspiracies to deprive persons of the equal protection of the laws. The court, however, found one of the necessary elements of that cause of action lacking in the case, that is, that Shortbull failed to demonstrate that the Tribal Council action was undertaken "for the purpose of depriving [him of]. . . the equal protection of the laws." Id. at 648.

70/ Id. at 650. The court further noted:

> We are thus presented with a situation in which Shortbull has no remedy within the tribal machinery nor with the tribal officials in whose election he cannot participate. . . We question whether such a result is justified on the grounds of maintaining tribal autonomy and self-government: it frustrates the ICRA's purpose of 'protect[ing] individual Indians from arbitrary and unjust actions of tribal governments,' and in this case it renders the rights provided by the ICRA meaningless.

Id. (quoting J. White's dissenting opinion in Martinez) (citations omitted). The Eighth Circuit adopted a similar rationale in Runs After v. United States. 766 F.2d 347, 353 (8th Cir. 1985).

71/ 709 F.2d 1319 (9th Cir. 1983).

rate for non-Indian employees than for Indian employees. A group of business people filed suit alleging a violation of Federal common law and of the ICRA. While the court found it had jurisdiction under 28 U.S.C. §1331 (giving the district courts jurisdiction over "civil actions arising under the Constitution, laws or treaties of the United States"), it found that the tribe's sovereign immunity barred Snow's action against the tribe under Federal commmon law. 72/ The court also noted that Martinez limits relief available under the ICRA to habeas corpus actions. 73/

Every circuit court that has addressed Federal jurisdiction under the ICRA has followed Martinez, even in situations in which the plaintiff was thereby left without a remedy for violations of the rights Congress articulated in

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72/ Id. at 1322.

73/ Id. at 1323. The Ninth Circuit adopted a near-identical position in National Farmers Union Insurance Companies v. Crow Tribe of Indians. 736 F.2d 1320, rev'd., 105 S. Ct. 2447 (1985). In that case, the appellate court dismissed the ICRA allegations by noting that Federal court review of ICRA violations is limited to writ of habeas corpus actions. "In view of Congress's manifest purpose to limit the intrusion of Federal courts upon tribal adjudication, we decline to recognize a common law cause of action in addition to the limited remedies available under the ICRA." Id. at 1323. The Supreme Court, on grounds unrelated to this Martinez holding, reversed the National Farmers decision. See notes 28-31.

enacting the ICRA. It thus appears that the Supreme Court's holding in Martinez, that Federal court jurisdiction under the Indian Civil Rights Act is limited to habeas corpus actions, is definitive.

V. Problems Affecting the Implementation of the Indian Civil Rights Act

Two sets of problems have been identified with respect to implementation of the Indian Civil Rights Act, one involving the impact of Congressional action and Supreme Court decisions on tribal court authority, the other concerning deficiencies in the tribal court system.

A. Congressional action and Supreme Court holdings

The limitation of tribal court jurisdiction over criminal matters under the Major Crimes Act and the ICRA's limitation on the criminal penalties which a tribal court may impose ($500 and six months) are viewed as serious problems. The Major Crimes Act provides for Federal jurisdiction over major crimes committed on the reservation. 74/ It is claimed that the F.B.I. fails to investigate and U.S. Attorneys often fail to prosecute these crimes. 75/ Under the theory that tribal courts retain concurrent jurisdiction over these crimes,

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74/ 18 U.S.C. §1152 (1982).

75/ Carrie Small, Ed., Justice in Indian Country, p. 34, American Indian Lawyer Training Program, Inc., 1980 (hereafter cited as Justice in Indian Country).

tribes often seek justice by prosecuting Indian criminals who are not prosecuted by Federal authorities in tribal courts. 76/ Despite the seriousness of the crime (rape, for example), the penalty which the tribal court can impose is limited by the ICRA. There is also a theory that the Major Crimes Act removed the tribes' jurisdiction over major crimes. 77/ Under this theory, a tribe's options for dealing with criminals not prosecuted by Federal authorities are limited.

The Oliphant holding that tribal courts have no inherent criminal jurisdiction over non-Indians is viewed as another major problem. 78/ Approximately one-third of the people on a reservation are non-Indian or non-member Indians and may be part of a family which includes Indian tribal members. Tribal judges are frustrated at having no way to deal with the crimes of these non-Indians short of removing them from the reservation and consequently breaking up families. 79/

76/ Telephone interview with Joseph Myers, Executive Director of National Indian Justice Center, January 7, 1986 (hereafter cited as Myers Interview).

77/ Myers Interview.

78/ Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). See notes 25-26. Prior to the Oliphant decision, a number of tribes had exercised criminal jurisdiction over non-Indians who committed victimless offenses on the reservations. With that decision, however, the Supreme Court held that "'by submitting to the overriding sovereignty of the United States,' Indian tribes gave up their authority to try non-Indian citizens of the United States." Justice in Indian Country, p. 33 (quoting Oliphant).

79/ Myers Interview.

National Farmers' 80/ recognition that tribal courts might not be able to exercise civil jurisdiction over non-Indians is viewed as another problem facing tribal courts. It is feared that tribal court jurisdiction will be eroded either through a judicial determination or Congressional action. Given the history or tribal courts, there is reason to take seriously these fears.

B. Tribal Courts

There are three major charges that are levied commonly against tribal courts. The first charge is that they lack the necessary resources to insure the provision of adequate due process to members of Indian tribes. Tribal courts are similar to justice of the peace courts or to other courts of general jurisdiction which exist in State systems. 81/ The atmosphere at tribal court proceedings, however, is informal compared to the Anglo-American system. 82/ Few written opinions are handed down by courts, the appearance of attorneys is kept to a minimum, and jury trials are rare. 83/ The

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80/ Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 105 S.Ct. 2447 (1985). See notes 28-31, 73.

81/ U.S. Department of Justice, Report of the Task Force on Indian Matters, prepared by Doris M. Meissner for the Office of Policy and Planning (1975), p. 295 (hereafter cited as Report of the Task Force on Indian Matters).

82/ American Indians, American Justice, pp. 118-19.

83/ Ibid.; Report of the Task Force on Indian Matters, p. 275.

applicable laws are the tribal codes, and on many reservations, these codes exist in mimeographed, unbound, or loose-leaf form. 84/ When a case is appealed to a higher Indian authority, the trial judge who allegedly committed the error sometimes sits on the appellate court hearing the appeal. 85/ In addition, courtroom facilities and recordkeeping systems are usually inadequate or non-existent. 86/

Compounding many of these concerns is the perception that tribal courts are underfunded, and the personnel have traditionally lacked necessary training. 87/ Providing resources for tribal courts is said to be one of the Bureau of Indian Affairs' lowest priorities, 88/ and, in fact, no

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84/ American Indians, American Justice, p. 116; American Indian Tribal Courts, p. 18.

85/ American Indians, American Justice, p. 119.

86/ Report of the Task Force on Indian Matters, p. 275.

87/ Contracts of the Bureau of Indian Affairs with the National Indian Justice Center to provide training and technical assistance are the only efforts being undertaken to address the problem of inexperience on the part of the tribal court personnel. Joseph Myers, Executive Director of the Center, recommends addressing these problems with omnibus Federal legislation granting increased jurisdiction (including criminal jurisdiction) to tribal courts which meet certain standards. Under the plan, funding would be provided to give tribes the resources they need to enable them to meet the standards if they choose to do so. Myers Interview.

88/ Gover Interview.

training for tribal court personnel was available until 1970. 89/ When the tribal governments were reorganized in 1934, training was not provided to teach court personnel, who were lay people, even the most rudimentary American legal concepts. Most tribal court systems today lack legally trained staff. 90/ In most courts, tribal judges are Indians from local reservations. 91/ Since educational qualifications are usually not considered in the selection process, most judges, have no formal education beyond the high school level. 92/ In addition, many reservations do not have prosecutors, and where there is one, he or she is likely to have no legal training. 93/ On most reservations, the only persons connected with the courts who have formal training are legal advisors employed by the courts. 94/ Because legal advisors are recent law school graduates, they sometimes have become involved in political matters beyond their capabilities. 95/ In addition,

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89/ Myers Interview.

90/ American Indian Tribal Courts, p. 18.

91/ Ibid.

92/ Ibid.

93/ Ibid.

94/ Ibid., p. 19.

95/ Ibid.

the turnover among them is high. 96/ Even though there are now a number of legally trained Indian judges and an increasing number of Indians attending law school, training remains inadequate. 97/

A second significant problem is the lack of separation of powers between the Tribal Council and tribal courts. 98/ In many tribes, the Tribal Council appoints the tribal judges, who serve at the pleasure of the Council. Consequently, if a plaintiff complains of action taken by the Council, and a judge rules against the Council, he or she might be removed. 99/

A third major concern involves the issue of sovereign immunity as it relates to tribal courts. Although tribes cannot waive their sovereign immunity in Federal or state courts absent express authorization from Congress, tribes can waive it in their own courts for specific purposes. Because tribal courts are the exclusive forum for enforcement of the ICRA, failure to waive sovereign immunity results in an

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96/ American Indian Tribal Courts, p. 18.

97/ Gover Interview.

98/ Myers and Gover Interviews.

99/ See, e.g., Shortbull v. Looking Elk, 667 F.2d 645 (8th Cir. 1981); Runs After v. U.S., 766 F.2d 347 (8th Cir. 1985).

inability to enforce the ICRA due to the lack of an available judicial forum. It is thus possible that a member of an Indian tribe can have his or her civil rights violated and still be unable to seek any redress whatsoever.

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Despite these problems, Congress has not held hearings on the ICRA since its enactment in 1968, 100/ and bills which address the problems discussed above have not been introduced. 101/ It thus appears that problems with the ICRA will persist. Determining the significance of these problems, and possible solutions to them, are the purposes of this Commission project.

100/ Myers and Gover Interviews.

101/ Wilson Interview. Legislation, however, has been introduced which would create a special magistrate with jurisdiction over Federal offenses within Indian country. See note 18.