# THE INDIAN CIVIL RIGHTS ACT

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**A Report of the United States Commission On Civil Rights**
**June 1991**

## 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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Arthur A. Fletcher, *Chairman*
Charles Pei Wang, *Vice Chairman*
William B. Allen
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Russell G. Redenbaugh

Wilfredo J. Gonzalez, *Staff Director*

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# Letter of Transmittal

June 1991

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *The Indian Civil Rights Act,* to you pursuant to Public Law 98–183, as amended.

The Commission's examination of the enforcement of the Indian Civil Rights Act of 1968 (ICRA) began in 1986. Subsequent factfinding included public hearings held in five locations: Rapid City, South Dakota; Flagstaff, Arizona; Washington, D.C.; Portland, Oregon; and Phoenix, Arizona. The transcripts of all of these hearings have been published.

This report discusses the ICRA from its legislative history through its current enforcement in tribal forums. Throughout this study two facts have emerged with great clarity. The first is the *diversity* of reservations and tribal governments, their adjudicative forums, and their traditions, as well as their experience with and degrees of success in resolving ICRA claims. The second is the *inadequacy of resources* provided by the Federal Government since enactment of the ICRA to facilitate a consistent level of implementation.

The Commission is encouraged by recent congressional initiatives to address tribal court funding, as well as issues of jurisdiction. We hope that this report will contribute toward enactment of legislation to provide sufficient resources to meet the needs of tribal governments, and particularly, to support court systems addressing complex legal issues. We especially hope that the report will succeed in demonstrating the need for legislation that recognizes the significant success of tribal governments in protecting the civil rights of individuals, as well as the varying needs of those governments that have been less successful. The Commission believes that broad brush approaches, such as a further enroachment on tribal government sovereignty through the imposition of Federal court review of ICRA claims, are unwarranted and inappropriate at

this time in light of the Federal Government's poor record of support for the costs of ensuring Indian civil rights.

Respectfully,

Arthur A. Fletcher, *Chairman*
Charles Pei Wang, *Vice Chairman*
William B. Allen
Carl A. Anderson
Mary Frances Berry
Esther Gonzalez-Arroyo Buckley
Blandina Cardenas Ramirez
Russell G. Redenbaugh

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# Contents

# Part I
# Introduction

The Indian Civil Rights Act of 1968, as amended (ICRA),[1] imposed on tribal governments restrictions similar to those in the Bill of Rights of the United States Constitution. The Commission on Civil Rights undertook a study of the enforcement of this act in 1986. At the core of the study were hearings in five locations[2] in which testimony was received from scores of individuals including, among others, tribal judges, tribal council members, Indian law scholars, tribal lay advocates,[3] United States Attorneys, attorneys who practice before tribal courts, representatives of tribal judges associations,[4] and the Bureau of Indian Affairs. Information was

[1] 25 U.S.C. §§ 1301–1341 (1988). References throughout this report to the Indian Civil Rights Act and to the Indian Bill of Rights should be viewed as references to §§ 1301–1303.

[2] *See Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Rapid City, S.D., July 31–Aug. 1 and Aug. 21, 1986 [hereinafter *Rapid City Hearing*]; *Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Flagstaff, Ariz., Aug. 13–14, 1987; *Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Washington D.C., Jan. 28, 1988; *Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Portland, Ore., Mar. 31, 1988; and *Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Flagstaff, Ariz,, July 20, 1988; *see also Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Phoenix, Ariz., Sept. 29, 1988.

[3] Lay advocates are generally members of the tribe who, though not having received formal training in the law, provide representation in tribal court for other tribal members. The fee charged is typically about $10. "I represent people who can't afford an attorney, and it is not that I am smarter than the people, but I guess I am able to talk for them and get their point across in court. That is my definition of a lay advocate." *Rapid City Hearing*, *supra* note 2, at 34 (testimony of Elma Winters, Lay Advocate, Pine Ridge Reservation).

[4] The National American Indian Court Judges Association testified at the hearing in Portland, as did the Montana-Wyoming Tribal Court Judges Association, the Great Lakes Judges Association, the Northern Plains Tribal Court Judges Association, and the Northwest Tribal Court Judges Association.

also gathered through field interviews, staff research, oral and written correspondence, statements submitted by tribes, and responses to Commission requests for information. In all, 162 persons provided testimony, and hundreds of others were interviewed.[5]

This report is the culmination of that study. It begins by reviewing the law's enactment and initial enforcement, and then addresses its enforcement today. The Commission finds that implementation and enforcement of the Indian Civil Rights Act by tribal governments has been, as Congress intended, a matter of *transition*. This process can be accelerated by 1) Federal recognition of the diversity of those governments and of their needs for accomplishing that transition, 2) provision of resources, primarily adequate funding and training, to meet those needs, and 3) the opportunity to develop appropriate mechanisms for the protection of individual rights and liberties within viable systems of self-government. At the conclusion of the report, the Commission sets forth recommendations that it believes will strengthen the enforcement of the ICRA, to the benefit of not only the individual tribal members, but their governments as a whole.

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[5] The Commission examined ICRA enforcement on the Navajo Reservation (based on 1980 Census data, the reservation's population is 110,443, of which 104,978 are American Indian); the Pine Ridge Reservation (population 13,229 of which 11,946 are American Indian), the Rosebud Sioux Reservation (7,328/5,688), the Zuni Pueblo Reservation (6,291/5,988), and the Cheyenne River Sioux Reservation (1,826/1,529). Tribal officials or representatives also testified, though in much less depth, about ICRA enforcement on the Colville Reservation (7,047/3,500), the Quinault Reservation (1,501/943), the Makah Reservation (1,245/803), the Coeur d'Alene Reservation (4,911/538), the Yakima Reservation (25,363/4,983), the Jicarilla Apache Reservation (1,996/1,715), the Sisseton-Wahpeton Sioux Reservation (13,586/2,700), the Fort Peck Reservation (9,921/4,273), the Colorado River Reservation (7,873/1,965), the Fort Mojave Reservation (219/127), the Hopi Reservation (6,896/6,591), and the Lac du Flambeau Reservation (2,211/1,092). BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, PC80-S1-13, AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: 1980, at 16-19 (1984).

# Part II
# History, Scope, and Enforcement of the Indian Civil Rights Act

## History and Scope of the Indian Civil Rights Act

Nearly all of the civil liberties set forth in the Constitution are stated in terms of restrictions on State or Federal governmental action. The Bill of Rights restricts actions of the Federal Government, while the 14th amendment restricts actions of State governments.[1] The plain meaning of the Bill of Rights and the 14th amendment preclude their direct application to tribal governments. Tribes were not established by the Constitution and do not derive their power or right to govern from either Federal or State government.[2] Tribes are inherently sovereign.[3] When they entered into relations with the United States, they did not forfeit all of their sovereignty, and "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited

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[1] Under the doctrine of selective incorporation, the Supreme Court applies to the States "those provisions of the Bill of Rights that the Court considers fundamental to the American system of law . . . through the due process clause of the fourteenth amendment." J. Nowak, R.Rotunda, & J.N. Young, CONSTITUTIONAL LAW 412 (2d ed. 1983); *Duncan v. Louisiana*, 391 U.S. 145, 147–50 (1968). In doing so, the Court applies the 14th amendment, specifically its due process clause, to the States. The content of portions of the Bill of Rights is read into the due process clause. For instance, it would be a denial of the 14th amendment's right of due process for a State to deny an individual his freedom of religion because it would "deprive . . . [that] person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. In that case, the content of the first amendment is read into the 14th's due process requirement. "It would be incorrect to refer to the state as violating the first amendment without noting its application to the state through the 14th amendment." J. NOWAK, R. ROTUNDA & J.N. YOUNG, *supra*, at 413.

[2] A tribe is its own source of power. Its right to establish a court or levy a tax is inherent. *Iron Crow v. Oglala Sioux*, 231 F.2d 89 (8th Cir. 1956); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985).

[3] *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982); *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

sovereignty which has never been extinguished."[4] The Supreme Court summarized these principles in *United States v. Wheeler*[5] as follows:

> [O]ur cases recognize that Indian tribes have not given up their full sovereignty. . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[6]

The conclusion that tribal powers are inherent and not derived from the Federal Government has led the Supreme Court to hold consistently that the Bill of Rights does not restrict tribal governments. The seminal case in this area is *Talton v. Mayes*,[7] in which the issue was whether tribes could be considered part of the Federal Government for the purpose of imposing fifth amendment grand jury requirements upon the Cherokee Nation. After pointing out that the powers of the Cherokee Nation did not spring from the Federal Government, the Court reasoned that "the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States."[8] In other words, tribes predate the Constitution, and Federal recognition and regulation of them does not make them part of the Federal Government for fifth amendment purposes.[9]

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[4] D. GETCHES, D. ROSENFELT, & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 254 (1979) [hereinafter GETCHES, CASES AND MATERIALS], (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122–123 (1971 ed.) (emphasis removed)). *See also United States v. Wheeler*, 435 U.S. 313, 322 (1978): "The powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished.*' F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original)."

[5] 435 U.S. 313 (1978).

[6] *Id.* at 323.

[7] 163 U.S. 376 (1895).

[8] *Id.* at 384.

[9] The Court reasoned: "It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole

(continued...)

In *United States v. Wheeler*,[10] the Court emphasized the independent origin of tribal power by failing to find a violation of the fifth amendment's double jeopardy provision when the Federal Government prosecuted a defendant after a tribal court convicted him of a lesser included offense. Recognizing that independent sovereigns are entitled to vindicate identical public policies, the Court, noting that "the powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished,'"[11] held that the tribe acted "as an independent sovereign and not as an arm of the Federal Government."[12] The Tribe's exercise of it "primeval sovereignty" is "attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government."[13]

It was through the Indian Civil Rights Act of 1968 (ICRA) that Congress statutorily imposed on the tribal governments restrictions similar to those found in the Bill of Rights. Commonly called the Indian Bill of Rights, the ICRA resembles provisions in the United States Constitution's first, fourth, fifth, sixth, and eighth amendments, and the equal protection and due process provisions of the 14th amendment. However, the ICRA is not identical to the Bill of Rights; the Congress enacted a modified version of the Bill of Rights out of concern for tribal traditions and finances. For example, recognizing the role of religion in the structuring of tribal life, culture, and sometimes government, the ICRA guarantees free exercise of religion but does not prohibit its establishment. Cognizant of tribal economic constraints, the act does not require tribes to provide free counsel for criminally accused or a jury trial for civil cases. The act applies to tribal action against all individuals, both tribal members and nonmembers.[14] The ICRA's main provisions, as amended, are set forth here:

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[9](...continued)
object to control the powers conferred by the Constitution on the National Government." *Id.* at 384.

[10] 435 U.S. 313 (1978).

[11] 435 U.S. at 322 (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 122 (1945) (emphasis in original)).

[12] 435 U.S. at 329.

[13] *Id.* at 328.

[14] *Dodge v. Nakai*, 298 F. Supp. 17, 24–25 (D. Ariz. 1968).

Section 1301. Definitions

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

*Section 1302. Constitutional Rights*

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 one year and[15] a fine of $5,000, or both;[16]

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[15] The United States Code footnotes the use of "and" and states: "So in original. Probably should be 'or'." 25 U.S.C. § 1302 n.1 (1988).

(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 1303. Habeas Corpus*

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.[17]

Underlying the act are several years of hearings by the Senate Subcommittee on Constitutional Rights[18] and the Subcommittee's conclusion that the rights of Indians were "seriously jeopardized by the tribal government's administration of justice."[19] "These denials occur," the Subcommittee said, ". . . not from malice or ill will, or from a desire to do injustice, but from the tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system."[20]

Approximately 70 tribes submitted their views during the course of the subcommittee's hearings.[21] Most were "sympathetic to the

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[16](...continued)

[16] The ICRA originally limited tribal courts to sentences of 6 months or $500, or both, but this was amended in 1986 by Pub. L. No. 99–570, Title IV, § 4217, 100 Stat. 3207–146 (1986).

[17] 25 U.S.C. §§ 1301–1303 (1988).

[18] *See Constitutional Rights of the American Indian: Hearings on S. 961, etc., Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); *Constitutional Rights of the American Indian: Hearings Pursuant to S. Res. 58 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963); *Constitutional Rights of the American Indian: Hearings Pursuant to S. Res. 260 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962); *Constitutional Rights of the American Indian: Hearings Pursuant to S. Res. 53 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961).

[19] *See* 113 CONG. REC. 13,473 (1967) (statement of Sen. Ervin).

[20] *Id.*

[21] "[T]he records of the hearings indicated that the Subcommittee received some expression of opinion from 70 to 80 tribes . . . ." Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 601 (1972). For (continued...)

purposes of the legislation," but "cautious . . . about taking large steps beyond their psychological preparedness or financial capability."[22] However, some tribes, particularly the Pueblos in New Mexico,[23] objected to the act both before and after its enactment. Among the general concerns raised were that the ICRA was an infringement on tribal right to self-government, that implementation of the ICRA's requirements would diminish or eliminate tribal customs and traditions,[24] that the ICRA was unnecessary in light of similar guarantees and traditions in tribal law;[25] and concern about where the funding for these new guarantees was to come from in light of the tribes' meager resources.[26] Testimony submitted on behalf of the Ute and Hopi Tribes, for example, demonstrates the conflict between tribal traditions and the ICRA's requirements:

> The defendants' standard of integrity in many Indian courts is much higher than in the State and Federal Courts of the United States. When requested to enter a plea to a charge the Indian

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[21](...continued)
additional background on enactment of the Indian Civil Rights Act, see R. Winfrey, Jr., *The Indian Civil Rights Act*, in BETWEEN TWO WORLDS[:] THE SURVIVAL OF TWENTIETH CENTURY INDIANS 105 (A. Gibson ed. 1986); and ERVIN, PRESERVING THE CONSTITUTION[:] THE AUTOBIOGRAPHY OF SENATOR SAM J. ERVIN. JR. 195-204 (1984).

[22] Burnett, *supra* note 21, at 601.

[23] *See Rights of Members of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. (1968) [hereinafter *Rights of Members Hearing*]; and *Amendments to the Indian Bill of Rights: Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) [hereinafter *Amendments Hearing*].

[24] *Amendments Hearing*, *supra* note 23, at 77 (testimony of Wendell Chino, President of the Mescalero Apache Tribe).

[25] *Rights of Members Hearing*, *supra* note 23, at 37, 39, 42 (1968).

[26] *See Amendments Hearing*, supra note 23, at 9, 25 (testimony of Domingo Montoya and James Hena, respectively). See, for instance, the testimony of Governor James Hena, Tesuque Pueblo:

> "We Indian Americans are considered less fortunate socially and economically in comparison to the rest of our American brothers. Yet no funds were appropriated to assist us in meeting the new Anglo-Saxon encroachments. If we are to be expected to conduct our court system in accordance with American jurisprudence which could not function if compensation to jurors, court personnel, et cetera, were removed, why is it that the Congress overlooked our dire need for financial assistance?"

*Id.* at 25.

> defendant, standing before respected tribal judicial leaders, with complete candor usually discloses the facts. With mutual honesty and through the dictates of experience, the Indian judge often takes a statement of innocence at face value, discharging the defendant who has indeed, according to tribal custom, been placed in jeopardy. The same Indian defendants in off-reservation courts soon learn to play the game of "white man's justice", guilty persons entering pleas of not guilty merely to throw the burden of proof upon the prosecution. From their viewpoint it is not an elevating experience. We are indeed fearful that the decisions of Federal and State Courts, in the light of non-Indian experience, interpreting "testifying against oneself" would stultify an honorable Indian practice . . . .[27]

The Pueblos in New Mexico particularly objected to the imposition of jury trials not only because of the cost involved, and the fact that in their small communities it would be difficult to find impartial jurors,[28] but because, for the Pueblos, "it [was] no more logical to use a jury system for the settlement of internal matters within the extended 'family' that makes up a pueblo than it would be to use a similar system within the framework of an Anglo-American family as a means for enforcing internal rules or resolving internal disputes."[29] Other tribes, such as the Hopi and Ute Tribes, also submitted testimony objecting to the jury trial requirement: "The right of trial by jury, upon request, is a recognized but seldom used privilege with many tribes. Many accused Indian people feel they do not need a jury of peers to determine the facts already within the knowledge of the accused. The defendant enlightens a credulous court."[30] This same testimony went on to inquire of the Congress:

> Void of guile, the Indian inquires, do we not have inalienable rights to be protected as our customs and traditions require? Or must we relin[q]uish our right to self-government and submit to an alien code of the reasoning that someone else knows better than we the safeguards of our sacred rights? . . .

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[27] *Rights of Members Hearing*, *supra* note 23, at 127 (statement of John S. Boyden).

[28] *Amendments Hearing*, *supra* note 23, at 14 (testimony of Domingo Montoya, Chairman of the All Indian Pueblo Council).

[29] *Rights of Members Hearing*, *supra* note 23, at 37 (testimony of Domingo Montoya, Chairman of the All Indian Pueblo Council of New Mexico).

[30] *Rights of Members Hearing*, *supra* note 23, at 128 (1968)(statement of John S. Boyden).

. . . .

. . . It seems highly desirable that there be a frank recognition, in the quest for protection of inalienable rights for everyone, that some virtue and some vice can be found in both the Indian and the non-Indian effort.[31]

There were other problems in the practical application of the ICRA by tribal governments in addition to the overall problem of inadequate funding. For instance, the prohibition against a bill of attainder appeared incompatible with the structure of many tribal governments in which the legislative and judicial authority were vested in the tribal council.[32] Likewise, the imposition of an adversarial system of justice was inconsistent with the tradition in many tribes for an inquisitorial-type judicial hearing.[33]

Although the Navajo Nation had established a nontraditional court system decades before the passage of the Indian Civil Rights Act,[34] its transition between the two cultures continues even today:

> The contribution of the [lay] advocates to the Navajo court system is beyond measure. Both our language and our traditions make Anglo court systems strange to us. In traditional Navajo culture the concept of a disinterested, unbiased decisionmaker was unknown. Concepts of fairness and social harmony are basic to us; however, we achieve fairness and harmony in a manner different from the Anglo world. For the Navajo people, dispute settlement required the participation of the community elders and all those who either knew the parties or were familiar with the history of the problem. Everyone was permitted to speak. Private discussions with an elder who could resolve a problem was also acceptable. It was difficult for Navajos to participate in a system where fairness required the judge to have no prior knowledge of the case, and where who can speak and what they can say are closely regulated. The advocates helped the Navajos

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[31] *Id.*

[32] *Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Washington, D.C., Jan. 23, 1988, Exh. 11 at 266, 269–70 (written statement of Robert N. Clinton, Professor, University of Iowa College of Law) [hereinafter *Washington, D.C., Hearing*].

[33] *Id.* at 270.

[34] Conn, *Mid-Passage—The Navajo Tribe and its First Legal Revolution*, 6 AM. INDIAN L. REV. 329 (1978).

through this process, and the advocates continue to be an important link between the two cultures.[35]

## Enforcement of the Indian Civil Rights Act

### Enforcement in Tribal Forums

The Indian Civil Rights Act does not require a tribe to institute a formal tribal court for adjudication of allegations of ICRA violations; it requires only that there be a tribal forum for vindication of these statutory rights. A review of published tribal court decisions reveals a variety of opinions issued by tribal judges in cases brought under either the ICRA or tribal law seeking vindication of procedural rights in the administration of justice. Opinions have been issued pertaining to the right to a trial by jury,[36] to a fair and speedy

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[35] Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 229 (1989) (the author is Navajo Chief Justice Tom Tso). Chief Justice Tso also wrote of how regrettable it is that the traditional dispute resolution methods used by the tribes were not viewed by non-Indians as something of value:

> I regret that the outside world has never recognized that Navajos were functioning with sophisticated and workable legal and political concepts before the American Revolution. I regret even more that the ways in which we are different are neither known nor valued by the dominant society. Because we are viewed as having nothing to contribute, much time has been wasted. Let me be more specific. Anglo judicial systems now pay a great deal of attention to alternative forms of dispute resolution. Before 1868 the Navajos settled disputes by mediation. Today our Peacemaker Courts are studied by many people and governments. Anglo justice systems are now interested in compensating victims of crime and searching for ways to deal with criminal offenders other than imprisonment. Before 1868 the Navajos did this. Now Anglo courts recognize the concept of joint custody of children and the role of the extended family in the rearing of children. Navajos have always understood these concepts. We could have taught the Anglos these things one hundred and fifty years ago.

*Id.* at 227.

[36] *George v. Navajo Indian Tribe*, 2 Navajo Rptr. 1 (1979); *Hoh Indian Tribe v. Penn*, 15 Indian L. Rep. 6029 (Hoh Ct. App. June 28, 1988); *Hopi Tribe v. Lonewolf Scott*, 14 Indian L. Rep. 6001 (Hopi Tr. Ct. Oct. 6, 1986); *Squaxin Island Tribe v. Johns*, 15 Indian L. Rep. 6010 (Sq. I. Tr. Ct. June 30, 1987); *Tso v. Navajo Nation*, No. A-CR-02-83 (Nav. Sup. Ct. Feb. 20, 1986); *United States v. McGahuey*, 10 Indian L. Rep. 6051 (Hoopa Ct. Ind. Off. July 25, 1983).

trial,[37] to adequate jail conditions,[38] to the right to counsel,[39] to due process in the administration of justice,[40] to equal protection under the law,[41] to search and seizure,[42] and to excessive fines.[43]

ICRA enforcement in these forums is discussed in greater detail in Part III of this report, particularly with respect to civil suits against a tribe in which the plaintiffs allege a violation of their civil rights by the tribe or its officers.

## Private Rights of Action in Federal Court

The Indian Civil Rights Act specifically provides for habeas corpus review in Federal Court for "any person . . . to test the legality of his detention by order of an Indian tribe."[44] Whether the

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[37] *Miller v. Crow Creek Sioux Tribe*, 12 Indian L. Rep. 6008 (Intertr. Ct. App. Mar. 22, 1984); *Navajo Nation v. Dennis Lee Bedonie*, 2 Navajo Rptr. 131 (1979); *United States v. Griffith*, 12 Indian L. Rep. 6004 (Hoopa Ct. App. Oct. 23, 1984); and *United States v. Myers*, 12 Indian L. Rep. 6003 (Hoopa Ct. App. Oct. 23, 1984).

[38] *In re Colville Tribal Jail*, 13 Indian L. Rep. 6021 (Colv. Tr. Ct. May 6, 1986) (Colville Tribal Court, on its own initiative, ordered the tribal jail closed due to poor jail conditions); the order was rescinded after the conditions were cured, 13 Indian L. Rep. 6030 (Colv. Tr. Ct. June 27, 1986); *In re A.W., A Minor*, 15 Indian L. Rep. 6041 (Nav. Sup. Ct. Aug. 4, 1988) (detention of juveniles in an adequate facility); *McDonald v. Colville Confederated Tribes*, 17 Indian L. Rep. 6030 (Colv. Tr. Ct. Jan. 12, 1990).

[39] *In re A.W., A Minor*, 15 Indian L. Rep. 6041 (Nav. Sup. Ct. Aug. 4, 1988).

[40] *Chavez v. Tome*, 14 Indian L. Rep. 6029 (Nav. Sup. Ct. Sept. 18, 1987); *Drags Wolf v. Tribal Business Council*, 17 Indian L. Rep. 6051 (Ft. Bert. Tr. Ct. Feb. 21, 1990); *In re Adoption of Four Children*, 4 Navajo Rptr. 9 (1983); *In re: L.L.H.*, 10 Indian L. Rep. 6043 (Intertr. Ct. App. Sept. 10, 1982); *Montreal v. Cheyenne River Sioux Tribe*, 13 Indian L. Rep. 6002 (Chy. R. Sx. Ct. App. Nov. 15, 1985); *Navajo Nation v. Kee Browneyes*, 1 Navajo Rptr. 300 (1978); *Sisseton-Wahpeton Housing Authority v. Kay and Ken, Inc.*, No. C-89-010-035 (Sisseton-Wahpeton Sx. Tr. Ct. Aug. 17, 1989); *United States v. Hostler*, 10 Indian L. Rep. 6050 (Hoopa Ct. Ind. Off. Feb. 24, 1983); *Begay v. Navajo Nation*, A-CR-04-87 (Nav. Sup. Ct. July 25, 1988); *In re Contempt of: Kee Yazzie Mann*, A-CV-12-85 (Nav. Sup. Ct. Feb. 20, 1987); *In re K.D.M.*, 12 Indian L. Rep. 6002 (Chy. R. Sx. Ct. App. Feb. 15, 1984); *Lente v. Notah*, 3 Navajo Rptr. 72 (1982).

[41] *Greger v. Greger*, 11 Indian L. Rep. 6025 (Colo. R. Tr. Ct. June 26, 1984).

[42] *United States v. Brooks*, 12 Indian L. Rep. 6021 (Hoopa Ct. App. Jan. 8, 1985).

[43] *Ute Mountain Ute Tribe v. Mills*, 10 Indian L. Rep. 6046 (Ute Ct. App. Dec. 2, 1981).

[44] 25 U.S.C. § 1303 (1988).

Federal courts have jurisdiction to adjudicate claims under the Indian Civil Rights Act other than by way of writ of habeas corpus was resolved by the Supreme Court in 1978 in *Santa Clara Pueblo v. Martinez*.[45] Prior to this decision, the Federal courts had generally found jurisdiction to adjudicate ICRA claims under either 28 U.S.C. § 1331(a) (Federal question jurisdiction)[46] or 28 U.S.C. § 1343(4) (civil rights jurisdiction).[47] During this period the Federal courts heard a variety of claims under the act; "[t]he most frequent disputes were those involving elections and enrollment."[48] Suits were brought to secure the right to vote,[49] to challenge apportionment,[50] and to claim the right to be a candidate.[51] Claims also were brought under the ICRA's bill of attainder[52] and double jeopardy provisions,[53] right to counsel,[54] due process[55] and equal protection provisions,[56] freedom of speech,[57] search and seizure,[58] excessive force,[59] and habeas corpus[60] provisions.

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[45] 436 U.S. 49 (1978).

[46] 28 U.S.C. § 1331(a) read: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . . ." 28 U.S.C. § 1331(a) (1976).

[47] 28 U.S.C. 1343 read: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (4) To 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." 28 U.S.C. § 1343 (1976).

[48] R. Winfrey, Jr., *supra* note 21, at 126 (citing DeRaismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Government*, S.D.L. REV. 20 (Winter, 1975), pp. 87–90; and "[f]or cases by subject matter, see: Indian Lawyer Training Program, *Manual of Indian Law*, pp. B3–B17.")

[49] *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975).

[50] *Brown v. U.S.*, 486 F.2d 658 (8th Cir. 1973).

[51] *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976).

[52] *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969).

[53] *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

[54] *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976).

[55] *Stands Over Bull v. Bureau of Indian Affairs*, 442 F. Supp. 360 (D. Mont. 1977), *appeal dismissed* (because of *Martinez*), 578 F.2d 799 (9th Cir. 1978).

[56] *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975).

[57] *Big Eagle v. Andera*, 418 F. Supp. 126 (D.S.D. 1976), *remanded*, 508 F.2d 1293 (8th Cir. 1975).

[58] *Ortiz-Barraza v. U.S.*, 512 F.2d 1176 (9th Cir. 1975).

Some Federal courts construed the ICRA to require that a plaintiff exhaust tribal remedies before invoking the jurisdiction of the Federal courts.[61] This rule permitted tribal governments to resolve tribal disputes and establish tribal policy before Federal court review, which became something like an appellate review. This rule, however, was not absolute and would not be followed if tribal remedies were unavailable or if exhaustion would be futile.[62]

The Federal courts tended to look to the tribe's customs and traditions in reaching a decision under the ICRA, and some did not require an inflexible application of Federal precedents construing the rights secured by the ICRA.[63] As one Federal court put it: "Essential fairness in the tribal context, not procedural punctiliousness, is the standard against which the disputed actions must be

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[59](...continued)

[59] *Loncassion v. Leekity*, 334 F.Supp. 370 (D.N.M. 1971).

[60] *Settler v. Lameer*, 419 F.2d 1311 (9th Cir. 1969), *cert. denied sub nom. Yakima Tribal Court v. Settler*, 398 U.S. 903 (1970).

[61] *E.g., O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973); *McCurdy v. Steele*, 506 F.2d 653 (10th Cir. 1974); *St. Mark's v. Chippewa-Cree Tribe*, 545 F.2d 1188 (9th Cir. 1976); *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976); *Brunette v. Dann*, 417 F. Supp. 1382, 1386 (D. Idaho 1976) (exhaustion required in a dispute between tribal court judges that could be decided by tribal appellate court). *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), though not an ICRA case and not pre-*Martinez*, is nonetheless noteworthy for its strong endorsement of the exhaustion rule.

[62] *E.g., Necklace v. Tribal Court of Three Affiliated Tribes of the Fort Berthold Reservation*, 554 F.2d 845 (8th Cir. 1977) (exhaustion of remedies unnecessary when no tribal habeas existed, even though tribal remedies for relief existed); *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974); *Howlett v. Kootenai Tribes*, 529 F.2d at 239–40 (no exhaustion was necessary when tribal judge, *ex parte*, admitted that it was unlikely that tribal court would overrule tribal council); *Runs After v. Cheyenne River Sioux Tribe*, 437 F. Supp. 1035, 1036–37 (D.S.D. 1977) (no exhaustion was necessary when operation of tribal appellate court was erratic and controlled by tribal council); *see generally, National Farmers Union Ins. Cos. v. Crowe Tribe*, 471 U.S. 845, 856 n.21 (1985) (exhaustion not required if the tribal court did not afford an adequate opportunity to raise the contested issue).

[63] *E.g., Wounded Head*, 507 F.2d at 1082–83; *Tom*, 533 F.2d at 1104 n.5.

measured."[64] However, other courts found that the requirements of the ICRA were identical to those of the Bill of Rights.[65]

Ten years after the Indian Civil Rights Act became law, the U.S. Supreme Court decided *Santa Clara Pueblo v. Martinez*[66] and held that the act was unenforceable in the Federal courts except for writs of habeas corpus. Two forums, the Court observed, remained available for relief: Tribal forums[67] and, where tribal constitutions require secretarial approval of new ordinances, the Department of the Interior.[68]

At issue in *Martinez* was a tribal ordinance enacted by the Santa Clara Pueblo in 1939 that barred from tribal membership children of female tribal members married to nonmembers. Children of male tribal members married to nonmembers were not barred. Consequences of Santa Clara tribal membership included the rights to vote, take matters before the tribal council, hold secular tribal office, retain land use rights, and live on the reservation.[69] Suit was brought in Federal district court alleging that the ordinance violated the ICRA's equal protection and due process clauses. The district court upheld the tribal ordinance. It found that the ICRA's equal protection guarantee was not identical to that of the 14th amendment's, and "should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally

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[64] *McCurdy v. Steele*, 353 F. Supp. 629, 640 (D. Utah 1973), *rev'd on other grounds* 506 F.2d 653 (10th Cir. 1974). Another court added: "[T]his court has neither the inclination nor the power to review or overturn . . . [the tribal court's] determination by forcing concepts of Anglo-American law upon the Tribe." *Conroy v. Frizzell*, 429 F. Supp. 918, 925 (D.S.D. 1977), *aff'd sub nom. Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978).

[65] Indian tribes are held to the Federal one-man, one-vote doctrine. *Daily v. United States*, 483 F.2d 700, 706-707 (8th Cir. 1973); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973). *See also* the Post-*Martinez* cases of *United States v. Strong*, 778 F.2d 1393, 1397 (9th Cir. 1985) (search and seizure requirements held identical to fourth amendment's), and *United States v. Alberts*, 721 F.2d 636, 638 n.1 (8th Cir. 1983) (search and seizure requirements held identical to fourth amendment's).

[66] 436 U.S. 49 (1978).

[67] *Id.* at 65.

[68] 436 U.S. at 66 n.22. ("[P]ersons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior.").

[69] *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 14 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

employed by the tribe in considering membership questions."[70] The court further explained:

> [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 therefore should be preserved and which of them are inimical to cultural survival and should therefore be abrogated. 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. Obviously they can and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct cultural group.
>
> Much has been written about tribal sovereignty. If those words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external authority considers those decisions wise. 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. Congress has not indicated that it intended the Indian Civil Rights Act to be interpreted in such a manner.[71]

On appeal, the tenth circuit agreed with the district court on the issue of jurisdiction but disagreed on the merits, holding that the membership ordinance violated the ICRA's equal protection clause.[72] The court considered it significant that the Martinez children were being raised in the language, religion, and customs of the Santa Clara Pueblo, and that the ordinance was "of relatively recent origin," originating from "practical economic considerations;"[73] if the ordinance were based upon concern that tribal property not be diminished, the better course would have been to exclude the offspring of both sexes where either parent married outside of the Pueblo. "In sum, if we were to approve their ordinance and in turn approve this plain discrimination, it would be tantamount to saying that the Indian Bill of Rights is merely an abstract statement of principle."[74]

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[70] *Id.* at 18.

[71] *Id.* at 18–19.

[72] *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

[73] *Id.* at 1048.

[74] *Id.*

The Supreme Court reversed the tenth circuit and concluded that the ICRA could not be interpreted to impliedly authorize suit against a tribe or its officers in the Federal courts. Looking first to whether suit could be brought in Federal court against tribes, the Supreme Court concluded that absent an express congressional waiver of tribal sovereign immunity, which the ICRA lacked, an action to enforce the act could not be brought in Federal court. Whether the ICRA impliedly authorized suit against a tribal officer, in this case, the tribal governor, was then taken up. Stating that providing a Federal forum for ICRA litigation would constitute an interference with tribal autonomy and self-government, the Supreme Court concluded that a Federal cause of action was not required to fulfill the purposes of the ICRA, and that Congress' failure to provide remedies other than habeas corpus was deliberate.[75] Writing for the majority, Justice Marshall observed that the ICRA manifests two distinct and competing purposes: to strengthen the position of individual tribal members in relationship to tribal authority, and "to promote the well-established federal 'policy of furthering Indian self-government.'"[76] While a Federal forum for ICRA relief would strengthen the former, he noted that it would weaken the latter.

The Court stated that "[t]ribal forums are available to vindicate rights created by the ICRA, and [25 U.S.C.] § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply."[77] The Court also noted (in footnote 22) that where tribal constitutions require that new ordinances be approved by the Secretary of the Interior, "persons aggrieved by [these] laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior."[78] Moreover, it said, "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."[79]

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[75] 436 U.S. at 61.

[76] *Id.* at 62.

[77] *Id.* at 65.

[78] *Id.* at 66 n.22.

[79] *Id.* at 72.

It is therefore clear that Federal court review of ICRA claims is restricted to habeas corpus actions, although the Federal courts have on occasion expressed frustration with this situation.[80]

## United States Department of Justice

In addition to individual plaintiffs bringing private causes of action in the Federal courts, the U.S. Department of Justice brought ICRA enforcement actions in the Federal courts prior to *Santa Clara Pueblo v. Martinez*. An Office of Indian Rights, a subunit of the Department's Civil Rights Division, was formed in 1973.[81] The Office's duties included the investigation and enforcement of the Indian Civil Rights Act. Although it participated in several Federal court ICRA suits, such as in the role of amicus curiae, the Office of

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[80] *Shortbull v. Looking Elk*, 677 F.2d 645, 650 (8th Cir. 1982); and *Cook v. Moran*, No. 6–85–1513 (D. Minn. Feb. 14, 1986), *reprinted in Washington, D.C., Hearing, supra* note 32, at 197, 206–207.

Shortly after the *Martinez* decision, the Tenth Circuit issued an opinion distinguishing *Martinez*. *Dry Creek Lodge v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), *reh'g denied*, 450 U.S. 960 (1981). In *Dry Creek Lodge*, the plaintiffs were non–Indian owners of a resort located within the boundaries of the Wind River Reservation. Though the resort land had been patented to non–Indians, access to the land had not. Displeased with the presence of the resort, the Arapahoe and Shoshone Tribes, with the aid of the BIA, barricaded the access road, trapping persons in the lodge and effectively shutting it down. Following an unsuccessful effort to resolve the dispute in the reservation's Court of Indian Offenses, suit was brought in Federal court. On appeal to the tenth circuit, the court found jurisdiction to hear the claim both before and after the Supreme Court's decision in *Martinez*. *Dry Creek Lodge, v. United States*, 515 F.2d 926 (10th Cir. 1975), *Dry Creek Lodge v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). The court distinguished *Martinez* on three grounds: (1) Non–Indians, who presumably were disenfranchised from tribal government, brought suit; (2) the dispute was not peculiarly intratribal in nature; and, (3) tribal remedies were unavailable. However, the tenth circuit later retreated from the *Dry Creek Lodge* exception to *Martinez* in *White v. Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984): "The rationale behind the holding of the Tenth Circuit in Dry Creek was based upon what the court regarded as absolute necessity. . . . Necessarily the *Dry Creek* opinion must be regarded as requiring narrow interpretation in order to not come into conflict with the decision of the Supreme Court in *Santa Clara*." *Id.* at 1312. *See also Nero v.Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 (10th Cir. 1989).

[81] *National Indian Civil Rights Issues: Hearing Before the U.S. Commission on Civil Rights*, Washington, D.C., Mar. 19–20, 1979, Vol. II, Exh. 13, at 127 (written statement of John E. Huerta, Deputy Assistant Attorney General, Civil Rights Division, U.S. Dept. of Justice). [hereinafter *1979 Commission Hearing*].

Indian Rights itself initiated only two ICRA enforcement actions in the Federal courts: *U.S. v. San Carlos Apache Tribe*, Civ. No. 74–52–GLD (JAW) (D. Ariz. 1974), which pertained to the tribe's election procedures and was settled by a consent decree; and *United States v. Red Lake Band of Chippewa Indians*, Civ. No. 6–78–125 (D. Minn. 1978), a suit to enforce the right to counsel provisions of the ICRA, which was dismissed after *Martinez*. The Department's ICRA activity during this period has been summarized as follows:

> In the 7 years prior to *Santa Clara*, the Department of Justice received about 280 complaints of ICRA violations on the part of tribal governments. ICRA complaints during this period accounted for just over 18% of all civil rights complaints involving Indians. Several of these matters were settled by informal discussion between the Department and the affected tribes. Others were not pursued because of non–ICRA commitments on our part. The Department did, however, participate in 6 federal civil lawsuits which raised ICRA issues, including 2 brought solely on ICRA claims. No cases have been brought subsequent to *Santa Clara*. Most complaints brought to the Department's attention pre–*Santa Clara* involved allegations of tribal election irregularities. Other alleged violations occurred in the area of tribal employment, law enforcement, i.e., police and court irregularities, and housing assignments policies.[82]

The Department stated that it "followed a policy of attempting to negotiate changes in tribal practices prior to suit in order to minimize federal court involvement in tribal affairs."[83] The Department explained:

> For example, we persuaded the Warm Springs reservation in Oregon to abandon its prohibition on allowing licensed attorneys to practice in tribal court. In *United States v. San Carlos Apache Tribe*, Civ. No. 74–52–GLD (JAW) (D. Ariz. 1974), we negotiated a consent decree which provided for certain changes in tribal election procedures. We also expended a great deal of effort in attempting to persuade the Navajo tribe to reapportion prior to the 1978 tribal elections.[84]

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[82] Written Statement of James M. Schermerhorn, Civil Rights Division, U.S. Dept. of Justice, Before the U.S. Commission on Civil Rights (Feb. 11, 1986), at 16–17 (on file at the U.S. Commission on Civil Rights) (footnotes omitted).

[83] *1979 Commission Hearing, supra* note 81, at 142.

[84] *Id.* at 142–43.

The Department received approximately 45 ICRA complaints in the 7½ years immediately subsequent to the *Martinez* decision.[85] The breakdown on these complaints was as follows:

> Seventeen complaints allege tribal court irregularities including a failure to allow retained attorneys to appear in tribal court, a failure to permit defendants an opportunity to be heard and the failure to afford criminal defendants a trial by jury. Thirteen complaints allege flaws in the tribal election process including improper interference by the tribal council, fraud and malapportioned election districts. Six complaints allege improper tribal hiring practices including political interference and nepotism. Four complaints allege housing violations including noncompliance with tribal housing assignment policies, favoritism and improper interference by the tribal council. The remaining miscellaneous complaints range from an alleged failure to provide tribal benefits equally to all members (similar to the *Santa Clara* facts) to an allegation of unsanitary and inadequate tribal jail conditions.[86]

The Department took no action on these complaints and "no effort has been made, post *Santa Clara*, to invoke the jurisdiction of the federal court."[87]

## United States Department of the Interior

Noting that relief may be available to ICRA claimants where tribal constitutions require Department of the Interior approval of new tribal ordinances, the Supreme Court in *Martinez* had suggested that, "[P]ersons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior."[88] The Supreme Court was referring to the fact that the Indian Reorganization Act of 1934 (IRA) requires the

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[85] James M. Schermerhorn, *supra* note 82, at 17.

[86] *Id.* at 17–18.

[87] *Id.* at 17. For additional information on the number and types of complaints received by the Department of Justice, post-*Martinez*, *see Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Phoenix, Ariz., Sept. 29, 1988, at Exh. 2, at 45, 52–55 (statement of James Schermerhorn, special litigation counsel, Civil Rights Division, U.S. Dept. of Justice, at a briefing on the Indian Civil Rights Act to the U.S. Commission on Civil Rights, Washington, D.C., Feb. 11, 1986), and Exh. 4, at 132 (letter from James Schermerhorn to William J. Howard, General Counsel, U.S. Commission on Civil Rights, Jan. 24, 1989).

[88] 436 U.S. at 66 n.22.

Secretary of the Interior to approve all tribal constitutions adopted in accordance with the IRA,[89] and many of these IRA constitutions require Departmental approval of tribal ordinances. However, Assistant Secretary for Indian Affairs, Ross D. Swimmer, told the Commission: "I don't know what their thinking was when they wrote that footnote, but I believe it's out of place today."[90] By 1988 only about half of the tribal constitutions required such secretarial approval,[91] and it was the Department's preference "that constitutions be adopted that do not require approval of the Bureau of Indian Affairs to take certain actions . . . ."[92] This was in keeping with the Department's movement towards eliminating departmental interference with, and oversight of, tribal action:

> [T]he role of the Bureau of Indian Affairs has outlived its usefulness on the reservation. We feel that it is time that, if tribal government is really going to be the force out there, we have to get out of the way. Our policy of self-determination means more and more responsibility and more and more authority being given to tribes with less oversight, if you will, and less structuring from the Bureau of Indian Affairs, and that we should pull back rather than become more involved in day-to-day decisionmaking and let the other processes, whether they be Congress or tribal government or the Federal courts, come in and set up the mechanism; that we would not be an effective force, especially as we are trying to implement a policy of reducing the impact of the BIA on tribal decisionmaking.[93]

In 1988 the Interior Department's ICRA role consisted almost exclusively of providing limited training to tribal court personnel on the act's requirements:[94]

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[89] 25 U.S.C. § 476 (1988).

[90] *Washington, D.C. Hearing, supra* note 32, at 14.

[91] Assistant Secretary Swimmer advised the Commission that approximately half of the tribal constitutions are Indian Reorganization Act constitutions, and that "within those there is usually some reference back to approval authority at some level." *Id.*

[92] *Id.* at 13–14.

[93] *Id.* at 13 (testimony of Ross O. Swimmer, Assistant Secretary for Indian Affairs, U.S. Dept. of the Interior).

[94] *See* letter from Ross Swimmer, Assistant Secretary for Indian Affairs, to Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, Jan. 27, 1988, reprinted as Exhibit 1, *Washington, D.C., Hearing, supra* note 32, at 142–149 [hereinafter Exhibit 1]. The letter from Assistant Secretary Swimmer (continued...)

> We consider ourselves to be in the position of offering resources, which may be money, technical assistance, some expertise in those areas, and review of constitutions, and with the Solicitor's Office, helping tribes understand the legal intricacies of tribal courts; but beyond that, once we have delivered those resources, it is a tribal government decision.[95]

According to information provided by 7 of the Bureau's 12 Area Directors, 142 of 189 tribal judges had received some type of ICRA training.[96] Fifty-three of these judges held law degrees.[97]

Assistant Secretary Swimmer told the Commission that the Department of the Interior had no mechanism for monitoring ICRA compliance and for receiving ICRA complaints.[98] Although the Department had several statutory means by which it could curb civil rights violations by tribal governments, it did not believe that Congress intended it to perform that role, nor would the Department recommend that it be given such a role.[99]

One of the statutory means was the Department's use of its statutory authority under 25 U.S.C. § 450m to rescind a contract with a tribe whenever the "Secretary determines that the tribal organization's performance under such contract or grant agreement involves . . . *the violation of the rights* or endangerment of the

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[94](...continued)
was a response to a letter from Chairman Pendleton to Donald P. Hodel, Secretary, U.S. Department of the Interior, Dec. 9, 1987. The Department's Judicial Services Branch administers a contract under which the National Indian Justice Center provides training to tribal court personnel which includes sessions on the ICRA.

[95] *Washington, D.C., Hearing, supra* note 32, at 12 (testimony of Ross O. Swimmer, Assistant Secretary for Indian Affairs, U.S. Dept. of the Interior).

[96] Exhibit 1, *supra* note 94, at 147.

[97] *Id.*

[98] *Washington, D.C., Hearing, supra* note 32, at 15. *See also* Exhibit 1, *Washington, D.C., Hearing, supra* note 94, at 144 ("There is no office within the Bureau with the responsibility to collect data in relation to the ICRA").

[99] *Washington, D.C., Hearing, supra* note 32, at 12–13. For additional background on the current authority of the Department of the Interior, see *Id.* at 80–81, 283–295 (testimony and written statement of Prof. Robert N. Clinton, University of Iowa School of Law). *See also* Clinton, *Tribal Courts and the Federal Union*, 26 WILLIAMETTE L. REV. 841, 926–935 (1990).

health, safety or welfare of any persons . . . ."[100] The Department advised that subsequent to the *Martinez* decision it had not exercised this authority with regard to ICRA violations[101] and it did not believe that Congress intended for it to do so:

> We do not believe that Congress intended for the Bureau to undertake a role in the enforcement of the ICRA, in the administration of Pub. L. 93–638 grants. Our role in the administration of these grants is to assist Indian tribal governments to achieve self-determination, a goal which necessarily presupposes a limited federal role in the administration of the program. . . .
>
> We find no implication in Pub. L. 93–638 that Congress intended to authorize the BIA to enforce the Indian Civil Rights Act through the threatened denial of federal funds. As a practical matter, to enforce the ICRA would require an expanded administrative law apparatus for making such determinations. That would run counter to the development of tribal justice systems, while further strengthening the authority of the Bureau of Indian Affairs over tribal governments.[102]

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[100] 25 U.S.C. § 450m (1988) (emphasis added). See also the implementing regulations at 25 C.F.R. § 271.74 (1990): "A contract made under this part may be terminated, and control or operation of the program or function assumed by the Commissioner or Area Director as appropriate, in whole or in part, when the Commissioner or Area Director determines that the tribal organization's performance under the contract involves: (1) The violation of the rights of any persons can be identified as a pattern or practice, or . . . ."

[101] Exhibit 1, *supra* note 94, at 143.

[102] Letter from Hazel Elbert, Deputy to the Assistant Secretary–Indian Affairs (Tribal Services) to Brian Miller, Deputy General Counsel, U.S. Commission on Civil Rights (Sept. 26, 1988), *reprinted in Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Portland, Ore., Mar. 31, 1988, as Exh. 4, at 124–125 [hereinafter *Portland Hearing*].

The Department's use of its contracting authority was discussed at length during the Commission's Washington, D.C., hearing. The Commission explored a then recent decision by the Department of the Interior to refrain from including language in a tribal court contract specifying that the tribe must comply with the Indian Civil Rights Act. The inclusion of such language had been recommended by both the Department's own counsel, as well as the local U.S. Attorney, in light of the tribe's past performance, as exhibited by two Federal court decisions admonishing the CFR court for its failure to comply with the ICRA (*Good v. Graves*, Civ. No. 6–85–508 (D. Minn. May 20, 1985), *reprinted in Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Phoenix, Ariz., Sept. 29, 1988, as Exh. 5, at 151, and *Cook v. Moran*, CIV No.6–85–1513 (D. Minn. Feb. 13, 1986), *reprinted in Washington, D.C., Hearing*, *supra* note 32, as Exh. 5, at 197); as well as the tribe's criteria for admission to its bar that were so restrictive (by requiring attorneys to be

(continued...)

The Commission had also asked the Department to identify weaknesses in administering tribal judicial systems under 638 contracts.[103] The Department had responded that the major weakness is "that the funds are 'banded' monies within the Bureau's Indian Priority System," meaning that the "funds for court systems are not stable and can be subject to funding increases or decreases based on tribal priority needs for that year. Unsure funding levels make it very difficult to develop a court system that can grow steadily to meet community needs."[104]

The Commission also explored whether ICRA violations had affected the Department's trust responsibility or its recognition of tribal officials, subsequent to the *Martinez* decision.[105] The Aberdeen Area Office identified two instances where "the Bureau [withheld] recognition of tribal council actions where questioned (disputed) members voted on enactments that required Secretarial

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[102](...continued)
members of the tribe), that no attorneys had been admitted. The Department's efforts over the years to convince the tribe to allow attorneys to practice proved fruitless and were met with resistance, including the issuance of a tribal memorandum that threatened to order the removal of BIA personnel if they attempted to enforce a BIA directive to allow attorneys into the court. Assistant Secretary Swimmer took the position that inasmuch as the contract required compliance with all Federal laws, the inclusion of the additional language was unnecessary. U.S. Attorney Arnold disagreed, and told the Commission that he believed that "the failure to do so has seriously shortened any possibility of using that [rescission of the contract] as an enforcement tool, assuming ongoing violations." *Washington, D.C., Hearing, supra* note 32, at 61. For testimony and materials regarding this issue, *see Washington, D.C. Hearing, supra* note 32, at 19–41, 316–459; *Portland Hearing, supra*, at 115–155.

[103] The United States Congress appropriated approximately $11.2 million in fiscal year 1987 to fund tribal court systems. *Tribal Court Systems and Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 40–41 (1988). The BIA distributes this money largely through contracts with the tribes under Public Law 93–638, the Indian Self-Determination and Education Assistance Act (thus these funds are often referred to as "638 contract" monies).

[104] Exhibit 1, *supra* note 94, at 145.

[105] Note, the "power to refuse to recognize tribal action is not the equivalent, however, of BIA power to displace the tribal political process or conduct tribal elections itself where not provided for by federal or tribal law." *Washington, D.C., Hearing, supra* note 32, at 266, 291 (written statement of Prof. Robert N. Clinton). *See also Wheeler v. U.S. Dept. of Int., Bur. of Indian Affairs*, 811 F.2d 549 (10th Cir. 1987); *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983).

approval,"[106] as well as two other instances where recognition of council members was withheld on the basis that the council had deviated from tribal constitutional provisions.[107] In addition, the Billings Area Office could identify two cases where it had "refused to recognize certain tribal council members due to election irregularities."[108] The Eastern Area Office cited a 1986 episode where the Assistant Secretary declined "to accord unconditional recognition to . . . tribal representatives who were elected in [a] 'seriously flawed' election."[109] And the Phoenix Area Office indicated that there had been instances in which the Phoenix Area Office had "refused recognition of tribal representatives." It explained that "[g]enerally, non-recognition status is imposed due to an election that is contested by the tribal membership or perhaps being litigated in tribal court. Non-recognition might also occur if there is a clear violation of the election procedures."[110]

The Department handles matters such as these, involving alleged violations of a tribal constitution, on a case by case basis;[111] there are no policy guidelines within the Department for addressing these matters.[112] In 1980 the Department had issued written guidelines, following an incident that occurred on one reservation.[113]

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[108] Memorandum from Aberdeen Tribal Government Services, to Deputy to the Assistant Secretary-Indian Affairs (Tribal Services) (Jan. 2, 1988) (on file at U.S. Commission on Civil Rights).

[107] Memorandum from Aberdeen Tribal Government Services, to Deputy to the Assistant Secretary-Indian Affairs (Tribal Services) (Jan. 2, 1988) (on file at U.S. Commission on Civil Rights).

[108] Memorandum from Billings Area Director to Deputy to the Assistant Secretary-Indian Affairs (Tribal Services) (Jan. 22, 1988) (on file at U.S. Commission on Civil Rights).

[109] Memorandum from Area Director, Eastern Area Office, to Deputy to the Assistant Secretary-Indian Affairs (Tribal Services) (Jan. 22, 1988) (on file at U.S. Commission on Civil Rights).

[110] Memorandum from Area Director, Phoenix Area Office, to Deputy to the Assistant Secretary-Indian Affairs (Tribal Services) (Jan. 21, 1988) (on file at U.S. Commission on Civil Rights).

[111] Exhibit 1, *supra* note 94, at 143.

[112] *Id.*

[113] Memorandum from Superintendent, Red Lake Agency, to Area Director, Minneapolis, U.S. Dept. of the Interior, (Jan. 22, 1988), *reprinted in Portland Hearing, supra* note 102, at 139. The Department issued the memorandum "to establish Departmental policy guidance for dealing with tribal governments in the wake of the *Martinez* decision." U.S. Dept. of the Interior Memorandum

(continued...)

In that incident a violent protest erupted over the tribal council's removal of the tribal treasurer, resulting in "the tragic loss of two young lives and millions of dollars in damage. . . ."[114] The Department refused to recognize the provisionally appointed tribal treasurer, questioning the process and procedure used to remove the former treasurer. It "denied a tribal request for release of tribal trust funds to operate their government."[115] Later action by the Department included its announcement that an "economic sanction was being imposed . . . which would curtail all Federal funds to the tribe, due to unsuccessful efforts to audit the . . . tribal accounts."[116] (Two and one-half months later the Department and the tribe reached an agreement on the audit). Still later, when a petitioning process to amend the tribal constitution was brought and the "council [employed] various delaying tactics," the Department "imposed a 10-day deadline for . . . tribal council action on the petition presented and [held] that the Bureau wanted a proper election on the issues to be conducted not less than 60 days or the Assistant Secretary would withdraw recognition of the tribal government as a sanction."[117] (The 10–day deadline was lifted pending the report of a two–man team sent in to help address the crisis).[118] The above–referenced 1980 memorandum was withdrawn 7 months after it was issued, reportedly due to tribal

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[113](...continued)
from Acting Assistant Secretary–Indian Affairs (June 12, 1980), *reprinted in Washington, D.C., Hearing, supra* note 32, as Exh. 2, at 150. This memorandum listed six sanctions that could be imposed against a tribal government for "breach of the terms of the political relationship" with the Federal Government by failure to adhere to the terms of its tribal constitution. The least severe of the sanctions was a "[r]efusal to recognize or approve a specific act of a tribal government or any consequence of it," while the most severe was the temporary "[w]ithdrawal of recognition of all [tribal] officials."

[114] Memorandum from Superintendent, Red Lake Agency, to Area Director, Minneapolis, U.S. Dept. of the Interior (Jan. 22, 1988), *reprinted in Portland Hearing, supra* note 102, at 139.

[115] *Id.* at 140.

[116] *Id.*

[117] *Id.* at 141.

[118] *Id.*

opposition. A subsequent memorandum instructed that such matters would be handled on a case by case basis.[119]

The Department's authority "to recognize, or conversely to recommend that Congress break relations with and derecognize, an Indian tribe" was also discussed at the Commission's Washington, D.C., hearing.[120] Robert N. Clinton, professor of law at the University of Iowa College of Law, explained:

> Just as the federal government monitors the human rights record of foreign governments for compliance with fundamental norms of human decency, the Department of the Interior and the BIA can and should monitor the records of compliance of federally recognized Indian tribes with the provisions of the ICRA. This role does *not*, however, authorize the BIA to intervene in any particular case to rectify what it perceives to be a violation of the ICRA. Rather, the power of the BIA in this instance is limited to recommending to Congress such derecognition or in limited cases derecognizing the offending tribe itself, a devastating decision that, like the breach of diplomatic relations with foreign governments, can only be used sparingly and thoughtfully if it is to have any effect.[121]

Absent congressional direction for it to do so, it appears unlikely that the Department would undertake such a role in light of its testimony to the Commission that it sees its role as limited to providing resources and technical guidance, and its movement away from further involvement.[122]

Lastly, the Commission examined whether the Department of the Interior had developed a model code for its Courts of Indian Offenses, as the Indian Civil Rights Act had mandated it to do by

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[119] The new memorandum instructed that: "In the event a situation develops where the Area Director believes that there is a clear violation of provisions of the tribal constitution, he should refer the matter to the Office of the Commissioner, with a full report on the circumstances. Each matter will be handled on a case by case basis." U.S. Dept. of the Interior Memorandum from Assistant Secretary–Indian Affairs, through Acting Deputy Commissioner of Indian Affairs, to All Area Directors (Jan. 16, 1981), *reprinted in Washington, D.C., Hearing, supra* note 32, as Exh. 3, at 155.

[120] *Washington, D.C., Hearing, supra* note 32, at 291, 81 (written statement and testimony of Prof. Robert N. Clinton).

[121] *Id.* at 292 (emphasis in original).

[122] *See Washington, D.C., Hearing, supra* note 32, at 12–13 (testimony of Ross O. Swimmer, Assistant Secretary for Indian Affairs, U.S. Dept. of the Interior).

July 1, 1968.[123] Although the Department of the Interior published a model code for public comment,[124] the code was never issued as a final rule.[125]

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[123] The law states, in part, that:

> The Secretary of the Interior is authorized and directed to recommend to the Congress, on or before July 1, 1968, a model code to govern the administration of justice by courts of Indian offenses on Indian reservations. Such code shall 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, . . . .

25 U.S.C. § 1311 (1988).

[124] On April 14, 1975, the Department of the Interior published for public comment a Model Code for Administration of Justice by Courts of Indian Offenses. "Model Code for Administration of Justice by Courts of Indian Offenses," 40 Fed. Reg. 16689 (1975).

[125] *See Cook v. Moran*, Civ. No. 6-85-1513 (D. Minn. Feb. 14, 1986), *reprinted in Washington, D.C., Hearing, supra* note 32, as Exh. 5, at 197; F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 333, n.17 (1982 ed.) ("The Act of Apr. 11, 1968, Pub. L. No. 90-284, § 301, 82 Stat. 73, 78 (codified at 25 U.S.C. § 1311), called for development of a model penal code for Courts of Indian Offenses, but the statute has not yet been carried out."); *Washington, D.C., Hearing, supra* note 32, at 15 (testimony of Joe Little, Chief, Judicial Services Branch and Acting Chief, Tribal Relations Branch).

# Part III
# Governments in Transition

## Development and Structure of Tribal Forums

The administration of justice by tribal governments takes place through tribal courts, Courts of Indian Offenses, and traditional tribal forums.[1] Tribal courts are courts established and operated by tribes; Courts of Indian Offenses, commonly called CFR[2] courts, are courts established and operated by the Bureau of Indian Affairs; and traditional courts generally consist of forums that rely upon tribal councils or council committees to adjudicate disputes.

In 1978, using data supplied by the Bureau of Indian Affairs, the National American Indian Court Judges Association reported that there were 71 tribal courts, 32 CFR courts, and 16 traditional courts.[3] Ten years later, the number of courts had increased to about 150,[4] of which the CFR courts numbered less than 20.[5] In

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[1] *See* NAT'L AMERICAN INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 42 (1978) (prepared under contract with the Bureau of Indian Affairs) [hereinafter INDIAN COURTS AND THE FUTURE].

[2] "CFR" stands for Code of Federal Regulations. CFR courts administer a code of law and order that is now incorporated into 25 Code of Federal Regulations Part 11. Originally authorized in 1883 by the Commissioner of Indian Affairs, these courts continue to serve tribes that lack the resources for their own tribal courts. INDIAN COURTS AND THE FUTURE, *supra* note 1, at 8–10. They remain, however, Federal courts under the control of the Department of the Interior. *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383–384 (8th Cir. 1987).

[3] INDIAN COURTS AND THE FUTURE, supra note 1, at 42.

[4] *Tribal Court Systems and the Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 19 (1988) (statement of Donald D. Dupuis, president, National American Indian Court Judges Association) [hereinafter *Senate Tribal Court Hearing*]. *See also* BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, NATIVE AMERICAN TRIBAL COURT PROFILES 1985.

[5] *Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Washington, D.C., Jan. 28, 1988, at 15 [hereinafter (continued...)

addition, a small number of tribes continue to operate under congressional delegations of jurisdiction to State courts.[6] The most notable delegation is Public Law 280, whereby Congress conferred on certain States, to varying degrees, criminal and civil jurisdiction over Indian reservations. The remaining tribal entities, most if not all of them very small, resolve disputes through a variety of nonjudicial forums.

Shifts in Federal Indian policy have hampered the development of tribal courts.[7] Only in the last 20 years have these courts been permitted to develop. In 1883 the Bureau of Indian Affairs first established CFR courts.[8] By 1925 tribal court appropriations had been reduced to almost half ($6,500) of the 1892 appropriation ($12,540), and there were fewer tribal judges as well.[9] The situa-

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[5](...continued)
*Washington, D.C., Hearing*] (testimony of Joe Little, Chief, Judicial Services Branch, Bureau of Indian Affairs, U.S. Dept. of the Interior). Note, some CFR courts serve more than one tribe. For instance, the Western Oklahoma CFR Court serves the Apache Tribe of Oklahoma, Caddo Indian Tribe of Oklahoma; Cheyenne-Arapaho Tribes of Oklahoma; Comanche Indian Tribe; Delaware Tribe of Western Oklahoma; Fort Sill Apache Tribe of Oklahoma; Kaw Tribe of Oklahoma; Kiowa Indian Tribe of Oklahoma; Otoe-Missouria Tribes of Oklahoma; Pawnee Indians of Oklahoma; Ponca Tribe of Indians; Tonkawa Tribe of Oklahoma; and the Wichita Indian Tribe of Oklahoma. Memorandum from Area Director, Anadarko Area Office, Bureau of Indian Affairs, to Deputy Assistant Secretary-Indian Affairs (Tribal Services) (Jan. 26, 1988) (on file at U.S. Commission on Civil Rights).

[6] For example, the States exercise jurisdiction over the Iowa of Kansas, Kickapoo of Kansas, Prairie Band of Pottawatomi, Sac & Fox of Missouri, and Alabama-Coushatta. These tribes do not have tribal courts. Memorandum from Area Director, Anadarko Area Office, Bureau of Indian Affairs, to Deputy Assistant Secretary-Indian Affairs (Tribal Services) (Jan. 26, 1988) (on file at U.S. Commission on Civil Rights).

[7] For a succinct historical overview of Federal Indian policy, see generally, U.S. COMMISSION ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 15-23 (1981) [hereinafter CONTINUING QUEST]. *See also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-206 (1982 ed.) [hereinafter F. COHEN].

[8] INDIAN COURTS AND THE FUTURE, *supra* note 1, at 8. *See* 25 C.F.R. § 11.1(b) (1989), indicating that these courts exist "to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law." Cohen's *Handbook of Federal Indian Law* explains that "Congress never expressly authorized these courts, . . . but their validity today is sustainable by congressional ratification and acquiescence." F. COHEN, *supra* note 7, 333.

[9] INDIAN COURTS AND THE FUTURE, *supra* note 1, at 10.

tion changed with the Indian Reorganization Act of 1934 (IRA)[10] and revisions to the Code of Indian Offenses the following year, which encouraged tribes to adopt constitutions and establish tribal courts.[11] At that time, according to the National American Indian Court Judges Association:

> Most tribes had only a shaky recollection of their traditional systems and were most familiar with the Bureau's regulations and procedures. Consequently, the abrupt reinstitution of traditional law on reservations was not realized. Most tribes either remained under the old system or adopted codes modeled closely after the BIA code which was revised in 1935.[12] Courts adopting their own codes became known as "tribal courts." A clear trend since the IRA has been for tribes to develop codes and thereby convert from Courts of Indian Offenses or "CFR courts" as they are commonly known (rules concerning them are found in 25 C.F.R. pt. 11) to tribal courts which operate under the residual sovereignty of the tribes, rather than as agencies of the federal government.[13]

In the 1950s Federal policy shifted toward termination of tribal governments, and developing tribal court systems were again adversely affected. When, in the 1960s, the pendulum of Federal Indian policy again swung, this time through adoption of the current policy of tribal self-determination, Congress mandated that the fledgling tribal court systems enforce the ICRA. In its 1978 report, the National American Indian Court Judges Association observed:

> The ICRA necessarily has drawn greater attention to the Indian court system, and the policy of federal support for Indian self-government has included strengthening Indian courts. It has not been until the last few years, however, that this has been reflected significantly in BIA programs or funding. . . .
>
> Overall, Indian courts have been retarded by their history. They originally were vehicles of an outside force. Later, their intended growth as integral parts of an Indian government was stunted by a

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[10] Indian Reorganization Act of 1934, ch. 576, 48 stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (1988)).

[11] F. COHEN, *supra* note 7, at 333–334.

[12] The quoted text contains a footnote at this point that reads as follows: "25 C.F.R. pt. 11. The new regulations limited the jurisdiction and sentencing authority of Courts of Indian Offenses (and of the tribal courts which used them)." INDIAN COURTS AND THE FUTURE, *supra* note 1, at 11 n.8.

[13] INDIAN COURTS AND THE FUTURE, *supra* note 1, at 11 (footnote omitted).

lack of effective programs or funding, as well as policy vacillations. However, for the past several years it has become increasingly important that they develop as strong elements of Indian government in order to protect the residual sovereignty of tribes against incursions by state and local governments and to fulfill Congress' own requirements under the ICRA.[14]

Judicial forums vary from reservation to reservation as a result of many factors including differences in the sizes of the tribes, their reservations' general populations, their caseloads, their wealth and resources, their traditions, and the tribunals' longevity. In addition, some tribal courts derive their authority from a written constitution, and others do not.[15] In 1983 the Navajo Tribal Courts handled a caseload of 40,406 cases, the Blackfeet Tribal Court a caseload of 8,158 cases, and the Rosebud Sioux Tribal Court a caseload of 6,237.[16] The Kalispel Tribal Court had 24 cases, the Las Vegas Paiute Tribal Court 14 cases, the Port Gamble Klallam Tribal Court 38 cases, and the Taos Pueblo Court two cases.[17]

The structure of these tribunals varies greatly too. For instance, the court system for the Navajo Nation [18] which of all the tribes has the greatest number of American Indians residing on its reservation,[19] consists of seven district courts located in Chinle, Crownpoint, Kayenta, Tuba City, and Window Rock, Arizona; and in Ramah and Shiprock, New Mexico. There is also a children's

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[14] *Id.* at 13.

[15] According to information provided by 10 of the Bureau's 12 Area Directors, 260 out of 445 tribes within the 10 areas have constitutions. *Washington, D.C., Hearing, supra* note 5, Exh. 1, at 148 (memorandum from the Assistant Secretary–Indian Affairs, Dept. of the Interior, to Clarence M. Pendleton, Chairman, U.S. Commission on Civil Rights (Jan. 27, 1988).

[16] BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, NATIVE AMERICAN TRIBAL COURT PROFILES (1985) at 62, 6, and 101, respectively.

[17] *Id.* at 42, 49, 75, and 91, respectively.

[18] Several articles have been written regarding the Navajo court system including Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989) [hereinafter *Tribal Courts*]; Tso, *The Tribal Court Survives in America*, JUDGES J., Spring 1986, at 22; Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983); and Fahey, *Native American Justice: The Courts of the Navajo Nation*, 59 JUDICATURE 10 (June–July 1975).

[19] BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, WE, THE FIRST AMERICANS 9 (1988). The Bureau of the Census estimates that there were 104,517 American Indians on the reservation at the time of the 1980 census.

court and a peacemaker court within each district.[20] Established in 1982, the peacemaker court has been described as a "blending of the old with the new," that is, a system "designed to integrate traditional Navajo dispute resolution methods with traditional Anglo-American judicial methods."[21]

The Navajo Nation has an appellate court, the Navajo Nation Supreme Court, which consists of three appellate justices; an organized bar association, which has responsibility for bringing disciplinary actions against its members; and its own Navajo caselaw reporter, the *Navajo Reporter*. Its tribal code is also published.[22]

In contrast, in many of the pueblos in New Mexico, such as that of the Cochiti, the Jemez, the Sandia, the San Felipe, the Santo Domingo, the Tesuque, and the Zia, their tribal leader, the Governor of the Pueblo, serves as the tribal judge.[23] In some of the Pueblos, such as the Pueblo of Cochiti and the Pueblo of Taos, "[c]ourt procedures are unwritten, and the only laws applied are customary laws of the pueblo."[24]

In some tribes, such as in the Chickasaw Nation,[25] the Choctaw Nation,[26] the Pueblo of Sandia,[27] and the Pueblo of Taos,[28] there is no appellate forum. In others, the tribal council serves as the appellate forum. These include the Hannahville Indian Community,[29] Pueblo of Acomo,[30] Pueblo of Isleta,[31] Pueblo of Pojoa-

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[20] Tso, *supra* note 18, at 228.

[21] *Id.* at 227 n. 3. The Navajo Peacemaker Court is discussed at length in Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983).

[22] NAVAJO TRIB. CODE (Equity Pub. Corp.).

[23] BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, NATIVE AMERICAN TRIBAL COURT PROFILES 1985 at 77, 79, 84, 85, 90, 92, 93 [hereinafter TRIBAL COURT PROFILES].

[24] *Id.* at 77, 91.

[25] Response of the Chickasaw Nation to Questions Submitted to Honorable Donald P. Hodel, Secretary of the Interior, on Dec. 9, 1987 (Jan. 19, 1988) (on file at U.S. Commission on Civil Rights).

[26] Response of the Choctaw Nation to Questions Submitted to Honorable Donald P. Hodel, Secretary of the Interior, on Dec. 9, 1987 (Jan. 21, 1988) (on file at U.S. Commission on Civil Rights).

[27] TRIBAL COURT PROFILES, *supra* note 23, at 84.

[28] *Id.* at 91.

[29] *Id.* at 33.

[30] *Id.* at 76.

que,[32] Seneca Nation,[33] and Tulalip Tribes.[34] In the Pueblo of San Ildefonso, appeals may be taken to the tribal council, whose decisions may then be appealed to religious leaders.[35] In the Quileute Tribe, the tribal council is the appellate forum, but if a defendant prefers, an outside judge will be brought in to hear the appeal.[36] In the Miccosukee Tribe, appeals are taken to the entire tribal membership over the age of 18.[37]

Some tribes belong to intertribal systems such as an intertribal circuit-riding court system or an intertribal appellate court system. For instance, in the Northwest there is a circuit-riding court system, the Northwest Intertribal Court System (NICS), which serves tribes with small caseloads not warranting permanent court personnel. The NICS governing board, with representatives from each tribe, appoints the judges subject to tribal council approval. The system is structured as follows:

> The Northwest Intertribal Court System is a consortium of 14 small Indian Tribes in western Washington funded in 1979. The system provides judicial and prosecutorial services to these member tribes on both 1) trial and 2) appellate levels.
>
> The system is governed by a governing Board of Directors comprised of representatives from its 14 member tribes. Tribal enrollment of these tribes range from 200 members in the smallest tribe to 2,000 members in the largest tribe.
>
> The system is a circuit court system wherein the courts are held at the tribal locations and held at least once a month and more if required based on caseload. The courts at the tribes are under their codes, laws, as there is no central generic code of N.I.C.S.

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[31](...continued)

[31] *Id.* at 78 ("The tribal council or an appellate body designated by it, handles all appeals.")

[32] *Id.* at 83.

[33] *Id.* at 107.

[34] Response of the Tulalip Tribes to Questions Submitted to Honorable Donald P. Hodel, Secretary of the Interior, on Dec. 9, 1987 (Jan. 22, 1988) (appealable to the Tribal Board of Directors) (on file at U.S. Commission on Civil Rights).

[35] TRIBAL COURT PROFILES, *supra* note 23, at 86.

[36] Response of the Quileute Tribe to Questions Submitted to Honorable Donald P. Hodel, Secretary of the Interior, on Dec. 9, 1987 (Jan. 21, 1988) (on file at U.S. Commission on Civil Rights).

[37] Response of the Miccosukee Tribe to Questions Submitted to Honorable Donald P. Hodel, Secretary of the Interior, on Dec. 9, 1987 (Feb. 9, 1988) (on file at U.S. Commission on Civil Rights).

Since 1979, the system has provided personnel to member tribes to conduct court at the trial court level, which are courts of record. We handle Judge trials, jury trials, and have always allowed attorneys to appear before the courts. Tapes are used for all trial proceedings.

The appeals from the trial court are heard by a 3 Judge panel of all appeals in the appellate court. The appellate review is generally on the record, with oral arguments although a couple of tribes allow de novo appeals. The Judge who hears cases at the trial level does not sit on the appeal case. Appellate Judges are contract Judges who sit on a case by case basis. There are currently seven Judges on contract and three of those are attorney Judges and the other four are experienced tribal court Judges with other tribes.[38]

In South Dakota there is an intertribal appellate court system called the Intertribal Court of Appeals. In 1985 its membership consisted of the Crow Creek Sioux Tribe, the Sisseton-Wahpeton Sioux Tribe, the Rosebud Sioux Tribe, the Three Affiliated Tribes, and the Omaha Tribe. As of 1988, only two tribes were members—the Three Affiliated Tribes of North Dakota and the Sisseton-Wahpeton Sioux Tribe. The operations of the Intertribal Court of Appeals have been described as follows:

Each tribe has by formal resolution ceded jurisdiction over appeals to the Court of Appeals. The court[']s jurisdiction and procedures are governed by a uniformed code.

. . . . .

The court personnel includes a full-time court administrator/clerk. Each member tribe selects an appellate judge and at least one alternate, to represent them in the Court of Appeals. These appellate judges are all part-time and serve on an on-call basis when the court convenes. The position of Chief Appellate judge is appointed on an annual basis and rotates among the member tribes giving each tribe a chance to have a judge in that position.

. . . . .

. . . The court applies the law of the tribe where the appeal was received from.[39]

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[38] Written Statement of Judge Elbridge Coochise, administrator and chief judge of the Northwest Intertribal Court System, submitted for *Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Portland, Ore., Mar. 31, 1988 [hereinafter *Portland Hearing*]. [Statement on file at U.S. Commission on Civil Rights.]

[39] TRIBAL COURT PROFILES, *supra* note 23, at 145.

Although many tribes have separate judicial courts, many of these judicial forums were granted their authority by their respective tribal councils. For instance, tribes that elected to come under the Indian Reorganization Act of 1934 were authorized to draft their own laws and constitutions and establish their own courts.[40] Of those tribes that have constitutions, most follow models prepared by the Bureau of Indian Affairs.[41] The models did not propose a separation of the tribal governments' executive, legislative, and judicial branches but instead placed judicial authority in the tribal councils.[42] "Various reasons account for this consolidation of functions in tribal councils,"[43] as noted by the American Indian Lawyer Training Program:

> In the case of the Pueblos, for example, native religious customs call for a theocratic system in which the religious leader appoints the governor and council, who perform both governmental and religious functions. Among certain tribes, tradition reserves power to a general council composed of all the adult members of the tribe, which customarily delegates authority on a case by case basis to an executive or business committee. Generally the consolidation results,

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[40] 25 U.S.C. § 476; *see generally*, F. COHEN, *supra* note 7, at 13–16, 149–51. Cohen states: "Tribal constitutions and corporate charters were subject to detailed examination before Secretarial approval was granted. Although some constitutions were individualized, many were standard 'boilerplate' constitutions prepared by the Bureau of Indian Affairs and based on federal constitutional and common law notions rather than on tribal custom." F. COHEN, *supra* note 7, at 149; INDIAN COURTS AND THE FUTURE, *supra* note 1, at 37. The National American Indian Court Judges Association report notes that of those tribes that did not incorporate under the Indian Reorganization Act, most have constitutions that resemble a model constitution prepared with the aid of BIA legal assistance. "Thus, most tribes' constitutions and law and order codes are virtually the same." *Id.*

[41] F. COHEN, supra note 7, at 149.

[42] AMERICAN INDIAN LAWYER TRAINING PROGRAM, JUSTICE IN INDIAN COUNTRY 45 (1980) [hereinafter JUSTICE IN INDIAN COUNTRY]. The National American Indian Court Judges Association's Long Range Planning Project surveyed 23 Indian reservations, "selected because they represent a cross section of the various situations of the 134 Indian courts in the nation." *Id.* at 36. After the survey, the Long Range Planning Project Report observed: "Of the reservations surveyed, three have a separation of powers clause as part of the tribal constitution." INDIAN COURTS AND THE FUTURE, *supra* note 1, at 40.

[43] JUSTICE IN INDIAN COUNTRY, *supra* note 42, at 45.

however, from the mandates of the IRA constitution and the tribes' lack of resources to support separate governmental departments.[44]

The lack of resources that tribal judiciaries are laboring under was amply evidenced during the Commission's hearings. Testimony received by the Commission consistently reported a lack of adequate tribal court funding. Judge Edythe Chenois, chief judge of the Quinault Tribal Court and president of the Northwest Tribal Court Judges Association, told the Commission that "one of the major problems in Indian country at this point is being able to carry out the Indian Civil Rights Act without proper funding. . . . I think that's one of the major problems that you're going to find in all Indian tribal courts, is that there's no proper funding in order that we can do the job."[45] Judge Chenois went on to explain:

> In my tenure as president [of the Northwest Tribal Court Judges Association], which has been about a year and a half, there have been some courts that, to my knowledge, have had personnel turnover. Again, we look at funding. I hate to keep bringing that up, but that's true. Tribal court judges have a hard time with their funding levels. There's just not enough money.
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> . . . . .
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> . . . In the last couple of years I know of tribal court judges that have gotten job offers that are like three to four times their salary. And it's real difficult, no matter how dedicated the tribal judge may be, to turn down a salary which is four times what you're earning in tribal court. And a lot of our own tribal members really want to stay, but given the economics of the entire country at this point, it's very difficult to stay on if you're getting a job offer which is a lot more money.[46]

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[44] *Id.*

[45] *Portland Hearing, supra* note 38, at 11. Judge Chenois testified that the Quinault Tribal Court consists of herself as chief judge, one part-time associate judge, and a full-time clerk. Two attorneys practice before the court as prosecutor and public defender. Both lay advocates and attorneys practice before her court. *Id.* at 6.

[46] *Id.* at 11. Judge Chenois testified that she had been advised by the Bureau of Indian Affairs that she was to operate her court with a budget of $15,000. The tribe was to supply additional monies, somewhere in the neighborhood of $59,000. *Id.* at 12. She also testified that jury trials were provided for when requested, and the bill for the jury services is submitted to the tribal government and paid without questions asked. *Id.* at 25.

Chief Judge Emma Dulik of the Makah Tribal Court told the Commission her tribal court budget recently vacillated between $75,000 and half that amount:[47] "We were—the judges—we were all full time; we had a full-time clerk. We even had a prosecutor in our contract. And now, like I say, we're down to half-time. It's like teasing us, you know. They [the BIA] throw us a certain amount; then it gradually disappears."[48] Cecilia Hawk, associate judge of the Suquamish Tribal Court, testified that neither she nor the chief judge were compensated for their duties.[49]

Anita Remerowski, former director of the Dakota Plains Legal Services, in speaking of the need for additional resources to support tribal institutional development, recounted a situation that occurred on the Rosebud reservation when its juvenile justice system ran out of funds. The tribe appealed to the legal services office and for 60 days the legal services office became the tribal court. "We had been the advocates in tribal court a few days before, and we became the court system, divvying up responsibilities between advocacy, judges, and clerks of the court."[50]

Testimony regarding the Pine Ridge reservation pointed to several deficiences resulting from inadequate funding. Among the points made were that Pine Ridge lacked a public defender because of funding problems;[51] that a recent tribal court budget was $300,000 while the budget for a similar State circuit court with similar responsibilities was over $1 million;[52] that Pine Ridge lacked a process server and that service of process was impeded by the existence on the reservation of nine different police districts supervised by nine different commissions;[53] that Pine Ridge lacked money to provide jury trials;[54] and that, at one Pine Ridge jail, 100

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[47] *Id.* at 23.

[48] *Id.*

[49] *Id.* at 56.

[50] *Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Rapid City, S.D., July 31–Aug. 1 and Aug. 21, 1986, at 11–12 [hereinafter *Rapid City Hearing*].

[51] *See Id.* at 42–43 (testimony of Jerry Mathews, Counsel, Pine Ridge Safety Commission).

[52] *Id.* at 52–53.

[53] *Id.* at 147 (testimony of Vincent Brewer, Sr., chief prosecutor, Oglala Sioux Tribal Court). One result of the existence of the commissions was that 48 patrolmen were supervised by 54 supervisors. *Id.* at 170 (testimony of Robert Fast Horse, chief judge, Pine Ridge Tribal Court).

[54] *Id.* at 154.

people were being kept in a holding facility built for 30 or 40 people, with inadequate heating and ventilation.[55]

Judge Elbridge Coochise, administrator and chief judge of the Northwest Intertribal Court System (NICS), told the Commission that the system, which provides tribal court personnel to 14 small tribes in western Washington, at one time provided a public defender, in addition to a judge and prosecutor, but that due to a funding reduction, the public defender postition had been eliminated.[56]

Also decrying the shortage of funds for tribal courts was Judge David Harding, judge pro tem of the Coeur D'Alene Tribe and associate judge of the Northwest Intertribal Court System, who told the Commission that:

> [I]f you have a caseload of 400 criminal cases a year, and it gets out into the community that if you're a criminal defendant and you ask for a jury trial, the chances of you ever going to trial are real slim, then anybody who hears that in the community is going to ask for a jury trial, because they know that there's only going to be a small percentage of those cases that actually receive a jury trial, because the courts cannot afford to give everybody a jury trial. And a lot of times that happens. We have at times—have had stacked up jury trials, where if you tried to add up in dollars how much it would cost to give every defendant that jury trial, you could not do it with the amount of money that was budgeted for that year.[57]

He further explained:

> I didn't mean to indicate that persons are routinely being denied jury trials. What I'm indicating to the Commission is that the reality of dollars is that, if you have 100 jury trials pending and a budget of $100,000, and it costs you $1,000 to actually conduct a jury trial, you've eaten up all your court fees for that year in jury trials alone. What about child sexual abuse? What about traffic court? What

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[55] *Id.* at 86 (testimony of Marvin Stoldt, Pine Ridge Reservation); *Id.* at 172 (testimony of Robert Fast Horse, chief judge, Pine Ridge Tribal Court).

[56] *Portland Hearing, supra* note 38, at 53. Judge Coochise noted that funding for the Intertribal Court System came from several sources. The BIA funded the prosecutor and judge component. The code-writing service was funded through the American Administration for Native Americans grant. And the community boards program was funded by three private foundations. *Id.* at 61.

[57] *Id.* at 24 (testimony of Judge David Harding).

about divorce court? What about domestic disputes? You know, that's jury trials alone.[58]

Judge Donald D. Dupuis, president of the National American Indian Court Judges Association, also testified to the need for better funding: "Many of us . . . after a while you look to do something else. As you heard this morning, some of the judges try and operate a court system on $15,000 of Federal funds. I think the clerk of a district court gets about 70,000 bucks a year."[59]

Despite the shortage of funds, Douglas Hutchinson, a former judge for the Northwest Intertribal Court System, with an extensive background in the development of tribal courts, testified to the quality of tribal court justice, particularly in view of the courts' relatively brief history.

> Indian tribal courts—there is not a one of them in the United States today existing in a constitutional form which has been in existence longer than 50 years. So many of these tribal courts have come into existence in the last 20 years, 20–25 years.
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> . . . . .
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> . . . [T]hey have worked very diligently, their governments have, at trying to put together governments that would satisfy the imposed limitations of the Indian Civil Rights Act and other unreasonable—my personal—unreasonable expectations that others have of them. And they have done a magnificent job, an extraordinary job. They have created these institutions out of nothing. They had very little funding . . . they've had no guidance. . . .[60]

According to Hutchinson, the courts "are handling today on a daily basis complex legal issues, not merely involving civil rights, but involving every aspect of a . . . normal judicial system . . . . They would do better if they had more funding, if they had more training, if they had more available people, if they had resource support and not external guidance."[61]

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[58] *Id.* at 25–26.

[59] *Id.* at 89. Judge Dupuis also testified that the National American Indian Court Judges Association had not met in 3 years because its funding had been cut off. *Id.* at 90.

[60] *Id.* at 34.

[61] *Id.* at 35. The tribal courts, Hutchinson cautioned strongly, do not need further imposition of external standards. In Hutchinson's view, the tribal courts have performed extraordinarily well, particularly in view of their having come into existence in only the last 20 or so years. *Id.* at 34–35.

The inadequacy of tribal court funding has been known for some time. In 1941, Commissioner of Indian Affairs John Collier, while noting the phenomenal progress of tribal courts, identified one lingering problem: "[T]he lack of adequate appropriations for the support of the courts and for the maintenance of an adequate police force have handicapped the administration of justice."[62] In 1977 the American Indian Policy Review Commission found inadequate funding and training and recommended that "Congress appropriate significant additional moneys for the maintenance and development of tribal justice systems."[63]

Senator Daniel Inouye, Chairman of the Senate Select Committee on Indian Affairs, remarked during a Select Committee hearing in January 1988, that members of the panel had all "in one way or another, suggested that the way to strengthen the [tribal] court system is to properly fund it."[64] He noted, however, that the BIA had requested the same amount for tribal courts in FY 1987 as in FY 1985, although the number of cases handled by the courts had risen from 185,000 to 230,000. "That being the case", he asked the agency, "don't you think that it takes a few more dollars to handle that increase?"[65]

Part of the problem is the dearth of information on Federal funding of tribal courts. Court budgets over the years have been comprised of "a mixture of tribal, BIA, LEAA, CETA, Public Law 93-638, and other funds."[66] In 1978 the National American Indian Court Judges Association wrote of the difficulties resulting from the method of funding tribal courts:

> [C]ourt planning is difficult. . . . There is no logical explanation for the uneven distribution of federal funds to various Indian reservations; funding seems to be determined by history or by the political muscle of a tribe. Inequities in funding were criticized in a Bureau of Indian Affairs report which found no correlation between popula-

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[62] 1941 Report of Commissioner of Indian Affairs, John Collier, *reprinted in* W. WASHBURN, 2 THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 953, 960 (1973). Commissioner Collier also noted: "Often factional interest and personal quarrels intrude to influence and affect the decisions of the courts. Often the absence of well-defined methods of appeal have resulted in injustice to defendants." *Id.*

[63] AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT, 95th Cong., 1st Sess. 167 (Comm. Print 1977).

[64] *Senate Tribal Court Hearing, supra* note 4, at 40.

[65] *Id.*

[66] INDIAN COURTS AND THE FUTURE, *supra* note 1, at 56.

tion or caseload and court budgets. It found that expenditures varied from $2.98 to $14.19 per capita and from $8.30 to $35.08 per case. Further, the report said that, due to varying levels of tribal support for courts (and law enforcement), funding inequities are far more serious in reality. To get the same services, some tribes spend none of their own money, while others have to spend a great deal. Those unable to spend tribal funds depend on the BIA entirely, but the level of services varies. Since the report, the Bureau has encouraged area and agency offices to base their budgeting on a formula which would lead to some parity in funding. Judging from the reservations visited, it does not appear that the funding which reaches Indian courts is consistent with the formula.[67]

The tribal judges' report goes on to say that although Federal agencies other than the BIA also sometimes provided funds for tribal court operations "[i]t seems that they rarely know what funds are being disbursed by the BIA or other agencies":[68]

> One tribe surveyed was due for a large increase in funding because the funds for court operations supplied by one agency were inadequate. It was discovered that other agencies were contributing funds to court operations and that the tribe actually had one of the largest court budgets in the country.[69]

Another problem highlighted by the tribal judges was that their courts received only a part of the funds they were supposed to receive: "Much money earmarked for the courts is lost on the way from Washington to the tribes, mostly at the BIA area office level."[70] The money that reaches the tribal government, as a general rule, is provided to the tribal councils, and they, in turn, must decide how the money should be allocated against other priorities. Another complication, according to the report by the tribal judges association, is that funding for law enforcement and

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[67] *Id.*, *citing* BUREAU OF INDIAN AFFAIRS, INDIAN RESERVATION CRIMINAL JUSTICE TASK FORCE ANALYSIS 1974–75, at 43 (1975). The tribal judges association concluded that only 3 of the 23 tribes surveyed thought that their tribal court budgets were adequate. INDIAN COURTS AND THE FUTURE, *supra* note 1, at 57.

[68] *Id.* at 56–57.

[69] *Id.* at 57.

[70] *Id.* at 57. In this regard, the tribal judges' report notes that "[a]lthough Public Law 93–638 was supposed to reduce the number of the BIA employees by contracting out positions to the tribes, the number of employees has increased since passage of the Act." *Id.*

court operations is often "lumped together."[71] As a result, funds are sometimes diverted from court operations to other needs such as police cars or the improvement or operation of jail facilities.[72]

Two years later, the American Indian Lawyer Training Program complained that a central repository for data on tribal administration of justice was still needed.[73] However, the amount of money provided to tribal courts by the BIA was increasing, a trend it found encouraging, though still "grossly inadequate." [74] Information on tribal court funding which the Department of the Interior provided to the Commission confirms that the funding has been gradually and significantly increased. The figures below are measured in thousands of dollars:

| Fiscal Year | Total Tribal Courts | Estimated Training |
|---|---|---|
| 1980 | $4,008 | |
| 1981 | 6,859 | |
| 1982 | 7,998 | |
| 1983 | 7,710 | |
| 1984 | 7,628 | |
| 1985 | 8,286 | |
| 1986 | 10,625 | |
| 1987 | 11,196 | 1,000 |
| 1988 | 11,947 | 1,000 |
| 1989 | 11,726 | 1,200 |
| 1990 | 12,192 | 1,200 |

These figures include funding for the Central Office and its local agencies. The Department told the Commission that it was unable to provide training costs incurred by its local BIA agencies, and that

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[71] *Id.*

[72] *Id. See also, Rapid City Hearing, supra* note 50, at 192 (testimony of Judge Lorraine Rousseau).

[73] JUSTICE IN INDIAN COUNTRY, *supra* note 42, at ix.

> To date, a national clearinghouse concerning itself with justice in Indian country—a resource center where information concerning all matters of tribal justice could be collected, evaluated and disseminated—has never been established. Questions have been referred to expensive task forces, tribal attorneys, and various organizations and Federal agencies that also lack access to a central resource center.

*Id.*

[74] *Id.* at 46–47.

amounts expended for training in fiscal years 1980 through 1986 were not available without additional research. The Department also advised the Commission that estimated training funds for fiscal years 1987 through 1990 were for contracts with the National Indian Justice Center and the American Indian Resources Institute.

Adequate tribal court funding is obviously an important consideration in meeting the obligation both by tribal governments and the Federal Government to ensure that the civil rights of persons who deal with tribal governments are observed.

In addition to the overall problem of inadequate funding, the four major challenges tribal governments have had to address, and continue to address, in complying with the Indian Civil Rights Act are: 1) establishing the independence of the judiciary; 2) defining the parameters of judicial review of council actions; 3) establishing appropriate limits to the sovereign immunity defense; and 4) securing and maintaining recognition of tribal court jurisdiction and authority.

## Establishing an Independent Judiciary

In 1978 the National American Indian Court Judges Association reported that "[a] lack of independence of the judiciary seems to be a serious problem with many tribes."[75] The report noted:

> [R]emoval [of tribal judges by councils] takes place for many reasons other than "just cause." In some tribes the judge changes whenever a new political faction takes power. Where recall is effected by a simple majority vote, judges are particularly susceptible to removal after making unpopular decisions. Short terms of office, council removal power, and tribal politics combine to make a judge susceptible to pressures from those in power to dispose of cases in particular ways.[76]

Two years later the American Indian Lawyer Training Program stated that "[p]erhaps the greatest flaw in the standard . . . [Indian Reorganization Act] constitution . . . is its failure to provide for a

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[75] INDIAN COURTS AND THE FUTURE, *supra* note 1, at 39–40 ("[T]ribal courts are often seen as subordinate arms of tribal councils, and this situation can lead to pressure being exerted by council members on the court when a particular outcome or action is desired. . . . A lack of independence of the judiciary seems to be a serious problem with many tribes.").

[76] INDIAN COURTS AND THE FUTURE, *supra* note 1, at 41.

separation of legislative, executive and judicial powers."[77] The resulting subordination of tribal judicial systems to tribal councils "began what has become a major hindrance to the development of effective tribal court systems—lack of separation of powers between these branches of government."[78]

In 1984 the Presidential Commission on Reservation Economies noted that "[b]oth Indians and non-Indians complain of political discrimination against them by tribal governments and by tribal courts which are arms of tribal governments. . . . Decisions rendered by tribal courts, which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians":[79]

> Businesses see uncertainty in situations where law is subordinate to the whims of tribal councils, especially where tribal governments are destabilized by frequent political turnover of elected office holders. There is a fear that tribal courts will not protect the property rights of non-Indians by according them due process of law or protecting individual non-Indian civil rights. Uncertainty increases risk and risk increases the cost of doing business on Indian reservations.
>
> Tribal government patronage systems and the politicization of tribal courts are significant obstacles to Indian reservation economic development since they discriminate unfairly against individuals and businesses. A lack of sovereign responsibility deters investment.[80]

In its 1989 report[81] the Special Committee on Investigations of the United States Senate Select Committee on Indian Affairs also called for greater separation of tribal governmental powers. Recommending legislation to return to the tribes all Indian lands, programs, functions, and other resources currently being managed by Federal agencies, the Special Committee would have the tribes enter new agreements with Congress and adopt new constitutions. Under these new constitutions:

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[77] JUSTICE IN INDIAN COUNTRY, *supra* note 42, at 45.

[78] *Id.* at 52.

[79] REPORT OF THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES, November 1984, pt. 2, at 36.

[80] *Id.*

[81] SPECIAL COMM. ON INVESTIGATIONS OF THE SENATE SELECT COMM. ON INDIAN AFFAIRS, 101ST CONG., 1ST SESS., FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS (Comm. Print 1989) [hereinafter the 1989 SENATE SPECIAL INVESTIGATIONS REPORT].

> Tribes will retain the power to determine and define their own form of government, but tribal constitutions must explicitly guarantee the freedoms of speech, press, assembly, religion and the other Bill of Rights protections now required by the Indian Civil Rights Act. In anticipation of the tremendous increase in tribal authority under the new federalist policy, tribes should strengthen the separation of powers between their legislative, executive and judicial branches of their governments. In the process, tribes could guarantee in their constitutions judicial review by an independent judiciary, free from interference by the tribal council or chairman.[82]

Tribes have had varying degrees of success in establishing the independence of their courts. Testimony ranged from an account by one judge of being suspended and jailed for suspending a tribal council primary election when presented with substantial evidence of vote fraud,[83] to another judge's recollection of how she had chastised council members who criticized her for enforcing a judgment against the tribe by telling them they were fortunate to have a court, and that it was her job to enforce the order.[84] The

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[82] *Id.* at 20.

[83] *Rapid City Hearing, supra* note 50, at 93–94. See also the written statement beginning at page 313 of the Rapid City hearing transcript for a fuller explanation of the events surrounding the judge's incarceration. When resort to the tribal court proved unavailable, he eventually was able to get the charges against him dropped by way of writ of habeas corpus from the Federal district court. *Id.* at 318. He told the Commission that removal from the bench is not an uncommon tribal council tool. "This method has been carried even further by barring former and present officials and judges from holding tribal elective office." *Id.* at 317. He pointed to the form of government "forced on most Indian tribes in order to have some entity to deal with" as the cause of the problem. *Id.* at 323. In 1984 the Bureau of Indian Affairs had cited this same tribe for problems in the area of judicial independence. "Political influence is a problem with the court and the Tribal administration." Draft Review and Evaluation, Rosebud Tribal Court at 20, (Mar. 14–16, 1984).

The chief judge at the time of the Commission hearing testified to a vast improvement in council noninterference, and that, as a practical matter, the tribe was avoiding interference, "because of the personalities who are in the tribal government right now." *Id.* at 187. He said "[t]hat could change any minute when you change the personalities." *Id.* at 188.

[84] The tribal court of appeals had found that the plaintiff's ICRA due process rights had been violated and ordered that she be reinstated with backpay. The officers of the tribal construction company issued a check to the plaintiff in accordance with the court order but then stopped payment on it. *Rapid City Hearing, supra* note 50, at 223, 224 (testimony of Judge Bertha C. Two Bulls).

(continued...)

personal fortitude of individual judges in resisting council pressure[85] was one of several factors cited by tribal judges at the Commission's Portland hearing for success in maintaining judicial autonomy. Other factors included the small size of the Northwest tribes,[86] and the manner in which the Northwest Intertribal Court System has been organized.[87] A key factor in achieving judicial independence also appeared to be the education of tribal council members on the role of the judiciary and the need for independence from outside influences. Judge Don Sollars, president of the Montana–Wyoming Tribal Court Judges Association and chief judge and court administrator from the Blackfeet Reservation in Montana, testified, for example, that "[I]f you're going to sit in a corner, they're [the council members] going to run over you. I mean, they're going to drag you around. If you stand up for what you believe, I don't think that these councils are going to fool with you."[88]

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[84](...continued)
The judge testified that "it took bringing the board members three times into tribal court and threatening them with 90 days in jail and a $180 fine before they obeyed the court order." *Id.* at 223–24. She was telephoned by members of the council's law and order committee and criticized and pressured for having enforced the judgment against the tribe. Her response to them was to tell them that they were fortunate to have a court, and that it was her job to enforce the order. Interview with Associate Judge Bertha Two Bulls, Oglala Sioux Tribal Court, in Pine Ridge, South Dakota, (July 1986).

[85] *See, e.g., Portland Hearing, supra* note 38, at 91, 97 (testimony of Judge Don Sollars); *id.* at 75 (testimony of Judge Lorraine Rousseau); *id.* at 62 (testimony of Judge Elbridge Coochise); *id.* at 35–36 (testimony of Judge Jeanette Whitford).

[86] *Id.* at 63 (testimony of Judge Elbridge Coochise). *See also id.* at 65 (testimony of Judge Cecilia Hawk), where Judge Hawk explained that another reason for the success of the Northwest Intertribal Court System stems from the fact that judges are appointed to indefinite terms of not less than 6 years, her reservation is checkerboard in nature with county streets, and the judges in the association have a good rapport, and a continuing education program, with county judges.

[87] *Id.* at 54 and 62, and prepared written statement. The Northwest Intertribal Court System (NICS), is a circuit–riding court system with small caseloads not warranting permanent court personnel. The NICS governing board, with representatives from each tribe, appoints the judges subject to tribal council approval. Because the governing board selects and compensates the appointed judges, the judges have greater independence than judges appointed and paid by their tribal councils. *Id.* at 53–54, 62 and written statement.

[88] *Portland Hearing, supra* note 38, at 97 (testimony of Judge Don Sollars).

Judge Elbridge Coochise, administrator and chief judge of the Northwest Intertribal Court System, testified:

> [W]hen I was sitting the first year in court, . . . the police arrested the tribal secretary. I got calls from several council people. And in short, about a year after that we went to the tribal council and said, "Hey, you either got to cut that out and give us our due as an independent entity, or you can take it back and do your own judgments." That was both the chief judge and I. From that, both the chief judge and I got lifetime appointments, so that we eliminate[d] that sort of problem.[89]

Edythe Chenois, chief judge of the Quinault Tribal Court, testified that "[t]he Quinault Tribal Court is separated and has a written separation clause in the tribal constitution":

> We are constitutionally separated under the constitution which was passed by the tribe in 1975. This is accurate, inasmuch as it is a practice separation, as well as one on paper.
>
> The council has consistently, during my tenure, been aware of the separation and has been very good about observing that. And I am confident that the tribal court is accorded all of the separation issues. We do not answer to the council. I've ruled against the tribe on several major issues, and I've been in there since 1980. I have had no problem with the council. Of course, we have a very good council, and I'm very happy.[90]

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[89] *Portland Hearing*, *supra* note 38, at 62 (testimony of Judge Elbridge Coochise). *See also id.* at 35 (testimony of Judge Jeanette Whitford). Whitford, chief judge of the Coeur D'Alene Tribal Court and Kalispel Tribal Court, said that although tribal councils, chairmen, or others had attempted three times to influence her, she quickly put an end to the attempts by stating that she was sworn to uphold the equal application of the tribe's laws, or that she resented the attempts at influencing her. *Id.* at 35–36.

[90] *Id.* at 6. *See also id.* at 58–59 (testimony of Judge John Rowe). Mr. Rowe, former chief judge of the Confederated Tribes of Siletz Indians, testified that on occasion, his court had successfully exercised judicial review of tribal council actions, and that such review was expressly mandated by the tribal constitution. *Id.* at 59. See also *id.* at 17 (testimony of Judge Elizabeth Fry): "I feel that we have a very independent court, and that it's kind of treated with kid gloves by the council, like they're afraid of claims of exactly what you're talking about." *But see, id.* at 20, 27 (testimony of Judge David Harding): "[A] lot of times it's a real subtle influence that goes on, but it doesn't take too much smarts to know that a person or other persons are trying to influence the judge. And a judge has to make a decision at that time as to whether you're going to listen

(continued...)

Judge Lorraine Rousseau, president of the Northern Plains Tribal Court Judges Association, contrasted the experience of the Northwest tribes and other tribes from the standpoint of council interference with judicial functions:

> If you look at the tribes from where most of the complaints about the Indian civil rights violations came from, you probably would see that it is the larger tribes in the United States, . . . .
>
> [W]hen you have to work with tribal councils that number 33, . . . you're getting into a very cumbersome type of legislative body.
>
> And I see the other problem as being the changeover in council members, as being every 2 years. You just get a council educated as to separation of powers . . . . and they're only in there for 2 years . . . .
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> . . . . .
>
> The other thing that I've observed is who's in those leadership positions at any particular time . . . . [W]ho is in there as the chief judge, and just how strong and aggressive is that chief judge when it comes to telling council members or the executives, the Chairman of the tribe, that, "I'm sorry, I cannot discuss this with you. You are not a party to the action."[91]

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[90](...continued)
to this or not, and politely say, 'I can't talk to you about this,' and hang up the phone, or say, 'I don't want to meet with you.'"

Several of the judges at the Portland hearing indicated that they had not personally adjudicated many ICRA claims. Judge Elizabeth Fry, associate judge of the Colville Tribal Court, testified that to her knowledge only one case had been brought in her court involving a civil rights claim. *Id.* at 15 (testimony of Judge Elizabeth Fry). Judge Edythe Chenois, chief judge of the Quinault Tribal Court where she has served on the bench for 8 years, said that she has adjudicated only six or seven ICRA cases. *Id.* at 13 (testimony of Judge Edythe Chenois). *See also* Judge Ward testimony, *id.* at 41, where he stated that he had heard only one civil case involving an ICRA claim, though, he said, all criminal cases have ICRA ramifications. Judge David Ward, chief judge of the Yakima Tribal Court, told the Commission that cases involving the civil provisions of the ICRA are rare in his court. *Id.* at 33. In contrast, Judge Lorraine Rousseau, president of the Northern Plains Tribal Court Judges Association, testified that her court had adjudicated numerous cases involving violations of the ICRA. "But," she said, "when you look at the merits of the case, 9 out of 10 are unsubstantiated, and they're not really violations." *Id.* at 75. Judge Dupuis said that on the Flathead reservation, they had only one or two civil rights violations. *Id.* at 88.

[91] *Id.* at 74–75.

Progress in establishing judicial independence has been brought about by changes in both structure and leadership on a number of reservations since the Commission's hearings. The Cheyenne River Sioux, for example, wrote the Commission that its new tribal chairman was "a strong proponent" of tribal courts; that only on one occasion since 1985 has the tribal council been asked to review a decision of the tribal court and the council refrained from doing so, based on the advice of its counsel; and that "in the future the Tribal Government plans to amend the Tribal Constitution to expressly require separation of powers between the executive, legislative and judicial branches of government."[92]

During his testimony before the Commission in 1988, the Assistant Secretary for Indian Affairs, Ross O. Swimmer, took the position that "[i]f you don't have a separation of power, you must have some kind of appellate review so that an independent judiciary can hear the case."[93] As a member of the President's Commission on Reservation Economies, he had recommended that appeals be permitted to the Federal courts; however, he told the Commission that he would modify that recommendation in support of giving tribal governments an opportunity to enforce the ICRA without Federal interference:

> . . . I would accept a tribal appellate review that could be structured, perhaps, from several tribal courts forming an appellate court, or even a reservation appellate court, as long as that tribal appellate court had some independence from a particular tribal government. Without it, I see that we would continue to have problems.[94]

Although arguments heard during the Commission's hearings included calls for imposition of broad brush requirements such as

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[92] Response of the Cheyenne River Sioux Tribe (June 26, 1990). The Cheyenne River Sioux Tribe also advised the Commission that since 1986 it has made a concerted effort to upgrade its judiciary and legal staff. As of 1990, its chief judge was an attorney who was a former assistant attorney general for the State of Arkansas; two of its three appellate court judges had law degrees (one of whom was Frank Pommersheim, who has taught and published on Indian law matters); the tribal prosecutor was a graduate of Georgetown University Law Center; the tribe's attorney general and assistant attorney general were both graduates of Harvard Law School, and the tribe's summer law clerks in the legal department were both Harvard law students.

[93] *Washington, D.C., Hearing, supra* note 5, at 11.

[94] *Id.*

a separation of powers,[95] adoption of tribal constitutions,[96] and Federal judicial review,[97] to prevent abuses of power by tribal governments, the record of this study establishes the need for flexibility among the tribes in devising means for ICRA enforcement. The ICRA was imposed on tribal governments by the Federal Government without accompanying support in the form of adequate funding, resources, or guidance as to how the rights guaranteed by the ICRA impact on tribal government. The Commission believes that respect for tribal sovereignty requires that prior to any further intrusion by the Federal Government into tribal justice systems, such as by way of imposing Federal court review, tribal forums be first given the opportunity to institute proper mechanisms that would operate with adequate resources, training, funding, and support from the Federal Government. Because of the great diversity of customs, traditions, resources, and even size, among tribes, the solutions they adopt will necessarily vary. For some tribes merely having the funds to educate their tribal leaders as to the role of the judiciary and the need for an independent forum for adjudication of civil rights may be sufficient. Other tribes may wish to join intertribal appellate systems, or to adopt or amend constitutions. Whatever the initiative, the tribes will need adequate funding to implement fully their ICRA enforcement mechanisms.

## Defining the Parameters of Judicial Review

Some of the testimony describing instances of council "interference" with the tribal court have spoken to other challenges for tribal governments, including the need to define the parameters for judicial review of council action. Although the concept of judicial review is "at the core of [American] constitutional jurisprudence,"[98] it "has not been characteristic of most legal systems outside of the United States,"[99] and its' success may be due to judicial restraint

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[95] *Rapid City Hearing, supra* note 50, at 323.

[96] *Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Flagstaff, Ariz., Aug. 13–14, 1987, at 136 [hereinafter *Flagstaff I Hearing*].

[97] *Portland Hearing, supra* note 38, at 28, 84.

[98] CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 99–16, 99th Cong., 1st Sess. 716 (1987) [hereinafter THE CONSTITUTION: ANALYSIS AND INTERPRETATION].

[99] Zlontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U. OF CALIF., DAVIS 1, 16 (1979).

in its exercise.[100] As "[j]udicial review is ultimately a delicate institution,"[101] training for tribal judges with regard to the "discretionary rules or concepts of restraint"[102] exercised by Federal judges may be helpful to tribal governments as they develop their own boundaries for such review. As one commentator explained:

> While tribal courts have acquired substantial familiarity with criminal due process concepts, they have had little experience with the body of constitutional law applicable to individual liberties in the civil context of the first, fifth and fourteenth amendments. This is not to say that tribal judges have no understanding of these matters, for no doubt many do. But most tribal judges will have great difficulty applying American constitutional analysis to the actions of the tribal councils. They will need substantial training, at least equivalent to what they have received in the area of criminal law.[103]

The development of these parameters in tribal governments may take longer for some tribes than others, and "[b]ecause Indian tribes lack a tradition of judicial review, their courts may encounter serious difficulties in identifying the requisite boundaries of the doctrine while simultaneously discharging their responsibilities under the ICRA."[104] Tribal governments are still grappling with the concept and defining the roles for their respective branches of government. An example of this tension can be found in the Navajo court system's recent history at the time of its issuance of *Halona v. MacDonald* (1977), a case that one commentator has called "the *Marbury v. Madison* of Navajo jurisprudence."[105]

In the absence of a constitution, the Navajo tribal courts find their origin in the tribal council.[106] During the 1970s, the courts

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[100] *Id.* at 11.

[101] *Id.* at 15.

[102] THE CONSTITUTION: ANALYSIS AND INTERPRETATION, *supra* note 98, at 721.

[103] Ziontz, *supra* note 99, at 14 (footnotes omitted).

[104] *Id.* at 15.

[105] *Id.* at 22 (footnote omitted).

[106] For the reasons why, see generally *Flagstaff I Hearing*, *supra* note 96, at 52–53, 54, 66, 68; R. YOUNG, A POLITICAL HISTORY OF THE NAVAJO TRIBE 87–120 (1978); P. IVERSON, THE NAVAJO NATION 36–37 (1981). *See also* Navajo Tribal Council Resolution No. CMY–28–88 (May 6, 1988), *reprinted in Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Flagstaff, Ariz., July 20, 1988, as Exh. 2, at 138 ("[T]he jurisdiction and powers of the Courts of the Navajo Nation, *particularly with regard to suits against the*

(continued...)

issued several opinions in which they looked to the ICRA to justify their review of the council's actions. In *Dennison v. Tucson Gas and Electric Co.* (1974), a Navajo court rejected the chairman's claim of sovereign immunity in an eminent domain case,[107] reasoning that "[a]ll that the plaintiff would be entitled to from the Navajo Nation under the statute, in any event, would be just compensation."[108] The court in *Dennison* used the ICRA's proscription against taking of private property without just compensation and the right to due process to set boundaries on the tribe's power of eminent domain. In *Halona v. MacDonald* (1977),[109] tribal members and members of the tribal council sought to enjoin an appropriation voted by the tribal council to pay legal fees of the tribal chairman. Described as probably "the first direct, head-on assault on the validity of a Navajo Tribal Council resolution and, certainly, the first successful one,"[110] the case resulted in a Navajo Appellate Court ruling that "judicial review by tribal courts of Council resolutions is mandated by the Indian Civil Rights Act."[111]

The *Halona* decision was of concern to the tribal council, particularly because a reapportionment plan it had passed was pending in the Navajo Nation's courts.[112] Three days after the *Halona* appellate decision was rendered, the tribal council passed a resolution removing the courts' jurisdiction to determine reapportionment cases and to determine cases challenging tribal council resolutions.[113] Nevertheless, when the reapportionment plan came before the courts, they asserted jurisdiction,[114] stating:

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[106](...continued)
*Navajo Nation*, are derived from and limited to the Navajo Tribal Council . . . ." (emphasis in original)).

[107] 2 Indian L. Rep. No. 4, at 52 (Navajo App. Ct. Dec. 23, 1974).

[108] *Id.* at 55.

[109] *Halona v. MacDonald*, 1 Navajo Rptr. 341 (Navajo D. Ct., May 18, 197[7]), *aff'd* 1 Navajo Rptr. 189, 5 Indian L. Rep. M-12 (Navajo App. Ct. Jan. 24, 1978).

[110] *Flagstaff I Hearing*, *supra* note 96, at 86 (testimony of Richard Hughes, former Director of Litigation of DNA (Dinebeiina Nahiilna be Agaditahe, which provides legal services on the Navajo reservation)).

[111] 1 Navajo Rptr. at 206.

[112] *Id.*

[113] *Id.*

[114] *Yazzie v. Navajo Tribal Board of Election Supervisors*, 5 Indian L. Rep. L-6 (Navajo D. Ct. Feb. 24, 1978), *affirmed* 1 Navajo Rptr. 213 (Navajo App. Ct. May 26, 1978).

> Counsel for appellants urges on us the doctrine that the Council has plenary power to abolish judicial review of its legislation or to pick and choose when such review may be exercised.
>
> We reject this view for the reasons enunciated in *Halona et al. v. MacDonald et al.* Counsel for appellants seems bent on forcing this Court to accept his view that the Navajo Tribal Council is a law unto itself, unrestrained by a constitution and therefore not subject to federal law as we interpret it or to Navajo tradition.
>
> We have previously explained our theory of the restraints imposed by 25 U.S.C. Section 1302 on any Indian government organized as the Navajo government is and of the traditional and customary limits placed on the Navajo Tribal Council. It is sufficient only to repeat:
>
> Judicial review of Council actions is, in our view, mandated by 25 U.S.C. Section 1302(8) as well as by Navajo tradition and custom.[115]

The Navajo courts also used the ICRA to enjoin executive branch officers from terminating the employment of the judicial branch fiscal officer in *Gudac v. Marianito.*[116] There the appellate court ruled that the ICRA precluded such actions by the executive branch because they endangered the independence of the judiciary:

> The judiciary *must* be free to control its own personnel and personnel policies if the courts are to remain free from political pressure. Indeed, such problems, as the legislative record surrounding the passage of this act [the ICRA] shows, were a major element in causing the passage of that act. We must rule that the Indian Civil Rights Act requires that Indian courts exercise independent control over their personnel. No other analysis is possible if any effect is to be given to the spirit of this law.[117]

According to former Navajo Deputy Attorney General Eric Eberhard, "the rulings of the Tribal Courts ordering the reapportionment of the Tribal Council and prohibiting Chairman MacDonald from using Tribal funds to pay for his legal fees in a federal criminal prosecution" were "the immediate impetus for the creation"[118] on

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[115] 1 Navajo Rptr. 213, 215 (Navajo App. Ct. May 26, 1978).

[116] 1 Navajo Rptr. 385, 5 Indian L. Rep. L-6 (Navajo App. Ct. Feb. 28, 1978).

[117] 1 Navajo Rptr. 385, 395, 5 Indian L. Rep. L-6, -7 (Navajo App. Ct. Feb. 28, 1978) (emphasis in original).

[118] *Flagstaff I Hearing, supra* note 96, at 110 (testimony of Eric D. Eberhard, Esq., Washington, D.C.); *see also* P. IVERSON, THE NAVAJO NATION 210–11 (1981).

May 24, 1978 of the Supreme Judicial Council (SJC),[119] composed of several members of the council, the chief justice, and two retired judges.[120] Richard Hughes, former Director of Litigation, DNA, explained that the proponents of the SJC had "a problem with the concept of judicial review of legislative action being applied wholesale to the Navajo court system."[121] Searching beyond its own court systems for an alternative,[122] the tribal council established "a super court consisting primarily of tribal council members that would have jurisdiction to review decisions of Navajo courts holding invalid any action of the tribal council."[123]

The resolution that established the SJC quoted from the order entered by Judge Lynch in *Yazzie v. Navajo Tribal Board of Election Supervisors*[124] and countered:

> This assertion of supreme authority by the courts, together with orders in this and other cases has virtually paralyzed the Navajo Tribal Council, since the Tribal Council does not know whether any resolution it adopts will be struck down any time a Judge feels that another plan would be "preferred by the Navajo people." . . .
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> . . . . .
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> . . . This challenge to the will of the people and the authority of the Navajo Tribal Council cannot be underestimated because judges and lawyers can almost always find some technicality of some section of the Indian Civil Rights Act to provide an excuse for striking down a resolution of the Tribal Council.[125]

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[119] Navajo Tribal Council Resolution No. CMY–39–78 (May 4, 1978) [hereinafter Nav. Res. CMY–39–78]; *see also Flagstaff I Hearing*, *supra* note 96, at 86–87, 109–12.

[120] *Flagstaff I Hearing*, *supra* note 96, at 88. The chief justice presided, but had no voting power except in the event of a tie. Nav. Res. CMY–39–78, *supra* note 119. The resolution also calls for the participation of two retired judges or, in their absence, a former member of the Navajo Tribal Council who had served a minimum of 8 years on the council. It is uncertain whether two retired judges ever served in addition to the chief justice.

[121] *Id.* at 87 (testimony of Richard Hughes, Former Director of Litigation, Dinebeiina Nahiilna be Agaditahe).

[122] For a more detailed account of the Navajo judicial conflict, see Ziontz, *supra* note 99, at 23–24; P. IVERSON, THE NAVAJO NATION 211 (1981).

[123] *Flagstaff I Hearing*, *supra* note 96, at 87. (Testimony of Richard Hughes).

[124] 5 Indian L. Rep. L–6 (Navajo D. Ct., Feb. 24, 1978), *aff'd* 1 Navajo Rptr. 213 (Navajo App. Ct. May 26, 1978).

[125] Nav. Res. CMY–39–78, *supra* note 119.

Two judges who had participated in these decisions, Judge John and Judge Lynch, were later terminated as judges. Both judges were removed from office by the council on December 20, 1978.[126] At the time, they were both "probationary judges," although they had served 3 and 4 years respectively, and Navajo law provided that probationary judges serve 2 years before being recommended for permanent status or removed.[127] They were not allowed into the council meeting at which their dismissal was discussed, even though Judge Lynch attempted to enter.[128]

Testifying on this difficult period in the development of the Navajo court system, Richard Hughes, former Director of Litigation, DNA, explained:

> [W]hat Judge Lynch and Judge John did was to try to bring the Navajo judicial system into a period of real independence in which they could exercise judicial power in a manner more or less coordinate with the other branches of Navajo government. And I think—I suppose I see their dismissal subsequently as really a reaction to that rather fundamental institutional change.[129]

The Supreme Judicial Council was abolished on December 4, 1985.[130] According to former Navajo Deputy Attorney General Eric Eberhard, it was "the only exception" to the "steady improvement" of the Navajo courts over the years in that "it directly involved the tribal council in the judicial functions of the courts."[131] Recognizing the danger in this, the resolution abolishing the SJC stated:

> If the Navajo Nation is to continue as a sovereign Nation and to move forward toward the reality of a three-branch form of govern-

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[126] *Flagstaff I Hearing*, *supra* note 96, at 106–107.

[127] *Id.* at 98.

[128] *Id.* at 106–07. Former Navajo Deputy Attorney General Eberhard stated:

> I personally do not believe that Judge John and Judge Lynch were accorded due process of law in terms of being apprised of the nature of the charges against them and in terms of being provided an opportunity to respond to those charges.

*Id.* at 109.

[129] *Id.* at 90.

[130] *Hearing on the Enforcement of the Indian Civil Rights Act Before the U.S. Commission on Civil Rights*, Flagstaff, Arizona, July 20, 1988, Exh. 3, at 154 [hereinafter *Flagstaff II Hearing*].

[131] *Flagstaff I Hearing*, *supra* note 96, at 109.

ment, the Supreme Judicial Council must cease to exist, as Tribal sovereignty requires strong and independent Tribal courts to enforce and apply the law.[132]

An election dispute on another reservation that involved a tribe of approximately 6,500 is another example of the tension that can occur between a tribal council and its judiciary as to which of these bodies will have ultimate authority to render final interpretations of the tribe's constitution. This 3-year election dispute centered on the interpretation of the tribal constitution's provision for the "election" of a head councilman. The dispute began after the tribal governor's death in July 1983.[133] Under the rules of succession, the tribe's lieutenant governor then became governor, and the head councilman became lieutenant governor. The dispute arose over the replacement of the head councilman, which, according to the terms of the tribal constitution, was to be by "election."[134] The tribal council took the position that inasmuch as the position of head councilman was not voted on in the regularly scheduled elections (but filled by the councilman elected with the highest number of votes), the council could elect the most senior council member as head councilman and fill the vacant, least senior council member slot by way of a general election. Therefore, the tribal council held

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[132] Navajo Tribal Council Resolution No. CD-94-85 (Dec. 4, 1985), *reprinted in Flagstaff II Hearing, supra* note 130, Exh. No. 3 at 154.

Other changes in the Navajo government structure occurred in 1989. *Navajo Times*, Dec. 21, 1989, at 12. (The Navajo Times described the changes as resulting from events spawned by the Senate Select Committee on Indian Affairs' investigation of Chairman Peter MacDonald.) One of the main reforms instituted was a separation of the tribe's legislative and executive powers. This was accomplished by replacing the position of tribal chairman with that of tribal president, removing the tribal chairman's authority to chair tribal council sessions and providing instead for a council speaker to chair the sessions, and providing the newly-instituted tribal president with authority to veto legislation, which veto the legislature can set aside by a two-thirds vote. Debate continues, however, over whether adoption of a tribal constitution remains a necessity in order to achieve reforms of a more permanent nature. Navajo Times, Dec. 14, 1989, at 1-2.

[133] *Flagstaff I Hearing, supra* note 96, at 3-27 (testimony of Jo Beth Mayes, Margaret Wilson, and Jerry Cordova).

[134] *Flagstaff I Hearing, supra* note 96, at 4-5. ZUNI CONST., art. XVII, § 3 (1975) reads: "In the event the governor resigns, dies, becomes otherwise incapacitated or is removed from office, his unexpired term shall be filled by the lieutenant governor. The head councilman will succeed to the office of the lieutenant governor. An election will be called to replace the head councilman."

an "election" for the head councilman among council members only,[135] resulting in complaints that the general electorate had been deprived of the right to vote.

This tribal court exists by virtue of the tribal constitution rather than, as is the case with most tribal courts, by virtue of tribal ordinance passed by the tribal council.[136] Shortly after the council's internal election of a head councilman, the tribal court declared the council action violated the tribal constitution and election code.[137] The response of the tribal council to the judge's decision was to remove the judge, and to replace him with the private attorney of the head councilman.[138]

When a community group's call for a popular election[139] proved fruitless, it presented the council with a recall petition containing 800 signatures.[140] The council rejected the recall petition, and approximately 61 names were later withdrawn,[141] allegedly due to harassment and threats of loss of entitlement.[142] Following submission of the recall petition, the council adopted a new election code, effective immediately, changing the requirements for recall petitions. Under the new election code, the group's recall petition was insufficient.[143]

On September 6, 1984, the tribal religious leaders, in accordance with the traditional system of government, appointed an alternative tribal council and condemned the existing, and allegedly improperly

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[135] *Flagstaff I Hearing, supra* note 96, at 4–5.

[136] ZUNI CONST., art. XIV (1975). This appears to be an unusual feature of the Zuni constitution. *See* Ziontz, *supra* note 99, at 1 & 11; INDIAN COURTS AND THE FUTURE, *supra* note 1, at 40.

[137] *In Re Order of Succession for Governor of Zuni Tribe*, Judicial Opinion from The Zuni Judicial Department to The Governor and The Tribal Council, signed by Chief Judge Michael Zunie and Associate Judges Albert Banteah and Juan Chico (July 14, 1983)[hereinafter *Order*]. *See also Flagstaff I, supra* note 96, at 4–5, 14 & 16.

[138] *Flagstaff I, supra* note 96, at 7, 14–15.

[139] *Pueblo of Zuni Concerned Community Citizens Committee v. Acting Deputy Assistant Secretary-Indian Affairs*, 14 IBIA 30, 32 (Feb. 12, 1986).

[140] *Id.* at 32–34. *Flagstaff I Hearing, supra* note 96, at 5–6 & 20–21. Mr. Cordova, the BIA superintendent, presented the recall petition to the tribal council on behalf of Ms. Mayes.

[141] 14 IBIA at 33. *Flagstaff I Hearing, supra* note 96, at 5–6 & 21.

[142] *Flagstaff I Hearing, supra* note 96, at 5–6 & 21.

[143] *Id.* at 5–7, 10–11 & 21; *Zuni Concerned Citizens*, 14 IBIA at 33.

constituted, tribal council.[144] Federal recognition of the alternative council was denied, and the existing tribal council continued to govern as before.

Two months later, the community group filed a lawsuit against the tribal council in tribal court. The suit was dismissed on the basis of sovereign immunity,[145] prompting allegations that the chief judge had been pressured into doing so.[146]

In May 1985 the group filed a petition with the Bureau requesting a Secretarial election.[147] The Bureau denied the petition three months later because "(1) a Secretarial election to 'temporarily suspend' a tribal constitution is not authorized by [the legal authorities relied upon]; (2) though authorized by these legal authorities, a Secretarial election 'to revoke' a tribal constitution may be requested only by the tribal government itself, and not directly through a petition by individual tribal members . . .; and (3) the recall and replacement of tribal officials are governed by the tribal constitution and are not proper subjects for a Secretarial election."[148] An Acting Deputy Assistant Secretary wrote that the failure to obtain a Secretarial election did not mean that the tribal members had no recourse:

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[144] *Flagstaff I Hearing, supra* note 96, at 24–26; The Independent (Gallup, New Mexico) Sept. 28, 1984 (letter to the editor from Martha Wato); *Zuni Concerned Citizens*, 14 IBIA at 33.

[145] *Mayes v. Zuni Tribal Council*, No. CV–84–41 (Nov. 19, 1984). The court cited *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) in support of the proposition that tribes enjoy immunity from suit. The provision in the Zuni code governing sovereign immunity that the court relied upon states:

> Except as required by Federal law, or the Constitution and By–laws of the Zuni Tribe, or as specifically waived by a resolution or ordinances of the Tribal Council specifically referring to such, the Zuni Tribe shall be immune from suit in any Civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.

*Id.* at 3, *citing* ZUNI CODE § 1–8–4.

[146] *Flagstaff I Hearing, supra* note 96, at 16, *cf.* at 7.

[147] A secretarial election is an election held within a tribe pursuant to regulations prescribed by the Secretary of the Interior as authorized by Federal statute. This differs from a tribal election conducted under tribal authority. *See Zuni Concerned Citizens*, 14 IBIA at 33 n.2, *citing* 25 C.F.R. 81.1(s).

[148] *Id.* at 37.

> [T]he people . . . could petition the tribal council demanding a referendum vote on whether or not the tribal council should be compelled to ask the Secretary to call an election for revocation of the . . . Constitution. . . . The petitioners might also consider asking the . . . tribal court for a determination on whether or not the subject petition could be used as the petition for the referendum vote. Petitioners are encouraged to seek relief through the tribal forum whenever possible.[149]

The Bureau's action prompted a letter of February 27, 1986, from the New Mexico congressional delegation to Interior Secretary Donald Hodel.[150] In that letter, the delegation expressed frustration with the Bureau's handling of the matter and called upon Secretary Hodel to restore constitutional government to the tribe:

> We are beyond the point of faith in constitutional government for many of the petitioners who must have watched in awe as the BIA served to confuse and effectively remove their petitioning rights over a two and a half year period. The petitioners . . . have continued to request BIA assistance in securing their basic rights and have been consistently frustrated.
>
> It is hard for us to understand the motivations of the bureaucracy in fanning a relatively simple constitutional requirement (to hold an election for head councilman) into a major crisis . . . . We are not trying to decide who should lead . . . . We are calling for the proper functioning of the existing constitution and its application in a fair and public manner.[151]

The substance of the congressional delegation's complaint was that although the Bureau's ruling on the petition was technically correct, the petitioners had relied upon BIA advice in framing their petition. In fact, according to the New Mexico delegation, the BIA official who rendered the advice regarding the petition was "the very person who denied approval of the petition that he suggested."[152]

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[149] *Id.* at 35.

[150] Letter from Senators Pete V. Domenici, Jeff Bingaman, Representatives Manuel Lujan, Jr., Joe Skeen, and Bill Richardson to Donald P. Hodel, Secretary, U.S. Dept. of the Interior (Feb. 27, 1986) (on file at U.S. Commission on Civil Rights).

[151] *Id.* at 3.

[152] *Id.* at 2. The letter also states that "The delays, counter-delays, appeals, and decisions have failed to yield the proper guidance rightfully expected from the BIA in its very special role of trustee." *Id.* at 3.

The voters eventually resolved their dispute, 3 years after it began, when at the next regularly scheduled election, they elected a new governor and replaced all but one member of the tribal council.[153]

On another reservation in 1981, the confrontation between court and tribal council also centered on an election. Reservation voters had approved a reapportionment of the tribal council election districts. When the council refused to acknowledge the results of the referendum election and was ordered to do so by the tribal court, the council fired the judge, rescinded the tribal court order, and installed a new judge who then ruled that the referendum election was invalid.[154] The Bureau of Indian Affairs refused to intervene in the election dispute, but eventually recognized the tribal council elected under the new judge's order.[155] When judicial review of the Bureau's action was sought in Federal court,[156] it was held as a matter of law that the Bureau's decision "was correct because it followed the . . . decision of the tribal court."[157] The plaintiff in the lawsuit against the tribal council, and one other member, ran for tribal council office in the next election. However, the council passed a resolution forever barring them from holding tribal office, alleging "past misconduct in office" and "frivolous legal action . . . against the tribe."[158] The tribal council subsequently removed the bar when plaintiffs consented to cease their pursuit of judicial and administrative remedies, and held another election.[159]

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[153] The incumbent governor was replaced by nearly a two to one margin. Only one member of the council was retained in office.

[154] *See Rapid City Hearing, supra* note 50, at 104–135.

[155] *Runs After v. United States*, 766 F.2d 347, 349 (8th Cir. 1985).

[156] *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985).

[157] *Id.* at 349 (citing *Committee to Save Our Constitution v. United States*, No. CIV–83–3011, slip. op. at 4 (D.S.D. Feb. 27, 1984)).

[158] Cheyenne River Sioux Tribal Council Resolution No. 190–84–CR *reprinted in Rapid City Hearing, supra* note 50, at 350.

[159] Joan LeBeau stated at the Rapid City hearing:

> [W]hat brought this whole matter to a head, starting in late 1985 and the early part of 1986, was the death of two councilmen, the indictments of two other councilmen, and subsequent convictions, plus the fact that the Bureau wasn't recognizing those four anyway. The tribal council then found themselves faced without a duly elected quorum to do business, and but for that I guess that turned it around.

*Rapid City Hearing, supra* note 50, at 111.

When the current official holding the contested seat learned of the rematch, he filed suit in tribal court alleging that the calling of a special election violated the tribal constitution. The tribe asserted its sovereign immunity to suit, but the tribal court issued an opinion, *LeCompte v. Jewett*, holding that passage of the Indian Civil Rights Act had implicitly abrogated the tribe's immunity from suit for ICRA claims, although not with respect to monetary damages.[160] Three months later the tribe passed a resolution reasserting its immunity from suit. It then instructed the tribal court to issue an opinion on two issues that had already been settled by the *LeCompte* decision, and reiterated that the tribal council had review authority over the decision of the court.[161]

Disputes within a tribal government regarding supreme authority to interpret the tribe's constitution and laws will occur with transitions in tribal governments and in the roles of their integral parts. Just as it is important for tribal governments to establish impartial forums for the resolution of other legal disputes, it is important that they also address the need for a forum authorized to resolve disputes such as these, involving election and constitutional controversies. In 1986 the Ute Tribal Court summed up the challenge for that tribe in the case of *Chapoose v. Ute Indian Tribe of the Uintah-Ouray Reservation*.[162] This case involved a dispute between the plaintiffs and the tribe as to whether the plaintiffs could be enrolled as members of the tribe. The tribal court found that the plaintiffs were entitled to be enrolled under the requirements for enrollment set forth in the tribal constitution, and ordered the council to enroll the plaintiffs. Although the council initially complied, it later reversed itself, removed jurisdiction over enrollment disputes from the tribal court, and stated that "the Business Committee shall review the decisions of the Ute Tribal Court and the Ute Tribal Appellate Court and render decisions consistent with the Constitution and the views of the people."[163] When the plaintiffs again presented their claim to the tribal court, the court asserted jurisdiction, stating:

> Clearly, the Business Committee cannot establish itself as final arbitrator of Indian Civil Rights Act violations claimed against them-

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[160] *LeCompte v. Jewett*, 12 Indian L. Rep. 6025 (Ch. R. Sx. Ct. App. May 30, 1985).

[161] Cheyenne River Sioux Tribal Resolution No. 213–85–CR (Aug. 26, 1985).

[162] 13 Indian L. Rep. 6023 (Ute Tr. Ct. June 3, 1986).

[163] *Id.* at 6024.

selves; a fair hearing before a neutral party is a minimum requirement of fundamental fairness. If there is no ICRA valid forum available, this tribal court cannot shirk its responsibility, no matter how attractive an alternative this may be, and therefore must accept jurisdiction. The jurisdiction of this court may be withdrawn only if Indian Civil Rights Act claims can be presented to an impartial forum and the other requirements of due process and equal protection have been met. The Business Committee has the discretion to establish such a forum but until they exercise such discretion this court must accept and retain the jurisdiction otherwise existing.

## Establishing Appropriate Limitations to the Sovereign Immunity Defense

Another challenge to tribal governments in implementing to the fullest the rights guaranteed by the Indian Civil Rights Act involves the extent to which the tribes invoke the defense of sovereign immunity from suit within tribal forums. Every level of government within our Federal system invokes the defense of sovereign immunity from suit to some extent.[165] As sovereign entities, so do tribal governments. And the extent to which they do also varies. Some tribal governments, such as the Colville Confederated Tribes, have statutorily waived their sovereign immunity in some instances. In January 1988 the Colville Tribes passed the Colville Tribal Civil Rights Act, which allows declaratory and injunctive suits against tribal officers and employees, as well as suits for monetary damages if the claim is covered by insurance.[166] Other tribal governments have not waived their sovereign immunity for any type of relief.[167]

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[164] *Id.* at 6027.

[165] *See* CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES (W. Winborne ed. 1982); and CIVIL ACTIONS AGAINST STATE GOVERNMENT, ITS DIVISIONS, AGENCIES AND OFFICERS (W. Winborne ed. 1982).

[166] *See Portland Hearing, supra* note 38, at 15 (testimony of Judge Elizabeth Fry, associate judge, Colville Tribal Court). Another example is the Menominee Tribe which statutorily waived its sovereign immunity to suit within its tribal courts for ICRA claims, see Johnson and Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153, 163 (1984).

[167] *See, for instance,* Rosebud Sioux Tribe Law and Order Code, Tit. 4, Ch. 2, Sec. 1, *cited in* Response of the Rosebud Sioux Tribe to Questions Submitted to Honorable Donald P. Hodel, Secretary of the Interior, on Dec. 9, 1987 (Jan. 21, 1988) (on file at U.S. Commission on Civil Rights). In the response received from the Rosebud Sioux Tribe to the questions submitted to the Department of the Interior regarding ICRA enforcement, the Commission was advised: "In the area of civil actions tribal members have no recourse against the Tribal (continued...)

The barring of all suits against a tribal government without its consent, particularly suits for injunctive or equitable relief under a statute such as the ICRA providing rights against the tribal government,[168] can leave the plaintiff with a feeling of frustra-

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[167](...continued)
government for alleged violation of civil rights unless specifically waived. This has the potential to be an impediment against enforcement of the ICRA. Waivers could be specifically made which allow perhaps declaratory or injunctive relief and without awarding monetary damages." *Id. See, also,* Oglala Sioux Tribal Council Resolution No. 87-76 (July 14, 1987), *reprinted in Washington, D.C., Hearing, supra* note 5, at 306. In response to questioning from Commission staff in 1986 regarding the tribe's immunity from suit under the ICRA, the Cheyenne River Tribal chairman stated that between 1979 and 1986, the tribal council had not "waived sovereign immunity for anyone, for any case or cause at all." *Rapid City Hearing, supra* note 50, at 282-83. *But see* the 1988 Cheyenne River Sioux Court of Appeals case, *Dupree v. Cheyenne River Hous. Auth.*, 16 Indian L. Rep. 6106 (Chy. R. Sx. Ct. App., Aug. 19, 1988), in which the court accepted jurisdiction over an ICRA claim, despite the tribe's assertion of sovereign immunity.

See also the transcript from the proceedings in the case of *DeHose v. Johnson*, No. C-89-04 (White Mtn. Apache Tr. Ct., Feb. 22, 1989), *rev'd sub nom. White Mountain Apache Tribe v. Natoli*, No. C-89-04 (White Mtn. Apache Tr. Ct. of App., Mar. 10, 1989), *reprinted in Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Commission on Civil Rights*, Phoenix, Ariz., Sept. 29, 1988, at 183-202, 233, 239 [hereinafter Phoenix Hearing], an ICRA case, whereby the attorney representing the White Mountain Apache Tribe asserted to the tribal court that there were no exceptions to the tribe's sovereign immunity, even if the tribal council had exceeded its authority.

[168] *See, for instance, Dubray v. Rosebud Hous. Auth.*, 12 Indian L. Rep. 6015 (Rsbd. Sx. Tr. Ct. Feb. 1, 1985), in which the plaintiffs brought suit in tribal court contesting their termination from employment and seeking injunctive, declaratory, and monetary relief. In dismissing the action, the court stated: "[T]his court can find no provision in the tribal code which would waive the tribe's immunity to suits based on claims under [the ICRA]. Therefore, because the tribe's immunity has not been waived, the plaintiffs' complaint . . . must be dismissed." (Note, the plaintiffs in the *Dubray* case had originally brought suit in Federal court. The Federal court dismissed the suit for lack of jurisdiction, stating: "This Court concludes that the Plaintiffs appear to have an appropriate tribal remedy for any and all of the wrongs alleged in the Complaint. Indeed, relegation of the Plaintiffs to their tribal remedy is consistent both with *Santa Clara Pueblo*, and with traditional notions of tribal sovereignty." *Dubray v. Rosebud Hous. Auth.*, 565 F. Supp. 462, 469 (D.S.D. 1983)).

*See, also, Garman v. Fort Belknap Community Council*, 11 Indian L. Rep. 6017 (Ft. Blkp. Tr. Ct. Jan. 20, 1984)(suit by tribal members challenging the enactment of a tribal election ordinance as being violative of the tribal constitution). In dismissing the action, the court stated: "That the Fort (continued...)

tion,[169] and often leaves the victim without an impartial tribal forum in which to seek redress under the ICRA or the tribe's own civil rights laws. This problem not only affects the individual involved, but can have a detrimental impact on a tribe, even if the violation complained of is not valid. Among the observations made to the Commission in this regard was that, "Even when someone loses a civil rights action, the satisfaction of knowing that he or she had a day in court is not only important to the individual but also to the system. Like an escape valve on a steam pot, access to the judiciary allows the release of pressure that otherwise would cause an explosion."[170]

Some tribal courts have taken the position that although their tribal governments have not legislatively abrogated or limited the tribe's sovereign immunity, the congressional passage of the Indian Civil Rights Act was an implicit abrogation of their tribe's immunity

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[168](...continued)
Belknap Community Council, and the members of the Ft. Belknap Indian Community, have not chosen to expressly waive tribal sovereign immunity to allow enforcement of the Indian Civil Rights Act in tribal courts is an act of tribal self-government that this court cannot ignore." *See also, White Mountain Apache Tribe v. Natoli*, No. C-89-04, (White Mtn. Apache Ct. App., Mar. 10, 1989, *reprinted in Phoenix Hearing, supra* note 167, at 239 (ICRA suit for declaratory, injunctive, and monetary relief, by tribal council member contesting suspension from the tribal council; suit was dismissed based on tribal sovereign immunity); *Whatoname v. Hualapai Tribe*, Civ. No. 003-80 (Hualapai Tr. Ct. App. May 11, 1981) (a suit by tribal officers to obtain injunctive relief to detain a recall election); and *Mayes v. Zuni Tribal Council*, No. CV-84-41 (Zuni Tr. Ct., Nov. 19, 1984)(suit for declaratory and injunctive relief under the tribal constitution alleging upcoming special election violated the constitution; suit was dismissed based on tribal sovereign immunity).

[169] In testimony before the Commission, Judge David Harding, judge pro tem, Coeur D'Alene Tribe, and associate judge, Northwest Intertribal Court System explained:

> [I]f you have what you feel is a violation of your right, and the defense of sovereign immunity is successfully raised, you're sunk. It doesn't matter how much anxiety, how much hurt has been caused to you, how much disgrace, or whatever it might be. You're sunk. . . . And it doesn't matter if you're Indian or non-Indian.

*Portland Hearing, supra* note 38, at 28.

[170] Letter from Stephen L. Pevar, to Chairman Clarence Pendleton (Feb. 1, 1988), *reprinted in Washington, D.C., Hearing, supra* note 5, as Exh. 17, at 314.

to suit under the ICRA.[171] In support of this position, they often cite the language in the *Martinez* decision that "[t]ribal 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."[172] Other tribal courts have allowed ICRA suits against tribal *officials* who have exceeded their authority.[173]

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[171] *See, for instance, Dupree v. Cheyenne River Hous. Auth.*, 16 Indian L. Rep. 6106 (Chy. R. Sx. Ct. App. Aug. 19, 1988)(an employment termination case):

> It is hard to conceive that this language [from *Martinez*] means anything else but that tribal courts must entertain causes of action based on the ICRA of 1968 and a claim of a bar to such as actions based on the doctrine of sovereign immunity is inapposit.
>
> . . .
>
> This does not mean, of course, that tribal councils are barred from acting in this area, particularly in regard to fashioning remedies—such as modest declaratory, injunctive or financial relief—that do not threaten to bankrupt or grind tribal government to a halt. There is even room within the ambit of *Santa Clara Pueblo* for other remedies or forums since "nonjudicial tribal institutions have also been recognized as competent law-applying bodies." . . . Tribal legislative bodies have significant authority to act in this area as long as they do not eviscerate a primary teaching of *Santa Clara Pueblo* that tribal courts or other tribal institutions must provide a forum to resolve ICRA disputes.

*Id.* at 6108–6109. *See, also, Miller v. Adams*, No. CV–002–81 (Intertr. Ct. App. Apr. 22, 1982), slip op. at 14–15:

> [B]ased upon the facts before us, the Tribal Court was not barred from hearing Appellant's claim by the doctrine of sovereign immunity. Where there is expressed legislation or the Constitution of the Tribe guarantees due process; and where the Court cannot determine the Constitutional right without hearing the action, the claim is not barred by the doctrine of sovereign immunity. [Where the same holds true with respect to 25 U.S.C. § 1302(8), the Tribal Court would have jurisdiction to hear the action.]
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> . . . .
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> . . . The Tribes in carrying out their governmental functions must guarantee their tribal members' civil rights as contained in the Constitution's Bill of Rights and the Indian Civil Rights Act.

[172] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

[173] *See, for instance, Committee for Better Tribal Government v. Southern Ute Election Board*, 17 Indian L. Rep. 6095 (S. Ute. Tr. Ct. Aug. 13, 1990) (an election–dispute case). *See also, Flett v. Spokane Tribe of Indians*, No. 83–071–CV (Spokane Tr. Ct. June 15, 1983), and *Satiacum v. Sterud*, 10 Indian L. Rep. 6013 (Puy. Tr. Ct. Apr. 23, 1982), in which the courts indicated that if the

(continued...)

In testimony before the Commission, Judge Elbridge Coochise, administrator and chief judge of the Northwest Intertribal Court System, was asked whether he thought the ICRA waived sovereign immunity. He responded in the negative and indicated that it is "something we need to look at and give the tribes the opportunity, like any other government, to say 'Yes, we waive that,' or, 'No, we don't.'"[174] The Commission believes that the Federal Government can play a positive role in encouraging the tribes to examine the extent to which they can enact statutory waivers of their sovereign immunity for adjudication of civil rights claims, recognizing that such an examination must include factors such as the size of the tribe's treasury and the competence of their judges. Appropriations for several pilot projects for this purpose would enable tribal governments to take the lead in this endeavor,[175] which the Commission believes is vitally important. The results of the pilot projects could provide guidance to other tribal governments of similar size and resources.

The need for tribal governments to address this issue was probably best summed up by one commentator when he wrote:

> [R]eal tension exists between sovereign immunity, which is crucial for tribal self-preservation, and individual rights, which are equally crucial in defining tribal sovereignty. This tension is one the tribes must resolve so that Congress and the Supreme Court do not act to further modify tribal sovereignty. The tribes' viability as true sovereigns requires that they take steps to harmonize their inherent right of tribal immunity with the individual civil rights of both Indians and non-Indians on the reservation.[176]

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[173](...continued)
defendant officials had exceeded their authority, immunity from suit would not be available.

[174] *Portland Hearing, supra* note 38, at 66.

[175] In Pommersheim & Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D.L. Rev. 1001 (1986), the authors also encouraged the tribal governments to "direct and lead the debate" on developing "parameters for ICRA litigation in tribal courts that provide room for meaningful redress while maintaining institutional integrity." By way of example, the authors indicated that "there might be a very modest ceiling on money judgments and cautious injunctive guidelines which limit the ability to interfere with important governmental functions. . . . Such efforts also need to be tempered by the realization that tribal courts, in most cases, are young developing institutions. . . ." *Id.* at 1026–1027.

[176] Lafferty, *Sovereignty: Tribal Sovereign Immunity and the Claims of Non-Indians under the Indian Civil Rights Act*, 9 AM. INDIAN L. REV. 289, 308 (1981).

## Securing and Maintaining Recognition of Tribal Court Jurisdiction and Authority

Public recognition of and respect for tribal court authority are also hindered by assaults on their jurisdiction by litigants, as well as jurisdictional disputes with neighboring State courts and authorities.

Assaults on tribal criminal jurisdiction have been particularly successful. In 1978, in *Oliphant v. Suquamish Indian Tribe*,[177] the Supreme Court held that tribes do not have criminal jurisdiction over non-Indians. In 1990, in *Duro v. Reina*,[178] the Supreme Court held that tribes do not have criminal jurisdiction over nonmember Indians. These two decisions have been the source of great concern to tribal interests, not only because this narrowing of tribal jurisdiction may result in a jurisdictional void as a result of *Duro*, but because of the Supreme Court's further expansion of what it views as tribal authority which is "inconsistent with the tribe's dependent status."[179]

A survey conducted by the National Center for State Courts to determine the frequency of State/tribal jurisdictional disputes offers the following statistics:

> Nine states (California, Colorado, Florida, Idaho, Maine, Mississippi, Nebraska, Nevada, and North Dakota) reported 1 to 10 cases. Utah

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[177] 435 U.S. 191 (1978).

[178] 110 S.Ct. 2053 (1990). In *Duro*, the U.S. District Court for the District of Arizona held that assertion of tribal criminal jurisdiction over a nonmember Indian would violate the equal protection guarantees of the ICRA. *Id.* at 2058. The district court also reasoned that to subject nonmember Indians, when non-Indians are exempt, to tribal criminal jurisdiction would constitute racial discrimination. *Id.* The Ninth Circuit reversed, rejecting the ICRA claims. 821 F.2d 1358 (9th Cir. 1987), *amended*, 851 F.2d 1136 (9th Cir. 1988), *reh. denied*, 860 F.2d 1463 (9th Cir. 1988) (Judges Kozinski, Leavy, and Trott dissenting in the denial of rehearing)(citing transcript of Commission's hearings on the ICRA). On certiorari to the Supreme Court, the petitioner likewise argued this was an ICRA case. *See* Brief of Petitioner Albert Duro, *Duro v. Reina*, No. 88-6546, at 43-50. The Supreme Court reversed, ruling that an Indian tribe may not assert criminal jurisdiction over a defendant who is an Indian but not a member of the tribe, and holding that "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership." 110 S. Ct. at 2056.

[179] *Duro v. Reina*, 110 S. Ct. at 2060; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 208.

> reported 10 to 20 cases. Minnesota and Montana reported 20 to 30 cases. South Dakota reported 30 to 40 cases. Three states (Alaska, New Mexico, and Washington) reported 40 to 50 cases. Five states (Arizona, Michigan, North Carolina, Oklahoma, and Wisconsin) each reported more than 50 cases.[180]

The most frequent subject matter of these disputes were cases involving the Indian Child Welfare Act, domestic relations, contractual matters, taxation, and fishing/hunting disputes.[181] It appears that some States and tribes are making inroads into resolving these problems through "informal working agreements between the judges of the two court systems, the education of judges and lawyers as to the respective authority of the two court systems, legislation that clarifies full faith and credit or comity, and formal agreements between the two governments,"[182] and the Commission believes that Federal support for reciprocal recognition of State and tribal court judgments will result in greater public respect for tribal court authority.

The United States Congress is currently considering legislation to reverse the effects of the above-mentioned *Duro* decision by recognizing that tribes have inherent authority to exercise criminal jurisdiction over nonmember Indians. In order to ensure that there would not be a jurisdictional void in law enforcement on the reservations, at the end of the 101st Congress, the Congress adopted a temporary measure that authorized tribal entities to assert criminal jurisdiction over nonmember Indians until September 30, 1991.[183] The Congress indicated that it intended "to develop more comprehensive legislation within the coming year."[184] The conference report accompanying this legislation explained the need for its passage:

> Reversing two hundred years of the exercise by tribes of criminal misdemeanor jurisdiction over all Indians residing on their reservations, the Court held that tribes had lost their inherent power to exercise criminal misdemeanor jurisdiction over Indians who commit criminal misdemeanors on tribal lands but are not members of the

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[180] Rubin, *Tribal Courts and State Courts: Disputed Civil Jurisdiction Concerns and Steps Toward Resolution*, 14 ST. CT. J. No. 2, 9, 10 (Spring 1990).

[181] *Id.* at 10–11.

[182] *Id.* at 15.

[183] Department of Defense Appropriations Act, 1991, Pub. L. No. 101–511, § 8077(b),(c), and (d), 104 Stat. 1856, 1892–1893 (1990).

[184] H.R. CONF. REP. No. 938, 101st Cong., 2d Sess. 133 (1990).

tribe upon whose reservation the misdemeanors were committed. In at least twenty states with substantial Indian populations, the Court's decision has created a jurisdictional void in which neither a tribe, a state, or the Federal government is exercising jurisdiction over crimes committed by non-tribal member Indians in Indian country.

Unless authority to exercise jurisdiction in Indian country is delegated to the states by the Federal government and assumed by the states, as has been done in eleven states pursuant to the provisions of Public Law 83-280, states do not have jurisdiction over crimes committed by or against Indians in Indian country. The Federal government exercises jurisdiction only over major crimes committed in Indian country when either the victim or the perpetrator of a crime is an Indian. Traditionally, tribes have exercised criminal misdemeanor jurisdiction over all Indians on their reservations.

With the Court's ruling in *Duro v. Reina*, this traditional pattern of jurisdiction has been altered, and unless the Congress acts to fill this jurisdictional void, those who identify themselves as Indian and are recognized under Federal law (18 U.S.C. 1153) as Indian, may come onto an Indian reservation, commit a criminal misdemeanor, and know that there is no governmental entity that has the jurisdiction to prosecute them for their criminal acts. Such is the situation across Indian country since the Court's ruling in May.[185]

The Commission on Civil Rights supports a permanent reversal of the effects of the *Duro* decision through legislation that recognizes the inherent authority of tribes to exercise criminal jurisdiction over nonmember Indians.[186]

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[185] *Id.* at 132-133.

[186] In a 1981 report, the Commission on Civil Rights recommended that "Congress should enact legislation permitting Indian tribes, at their option, to assume criminal jurisdiction over all persons within reservation boundaries, in compliance with the limitations and procedural guarantees specified by the Indian Civil Rights Act." CONTINUING QUEST, *supra* note 7, at 191. The Commission reiterates its support for this recommendation, and recommends the eventual reversal of the effects of the *Oliphant* decision.

# Part IV
# Findings and Recommendations

## Findings

**Finding 1.** The Commission on Civil Rights finds that the United States Government has established a government-to-government relationship with our nation's tribal governments; that these tribal governments have retained the powers of self-government; and that for many of these governments, the powers of self-government are exercised through passage and enforcement of their own laws, the latter often being by means of their own tribal court systems.

**Finding 2.** The Commission finds that in passing the Indian Civil Rights Act of 1968 the United States Congress did not fully take into account the practical application of many of the ICRA's provisions to a broad and diverse spectrum of tribal governments, and that it required these procedural protections of tribal governments without providing the means and resources for their implementation.

**Finding 3.** With the exception of habeas corpus actions, enforcement of the Indian Civil Rights Act today takes place solely in tribal forums. Neither the Federal courts nor any Federal agency enforces or oversees enforcement of the ICRA.

**Finding 3(a).** The Interior Department's ICRA role is limited almost exclusively to providing funding and marginal levels of training to tribal court personnel on the ICRA's requirements.

**Finding 3(b).** The Interior Department does not today provide the possible relief suggested by the Supreme Court in its reference in footnote 22 of the *Martinez* decision, specifically, that persons who are aggrieved by tribal laws requiring Secretarial approval may have recourse with the Department of the Interior.

**Finding 3(c).** At least since 1978, the Department of the Interior's use of its statutory authority under 25 U.S.C. § 450m to rescind a contract with a tribe whenever the "Secretary determines that the tribal organization's perfor-

mance under such contract or grant agreement involves . . . the violations of the rights or endangerment of the health, safety or welfare of any persons . . ." has not been exercised because of ICRA violations and the Department does not believe that Congress intended for it to do so.

**Finding 4.** The adjudication of civil ICRA suits in tribal forums can be problematic due to the form of government imposed on some tribes through the Indian Reorganization Act of 1934, as well as the later imposition of the Indian Civil Rights Act of 1968 without adequate resources for its implementation.

**Finding 5.** The failure of the United States Government to provide proper funding for the operation of tribal judicial systems, particularly in light of the imposed requirements of the Indian Civil Rights Act of 1968, has continued for more than 20 years. Funding for tribal judicial systems may be further hampered in some instances by the pressures of competing priorities within a tribe.

**Finding 6.** The vindication of rights guaranteed by the Indian Civil Rights Act within tribal forums is contingent upon the extent to which the tribal government has waived its immunity from suit; concern about the potential effects of law suits, even for declaratory or injunctive relief, on the viability of tribal government has made some tribes reluctant to waive sovereign immunity to any extent, with the result that plaintiffs' efforts to adjudicate ICRA claims are frustrated.

**Finding 7.** Public recognition and respect for tribal court authority is hindered by assaults on their jurisdiction by litigants as well as jurisdictional disputes with neighboring courts and authorities.

## Recommendations

The Commission is encouraged by the recent congressional focus on tribal court funding and the strengthening of tribal forums, and strongly encourages the Congress to go forward in this area. If the United States Government is to live up to its trust obligations, it must assist tribal governments in their development, and must continue to promote the recognition of this authority, as the Congress has previously done by means of the Indian Child Welfare Act.

The Commission strongly supports the pending and proposed congressional initiatives to authorize funding of tribal courts in an

amount equal to that of an equivalent State court. The Commission is hopeful that this increased funding will allow for much needed increases in salaries for judges, the retention of law clerks for tribal judges, the funding of public defenders/defense counsel, and increased access to legal authorities.

The Commission also supports the pending and proposed congressional initiatives to provide a more equitable distribution of funding for tribal forums, such as a system based on caseloads, population, etc., independent of the Indian Priority System; to provide for an annual survey and report to Congress regarding the funding needs of tribal courts; and to provide funding in a manner that allows for flexibility among tribal forums.

The Commission believes that Federal support for reciprocal recognition of State and tribal court judgments will result in greater public respect for tribal court authority, and encourages the Congress to reflect such support in tribal court legislation.

The Commission supports the congressional reversal of the effects of the *Duro* decision through legislation that recognizes the authority of the tribes to exercise criminal jurisdiction over nonmember Indians.

The Commission recommends to Congress that special attention be placed not only on the needs of tribal judicial personnel for training, but on the need to train the council members also. If the ICRA is to be fully implemented, all members of the tribal government must be trained in its requirements and the need for an impartial forum for resolution of disputes under the ICRA.

The Commission recommends that the Congress establish a mechanism and provide sufficient means for each tribal government to report at least biennially as to (1) the amount and adequacy of funding allocated to resolution of disputes; (2) the forum(s) within each tribal government with authority to resolve ICRA claims, and the extent of that authority, including the types of relief the respective forum is authorized to render under the ICRA; (3) the number of written ICRA complaints, both civil and criminal, filed with each tribal government, the forum within the tribal government in which they were filed, the violation alleged, and their final disposition; (4) the method of selecting and retaining tribal court judges, judicial personnel, and others whose duties pertain to the resolution of ICRA claims; (5) whether an appeal process exists and was exercised; and for these reports to be compiled and the data analyzed by a designated agency in a manner that will enable the Congress to monitor the success or shortcomings of the Indian judicial systems.

The Commission recommends that funds be authorized and appropriated for the establishment of several pilot projects to assist tribal governments in an exploration of the extent to which they might enact statutory waivers of sovereign immunity to allow for civil rights suits against the tribe, without jeopardizing the tribal government's viability.

Although the Commission received testimony from several witnesses who supported Federal court review of ICRA claims, most of them indicated that amending the statute to provide for such review should be a means of last resort. The Commission believes that respect for tribal sovereignty requires that prior to considering such an imposition, Congress should afford tribal forums the opportunity to operate with adequate resources, training, funding, and guidance, something that they have lacked since the inception of the ICRA.

With a renewed commitment by Congress to provide adequate funding, training, and resources to tribal governments such that their judicial systems might achieve the respect that is due them, as well as congressional support for the recognition of tribal court judgments by State courts and authorities, the Commission hopes that the current trend towards the narrowing of tribal jurisdiction will be reversed, and that, instead, the future will be one of promise and greater respect for tribal sovereignty and authority.

# Statement by Commissioner William B. Allen

The temptation to approve this report is great despite its manifest errors of legal and historical interpretation.[1] The reason for this is that the Commission's study has finally been freed from its unhealthy and collusive connection with the Department of Justice's efforts to build a case for legislation previously introduced as S. 517. During that earlier phase the Commission actually had less control over its own study than did certain staff from the Department of Justice.[2] The sheer scope and importance of the inquiry, however, had the effect of producing a record of far greater weight than the collusion intended. Despite the passage of time and changes in staff, the record remains to support a broader effort, and the Commission's study is now free from those prior suspicions. Nevertheless, some aspects of the prior analysis remain in the final product (to be expected, since the whole work could not be redone), and these convey erroneous conclusions even while no longer supporting their predetermined end. I write, now, therefore, largely to clarify these errors of legal and historical analysis and also to take full advantage of the rich record this 6-year study produced.

Moreover, I cannot concur in a report that claimed fewer than 90 seconds of substantive Commission deliberation after more than 6 years study and $600,000 of resources invested in it. The report is far briefer than such an extensive record would seem to justify.[3] Furthermore, the direction of its recommendations, contrary to the recommendations of the very worthwhile "Final Report and Legislative Recommendations" of the Special Committee on Investigations of the Select Committee on Indian Affairs of the United States Senate," is to infuse the Federal Government even deeper into custodial care of Indians, while the gravamen of our findings is that that is the very source of most of the problems we uncovered.[4]

This abbreviated version seems to suggest far less importance for the ultimate product than I believe it in fact merits. Indeed, I am persuaded that the hearing and study record behind this report make it possible, for the first time in our history, for the Government of the United States to be completely honest rather than merely apologetic about its failures in treating with American Indians. The approved Commission "Report" fails to live up to this high expectation.[5]

Accordingly, I add now my own brief statement about the meaning of this extensive record.[6] In order to coverage as comprehensive as possible in the circumstances, I restrict the text to a further elaboration of findings and recommendations supported by the record. I omit interpretations save where absolutely necessary

to justify findings or recommendations, and then I relegate them to footnotes in order to preserve an undisturbed flow in the text.

## Findings

I. There is no foundation for Congress' and the Court's assertion of a "plenary power" over Indian tribes taken as independent and sovereign governments. Such a "plenary power" neither has been nor can be acquired by conquest, treaty, or constitutional stipulation.[7]

A. Whatever may be the rule in international law, the assertion of complete and arbitrary power over noncitizens by the Government of the United States is incompatible with the Constitution of the United States, which is superior to *every* positive determination by the Government.[8]

B. Even if complete and arbitrary power over noncitizens were possible for the Government of the United States, such unlimited power could not be extended over citizens who, as such, are parties to the Constitution that limits the power of government.

1. Nor can citizens be placed outside of the protection of the Constitution by means of the fiction of "government to government relations," where the "government" with which the United States deals is not in fact independent and sovereign (including control of its own territory).[9]

a. Therefore, insofar as the ICRA applies to U.S. citizens, it exceeds the power of Congress to enact.

C. The Congress of the United States can legitimately exercise no power over tribes whose members are citizens of the United States which power is not in fact a power over the citizens themselves and therefore subject to the relevant constitutional limitations.

1. With respect to special protections afforded against lawfully subordinate governments, the United States has no power whatever to make exceptions, for any purpose whatever.[10]

a. With respect to special protections afforded against lawfully subordinate governments, the United States may not apply a lesser standard of protection against itself.

D. Not one Federal dollar has been spent on the enforcement of fundamental civil rights of American citizens domiciled on reservations since the 1978 Supreme Court decision, *Santa Clara Pueblo* v. *Martinez.*

II. The Government of the United States has failed to provide for Indians living on reservations guarantees of those fundamental rights it is obliged to secure for all U.S. citizens living on territory controlled by the United States and under the laws of the United States.

A. In abandoning by act of Congress individual U.S. citizens to the indeterminate control of tribal governments without recourse to Federal courts of judicature the United States thereby fails to provide the just constitutional claims for which all citizens may pray.

B. Federal legislation for tribes, as distinct from citizens, implicates the rights of citizens in other areas.

1. The Indian Child Welfare Act (ICWA) is a case study of rights imperiled by the process of legislating for tribes without regard to citizens.

a. ICWA produces institutional child neglect and abuse without recourse to fundamental due process protections.[11]

2. Congress established the Legal Services Corporation to provide legal representation for indigent clients in civil cases. An exception to a general prohibition against uses of Corporation funds in criminal cases is provided where persons are charged with a criminal misdemeanor or less in a tribal court, 42 U.S.C. §2996f(b)(2); 45 C.F.R. §1613.4. In 1988 Corporation staff advised the Commission that the Corporation had allocated $7 million for all Native American legal services programs, of which 10 were reservation based and 22 were located near reservations. Discussions with Corporation staff indicated that many of these programs are overseen by boards of directors that include tribal council members, and that these programs frequently represent tribal governments in relation to State governments or the Bureau of Indian Affairs. The use of tribal council members as directors of the programs ostensibly set up to provide representation of indigent American Indians in litigation against tribal governments calls into question the integrity of these programs.

III. Enforcement of ICRA by tribal governments: The record of hearings and studies justifies the conclusion that tribal enforcement of ICRA has been at best uneven; sometimes reaching to customary levels of expectation among Anglo-American jurisdictions, often lacking altogether.

A. Among the explanations for, and examples of, the failures are a number of individual and systemic factors.

1. Claims of sovereign immunity.

2. Lack of autonomy in judicial offices.

3. Woeful lack of funding of tribal courts.

4. The Secretary of the Interior has failed to use statutory means (§450m of Public Law 93-638) to enforce the ICRA.

5. General allegations of illegal searches and seizures.

6. Widespread denial of the right to counsel.

7. Ex parte hearings.

8. Restriction of right to a jury trial.

9. Violations of freedom of the press.

10. Violations of due process and equal protection of the laws.

11. Cruel and unusual punishments.

## Recommendations

I. A. That the "blueprint for a New Federalism" proposed in the "Final Report and Legislative Recommendations" of the Special Committee on Investigations of the Select Committee on Indian Affairs of the United States Senate be enacted forthwith, including the four "indispensable conditions":

1. The Federal Government must relinquish its current paternalistic controls over tribal affairs; in turn the tribes must assume the full responsiblities of self-government;

2. Federal assets and annual appropriations must be transferred in toto to the tribes;

3. Formal agreements must be negotiated by tribal governments with written constitutions that have been democratically approved by each tribe; and

4. Tribal government officials must be held fully accountable and subject to fundamental Federal laws against corruption or abuse of power.

B. A comprehensive guarantee of the natural and civil rights of American citizens of Indian descent demands that we resolve the constitutional ambiguity in the relation between individual Indians, their tribal governments, and the government of the United States; such a resolution will embrace the either/or choice of full sovereignty or citizenship.

1. A Resolution on the side either of sovereignty or of American citizenship must entail the dissolution of the Bureau of Indian Affairs per se, acting as a caretaker or guardian for a conquered race. Certain functions of the Bureau could survive in the Department of State relative to those Indian communities following the path of sovereignty.

a. Wherever there has been within any tribe no express acceptance of American citizenship, and where continued territorial and administrative integrity of the tribe obtains, the United States should accord full and formal recognition of the independence of the nation on grounds mutually acceptable, such grounds being spelled out in a final treaty of peace between such independent tribe(s) and the Union.

b. Because it is sometimes unclear where American citizenship has been embraced and where it has not, and because the government of the United States may not withdraw accomplished citizenship, before steps toward independence can be taken, the United States is obligated to conduct a plebiscite among the members of affected tribes. The plebiscite should be carried out under the direct control of the Federal Government, with all rules and procedures subject to congressional authority.

C. 1. a. The Indian Civil Rights Act should be repealed.

i. Where Indians constitute a thriving political society but do not choose independence from the United States, where they possess territorial integrity and material resources for the conduct of government, and where

there is sufficient divergence of interest between them and the state(s) of the Union where they are located geographically, they should be empowered to petition Congress for independent status within the Constitution of the United States as States or territories or commonwealths.

ii. Tribes ineligible for independent political status within the Constitution by reason of size or circumstance, but which yet retain fealty to American citizenship, should be encouraged toward separate municipal status wherever possible.

iii. Congress ought, all other provisions failing, at least to enact a self-denying ordinance to the effect that it will attempt over Indian tribes the exercise of no municipal powers other than those generally established over States within the United States. This will leave the tribes as "States" without representation, save through the States within whose boundaries they lie.

D. While the reservation system and/or the custodial responsibility of the United States still subsists, it is recommended that a Board of Indian Judges be established within the Civil Rights Division of the Justice Department, there to propose and oversee the establishment of adequate mechanisms and resources to guarantee the enforcement of fundamental civil rights on reservations.

1. The purpose of the Board of Indian Judges shall be to recommend a system of Indian Regional Appellate Courts and appropriate criminal justice procedures to articulate within such an appellate structure.

a. Such courts may be based on existing regional judges associations and would be best organized according to the existing sympathies and common customs of the various tribes within a region.

b. Such courts should also be articulated within the structure of existing circuit courts of the Federal judiciary.

2. Alternatively, and failing by some fixed date such a result as called for from the Board of Indian Judges, the Department of Justice in consultation with the Board of Indian Judges should recommend to Congress a means by which existing

tribal courts may be brought directly within the appellate jurisdiction of the Federal court system. This course implies necessarily amendment of the ICRA to fill in the gaps cited by the *Martinez* decision.

II. Congress would do better to replace the ICRA with legislation providing for the enforcement of the civil and constitutional rights Indians enjoy by virtue of their citizenship in the United States. Such legislation should specify *de novo* review by appropriate judicial bodies in civil rights actions brought by plaintiffs in tribal courts.

A. Such legislation would subordinate tribal governments to the Constitution of the United States and provide for a waiver of tribal sovereign immunity. Additionally, Congress should explicitly amend civil rights laws currently in force to include American citizens domiciled on Indian reservations.

B. Congress should not only reverse the Duro decision, but should extend the rule to establish general jurisdiction over all persons committing infractions on Indian reservations.[12]

1. Congress should repeal the Indian Child Welfare Act, and any similar legislation the consequences of which are to enracinate social pathologies.

a. Due process requirements mandated in particular civil rights areas ought expressly to be extended to all judicial procedures touching questions of life, liberty, or property.

2. b. Congress should amend 42 U.S.C. §2996(b) to clarify its intent with respect to use of funds by the Legal Services Corporation in providing funds for the representation of indigent clients, not governments, in tribal court proceedings.

III. A. 1. Within their own constitutions and without respect to their status, tribes should guarantee that sovereign immunity shall not constitute a defense against claims for injunctive, declaratory, or other equitable relief in fundamental civil rights pleadings.

2. Tribes should, further, provide judicial review by an independent judiciary. Moreover, Congress should amend the language in 25 U.S.C. §450n, which provides that

"Nothing in this Act shall be construed as—(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe . . ."

3. Congress should provide, through the Department of Justice, direct funding for tribal court systems commensurate with levels that obtain in comparable State or municipal systems.

a. Congress should appropriate and earmark monies for a criminal defense fund to be used to reimburse attorneys who represent indigents in criminal proceedings in tribal court. A voucher system should be established to pay these attorneys a predetermined rate for their services. Alternatively, Congress should appropriate and earmark monies to pay for attorneys to be added to either the Federal defender's office or the United States Attorney's office in every jurisdiction that contains a tribal court.

4. Title 25 U.S.C. §450m requires, *inter alia*, that certain language be included in contracts or grant agreements which the Secretary of the Interior enters into with tribal organizations. That language is to expressly provide that the Secretary may rescind and reassume such contracts or agreements where he determines that the tribal organization's performance thereunder involves the violations of rights. Unwise though this relationship be, while it persists Congress should amend §450m to specify that violations of the Indian Civil Rights Act, while it is in force, provide a basis for rescission of such contracts or agreements and to require certification by the tribe that it is complying with the ICRA. This minimal level of enforcement should also provide a private right of action against the Secretary for persons whose rights are allegedly violated.

5–11. The Federal Judicial Center, an agency within the Judicial Branch of the United States, is mandated, *inter alia*, to conduct research on the operation of Federal courts, to stimulate and coordinate such research by other agencies or persons, and to conduct programs of continuing education and training of judicial branch personnel including judges. Serious consideration should be given to using the Federal Judicial Center, alone or in conjunction

with the Board of Indian Judges provided for above, to assist in the development of tribal courts through the provision of training and technical assistance. Such training and assistance should also be extended to tribal council members and police personnel.

a. Ideally, the Board of Indian Judges would take the lead in recommending ways and means of regularizing and insuring a fair administration of justice under tribal governments wherever necessary. In addition to direct funding by the Department of Justice, it should provide for mandatory trial by jury in appropriate cases, the incorporation of American citizens living on reservations within all civil rights statutes, including the Voting Rights Act of 1965 (with amendments), and some workable standard to ensure that the orders of courts will be obeyed by tribal executives and police.

## Endnotes

1. All the present day inhabitants of North America can trace their origins to a history of primitive, unlettered barbarism. Nevertheless, Federal Indian law continues to be premised on the ignorance of the Indians. Indians, it is said, are in their pupillage; they are wards of the United States. It is essential first to understand this foundation of Indian law, before one can meaningfully address the Indian Civil Rights Act (ICRA) or entertain any serious discussion of what the United States Commission on Civil Rights should say about the ICRA.

Accordingly, it is important to note that the criticisms in this statement are not criticisms of the Commission staff who drafted the report and who, in this as well as in other productions, have exhibited a professional excellence beyond question. I here criticize an approach, in much the same spirit we have previously criticized the production of narrow reports by this commission. Before, we have insisted that an economic analysis, unleavened by historical sensitivity, was insufficient for the mission of the Commission on Civil Rights. Today I say that mere legal analysis is no more sufficient, alone, than mere economic analysis.

This outlook was well expressed by Commissioner Mary Frances Berry, in the Commission meeting of November 17, 1989, when she declared: "I thought that the economics ought to be put into the context of the culture and social history of black women in this country so that we would have a fuller understanding of their status and that I also thought that there ought to be some discussion of the history of discrimination on the basis of gender in general with black women as a sub-context of that . . . . I believe that that context, the history, needs to be put into the report so that people will more fully understand the economics that they read . . . . I am considering [the report] from the perspective of a public who reads it. So, if we could separate criticism of what they have done from criticism of us as a body publishing a study, then I think we will be getting somewhere . . . . to give people these narrow answers doesn't make any sense and so I pleaded . . . that we put more about the history of black women and women in this country to flesh out the areas where we talk about the economics . . . the people who did the report are not professional historians and perhaps . . . it's not their fault that they're not and they weren't asked to do this and we need somebody to do it." Similarly, Commissioner Blandina Cardenas Ramirez observed that ". . . we have spoken about a need for, if you would, an interdisciplinary approach to these issues consistently every single time one of these economic status reports have come up . . . ." With Commissioners Berry and Ramirez I have consistently emphasized an interdisciplinary focus. I remain consistent in underscoring its importance. We do not have the capability at the Commission at this stage of our development to provide that kind of breadth in our reports. Therefore, I now write, not to provide the comprehensive focus we need, but at least to suggest the scope of such a capability. In doing so, I take occasion to correct the most misleading, if unintentional, errors of the report now approved by the Commission.

2. This Commissioner well remembers sitting in the office of Senator Inouye and responding to an inquiry concerning DOJ influence that our study was independent, only then to be confronted for the first time with the copy of a memorandum that clearly showed such a relationship. Needless to insist, I had been assured that we retained an appropriate arms' length relationship and my embarrassment was acute.

3. The Commission's study into enforcement of the Indian Civil Rights Act of 1968 was begun in 1985, when the Commissioners adopted a written project proposal authorizing further development of the study. The investigations and hearings by the Commission subcommittee responsible for the study comprise the most extensive factfinding conducted on the status of civil rights on Indian reservations ever undertaken. In significant part, this factfinding is set forth in the hearing records noted in Part I, n. 2 of the "Report."

In all, 178 persons testified before the subcommittee. Witnesses included numerous tribal judges and council members, Assistant Secretary for Indian Affairs, Ross Swimmer, and other representatives of the Department of the Interior, United States attorneys from South Dakota, New Mexico, and Minnesota, Indian law scholars, lay advocates, and attorneys who practice before tribal courts. Included also were numerous private citizens who sought recourse to the Commission to complain of tribal government abuses of their civil rights, testimony essential to a legitimate examination of the status of civil rights in Indian country.

The eventual selection of hearing sites conformed to the Commission's purposes. Rapid City was chosen for its proximity to the Rosebud, Cheyenne River, and Oglala Sioux Tribes, all of which were generally perceived to be experiencing difficulty properly enforcing the ICRA. Flagstaff, on the other hand, was selected for its proximity to the Navajo and Zuni Pueblo Tribes, and because the Navajo judicial system was reputedly the best in Indian country. Later, the subcommittee added hearings in Portland to receive testimony from numerous tribal judges in the Northwest (at their request); in Washington, D.C., to examine the ICRA enforcement efforts of the Bureau of Indian Affairs; again in Flagstaff to examine alleged ICRA violations and more fundamental issues arising out of Indian Child Welfare Act (ICWA) cases, allegations of threats to the independence of the Navajo judiciary, and recent amendments to the Navajo Tribe's sovereign immunity act; and, finally, in Phoenix, to receive testimony of three members of the Navajo judiciary on the issue of judicial independence.

4. "A New Federalism for American Indians," November 1989, S. Prt. 101–60. It was the institutionalization of the benefactor to ward relation which transformed Indian policy from a democratic to an imperial one, and which seemed to take as its goal the transformation of Indians into subjects habituated to dependency. It is not too much to say that the Bureau of Indian Affairs (BIA) was the first welfare agency in our nation's history, and we should not be surprised if our first and longest lasting welfare program has had similar, and perhaps even more harmful, effects than those of recent vintage.

In our study we found it a particularly striking and revealing fact that the BIA was created on March 11, 1823, by then Secretary of War John C. Calhoun, who later became the greatest of all antebellum defenders of slavery. Francis Paul Prucha, *The Great White Father*, vol. 1, p. 164. Calhoun's influence on the development of Indian policy corresponded with a significant shift of emphasis, from treating Indians as friends and brothers in the early years of the republic, to treating them as children of the "Great White Father." It was Thomas Jefferson, in the sixth compact with the Cherokees (1803, unratified), who introduced the language of "father" which Calhoun later perfected as "great white father." Jefferson addressed the Indians as "their father the President of the United States," and also scripted their response, "our Father, the President." Washington's language had always been, "my brothers," from the early 1750s through the end of his administration. Calhoun's writings demonstrate an intention to civilize the Indians (caring for them in the meantime), and to do so under the slavish tutelage of the Federal Government. In other words, only by treating Indians unequally, i.e. as lower than human, will they *become* human. In embarking upon an enterprise to civilize a race by direct intervention and superintendence of their way of life, Calhoun involved himself in tyranny as much as he did in denying the possibility of civilization to the black race.

The following excerpt from a Calhoun report aptly summarizes the attitude: "Our views of their [the Indians] interest, and not their own, ought to govern them. By a proper combination of force and persuasion, of punishments and rewards, they ought to be brought within the pales of law and civilization. . . When sufficiently advanced in civilization, they would be permitted to participate in such civil and political rights as [the government] might safely extend to them. . . It is only by causing our opinion of their interest to prevail, that they can be civilized and saved from extinction." Statement submitted to Congress, December 5, 1818. *American State Paper: Indian Affairs*, 2:182–184. The logical conclusion of such sentiments is the constitutional and administrative tyranny which still serves as the linchpin of our Indian policy (plenary power and guardianship), and under which tribes still suffer.

5. Singular misunderstandings about America's treaty relations with Indians, the status of tribes during this process, and the evolution of Supreme Court decisions touching these matters characterize this report. A cursory view reveals that the end of treaty making in 1871 is hardly a starting point for our analysis.

Nothing can be more incredible than the belief—nay, assumption—that as the Americans were changing the foundations of all their laws while they broke their dependence on Great Britain, they nevertheless borrowed and perpetuated the terms of England's relationship to the Indians. "The three types of colony—provincial, proprietory, and charter governments—exercised varying degrees of self-government. 1 J. Story *Commentaries on the Constitution of the United States*, §159, 1858. By the time of the Revolution, however, all the colonies maintained that their authority to govern themselves derived from the British Crown. [Cf., Cambone, below, note 8.] Therefore, they argued, they were subjects of the King rather than

of Parliament, which they claimed could not rightfully interfere with internal affairs of the colonies. B. Bailyn, *The Ideological Origins of the American Revolution*, 224–25, 1967." Kenneth W. Johnson, "Sovereignty, Citizenship and the Indian," 15 *Arizona Law Review*, n.36, 980 (1973). Not only would borrowing their relationship to the Indians from England tend literally to undermine the justifications of American independence, but it would more importantly surrender the just claim to establish principles of right, newly enunciated and only then practially brought to bear upon human life.

In order, then, fully to appraise what in the way of right is yet owing to the American Indian, we must consider the American claim of right, in light of which alone it is possible to offer anything more than arbitrary power to regulate U.S. dealings with the Indians. The American Revolution was effected on the basis of the theory that the land of the Indians belonged, not to the King of Great Britain (the colonies' sovereign) but to the Indians—a position that determined all American policy thereafter. The Indians, however, did not subscribe to this theory, with the exception of the Delawares. Accordingly, they became enemies to the United States, allied with the King of Great Britain. When the Americans vindicated their legal theory by force of arms, they then left Indian claims in limbo. Had those claims fallen along with the claims of the King? If not, were they left to the United States to define, as victor in war? Could it be that the U.S. had overthrown the King's claim of conquest over the Indians only to substitute one of their own?

Apologizing for dilating at length on matters well within memory, I insist only that, before we credit tales of customs and usages from time immemorial we must, at a minimum, establish an accurate recall of those events, laws, and usages that everyone knows. Who fails at relating what is well within memory must not be trusted in the pretense to recall time immemorial. The above-cited Senate Select Committee Report (1989) correctly reported George Washington's decision to treat Indians as free and not as conquered nations. Using the preeminent case of the Cherokees and related tribes, Robert Cotterill demonstrated the eventual development and ultimate abandonment of that policy.

"The territorial claims of the Cherokees ran from the northward-flowing Tennessee on the west to the Kanawha, Broad, Edisto on the east; from the Chattahoochee, Coosa, and Black Warrior on the south to the Ohio on the north. Although none of those boundaries was conceded by their [immediate] neighbors, the Cherokees succeeded in transmitting their claims thereto into an ownership sufficient for sale." Thus, the great acquisitions by the United States were effectuated by purchase through treaties. During this period tribes such as the Chickasaws remained small and sustained their integrity through a policy of naturalizing alien people. The southern Indians in general had mated economic communism with individual liberty by means of maintaining a state so near anarchy that only "unanimous consent" could attain any practical purpose, and dissident minorities consequently did not exist.

Against this background, neighboring States, like Georgia, were often tempted beyond resistance to intrude on Indian holdings, with the result that the U.S. dealt as often and as much with American citizens as with

Indians in attempting to maintain a stable policy. The failure to execute the Treaty of New York, concerning the drawing of boundary lines, effectively undercut efforts to restrain Georgia. This set up conflicts, for which the Chief McGillivray was also in part responsible.

In 1785–86 three Treaties of Hopewell were signed, one with the Cherokees (November 28), one with the Choctaws (January 3), and one with the Chickasaws (January 10). That with the Choctaws contained an acknowledgment of American sovereignty (although the 31 signators had been inundated with liquor). At New York, July 21, 1790, McGillivray appeared on Washington's invitation to form a treaty in which he "refused . . . acknowledgment of United States sovereignty except over those Creeks living within the limits of the United States." Here is where the connection between land cessions and sovereignty began to be formed. Only the day after McGillivray arrived at New York President Washington signed an Act for Regulating Trade and Intercourse with the Indian Tribes. The act was founded on continuing nationhood for Indians, save as explicitly surrendered in treaty. This had the effect of obligating the United States to defend established Indian land claims. By 1802, however, a new "Intercourse Act" carried with it the political promise (a Compact with States) to extinguish Indian land claims!

The healthy policy unravelled in subsequent years. Return J. Meigs, Indian agent, retorting Cherokee resistance to surrender land and identity, wrote to the Secretary of War, April 16, 1811, "I have ever been of the opinion that the Indians have not the right to put their veto on any measure deliberately determined and decreed by the Government." On August 9, 1814, Andrew Jackson exacted the "Treaty of Fort Jackson" to close the Creek War of 1813–1814. This largely despoiled the Creeks of all land and set Cherokees and Choctaws in an impossible position from which they would never recover—despite an apparent respite won by the Cherokees on March 22, 1816, when two treaties acknowledged their land claims south of the Tennessee at the price of cession of all their South Carolina claims. The very concept of the "Indian Agent"—at once an ambassador but also a factor—worked against Indian claims of sovereignty. Nevertheless, tribes often demanded the appointment of such an official.

The treaties of March 22, 1816, were dead by fall, replaced by separate treaties liberally defended by the eloquence of bribery, with Cherokees, Chickasaws, and Choctaws. These were followed immediately by calls for "removal" and further demands for cession. By July 1817, and *under coercion*, Cherokees had agreed to swap land in Georgia and Tennessee for that territory in Arkansas on which a few voluntary emigrants already lived. This "Calhoun Treaty" announced the arrival and the policy of the newest Secretary of War. In March of the same year President Monroe had declared that Indians should no longer be dealt with by treaties but rather by legislation—a goal finally accomplished in 1871.

Yet another respite for the Cherokees occurred in the negotiations of 1819, which included clauses that foreshadowed Cherokee citizenship and permanent inhabitancy. In fact, however, this only set up the ultimate confrontation, although it bought a decade's quasi peace. By December 1, 1824, Americans who negotiated with Creeks announced (in a timid echo of a claim made to the Cherokees in 1823) that "they [Creeks] had been

conquered in the Revolution and had since held their land as tenants at will . . .," holding only by the forbearance of the United States. This explicit renunciation of the original policy fostered by George Washington is the immediate cause of the entire tragedy of Indian history in the United States since that day. At the very same time the fraudulent "Indian Springs Treaty" had the Creeks abandoning all claims and agreeing to removal! The treaty was subsequently abrogated by President Adams, but it had in fact been ratified by the Senate, clearly indicating the disposition of official opinion in the United States toward Indians.

This brief history is culled from many sources, but principally Robert Spencer Cotterill, *The Southern Indians: The Story of the Civilized Tribes Before Removal* (Norman, OK: Univ. of Oklahoma Press, 1966[1954]), pp 5, 7, 12, 85, 174, 188-89, 196, 202, 203, 207, 215, 217-18, 220, 234. Additional material is found in Kirke, Kickingbird, et al., *Indian Treaties* (Washington, D.C.: Institute for the Development of Indian Law, 1980); Francis Paul Prucha, ed., *Cherokee Removal: Selected Writings of Jeremiah Evarts*, 1980; and Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," 21 *Stanford Law Review* 1969.

6. A longer statement would be warranted by the record but would ill fit the limited dimensions of the approved statement. For the sake of propriety, therefore, I abbreviate my own statement.

7. Felix S. Cohen, *Handbook of Federal Indian Law*, 1942 edition (Albuquerque, NM: Five Rings Corporation, 1986) Reprint with Foreword by Robert Bennett and Frederick Hart. The authority on the subject of "plenary power" has long been taken to be Cohen's compendium. Nevertheless, a critical reading of Cohen's work reveals that there is no fundamental basis for the claim; it results merely from the positive assertion whether of the Court or of Congress (most recently at the head of the Indian Child Welfare Act). The opacity of presumed "plenary power" law in the 20th century was silently revealed by Cohen, showing the entire idea to be a cruel hoax perpetuated by lawyers and jurists. At p. 42 Cohen defers discussion of Congress' power to legislate over Indian affairs to Chapter 5, sec. 2. But in chapter 5, sec. 2, he observes that "all the scope of the obligations assumed and powers conferred has been discussed in chap. 3," (where the original reference to chapter 5, sec. 2 is found!) "and need not be rexamined at this point." This empty explanation is amply explained by Johnson at 988 and 1001: "Exclusive federal jurisdiction over Indian affairs is predicated uppon the Indian's nonparticipation in our constitutional system of government and the concomitant recognition of a tribal right of self-government." In other words, "plenary power" is just a mistranslation of "exclusive jurisdiction," which properly applies to the Federal Government only as against the States. And the price even of that "exclusive jurisdiction" is noninclusion and liberty for Indians, exactly the reverse of "plenary power." That is why it is ultimately impossible to found Federal concern for the civil rights of Indians on "plenary power." "In no other area of constitutional law does there exist a doctrine recognizing the preservation of cultural autonomy as a justification for limiting individual civil rights. Even disregarding notions of inherent tribal sovereignty, the

actions of the tribe which affect individual civil rights still constitute the kind of governmental action found by the Supreme Court in arguably private actions performed in an environment of state inaction or merely nominal governmental support."

8. Johnson misconstrues the relevance of this finding by interpreting it as militating against the Indian's claim of self-government while maintaining citizenship: "the 'grant' of citizenship to Indians, who still owe at least partial allegiance to the pre-constitutional sovereign tribes, is at odds with the framer's concept of membership in the American political community. Nor does it accord with the fourteenth amendment's prerequisites for citizenship. Congressional and judicial reluctance to attach the emotion-laden label of 'non-citizen' to the first Americans probably explains why challenges to this obvious contradiction have not met with success. It is nonetheless clear that, to the extent he asserts an inherent right of tribal self-government, the Indian has not truly manifested his consent to be governed wholly under the internal government set forth in the Constitution." Johnson, 1001-02. This error is not, as Johnson conceives, to be laid at the feet of the Indian. Rather, the contradiction falls to the responsibility of the United States government, which has operated with respect to the Indian *outside the limits of the Constitution.*

A more serious error than Johnson's is the underlying rationale of the Report of the Commission on Civil Rights, namely, that the Constitution does not apply to Indian tribes. Johnson has shown why that is inconsistent with a fulsome reading of the law. Nevertheless, there looms still more importantly an anachronistic reading of the law, the significance of which ought to be broached here for the sake of future clarity about the constitutional status of the rights of American citizens who are Indians. Initially, let us observe that Alexander Bickel is simply incorrect to depreciate the relevance of citizenship: ". . . emphasis on citizenship as the tie that binds the individual to government and as the source of his rights leads to metaphysical thinking about politics and law, and more particularly to symmetrical thinking, to a search for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged one next and against the other. Such thinking bodes ill for the endurance of free, flexible, responsive and stable institutions. . . ." "Citizenship in the American Constitution," 15 *Arizona Law Review* 387 (1973). Bickel's erroneous view subtends nevertheless the views of the Commission's Report, that "the Bill of Rights does not restrict tribal governments. The seminal case in this area is *Talton* v. *Mayes* [163 U.S. 376 (1895)]." At p. 4. Without entering into the substance of *Talton* we may yet readily discern the error in this reading. *Talton* was decided *prior* to the decisive constitutional readings which affect the decision of this question and has *never* been reviewed in light of those developments. Two such developments, among others, are key: The general grant of citizenship in 1924 and the decision in *Bolling* v. *Sharpe* (347 U.S. 495 [1954]) that held the Federal Government to a standard not less than that to which the States were subject. Even if it were the case that the 14th amendment did not in its terms convey citizenship to Indians born or naturalized in all territory subject to the direct jurisdiction of the Constitution (and I believe that is

not the case), it would nevertheless be true that these subsequent decisions had brought Indians within the ambit of the comprehensive protections of the Constitution. The result is that tribes would become akin to private associations for constitutional purposes. Accordingly, the Commission's anachronistic reading leads to a decisive misinterpretation which is decidedly unfriendly to the rights of Indians.

We must delve more deeply into the basis of this strange and anachronistic reading. Kenneth Johnson described this effect in the context of the decision shortly following *Talton:* In *United States* v. *Wong Kim Ark,* the Supreme Court was presented with the question whether a child born in the United States of noncitizens was a citizen of the United States by virtue of the 14th amendment. Neither the majority nor the dissenting opinion appear to have accepted the 14th amendment alone as being dispositive of the issue. Rather (and unfortunately), both opinions chose as their reference point not concepts of sovereignty or consent to be governed but whether, after the Revolution, the common law or international law was to be utilized in construing the Constitution. *The majority relied upon the common law of Britain* [emphasis added, note omitted]. The very concept of sovereignty, embodied in the common law of citizenship, which was denied by the colonists in order to legitimize their demands for internal self-government was applied by the United States Supreme Court to identify natural born members of this nation's ultimate sovereign [note omitted]." Johnson, 992.

This points us properly toward the crucial historical error that has produced the anomaly of reading American citizens who are Indians out from under the protections of the Constitution. It is only partially, and not most importantly, the reliance upon the common law of citizenship though that is closely related to the error. The error is a misconstruction of the international law of "discovery" as it applies to the status of Indians, an error the Commission's report has followed uncritically. Cohen, at 45, remarked that "some time after the end of the treaty-making period the federal government [did] take the ultimate step of asserting jurisdiction over offenses committed by Indians against Indians within Indian Country." In light of our earlier discussion, this clearly was only an elaboration of a power that had long been at least tacitly assumed. But Cohen, at 47, introduced his thesis that Victoria had elaborated the moral basis for these relations with Indians. He attributed to these principles the main influence in deciding *Johnson* v. *McIntosh* (8 Wheat. 523 [1823]) and *Worcester* v. *Georgia* (6 Pet. 515 [1832]). But Victoria was never cited by Justice Marshall, and Emmerich de Vattel, given minor notice by Cohen,was cited by Marshall. Cohen does cross-reference, from this chap. 3, sec. 4, to his chap. 15, sec. 4, in which the same theme, "aboriginal possession" or title is treated in detail, and in which Vattel is properly cited. Still, Cohen's main argument relies on Victoria. "the theory of Indian title put forward by Victoria came to be generally accepted by writers on international law of the sixteenth, seventeenth, and eighteenth centuries who were cited as authorities in early federal litigation on Indian property rights." Not only did Vattel not rely on Victoria; he disagreed with Victoria's analysis, as I will show.

Vattel, in *Le droit des gens, ou principes de la loi naturelles, appliqués à la conduite et aux affaires des nations et des souverains* [edition of James Brown Scott, *The Classics of International Law*, (Washington, D.C., Carnegie Institution, 1916), vol. I], discussed several titles to aboriginal holdings and their relations to the colonists in North American. At Bk. I, §81 he arrayed the cultivation of the earth against nomadic and other forms of existence, concluding that "the establishment of several colonies in the continent of North America, while restricting itself to just limits, can only be very legitimate" since it brings cultivation and more intense usage to the land. Additionally, "the peoples of these vast lands rather wander than dwell in them."

There is, then, a preference in natural law for cultivation over forage when it comes to possession of land. Nevertheless, Vattel does not proceed from this finding to a law of conquest. He recognizes rather (Bk. I, §207–09) that "all men have an equal right" to those properties that don't already belong to someone. Accordingly, possession falls to the first occupant of any uninhabited territory. Nor is the mere sign of possession (such as a landmark) sufficient. Rather, evidence of a clear intention to inhabit and cultivate must follow. When the discoverers located deserted territories and claimed them in the name of their sovereigns, that produced a "title that has been respected, provided that a real possession followed shortly thereafter." By contrast, it is a serious question whether a nation can possess in this manner territory that it does not actually occupy, and Vattel concludes that "it is not difficult to decide that such a pretense would be absolutely contrary to natural right. For nature has intended all the earth for the common needs of mankind and extends a right to particular men only to the extent that they may benefit, not in order to obstruct others. Accordingly, "when the sailors have come across deserted countries in which folk from other nations had erected some landmark in passing, they wasted no more time over that vain ceremony than over the papal dispositions which parceled out a large part of the world between the crowns of Castille and Portugal." Not discovery, then, but discovery and use conveys legitimate title, and that without respect to the conventions of Europe.

Beyond even this observation, however, is the intriguing question raised by the discovery of the new world; namely, whether a people can legitimately occupy *a portion* of a vast territory "in which one finds only some nomadic peoples, incapable by reason of their small numbers of inhabiting the entire land." Here Vattel returned to the reasoning of §81, namely that there was an obligation to cultivate the earth and that no one could claim exclusive power over land that they neither needed nor were in a position to dwell in and cultivate. Further, the European peoples were "too crowded" at home and could "legitimately occupy" and establish colonies in such portions of that territory as the native peoples had no particular need for. "Nous l'avons déjà dit, la terre appartient au Genre-humain pour la subsistance: Si chaque nation eut voulu dés le commencement s'attribuer un vaste pays, pour n'y vivre que de chasse, de pêche & de fruits sauvage; notre globe ne suffiroit pas à la dixième partie des hommes qui l'habitent aujourn'hui."

While this view may rightly seem to depict a justification of European expropriation of Indian territory, its significance for our purposes is rather the contrary. For despite this natural license that Vattel accorded the Europeans, he immediately added the important reflection that "one must praise the moderation of the English Puritans, who first established themselves in New England. Although furnished with a charter from their sovereign, they purchased from the savages the land that they wished to dwell in. This praiseworthy example was followed by William Penn and the colony of Quakers that he led into Pennsylvania."

Vattel, therefore, recognized in the principal American settlers a disposition to deal with the Indians as "owners" despite any liberty nature may have accorded them to view the Indians as interlopers. Nor was this qualification of the claim of conquest vis–a–vis the Indians on the part of the Americans the only important observation Vattel made. Immediately thereafter he reflected that "a nation which establishes dominion over a distant country and sets up colonies in it, that country, although distant from the mother country, constitutes a natural part of the latter, entirely like its ancient territories. Whenever the political laws or treaties make no explicit difference between them, all that one may say about the nation's own territory must also apply to its colonies."

Interestingly, these 17th century views were directly echoed in the American Revolution (and also in *McIntosh* and *Worcester*, though later commentators have misunderstood this relation), while the 16th century views of Franciscus de Victoria played no role at all, Felix Cohen to the contrary notwithstanding (Cf., "Original Indian Title," in *The Legal Conscience*, ed. by Lucy Kramer Cohen [New Haven: Yale U. Press, 1960], p. 289). Victoria's work simply dealt with a different question [See, *The First Relection of the Reverend Father, Brother Franciscus de Victoria, On the Indians Lately Discovered in The Classics of International Law*, ed. by Ernest Nys (Washington, D.C.: Carnegie Institution, 1917)], namely, what relations could legitimately subsist between the Spanish and the Indians in the new world. The title of the "Second Section" is "On the Illegitimate titles for the reduction of the aborigines of the New World into the power of the Spaniards." In discussing these illegitimate titles of *sovereignty* Victoria indicates "discovery" as one of the seven formal and an eighth informal title. To be sure, he discussed the Indians ownership of their land and of themselves in this review, but his primary focus was not on the possession of the land.

Discovery was the third of Victoria's titles: "Accordingly, there is another title which can be set up, namely, by right of discovery; and no other title was originally set up, and it was in virtue of this title alone that Columbus the Genoan first set sail. And this seems to be adequate title because those regions which are deserted become, by the law of nations [jus gentium] and the natural law, the property of the first occupant [Inst; 2,1,12]. Therefore, as the Spaniards were the first [among Europeans] to discover *and* occupy the provinces in question. . . . Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant. . . . And so, as the object in question was not without an owner, it does not fall under the title we are discussing. [138–39]" Thus dismissing discovery, which at most only distinguished European claims, without considering

what it means "to occupy" a country, Victoria could well conclude that "the seizure and occupation of those lands of the barbarians whom we style Indians can best, it seems, be defended under the law of war. . . ." [163]—that is, conquest. Conquest, in turn, can derive only from just war. Accordingly, the nonoffending Indians could not be brought under Spanish sovereignty. Victoria's work aims to defend free intercourse under the jus gentium. Victoria dismissed a sixth title without much ado, namely, the consent of the majority of the natives. Then, after the "seventh and last title," he discussed "another title which can indeed not be asserted;" namely, the natural right to assume control over barbarians for their own good, and to set up rulers over them. Surely, this could by nature only be done, once, by the first discovers or occupiers, so to speak. Thus, following Victoria, neither discovery, conquest, nor the ward or pupillage theory could justify sovereignty over the Indians. This could not, then, have informed the American position toward the Indians.

Victoria's theory, however, makes little contact with the claims enunciated by Vattel, which concerned themselves far less with sovereignty over the Indians than with the colonists sovereignty over themselves. The question for the Americans turned rather around their relations to Indian nations than to Indian subjects and this for important politial reasons as well as reasons of international law. Nor was control of the land of immediate consequence, as Vattel correctly foretold. The land sold to Europeans was to the Indians often as much a gewgaw as were to the Europeans the trinkets and jewelry used to acquire the land. *Jurisdiction* was the genuine interest transferred, as is reflected in the treaties by the use of "cede" rather than "sell." Indians could not integrate within tribal jurisdictions Europeans who retained or wished to retain possessory interests within tribal jurisdictions, although on their own terms they generally and freely integrated within tribes Europeans and Africans. Indians sold the jurisdiction both because it mattered little to them and because they received valuable consideration, besides gewgaws, in return, namely, the promise of protection. Still, they could have sold land without jurisdiction. That is, they could have welcomed Europeans within their own jurisdictions. They did not, for they could not. They knew only the territoriality of the tribe, not the individual. Possession is indeed nine-tenths of the law; unfortunately, it is not that tenth part that makes the law, jurisdiction, and without which possession is only use, only waste or consumption. There must be actions before there can be *choses en action.*

The Indian perspective is not alone sufficient for our purposes, however. We must also consider what the Americans aimed to accomplish in elaborating their complex relations with the Indians. In this respect, nothing is more important than the constitutional claims of the Americans in their struggles with Great Britain. They had debated the law of discovery and the law of conquest with the Crown long before they employed the terms in their dealings with Indians. To sustain their own just claims, they had to refute the claims of the Crown, reflected in Blackstone's Commentaries, that the lands of the colonies were conquered lands, carrying with them the absolute dominion, or "plenary power," of Great Britain—a meaning Blackstone elaborated in the observation that "sovereignty and legislature are indeed convertible terms; one cannot subsist without the other." 1

Blackstone 46. This sovereignty, to be distinguished from the jurisdiction described by Vattel as travelling with colonization, Burlamaqui observed to be conveyed by conquest. [*The Principles of Natural and Political Law* (5th ed., 2 vols. in 1, Dublin, 1791), II, Pt. I, chap. viii, secs. 1–3, 230.] By contrast, the discovery of deserted land and the insertion of a colony thereinto carried corporate standing under the constitution of the mother country. [The full discussion of the significance of this constitutional argument is presented in Stephen A. Cambone, *Noble Sentiments and Manly Eloquence: The Suffolk Resolves and the Movement for Independence* (Ann Arbor: University Microfilms, 1980), pp. 7–75.] This reasoning was familiar to the Americans from the case of the Irish (See, James Wilson, *Lectures on Law*, Appendix, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," 1774), at 532. The Americans, then, articulated a principle of discovery, a constitutional principle, which was essential to the attainment of their independence and in accord with which it was necessary for them to maintain that America was not conquered but rather freely settled. This meant, in turn, that their relations with the Indians could not have been the relations of conquerors to conquered, if they were to maintain consistency with their revolutionary claims.

The principle of discovery that surfaced in *McIntosh* and was present by implication in *Worcester* (and *Cherokee*) bore strong marks of the constitutional debate through which the Americans had so recently come. That is why it is incautious at best simply to relate it to the theory of Victoria. It bears far more the marks of Vattel, including his praise of American sensitivity to the Indians. Perhaps the authoritative reading of this period of jurisprudence is that preserved to us by Justice Story, first in his Commentaries, written just after the landmark decisions of the early 1830s, and finally in his 1859 abridgment of that work for student readers. In the first work he reported the law as the Supreme Court had decided it, although indicating along the way that the history did not justify it. By 1859, however, he was sufficiently removed from the controversies of the 1830s that he could rewrite the sections dealing with Indian law. What he did then was to reassert the version of American history that is recorded here.

Story wrote in the *Commentaries* [2:41, §1099 & 43, §1101] that America had inherited from the British Crown a prerogative power in dealing with the Indians. This would have depended upon a right of conquest as opposed to that form of discovery the Americans had asserted in the Revolution. Nevertheless, this was precisely the argument the Court had developed in the series of cases from *McIntosh*. He went on to observe that this required viewing tribes as "distinct political societie[s], capable of self-government." This tracked with the Court's opinion, which went on to distinguish these political societies as nonetheless not foreign states, and instead "domestic dependent nations" (there is no comma in the text, as the report amends!). On this reading, the relation of the tribe to the United States is that of a "ward to a guardian." Justice Story, still sitting on the Court, stopped just there, simply quoting the majority opinion in *Cherokee* from which he had dissented!

The reason the Court seemed to have backed into this position derived from Justice Marshall's wrestling with the problem of Indian title. He wrote, "All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." [Quoted at 1 Story 15] The problem, however, is that if the Indians had no such absolute and complete title, the Americans had no basis for their Revolution! After Story quoted Marshall's *McIntosh* opinion at length, presenting the history of "conquest or treaty" that led to European domination of Indians, and in the very few mentions of Indians at all—New Haven, Rhode Island, Pennsylvania, all counter to the thesis—one gets a picture of ready and easy accommodation, punctuated by the generosity of William Penn. In short, Story comes very near to certifying the "desert land" point of view, reducing the notion of European discovery to nothing more than a polite fiction of realpolitik.

Then, in his chapter 16, following the history, Story gives the analysis whereby, like Wilson, he refutes Blackstone's claim that colonies were conquered lands! [1 Story 101] "There is great reason to doubt the accuracy of this statement in a legal view." He continued that, at the time of the leading grants from the Crown, there had been no "conquest or cessions from the natives." The Indians were not overcome by force and were not considered as "having any regular laws, or any organized government." They were subjected to obedience "as dependent communities, and no scheme of general legislation over them was ever attempted." Indeed, they were generally regarded as at liberty to govern themselves, so long as "they did not interfere with the paramount rights of the European discoverers." The implication that the "discoverers" acquired no rights over the Indians was then affirmed by Story in the declaration, "as there were no other laws there to govern them, the territory was necessarily treated, as a deserted and unoccupied country, annexed by discovery to the old empire and composing a part of it." This shows clearly that the theory of discovery does not undergird the notion of a "domestic dependent nation" and cannot, therefore, constitute the foundation of a wardship or pupillage. Joseph Story, *Commentaries on the Constitution of the United States*, 2 vols., (Boston: Charles C. Little and James Brown, 1851), 2d edition.

If this reading of Story's famous work seems too subtle, it will perhaps add further credence if we consider at least the critical portion of his subsequent work: *A Familiar Exposition of the Constitution of the United States*, Reprint of the 1859 edition (Lake Bluff, Illinois: Regnery–Gateway, Inc., 1986). At chapter one, p. 28, Story uses a different voice to describe the Indian situation. "At the time of the discovery of America. . .the various Indian tribes, which then inhabited it, maintained a claim to the respective limits, as sovereign proprietors of the soil. They acknowledged no obedience, nor allegiance, nor subordination to any foreign nation whatsoever; *and as far as they have possessed the means*, they have ever since consistently asserted this full right of dominion, and have yielded it up only, when it has been purchased from them by treaty, or obtained by force of arms and consent. In short, *like all civilized nations* of the earth, the Indian tribes deemed themselves rightfully possessed, as sovereigns, of all the territories, within which they were accustomed to hunt, or to

exercise other acts of ownership, upon the common principle, that the exclusive use gave them an exclusive right to the soil, whether it was cultivated or not.

"It is difficult to percieve, why their title was not, in this respect, as well founded as the title of any other nation, to the soil within its own boundaries. How, then, it may be asked, did the European nations acquire the general title . . . ? The only answer which can be given, is their own assertion . . . that their title was founded upon the right of discovery. . . .

"The truth is, that the European nations paid not the slightest regard to the rights of the native tribes. They treated them as mere barbarians and heathens, whom, if they were not at liberty to extirpate, they were entitled to deem mere temporary occupants of the soil. They might convert them to Christianity; and, if they refused conversion, they might drive them from the soil, as unworthy to inhabit it. They affected to be governed by the desire to promote the cause of Christianity, and were aided in this ostensible object by the whole influence of the papal power. But their real object was to extend their own power and increase their own wealth, by acquiring the treasures, as well as the territory, of the New World. Avarice and ambition were at the bottom of all their original enterprise." This Justice Story no longer sits on the Court and no longer defers to the "settled rule of law."

When Story accepted Marshall's reliance on Spanish and Portuguese experience, instead of distinguishing the U.S. from the other America, his voice changed, and he blasted the foundation as a hypocrisy: "The right of discovery, thus asserted, has become the settled foundation . . . and it is a right which, under our governments, must now be deemed incontestable, however doubtful in its origins, or unsatisfactory in its principle." [at p. 30] What this means, then, is that the principle of discovery yields the occupation of the territory of North America, and perhaps even jurisdiction over it, but can by no means yield "plenary power" over either individual Indians or tribes. Yet, one fears that the Commission Report accepts precisely this result as incontestable, without seeing how doubtful and unsatisfactory the principle is.

In light of this review, it is no longer possible for responsible policymakers to accept the last two of Felix Cohen's "four basic principles" of Federal Indian law: (1) The principle of the legal (sic) equality of races; (2) the principle of tribal self-government; (3) the principle of Federal sovereignty in Indian affairs; and (4) the principle of governmental protection of Indians. "Spanish Origin of Indian Rights," *Legal Conscience*, p. 232.

9. Cohen's discussion of the development of the ward status in the recent era illustrates the problem. In 1 Cohen 16 we find an explanation of the mounting pressure to end treaties with Indians as a response to defections and attempts to treat with the Confederacy during the War of American Union. Cohen quoted Interior Secretary Caleb Smith in 1862 to the effect that a conscious choice was to be made: "A radical change in the mode of treatment of the Indians should be adopted. Instead of being treated as independent nations they should be regarded as wards of the government. . . " Smith said it had been mistaken theretofore to treat tribes as "quasi-independent nations," since they lacked all of "the elements of

nationality." Even though the formality of consent was acknowledged through treaties, in fact the Indians always yielded to irresistible force. In 1869 Interior Secretary Parker repeated the recommendation [1 Cohen 18] and observed along the way that the government had injured Indians "in deluding this people into the belief of their being independent sovereignties, while they were at the same time recognized only as its dependents and wards." In fact Parker called them "subjects," assimilating their status to that of a people governed by relationships not derived from consent. Actually, however, the argument for independence was made most forcefully as early as 1828, when Attorney General William Wirt maintained three criteria for tribal independence: government by their own laws; absolute power of war and peace; and inviolable territory and sovereignty. None of Wirt's three criteria apply to tribes in the United States of 1990, of course. To apply the term, sovereign, to them in their present state is a cruel and inhuman pun—for they are capable of none of the essential attributes of sovereignty. It is an extreme aggravation of the joke, therefore, to deny Indians at the same time the essential protections of citizenship. Nor does Cohen lighten the Indian's burden by his happy ejaculation, "the special status of the Indian is, by and large, something that he has bought and paid for and that he can relinquish whenever he chooses to do so." "Indians Are Citizens!", *Legal Conscience*, at 257. One might have expected better of Cohen, since the burden of his argument is actually to insist upon full rights of citizenship for Indians, a point he reiterated in "Indian Wardship: The Twilight of A Myth," [*Legal Conscience*, 328]: ". . .the courts have held that Indians are not wards under guardianship, but on the contrary are full citizens of the United States and of the states wherein they reside, and are entitled to all the rights and privileges of citizenship." The catch, of course, is that this claim is not understood to apply to the tribes, where Indians may be no less completely members than they are citizens in the United States, but where their United States citizenship is of little value to them. Cohen concluded the article with the hopeful anticipation that we will eventually dispel the "lingering legend of wardship," whether of individual Indians or of tribes. That surely will not be accomplished for so long as the so-called special "government to government" relationship persists.

10. The Constitution of the United States prescribes no criteria for legitimacy in government, other than the republican. Tribal heritage may be a legitimate basis of government, but it is not one known to the Constitution. It may operate, therefore, only independently of the Constituiton. Tribal governments—preconstitutional and prerepublican—have always been at a disadvantage trying to find a secure space under and within the Constitution of the United States. They are in fact tolerable under the Constitution only to the extent that they may be treated as private associations. Cf., Johnson, at 985.

11. Cf., *Indian Child Welfare: A Status Report*, "Final Report of the Survey of Indian Child Welfare and Implementation of the Indian Child Welfare Act and Section 428 of the Adoption Assistance and Child Welfare Act of 1980," prepared by CSR Incorporated (Washington, D.C.) and Three Feathers

Associates (Norman, OK) for the Administration for Children, Youth and Families, U.S. Department of Health and Human Services, and the Bureau of Indian Affairs, U.S. Department of the Interior, April 18, 1988. This must come as no surprise to any who have regarded closely the results of the ICWA. The abuses which I have personally documented, received innumerable complaints about, and seen reflected in official testimony and reports, are all too apparently the natural concomitants of the systemics liabilities of this approach to cultural preservation. Consider the five leading consequences of the ICWA to date:

1. Fewer adoptions, coupled with increasing resistance to termination of parental rights.

2. Concerns about a lack of tribal accountability which undermines even potentially positive enforcement of the act.

3. A not insignificant absence of tribal courts in many places and, hence, adequate due process.

4. Federal-level efforts to communicate performance standards and to monitor or enforce compliance have been limited.

5. No reduction in the flow of Indian children into substitute care has resulted, coupled with a dramatic shortage of Indian foster homes, and a decline in adoption rates spells disaster for Indian youths.

The fact is, the ICWA is a blunderbuss where a rifle was called for; pinpoint accuracy in addressing human suffering is a moral necessity, not a mere budgetary luxury. Of the many concrete cases of abuse that have resulted, perhaps none is more compelling than the story of the child with 20:500 vision, who loves to read and who was restored to her tribe, only to be deprived of the prosthetic her foster parents had provided and subjected to physical abuse as well! This tragedy resulted in significant measure as a consequence of the ICWA.

12. The problem aimed at by the "Duro-fix" did not originate with 1950s self-determination nor even the 1934 "Reorganization Act," as the Report implies. Like so many *other* evils it originated in the paternalism of the early 19th century. 1 Cohen 2-3 offers a compelling account of its early origins. A primitive version of "self-government" policy was contained in the 1834 Trade and Intercourse Act: "That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian Country: *Provided*, the same shall not extend to crimes committed by one Indian against the person or property of another Indian" [note omitted]. In short primitive "self-government" was nothing but a Federal license for Indians to abuse one another, even if it did convey by implication a kind of racially construed "sole and exclusive jurisdiction" to tribes themselves. Since U.S. jurisdiction must follow the power to punish crimes by whites aginst Indians and crimes by Indians against whites, clearly the tribes cannot have "sole and exclusive jurisdiction" within their territory however construed. This comports with Cohen's definition of "Indian Country" at p. 5 as "country within which Indian laws and custom and federal laws relating to Indians are generally applicable." Thus, they receive the concession to handle crimes of Indians against Indians, meaning that their jurisdiction is as to race alone. That will

remain true unless the proposed "Duro-fix" extends a truly general jurisdiction.