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The Indian Civil Rights Act of 1968[1] provided a legislative answer to the question of whether, and to what extent, fundamental civil liberties recognized in constitutional law should constrain federally recognized Indian Tribes[2] in the exercise of their sovereign powers. In enacting this law, Congress weighed its desire to protect individuals from arbitrary and overly intrusive

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[1] 25 U.S.C. §§ 1301 et seq.

[2] There are currently close to 500 federally recognized Indian tribes and their number can be expected to grow as nonrecognized tribes surmount the bureaucratic hurdles to federal acknowledgement. Those Indian communities that lack federal recognition cannot exercise powers of sovereignty within the federal system and are not eligible for federal programs specifically benefitting Indians. See DAVID H. GETCHES & CHARLES F. WILKINSON, FEDERAL INDIAN LAW: CASES AND MATERIALS 5 (2d ed. 1986). Significantly, federal recognition of tribal status is a political — and not an ethnological — matter. Ethnologically distinct tribes were occasionally consolidated to form a larger political unit and single tribes were at times broken up into smaller units. *See* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 5–7 (Rennard Strickland, et al. eds., rev. ed., 1982). Although the Supreme Court has warned that Congress' determination of tribal status should not be arbitrary (United States v. Sandoval, 231 U.S. 28 (1913) (upholding congressional recognition of Pueblo Indians as "dependent tribes" for purpose of prohibiting liquor)), it has never interfered with such a determination. Today federal recognition can be terminated (with tribal consent), restored, or acknowledged for a first time, as was recently the case with the 450–member Micmac Tribe of Maine. *See Maine Indians Win Recognition*, N.Y. DAILY NEWS, Nov. 28, 1991, at 8; 137 CONG. REC. H9653 (daily ed. Nov. 12, 1991) (statement of Rep. Miller). There are also tribes that are recognized for some federal purposes but not for others. *See* COHEN, *supra*, at 7. *See generally* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 1189-99 (3d ed. Michie 1991); Timothy Egan, *Indians Become Foes In Bid for Tribal Rights*, N.Y. TIMES, Sept. 6, 1992 at A26 (discussing intertribal competition over resources as an additional impediment to recognition).

tribal actions against the tribes' interest in retaining their legal capacity to act as self–governing entities. Congress struck the balance between these two competing interests by drafting a bill of rights that reflected the particular circumstances of the tribes.[3] The possibility of an appeal by writ of habeas corpus to a federal

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[3] This law, as enacted, reads:

> No Indian tribe in exercising powers of self–government shall—
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> (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;
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> (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;
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> (3) subject any person for the same offense to be twice put in jeopardy;
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> (4) compel any person in any criminal case to be a witness against himself;
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> (5) take any private property for a public use without just compensation;
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> (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;
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> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both [amended by Act of Oct. 27, 1986 to read: for a term of one year and a fine of $5,000, or both];
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> (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;
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> (9) pass any bill of attainder or ex post facto law; or
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> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons. 25 U.S.C. § 1302.

district court was also explicitly provided.[4]

The Indian Civil Rights Act (ICRA) was controversial at its inception and continues to generate controversy today, a quarter of a century after its passage. An ongoing dispute surrounds the tribes' ability to enforce ICRA in a meaningful way. This dispute has been fueled by disturbing allegations of corruption in tribal governments and of violations of due process and equal protection by those governments.[5] In order to understand the origins of ICRA and why it remains problematic, this article will discuss tribal sovereignty, pre–ICRA cases which had a major impact on the sovereign capacity of the tribes, and the salient cases where ICRA was interpreted.

I. The Legal Framework of Tribal Sovereignty

Indian tribes in the United States are recognized as having inherent powers of sovereignty.[6] They possess all powers of

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[4] This provision was codified at 25 U.S.C. § 1303 and reads: "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."

[5] While no one can say with great certainty how extensive this corruption is, or how frequent these deprivations of civil liberties are, there is continuing congressional interest in investigating the manner in which tribes enforce ICRA guarantees. *See, Enforcement of the Indian Civil Rights Act: Hearings Before the U.S. Commission on Civil Rights*, 100th Cong., 2d Sess. 45–49 (1988) (testimony of James Schermerhorn, Special Litigation Counsel for the Department of Justice) (setting forth a list of ICRA complaints and discussing the problem of insufficient information concerning the effectiveness of tribal enforcement of ICRA). There has also been legislation proposed that would expand the jurisdiction of federal courts to hear ICRA appeals on a wider array of legal grounds. 135 CONG. REC. S2186 (daily ed. March 6, 1989) (statement of Sen. Hatch).

[6] *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978) (holding that successive trials by tribal and federal courts do not violate the double jeopardy provision of the Fifth Amendment). A practical consequence of tribal sovereignty has been that while other peoples have sought equal protection under state and federal law, Native Americans have often sought to preserve their autonomy from both. Another striking and exceptional instance of self-government (entirely unacknowledged, though viable and enduring) emerged

sovereignty not explicitly modified by treaty or by federal statute or implicitly modified by virtue of their dependent status.[7] Historically these modifications of tribal powers have been

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from within America's Chinese Communities. *See* STANFORD M. LYMAN, CHINESE AMERICANS 29 (1974).

[7] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), where the Supreme Court in a 6–2 decision (Justice Brennan abstained) held that federally recognized Indian tribes had lost criminal jurisdiction over non–Indians when they submitted "to the overriding sovereignty of the United States." 435 U.S. at 210. Justice Marshall, joined by Chief Justice Burger, dissented, writing that:

> In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation.

435 U.S. at 212. A discussion of the weaknesses of Justice Rehnquist's opinion for the majority (particularly of that opinion's reliance on peripheral materials, such as the language of bills that were never enacted, to argue in support of an "unspoken assumption" that the tribes lacked the sovereign power at issue) can be found in Robert Laurence, *Justice Thurgood Marshall's Indian Law Opinions*, 27 How. L. J. 35–40 (1984).

In 1980 the Court expanded its holding in *Oliphant* to include situations in which a tribe seeks to exercise criminal jurisdiction over an Indian who is not a member of that tribe. Although federal law had not explicitly removed criminal jurisdiction over nonmember Indians from the recognized powers of the tribes, the majority chose to depart from a restraintist theory of judicial interpretation and to hold that the disparate treatment of nonmember Indians and non–Indians at issue would violate ICRA's equal protection guarantee. Confronted with the fact that its holding would create a "jurisdictional void" over minor crimes (serious crimes fall under federal jurisdiction pursuant to the Major Crimes Act of 1885 (codified at 18 U.S.C. § 1153)), the majority pointed out that: "States may, with the consent of the tribes, assist in maintaining order on the reservation by punishing minor crime." Duro v. Reina, 495 U.S. 676, 697 (1990) (Brennan, J., and Marshall, J., dissenting).

The jurisdictional void created by *Duro* proved to be more than Congress could abide by and the definition of "powers of self-government" in 25 U.S.C. § 1301(2) was amended in 1990 to mean "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." Department of Defense Appropriations Act, Pub. L. 101-511, § 8077(b), 104 Stat. 1892-93 (1990) (emergency measure made permanent in Criminal Jurisdiction Over Indians, Pub. L. 102-137, § 1, 105 Stat. 646 (1991)). *See* Mausseaux v. United States Comm'r of Indian Affairs, 806 F. Supp. 1433, 1441-43 (D.S.D. 1992) (discussing legislative history of this amendment).

extensive in matters concerning external features of sovereignty[8] and limited in matters of internal self-government.[9] Though substantially modified, it is a mistake to assume that tribal sovereignty has only a vestigial character. Indeed, as one authority on U.S./Indian relations notes:

> [the] tribes enjoy sovereign immunity from suit and are not subject to adverse possession, laches, or statutes of limitation. Tribes can exercise the right of eminent domain, tax, and create corporations. They can set up their own form of government, determine their own members, administer justice for tribal members, and regulate domestic relations and members' use of property. They can establish hunting and fishing regulations for their own members within their reservations and can zone and regulate land use.[10]

The fundamental parameters of tribal sovereignty were established by the Supreme Court in three enduring decisions penned by Chief Justice John Marshall: *Johnson v. McIntosh*,[11]

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[8] These external features include "the power to transfer tribal land without federal approval, the power to carry on relations with nations other than the United States, the power to regulate non-Indians when no tribal interest justifies such regulation, and the power to impose criminal punishment on non-Indians." COHEN, *supra* note 2, at 245–46.

[9] Though limited, congressional intrusions upon tribal self-government are by no means rare. For example, Congress has occasionally enacted statutes defining membership in a tribe in terms of race and percentum of blood, in apparent disregard of the tribe's own criteria for membership. A district court defended this practice by writing:

> . . . if the legislation is to deal with Indians at all, the very reference to them implies the use of "a criterion of race." . . . Necessarily continued intermarriage with white persons would ultimately produce persons who were in no true sense Indians. At some reasonable point a line must be drawn between Indians and non-Indians, between those properly to be regarded as continuing members of the tribe, and those who are not.

Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814–15 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966).

[10] FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 1188 (1984).

[11] 21 U.S. (8 Wheat.) 543 (1823).

Cherokee Nation v. Georgia,[12] and *Worcester v. Georgia*.[13] In the first of these decisions Marshall steered a course between recognizing that the tribes held full title to lands that they occupied or finding that they held no effective title whatsoever. Marshall held that a tribe could not grant its land to an individual without federal authorization and thereby met "a pragmatic need to fit Indian title into our system of land tenure with a minimum amount of disruption to well–established procedures by which title to millions of acres of Indian lands had already been obtained."[14]

Marshall's opinion discussed an aspect of U.S./Indian relations which impacted both on land transfers involving the tribes and the tribes status as sovereign nations. Originally in the Americas, principles of discovery of previously unknown lands guaranteed to European nations an "ultimate dominion" over the territory claimed and conferred on them an exclusive "right of acquiring the soil from the natives." The tribes continued to enjoy an "Indian right of occupancy," but were unable to alienate their lands to foreign states or to individuals without the approval of the nation asserting an ultimate title to it. In what were essentially relations worked out between European states, a central feature of the tribes' status as sovereigns was modified:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their right to complete sovereignty, as independent nations, was necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.[15]

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[12] 30 U.S. (5 Pet.) 1 (1831).

[13] 31 U.S. (6 Pet.) 515 (1832).

[14] GETCHES AND WILKINSON, *supra* note 2, at 42.

[15] *Johnson*, 21 U.S. (8 Wheat.) at 573–574.

Marshall refined this notion of a limited tribal sovereignty in *Cherokee Nation v. Georgia.*[16] This case involved a state's efforts to extend its laws over tribal territory lying within its boundaries. Georgia's defiance of federal law, coupled with the executive's hostility toward any ruling that would strengthen the autonomy of the tribes and forestall their relocation westward, produced a political crisis. If the Court were to abide by existing statutory law and legal precedent and issue a ruling adverse to Georgia, a substantial likelihood existed that the Court would be ignored. Marshall sidestepped this dilemma by determining that the Court did not have jurisdiction to resolve the issue. He wrote that tribal nations were not "foreign" nations as contemplated in Article III, Section 2 of the Constitution,[17] but were rather domestic dependent nations:

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
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> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.[18]

In *Worcester v. Georgia,*[19] Marshall further solidified his analysis of tribal sovereignty by refusing to find implied abdications of tribal power in the vague and carelessly broad

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[16] 30 U.S. (5 Pet.) 1 (1831).

[17] U.S. CONST. art. III, § 2 states: "The judicial power shall extend to . . . Controversies . . . between a State...and foreign states . . . ."

[18] *Cherokee Nation,* 30 U.S. (5 Pet.) at 17–18.

[19] *Worcester,* 31 U.S. (6 Pet.) 515 (1832).

language of the various treaties that had been made with the tribes. This case arose when two missionaries were imprisoned under a statute that prohibited white persons from residing upon Cherokee territory without the permission of Georgia's governor. The Court found jurisdiction in the Judiciary Act of 1789 based on Georgia's interference with U.S./Indian relations rooted in treaties and federal statutes. Georgia's laws were held to be without force within the boundaries of the Cherokee Nation. Marshall stressed the fact that Indian treaties constituted an explicit recognition of the national character of the tribes:

> The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[20]

II. A Dichotomy in Interpretations of Tribal Sovereignty

The decisions influencing federal Indian law that have followed *Johnson*, *Cherokee Nation* and *Worcester* interpreted the principle of tribal sovereignty in disparate ways. Getches and Wilkinson have identified two clashing tendencies among these decisions: a tendency to strengthen the autonomy of the tribes as self-governing political entities and the tendency to erode tribal sovereignty by either extending state jurisdiction to tribal territories[21] or by emphasizing Congress' plenary authority to regulate

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[20] 31 U.S. (6 Pet.) at 559–60.

[21] *See, e.g.*, United States v. McBratney, 104 U.S. 621 (1882), where the murder of a non-Indian by another non-Indian upon tribal territory (the Ute Reservation) was held to fall within the jurisdiction of the state of Colorado and not within the exclusive jurisdiction of the federal government.

matters affecting the tribes.[22]

In *Ex parte Crow Dog*,[23] the Court issued a salient decision which strengthened tribal sovereignty. This case involved a murder committed in "Indian country," which the Court defined as "all the country to which the Indian title has not been extinguished ... even when not within a reservation."[24] Both the victim and the perpetrator, Crow Dog, were members of the Sioux Nation. Following Crow Dog's conviction in a district court for the Territory of Dakota, an appeal was taken to the Supreme Court upon a writ of habeas corpus. Crow Dog contended that inasmuch as the murder occurred within Indian country, no crime had been committed against the United States, and therefore the district court lacked jurisdiction. The Court agreed that jurisdiction in this case was exclusively a tribal matter insofar as statutes had extended federal jurisdiction to crimes committed in Indian country by: (1) Indians upon non–Indians or upon Indians of another tribe; and (2) by non–Indians upon Indians or upon non–Indians; *but not* by Indians upon members of their own tribe. Crow Dog's imprisonment was declared illegal. Justice Matthews, writing for the court, expressed concern regarding the unfairness of extending federal law to intratribal disputes and, in doing so, also demonstrated the pall of racism that hung over many of the decisions concerning Indians:

> It is a case where . . . law . . . is sought to be extended over

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[22] Cases tending to erode tribal sovereignty reflect the influence that assimilationist ideology has had on American political development. Such cases were, and continue to be, grounded less in a careful reading of the historical record than in an assumption that the tribes have "withered under the weight of non–Indian society and that the courts should acknowledge the declining of tribes and doctrines such as tribal sovereignty." GETCHES AND WILKINSON, *supra* note 2, at 279. *See, e.g.*, People v. Snyder, 144 Misc. 2d. 444, 446 (N.Y. County Ct., Erie County, 1988) (suggesting that the "trend" in Indian policy "is clearly moving away from the concept of sovereignty and toward incorporation of Indian citizens fully within mainstream society").

[23] 109 U.S. 556 (1883).

[24] *Id.* at 561.

> aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning, which judges them by a standard made by others and not for them; which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[25]

Crow Dog had not escaped punishment entirely, but had submitted to a traditional sanction requiring him to compensate the victim's relatives according to the terms that they set.[26] Popular opinion, however, much preferred hanging as a punishment. Outrage over Crow Dog's successful appeal, coupled with the aggressively assimilationist sentiments of that era,[27] produced a

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[25] *Id.* at 571.

[26] VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE at 168 (1983).

[27] The complete assimilation of tribal peoples became a paramount goal for policy makers from the 1870s through the 1920s and again in the late 1940s through the 1950s. This goal was often expressed at considerable length in annual reports issued by the Bureau of Indian Affairs, as was the case in the 1885 report authored by Commissioner J.D.C. Atkins:

> They must abandon tribal relations; they must give up their superstitions; they must forsake their savage habits and learn the arts of civilization; they must learn to labor, and must learn to rear their families as white people do, and to know more of their obligations to the Government and to society. In a word, they must learn to work for a living and they must understand that it is their interest and duty to send their children to school. Industry and education are the two powerful co-operating forces which, together, will elevate the Indian, and plant him upon the basis of material independence. They will awaken the spirit of personal independence and manhood, create a desire for possessing

legislative response: the Major Crimes Act of 1885.[28] This act extended federal jurisdiction to encompass intratribal disputes occurring within tribal territory where any of seven major crimes had occurred.

The validity of the Major Crimes Act was forcefully affirmed soon after that act's passage. Justice Miller, writing for the Court in *United States v. Kagama*,[29] went beyond grounding congressional power over intratribal crimes in the commerce clause and posited an extra–constitutional source for such authority:

> . . . [The] power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government and can be found nowhere else.[30]

Justice Miller's analysis refused to recognize any sovereign

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property, and a knowledge of its advantages and rights.

Report of the Commissioner of Indian Affairs, House Executive Document No. 1, 49 Cong. 1 Sess., serial 2379, 5 (1885).

Such widespread lack of tolerance for tribal belief and tribal methods became a chronic wellspring of conflict and misunderstanding between federal administrators of Indian policy and the tribes. In urging a more moderate approach to U.S./Indian relations Frank Hamilton Cushing of the Bureau of Ethnology recommended that Indians indeed be offered a practical education *but* only by persons of "high ability" who were "possessed of a large understanding of human nature." Before this could happen, however, such persons would have to first be sent "to the Indians as themselves students." Frank Hamilton Cushing, The Need of Studying the Indian In Order to Teach Him: An Address Delivered Before the Board of U.S. Indian Commissioners At Washington D.C. 4-5 (A.M. Eddy, 1897), *reprinted in* Board of U.S. Indian Commissioners, Annual Report for 1886 (U.S. Gov't Printing Office, 1897).

[28] 18 U.S.C. § 1153.

[29] 118 U.S. 375 (1886) (upholding federal jurisdiction over intratribal murder).

[30] *Id.* at 380.

capacity on the part of the tribes and deformed the salient precedents established in *Cherokee Nation* and *Worcester* to fit that interpretation. Miller emphasized the tribes' status as "'wards of the Nation,' 'pupils,' as local dependent communities" and concluded that:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the Tribes.[31]

Justice Miller's characterization of the tribes as "remnants" was not accurate inasmuch as the majority of the tribes continued to exercise autonomous powers of self–government. The Cherokee Nation, for example, retained exclusive jurisdiction over intratribal offenses pursuant to a treaty of 1866. When a tribal conviction for murder was appealed upon a writ of habeas corpus, the Supreme Court reaffirmed the sovereign status of the tribe and established the doctrine which federal Indian law scholars have referred to as "constitutional immunity." Under this doctrine, the limitations on governmental powers guaranteed in the Constitution do not apply to tribal governments.[32] The appeal which gave rise to this

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[31] *Id.* at 384–85.

[32] An exception would be found in the Thirteenth Amendment, which amendment's proscription against slavery applies to all persons within the United States regardless of whether they act on behalf of a governing entity or as private individuals. *See* In re Sah Quah, 31 F. 327 (D. Alaska 1886), where a district court ruled that traditional slave holding practices among the Indians of Alaska violated the Thirteenth Amendment and ordered the emancipation of an Indian held in bondage. It is interesting to note that the district court in *Sah Quah* narrowed its holding to apply only to Alaskan Indians — which it described as "dependent subjects" — and not to the tribes that had retained sovereign capacities. The Alaskan Indians were, the decision surmised, "essentially patriarchal, and not tribal, as we understand that term in its application to other Indians. They . . . have no independence or supremacy as will permit them to sustain and

decision, *Talton v. Mayes*,[33] was based on a perceived violation of the Fifth Amendment's grand jury clause[34] and the Fourteenth

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enforce a system of forced servitude at variance with the fundamental laws of the United States." *Id.* at 329.

Slavery had also existed among the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; tribes that had sided with the Confederacy during the Civil War. The federal government negotiated treaties with these tribes in 1866 that abolished slavery and required that membership in the tribes be extended to former slaves. COHEN, *supra* note 2, at 665.

[33] 163 U.S. 376 (1896) (Harlan, J., dissenting without opinion). Part of Harlan's objection to the *Talton* holding may have had to do with the fact that it left the application of the Constitution — and of the fundamental, as well as remedial, rights guaranteed by that document — to the will of Congress, a body that is, itself, a constitutional creation. *See* Hawaii v. Mankichi, 190 U.S. 197 (1903) (Harlan, J., dissenting) (holding that the provisions embraced by the Fifth and Sixth Amendments did not apply to the Territory of Hawaii prior to congressional legislation explicitly extending those provisions). In *Mankichi* Harlan wrote that:

> . . . if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of trade and commerce, and to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction, which are inhabited by human beings, over which territories, to be called "dependencies" or "outlying possessions," we will exercise absolute dominion, and whose inhabitants will be regarded as "subjects" or "dependent peoples," to be controlled as Congress may see fit, not as the Constitution requires nor as the people governed may wish. Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a colonial system entirely foreign to the genius of our government and abhorrent to the principles that underlie and pervade the Constitution. It will then come about that we will have two governments over the peoples subject to the jurisdiction of the United States, ——one, existing under a written Constitution, creating a government with authority to exercise only powers expressly granted and such as are necessary and appropriate to carry into effect those so granted; the other, existing outside of the written Constitution, in virtue of an unwritten law, to be declared from time to time by Congress, which is itself only a creature of that instrument.

Id. at 240.

[34] U.S. CONST. amend. V states "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury . . . ."

Amendment's Due Process Clause[35] where a tribal indictment occurred by a five-person grand jury. Such a jury, the appellant claimed, was insufficient under either federal law or the laws of the Cherokee Nation. Writing for the majority in *Talton*, Chief Justice Edward White concluded 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. 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 5th Amendment, which as we have said, has for its sole object to control the powers conferred by the Constitution on the National Government.[36]

Justice White further held that the issue of whether an indictment by a federally deficient grand jury violated the Fourteenth Amendment's Due Process Clause had been previously resolved in *Hurtado v. California.*[37] The Court there refused to incorporate the grand jury requirement into the Fourteenth Amendment's Due Process Clause.[38] The question in *Talton* of whether the appellant's indictment violated Cherokee law was "solely a matter within the jurisdiction of the courts of that nation."[39]

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[35] U.S. CONST. amend. XIV § 1 states:..."nor shall any State deprive any person of life, liberty, or property, without due process of law...."

[36] *Talton*, 163 U.S. at 384.

[37] 110 U.S. 516 (1884).

[38] *See* Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 392 (1959), where the inapplicability of the Fifth and Fourteenth Amendments to federally recognized Indian tribes was reiterated. In this opinion — which stemmed from due process challenges to a tribal tax imposed on nonmember lessees of Oglala Sioux grazing and farm lands — the court of appeals held that the Fourteenth Amendment could not limit the legislative powers of Indian tribes inasmuch as such entities were not states. *Id.* at 556.

[39] *Talton*, 163 U.S. at 385.

While the *Talton* opinion has been widely championed by proponents of tribal sovereignty, it did not act to diminish congressional power to regulate the Tribes. A subsequent opinion delivered by Justice White in *Lone Wolf v. Hitchcock*,[40] reiterated this power forcefully. The case arose when statutes were enacted providing for the allotment of Kiowa, Comanche and Apache lands to individual tribal members, and the sale of surplus land. These statutes implemented an 1892 agreement for the cession of tribal lands made between the federal government and members of those tribes. That agreement, however, violated an earlier treaty[41] guaranteeing that no cession of tribal lands was possible without the written consent of three quarters of all the adult male members of the tribes. When the statutes at issue were challenged, the Court refused to interfere with Congress' power to act, regardless of the earlier conflicting treaty provisions:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. ... When ... treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of government policy, particularly if consistent with perfect good faith towards the Indians.[42]

The Court refused to question the motives which might lie beneath the challenged legislation and noted that if injury to the tribes had resulted from an exercise of power on the part of Congress, then "relief must be sought by an appeal to that body for redress, and

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[40] 187 U.S. 553 (1903).

[41] This treaty of 1867 — called the Medicine Lodge Treaty — demarked a reservation to be occupied by the Kiowa, the Comanche, and by such other tribes as might peacefully join them. The Apache subsequently came to occupy this reservation by operation of a separate treaty. *Id.* at 554.

[42] *Id.* at 566.

not to the courts."[43]

Though the underlying reasoning of these precedents is inconsistent, none of them have been substantially modified and they continue to be cited frequently today. *Crow Dog* and *Talton* were built upon the Marshall decisions to reinforce the doctrine of tribal sovereignty while *Kagama* and *Lone Wolf* emphasized the dependency of the tribes on the federal government and created a doctrine out of Marshall's dicta comparing the tribes to wards.[44] The synthesis of this disparity emerges in the ironic notion that the tribes have full powers of sovereignty over their territories *except* to the extent that those powers have been modified or terminated by Congress[45] or compromised by the tribes' dependent status. It is important to note, however, that Congress' plenary authority over Indian affairs is not an "'absolute'" authority, as is made clear in the most recent edition of Felix Cohen's *Handbook of Federal Indian Law*.[46] In addition to the vague notions that Congress must act in good faith and in the best interests of the tribes, there are also grounds to challenge congressional action that are more amendable to judicial review:

> Plenary does not mean "absolute," in the sense that it may be exercised free of constitutional limits or judicial review. It is

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[43] 187 U.S. at 568. The aspect of the *Lone Wolf* opinion which interpreted treaty abrogations as political matters and, as such, inappropriate for judicial review has been modified in subsequent opinions. Federal courts no longer have the luxury of taking Congress' good faith toward the tribes for granted and must now treat the presence or absence of congressional good faith as a question of fact. *See* United States v. Sioux Nation, 448 U.S. 371 (1980).

[44] *See* COHEN, *supra* note 2, at 220.

[45] *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959) (Black, J.) (holding that a civil suit brought by a non–Indian plaintiff for a cause of action originating on Navajo territory fell within the exclusive jurisdiction of tribal courts). In *Williams*, Black wrote for a unanimous Court that "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . [I]f this power is to be taken away from them, it is for Congress to do it." *Id.* at 223.

[46] See COHEN, *supra* note 2.

> settled today, although it may not have been when the term "plenary power" was first utilized, that Congress is subject to constitutional strictures in dealings with Indians. Cases have held, for example, that if the Congress takes Indian property for non-Indian use, the United States is liable under the fifth amendment of the Constitution for payment of compensation and an uncompensated taking may be rejoined. (citations omitted)[47]

As cases arose challenging certain actions on the part of tribal governments as violative of fundamental civil liberties, federal courts frequently found that they lacked the capacity to rule on such issues absent a explicit grant of jurisdiction by the legislature. In *Toledo v. Pueblo de Jamez*[48] a district court considered a complaint brought by Protestant members of a Pueblo Indian community alleging that they had been subjected to "indignities, threats and reprisals" in an effort on the part of the Pueblo to coerce them to accept Catholicism. The complaint, based on a federal civil rights statute[49] that provided a federal cause of action against state officials for discrimination, was dismissed due to the fact that the Pueblo did not derive its "governmental powers from the State of New Mexico."[50]

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[47] COHEN, *supra* note 2, at 217. The plenary power doctrine has occasionally sustained some rather drastic instrusions into tribal self-government. Among the most blatant of these intrusions was a 1906 statute empowering the President of the United States to appoint the Principle Chief of the Cherokee Nation. When - sixty-five years after its passage - the legality of the act was challenged by five members of the Cherokee nation, the Tenth Circuit held that the court below had properly dismissed the complaint for lack of jurisdiction. In a poorly reasoned opinion, the court held that the challenge to the act - on grounds that it transgressed the Fifth and Fifteenth Amendments - was "so lacking in substance and so contrary to the well established law enunciating the power of the Congress to legislate with respect to Indian tribes and their affairs that it affords no substantial basis for a claim of federal jurisdiction." Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971).

[48] 119 F. Supp. 429 (D.N.M. 1954).

[49] 42 U.S.C. § 1983.

[50] *Toledo*, 119 F. Supp at 432.

Another controversy involving religious freedom arose when the Navajo Tribal Council adopted an ordinance prohibiting the use of peyote and made arrests pursuant to that ordinance.[51] Members of the Native American Church brought an action seeking to enjoin further enforcement of the ordinance, contending that it violated the guarantee of free exercise of religion provided by the First Amendment and made applicable to the states through the Fourteenth Amendment. The Tenth Circuit concluded that neither the First nor the Fourteenth Amendments limited the tribe:

> ... Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States. The Constitution is, of course, the supreme law of the land, but it is nonetheless a part of the laws of the United States. Under the philosophy of the decisions, it, as any other law, is binding upon Indian nations only where it expressly binds them, or is made binding by treaty or some act of Congress.[52]

Federal courts, however, were not always reluctant to find jurisdiction to hear tribal civil liberties appeals. In *Colliflower v. Garland*,[53] the Ninth Circuit concluded that a writ of habeas corpus had wrongly been denied a member of the Gros Ventre Tribe sentenced to five days' imprisonment, where the action by a

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[51] Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).

[52] *Id.* at 134-134. *See also* Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967), where the Eighth Circuit affirmed the dismissal of an action seeking to invalidate a tribal election alleged to have violated the due process and equal protection guarantees of the Fourteenth Amendment as well as the right to vote guarantee of the Fifteenth Amendment.

[53] 342 F.2d 369 (9th Cir. 1965).

court of Indian offenses[54] was alleged to have been "taken summarily and arbitrarily, and without just cause." The Ninth Circuit based its reasoning upon the notion that the sentencing court was in part a federal entity:

> In spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government. Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains a partial control over them.[55]

The *Colliflower* court relied heavily on *Kagama* — which it quoted at length — and upon the concomitant notion that *Worcester* was out of date. Referring to *Worcester* the court suggested that:

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[54] Distinction is made in federal Indian law between "tribal courts," which are based on a law and order code adopted by a tribe and "courts of Indian offenses" or "C.F.R. courts" which are based on federal regulations. Many of the courts which were once courts of Indian offenses have converted to tribal courts with the adoption of the necessary tribal laws. *See* 25 C.F.R. § 11.1(d). As Getches and Wilkinson note, there are also a "[v]ery few tribes" that "retain judicial systems based upon Indian custom." GETCHES AND WILKINSON, *supra* note 2, at 386.

[55] *Colliflower*, 342 F.2d at 379. Following *Colliflower*, a subsequent Ninth Circuit decision vacated a district court's dismissal of a habeas corpus appeal brought by a Yakima Indian who had been convicted of violating tribal fishing regulations and fined $250. Like the court in *Colliflower*, the court in *Settler v. Yakima Tribal Court* was offended at the summary character of the conviction: ". . . there must be and is a limit to the 'exclusive' authority of the Yakima Nation to regulate Indian fishing when that regulation becomes so summary and arbitrary as to shock the conscience of the federal court . . . ." The court further held that where no other avenue for appeal presented itself, habeas corpus review was appropriate: "The availability of habeas corpus appears particularly appropriate where the petitioner, although not held presently in physical custody, has no other procedural recourse for effective judicial review of the constitutional issues he raises." Settler v. Yakima Tribal Court 419 F.2d 486 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970). [Note: the controversy in *Settler* arose prior to the effective date of ICRA, rendering that statute inapplicable to its resolution].

> We know that in the more than one hundred and thirty years that have since passed, the "independence" of the Indian tribes and their resemblance to nations, have decreased, and their dependency has increased. As the United States has expanded, it has repeatedly broken its treaties, has taken the Indian's land by force, has repeatedly imposed new and more restrictive treaties upon them, has confined them in ever smaller reservations, often far from their original homes, and has reduced them to the status of dependent wards of the government.[56]

III. The Indian Civil Rights Act and its Applications

The developments in the decisional law affecting the constitutional rights of Indians have increasingly occupied the attention of Congress. The Senate Subcommittee on Constitutional Rights began investigating the constitutional rights of American Indians in 1961 and found those rights to have been abused by all three sovereigns in the federal system: state, national and tribal. The response to this unacceptable state of affairs focused exclusively on the tribal governments. A bill proposed by Senator Sam Ervin of North Carolina would have made tribal governments "subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution."[57] An accompanying bill provided for appeal from a tribal forum to a federal district court, which appeal would take the form of a trial *de novo*. Other bills provided for investigation of complaints by the Attorney General;[58] for the development of a Model Code for the tribes;[59] for requiring tribal consent before a state could assume civil or criminal jurisdiction over tribal territories;[60] and for the employment of legal counsel,[61] as well

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[56] *Colliflower*, 342 F.2d at 375.

[57] 111 CONG. REC. 1799 (daily ed. Feb 2, 1965) (statement of Sen. Ervin).

[58] This provision was not enacted.

[59] 25 U.S.C. § 1311

[60] 25 U.S.C. §§ 1321-1326

as for other general housekeeping matters.[62]

Indian law scholars have pointed to the incomplete nature of the legislation the Subcommittee proposed, noting that it answered the problem of abuse of civil rights by tribal governments, but entirely neglected the equally compelling and more pervasive problem of abuse of the rights of tribal Indians by the federal government, the states, or their political subdivisions. The senators may have assumed that other civil rights enactments would adequately fill this gap. Another possible explanation is that the senators were, in part, motivated by a desire to encourage the assimilation of the tribes. An insight into this possibility was provided by Donald Burnett Jr. in a thorough study of ICRA's legislative history. Burnett examined the political background of Senator Sam Ervin, who championed the ICRA bills and made their passage a long–term personal project. Ervin, however, was not a strong supporter of civil rights measures, in fact he had previously opposed them.[63] Burnett concluded that underneath Ervin's express concern over the civil rights of Indians lay an assimilationist sentiment:

> Senator Ervin could politically afford to support Indian rights largely because of the extensive assimilation of North Carolina Indians into southern life. The Cherokee and Lumbee settlements had been fully integrated into the state's governmental structure as counties and municipalities. It has been said that they represent a small, unaggressive, poorly differentiated minority in the state. This integration has been facilitated, especially in the case of the Cherokee, by the early evolution of legal institutions modeled after those of their white neighbors. Their codes, courts, sheriffs, and police forces, for example, have long been in existence.
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> While this fact freed Senator Ervin to investigate Indian rights without political difficulty at home, it limited his

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[61] 25 U.S.C. § 1331

[62] 111 CONG. REC. at 1800–02 (1965), *see also* 1968 U.S. CODE CONG. AND ADM. NEWS 1863–67.

[63] Donald Burnett, Jr., *An Historical Analysis of The 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 575 (1972).

> perspective. During the hearings, he revealed his inclination to try to duplicate the North Carolina assimilation experience on a national level. He demonstrated this predilection by focusing on how the systems of tribal justice outside North Carolina failed to conform to the country's constitutional scheme.[64]

Ervin's proposal to hold the tribes to the same constitutional standards as the national government and to provide for a trial *de novo* upon appeal to a district court met considerable resistance from several of the tribes and from the Department of the Interior. The Department instead offered a proposed redraft of the bills at issue tailoring established fundamental rights to better fit the general circumstances that surrounded the operation of tribal governments and eliminating the provision for a trial *de novo.*[65]

In introducing this redraft, Frank Barry, Solicitor for the Department of the Interior, pointed to the inapplicability of the Fifteenth Amendment to the tribes, who "would want to restrict voting to members and to restrict membership to persons having a certain proportion of Indian blood."[66] Barry also discussed the inapplicability of the Third Amendment, the Seventh Amendment and the Fifth Amendment's grand jury clause, and noted the failure of the proposed legislation to include the Fourteenth Amendment's Equal Protection Clause. On behalf of the Department, Barry urged Congress to proceed methodically in its efforts to impose civil liberties constraints on tribal governments:

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[64] *Id.* at 576.

[65] *Hearings on [Bills] to Protect the Constitutional Rights of American Indians*, Subcommittee on Constitutional Rights, 89 Cong. 1 Sess. 318 (1965) (statement of Sen. Ervin) [Hereinafter "Hearings"]. Burnett contends that tribal objections to the trial de novo provision stemmed from the fact that it would have usurped part of the functions of the tribal courts, whereas objections of the Department of the Interior (under whose authority the Bureau of Indian Affairs operates) stemmed from the fact that the Department had jurisdiction to hear appeals from those courts which were operating under administrative rules and procedures — the courts of Indian offenses — and did not wish to part with any of its authority. Burnett, *supra* note 63, at 593.

[66] Hearings *supra* note 65, at 18.

> By taking the pains to specify the rights it is desirable to extend to the Indian, we assure ourselves that all of the basic rights intended are included in the legislation and that no restrictions are imposed upon the tribal governments which are not necessary to protect the individual Indian against action by the tribe. Finally, by giving consideration to each of the rights so extended, its reasonable relationship to the differences between Indian tribes and the U.S. Government is assured.[67]

In creating ICRA, Congress followed the advice of the Department of the Interior and drafted a modified bill of rights to limit the powers of government exercised by the tribes. This bill also provided for federal appellate jurisdiction upon a writ of habeas corpus, as opposed to an appellate jurisdiction necessitating an entirely new trial at the federal level. As the editors of the 1982 edition of the *Handbook of Federal Indian Law* have noted, the limitations upon tribal governments imposed by ICRA are considerably narrower than constitutional restraints imposed upon the national government and upon the states:

> Many significant constitutional limitations on federal and state governments are not included in the Indian Civil Rights Act.... Notable omissions are the guarantee of a republican form of government, the prohibition against an established religion, the requirement of free counsel for an indigent accused, the right to a jury trial in civil cases, the provisions broadening the right to vote, and the prohibitions against denial of the privileges and immunities of citizens. [citations omitted.][68]

The first case to interpret ICRA, *Dodge v. Nakai*,[69] dealt with the Navajo Tribe's exclusion from tribal territory of a nonmember serving as director of the reservation's legal services

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[67] Hearings *supra* note 65, at 18–19.

[68] COHEN, *supra* note 2, at 667.

[69] 298 F. Supp. 26 (D. Ariz. 1969).

program.[70] There was no writ of habeas corpus, as would be required to bring the case within the district court's purview under a strict reading of ICRA. The *Dodge* court instead chose to locate its authority to hear the case in statutes granting federal jurisdiction in controversies involving federal questions, civil rights and mandamuses.[71] In a holding widely regarded as an unwarranted intrusion into tribal powers of self-government,[72] the court ruled that an exclusion order issued under the authority of the Navajo Tribal Council was a legislative act effecting a punishment and, as such, a bill of attainder violative of ICRA. The court moreover found the summary nature of the exclusion order violative of the due process provision of ICRA and, looking to the excluded party's long-term involvement in a political dispute with the tribe, determined that the order violated the subsection of ICRA that guaranteed freedom of speech:

> This action ... constitutes an abridgment of free speech on the Navajo Reservation, both the freedom of speech of the lawyer who is representing his clients in a manner deemed acceptable to his employer, and the freedom of speech of the clients who seek out that lawyer to act as their spokesman in the community.[73]

During the decade following the passage of the act, federal courts followed the example of the earlier *Dodge* court, and continued to locate their authority to settle controversies arising under ICRA in a variety of jurisdictional statutes. The courts viewed the passage of ICRA as implying a waiver of the tribes' sovereign immunity and turned their attention to the issue of how

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[70] The tribal exclusion order was based on an incident in which the party to be removed had laughed during a meeting between tribal officials and legal services representatives. The officials' animosity toward the individual in question had evidently already been well established before the incident took place. 298 F. Supp. at 32.

[71] 28 U.S.C. §§ 1331, 1343(1), 1343(4), 1361 and 1651.

[72] *See, e.g.*, DELORIA & LYTLE, *supra* note 26, at 132–33.

[73] *Dodge*, 298 F. Supp. at 37.

closely interpretations of ICRA guarantees should parallel interpretations of similar constitutional guarantees. The issue was addressed peripherally in *Groundhog v. Keeler.*[74] The court, relying upon a Senate subcommittee report that had described an ICRA bill as extending some, but not all, of the requirements of the Equal Protection Clause to the tribes, concluded that the equal protection guarantee in ICRA was narrower than the Fourteenth Amendment's Equal Protection Clause. The editors of Cohen's *Handbook of Federal Indian Law*, however, have criticized this aspect of the *Groundhog* opinion for its careless use of legislative history:

> The court based this view in part on an erroneous reference to the Act's legislative history. The court quoted a Senate Report referring to the Act's equal protection provision without noticing that the Senate Report described an earlier draft of that provision, which would have protected only "members of the tribe," a standard obviously narrower than that of the fourteenth amendment. The bill was amended before passage to protect all "persons."[75]

Both the Eighth and Ninth Circuits followed the lead of the Tenth Circuit in *Groundhog*, and have held that ICRA guarantees are less extensive than parallel constitutional guarantees. In *Wounded Head v. Oglala Sioux Tribe*,[76] the court of appeals relied

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[74] 442 F.2d 674 (10th Cir. 1971).

[75] COHEN, *supra* note 2, at 669–70, n. 60.

[76] 507 F.2d 1079 (8th Cir. 1975). The issue of whether or not ICRA guarantees duplicated — or merely approximated — similarly worded constitutional guarantees was also discussed in a case involving a civil suit initiated by fired employees of a tribal government who claimed that their dismissal was in retaliation for their having demonstrated against a tribal policy and, as such, violative of ICRA. Janis v. Wilson, 385 F. Supp. 1143, 1146 (D.S.D. 1974), *remanded*, 521 F.2d 724 (8th Cir. 1975) (district court reached merits prematurely, not having first determined that all tribal remedies had been exhausted). The district court in *Janis*, in granting the defendant tribe's motion for summary judgment, held that ICRA guarantees did not duplicate constitutional guarantees of parallel wording. The court felt that it had been Congress'

on the *Groundhog* opinion to argue that ICRA's equal protection subsection was not coextensive with that contained within the Fourteenth Amendment. The court relied on this equal protection analysis to set aside an argument that a tribal election law requiring members to be twenty–one years old to vote violated ICRA. This approach, however, was unnecessary and was also flawed insofar as it relied upon the *Groundhog* court's weak reading of ICRA's legislative history.

Equal protection of the laws as established in ICRA requires a tribe to treat all persons within its jurisdiction equally, absent a reasonable necessity for doing otherwise. It does not, as the plaintiffs in *Wounded Head* contended, require the tribes to import federal law, or state law, into their jurisdictions in an effort to guarantee that their members receive the same treatment as voters without its boundaries. The court's efforts at narrowing ICRA's equal protection guarantee were superfluous to its holding, especially when we consider that Congress intended ICRA's guarantees to extend up to the point at which they would be used to bring rights that Congress clearly meant to exclude inside of ICRA's reach. Congress was deliberate in the silences it left in ICRA and there is no reason to believe that the substance of a

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intent that ICRA guarantees be "harmonized with legitimate tribal interests" and set forth the following considerations to be taken into account:

> . . . the plaintiffs' remaining claims under 25 U.S.C. § 1302(1) and (8), [ICRA's subsections guaranteeing freedom of speech and due process of law] under the facts of this case, must not be measured by the same standards imposed by the Bill of Rights on state and federal governments, but rather these limitations must be applied with recognition of the Oglala Sioux Tribe's unique cultural heritage, their experience in self government, and the disadvantages or burdens, if any, under which the defendant government was attempting to carry out its duties.

385 F. Supp. at 1150–51.

See also Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976) (The Sixth Amendment does not require the tribes to guarantee a right to an appointed counsel, and they are only bound by ICRA's guarantee of a right to counsel at criminal defendant's own expense). In *Tom* the court of appeals noted that:

> the courts have been careful to construe the terms "due process" and "equal protection" as used in the Indian Bill of Rights with due regard for the historical, governmental and cultural values of an Indian tribe. As a result, these terms are not always given the same meaning as they have come to represent under the United States Constitution.

Id. at 1104, n.5.

guarantee as obvious as the Twenty–Sixth Amendment's was left out by oversight. Nor is it necessary to erode the rights that are included in ICRA to make its exclusions more persuasive.

While the problem of interpreting the extent of ICRA guarantees remains, the opportunity for the federal judiciary to hear ICRA cases was substantially lessened in 1978 when the Supreme Court reawakened the issue of the tribes' sovereign immunity from suit in *Santa Clara v. Martinez.*[77] No single case has had a greater impact on the enforcement and interpretation of ICRA. This case, which restricted federal review of ICRA cases to those actions brought upon a writ of habeas corpus, originated when Julia Martinez, a member of the Santa Clara Pueblo Tribe, commenced an action in a United States district court for declaratory and injunctive relief in order to prevent a tribal ordinance[78] from excluding her children from membership in the tribe.[79] The tribe moved to dismiss the action for lack of federal jurisdiction over what it characterized as a purely intratribal dispute.[80] Construing the provisions of ICRA strictly, the Supreme Court agreed and held

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[77] 436 U.S. 49 (1978).

[78] Ms. Martinez challenged the following two sections of the ordinance as violative of ICRA's guarantee of equal protection of tribal laws:

> 2. That children born of marriages between male members of the Santa Clara Pueblo and non–members shall be members of the Santa Clara Pueblo.
> 3. Children born of marriages between female members of the Santa Clara Pueblo and non–members shall not be members of the Santa Clara Pueblo.

Id. at 52.

[79] The suit underlying the *Santa Clara* case was structured as a class action in which Julia Martinez represented Santa Claran women who had married men who were not tribal members. Ms. Martinez was accompanied in the suit by her daughter, Audrey Martinez, who represented children born to Santa Claran women who had married non–members. *Id.* at 53.

[80] The district court (D. New Mexico) concluded that it had jurisdiction and found for the tribe on the merits of the case, holding that a federal court could not properly "'determine which traditional values will promote cultural survival and shall therefore be preserved . . . .'" The Tenth Circuit upheld the lower court's finding of jurisdiction and reversed on the merits, concluding that — absent a compelling tribal interest — the offending sections of the ordinance must fall. *Id.* at 54–55.

that jurisdiction could not be implied under ICRA's provisions, but must be limited to explicit statutory provisions.

Writing for the majority, Justice Marshall reviewed the decisional history of tribal sovereignty and concluded that although Congress had plenary authority to modify the immunity from suit Indian tribes possessed as sovereigns, it had not chosen to do so. Cognizant of the Tenth Circuit's concern that without a waiver of sovereign immunity ICRA's guarantees would "constitute a mere unenforceable declaration of principles," the Court nevertheless held that the suit in question should have been precluded. Justice Marshall stated that "[i]n the absence here of any unequivocal expression contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit."[81]

The case however did not end at this point for the suit had been commenced against both the tribe and its governor, Lucario Padilla. Resolution of the sovereign immunity issue prevented only a suit against the tribe as an entity and did not forestall a suit against a tribal officer. To resolve this second issue the majority turned to a discussion of the legislative history of ICRA to determine Congress' intent in passing the act. The Court recognized two "distinct and competing purposes" in Congress' enactment of ICRA: to strengthen "the position of individual tribal members vis–a–vis the tribe" and to further "tribal self–determination." The Court held that "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other." [82]

The Court concluded that Congress had struck a delicate balance between these two competing legislative goals by limiting the provision for appeal under ICRA to a writ of habeas corpus. The majority determined to leave this balance intact "[u]nder these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in

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[81] *Id.* at 55, 59.

[82] *Id.* at 62, 64.

providing only for habeas corpus relief." [83]

The *Santa Clara* opinion's narrow interpretation of federal review under ICRA has relegated non–habeas corpus controversies arising under the act to tribal forums, where they run a substantial risk of being foreclosed by the tribes' sovereign immunity from suit.[84] Legal inventiveness on the part of litigants has also produced a variety of jurisdictional theories intended to circumvent *Santa Clara*, principally by bringing suit for disputes falling within the ambit of ICRA under other federal civil rights laws. These alternative theories of jurisdiction have met with mixed success,

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[83] *Id.* at 66. The majority opinion, delivered by Justice Marshall, was joined by Justices Brennan, Stevens, Stewart, Powell and Burger. Justice Rehnquist joined the opinion except for the portion determining the sovereign immunity issue. Justice Blackmun took no part in the case. Justice White, though agreeing with the majority's resolution of the sovereign immunity issue, wrote a dissenting opinion arguing for the existence of a private civil remedy against a tribal officer to redress ICRA violations. Justice White wrote:

> Given Congress' concern about the deprivations of Indian rights by tribal authorities, I cannot believe, as does the majority, that it desired the enforcement of these rights to be left up to the very tribal authorities alleged to have violated them. In the case of the Santa Clara Pueblo, for example, both legislature and judicial powers are vested in the same body, the Pueblo Council. . . . To suggest that this tribal body is the "appropriate" forum for the adjudication of alleged violations of the ICRA is to ignore both reality and Congress' desire to provide a means of redress to Indians aggrieved by their tribal leaders.

Id. at 82.

[84] *See, e.g.*, Sisseton–Wahpeton Community College v. Wynde, 18 I.L.R. 6033 (N. Plns. Intertr. Ct. App. 1990), where an intertribal court of appeals held that:

> . . . [N]ot every right the transgression of such has a corresponding remedy. That is the very nature of tribal sovereignty from the earlier days consistent with the Anglo–American concept of the common law. This is not to suggest that tribal sovereignty is a child of Anglo–American sovereignty concepts, but is to suggest that the tribal sovereignty enjoyed by a Native American tribe should certainly be no less than the maximum enjoyment guaranteed to any other sovereign.
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> . . . [T]he concept of tribal sovereignty is paramount to the concept of due process and must of necessity be given such preeminence to guarantee the very existence of the tribe.

Id. at 6035, 6036.

though they are clearly subversive of *Santa Clara*'s holding.[85]

Furthermore, the cases which continued to be appealed to federal courts under ICRA's habeas corpus provision, absent explicit statutory language to the contrary, have generally followed constitutional principles when determining the parameters of ICRA's guarantees. Typical of these cases is *United States v. Lester,*[86] where the Eighth Circuit considered an ICRA search and seizure case under Fourth Amendment standards. Similarly, the Supreme Court of Arizona has held that ICRA's privilege against self-incrimination does not provide "protection inferior to that of the United States and Arizona Constitutions."[87]

Conclusion

Controversy continues to surround the Indian Civil Rights Act. Legislators neglect the problem of intrusions on the civil rights of tribal Indians by nontribal authorities, and question the effectiveness of tribal enforcement of ICRA guarantees. The legislators investigating ICRA enforcement have not fully considered the problem of accessibility to the federal courts which would arise if federal forums displaced their tribal counterparts. If Congress acts to widen the scope of federal appeals under ICRA it may well diminish tribal sovereignty and gain only an empty victory for civil liberties.

An alternative remedy that so far has received only scant attention is providing funds to the tribal courts directly,[88] and

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[85] *See* Kevin Gover & Robert Laurence, *Avoiding Santa Clara v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497 (1985).

[86] 647 F.2d 869 (8th Cir. 1981).

[87] Tracy v. Superior Court, 810 P.2d. 1030, 1047 (Ariz. 1991) (upholding order of superior court compelling attendance of non-Indian witness before District Court of Navajo Nation).

[88] *Enforcement of the Indian Civil Rights Act, Hearings Before the U.S. Commission on Civil Rights*, 100th Cong., 2d Sess. 18-20 (September 29, 1988)(statement of Tom Tso, Chief Justice, Navajo Nation) The following

encouraging the development of an enhanced network of tribal and intertribal appellate courts that can free jurists from the political intricacies of any particular tribe. If Congress is true to the past and to its promises, no clearer path lies to furthering its dual interests in tribal sovereignty and civil liberties than in allowing the tribal courts to develop an autonomous body of civil liberties law that can synthesize tribal principles with the principles embodied in the Constitution. This effort would by no means be as fast and easy as a statute expanding federal jurisdiction over ICRA claims, but in the long run may offer a more effective remedy for tribal intrusions on civil liberties; a remedy that may well result in speedier trials with less expense to the litigants. Clearly tribal and intertribal appellate courts are uniquely qualified to balance the competing claims of tribal self-government and individual civil liberties that are embodied in the Indian Civil Rights Act. These institutions hold great promise for protecting both tribal governments and their members from an erosion of fundamental guaranties deeply rooted in history.

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insights provided by the justice are particularly worth repeating:

> I think we must all understand that there are over 200, I believe, Indian courts across the Nation, across the United States, and each of those tribal courts are at a different level of development and different levels of sophistication. What the courts up north, or another court in another part of the United States, what their needs are may be different than what the needs are on the Navajo Reservation. So I think that each particular court must be dealt with separately in their own setting and according to their own needs.
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> I have a lot of recommendations on ways that the Navajo courts can be assisted and improved. And certainly, more funding is one thing. Establishment of more facilities, office facilities, court buildings, that is essentially what we need. But, because of lack of funding, we are not developing in that area. Certainly, training for judges is needed. And we have been working with what we have. And I think we have been making good improvement towards the development of judges. Yes, funding, more facilities, equipment, up–to–date equipment, computers for our record system so at some point when the Commission asks us for information, we can just punch one button and out comes that information.
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> We have assistance of that nature, but that all requires more funding with less red tape in getting the funding from the Bureau. And I understand when Congress appropriates money, it goes through several different hands before it comes out to the field. So if all the middlemen are cut out of the funding, that way you can get more dollars to the field operation, rather than the administration.

Id. at 21.