

## INDIAN SOVEREIGNTY AND JUDICIAL INTERPRETATIONS OF THE INDIAN CIVIL RIGHTS ACT

Indians<sup>1</sup> living on reservations<sup>2</sup> within our country no longer enjoy the independence and right of self-government that once characterized their relationship with the federal government.<sup>3</sup> The courts<sup>4</sup> and Congress, since the enactment of the Indian Civil Rights Act (ICRA),<sup>5</sup> have imposed on tribal governments the same or similar constitutional stan-

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1. The term "Indian" includes:

[A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on 1 June 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood . . . .

25 U.S.C. § 479 (1976).

2. An "Indian reservation" consists of lands validly set apart for the use of Indians under the supervision of the government. The United States retains title to the land. *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (per curiam). *Hunting & Fishing, Wind River Reservation*, 58 INTERIOR DEC. 331, 343 (1943) ("An Indian reservation is simply a part of the public domain set apart by proper authority for use and occupation by a group of Indians. . . . The United States holds the title . . . .") (citation omitted).

3. *See Talton v. Mayes*, 163 U.S. 376 (1896); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *See generally* Powers of Indian Tribes, 55 INTERIOR DEC. 14 (1934); U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW (1958).

Throughout the 1800's, the federal government and Indian tribes entered into various treaties that formally provided for tribal sovereignty. Article Five of the Treaty with the Cherokees, signed in 1835 provides:

The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians . . . .

Treaty with the Cherokees, Dec. 29, 1835, United States-Cherokee Nation, art. V, 7 Stat. 478, 481.

4. *See, e.g., Daly v. United States*, 483 F.2d 700 (8th Cir. 1973); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973); *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).

5. In 1968 Congress enacted the Indian Bill of Rights as part of the Civil Rights Act. Act of April 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77 (codified at 25 U.S.C. §§ 1302-1303 (1976)):

§ 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

dards<sup>6</sup> that restrict state and local governments, despite the incompatibility of those standards with Indian lifestyle and tribal constitutions.<sup>7</sup>

This Note first develops the historic basis of the Indian sovereignty doctrine and its later modifications. Second, the Note discusses the ICRA as the method used by Congress to impose the Bill of Rights of the United States Constitution on tribal governments. Last, the Note examines conflicting interpretations of the ICRA. Indians have challenged the Act as a method by which the federal government used its own constitutional standards to restrict tribal activities.<sup>8</sup> Recently, however, courts have begun to interpret the statute on the basis of tribal customs and traditions.<sup>9</sup> Thus, this Note concludes that although the ICRA represents a significant intrusion on Indian sovereignty,<sup>10</sup> judicial standards of review based on tribal customs can minimize its dele-

cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§ 1303. *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.

6. "Constitutional standards" refers to the generally recognized elements used by the court in applying the Constitution to the factual situation of the case at bar. For example, under the equal protection clause of the fourteenth amendment, the constitutional standard developed by the Court is that all persons are guaranteed equal treatment under the law unless there is a reasonable basis (traditional equal protection) or a compelling state interest (strict scrutiny) to justify disparate treatment. See NOWAK, *HORNBOOK ON CONSTITUTIONAL LAW* 522-25 (1978).

7. The Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1976), establishes mechanisms and procedures by which Indian tribes can organize and govern their internal affairs on the basis of their own constitutions. *Id.* § 476.

8. See notes 113-18 *infra* and accompanying text. The restrictions imposed by the ICRA are primarily geared toward limiting the scope of tribal governmental power over tribal members. See text of ICRA, *supra* note 5.

9. See generally notes 119-54 *infra* and accompanying text.

10. See note 114 *infra* and accompanying text.

terious effects.<sup>11</sup>

## I. INDIAN SOVEREIGNTY

The ultimate source of Indian sovereignty is the "tribe's primeval nationhood."<sup>12</sup> The Supreme Court, in *Worcester v. Georgia*,<sup>13</sup> recognized this sovereignty by holding that Indian tribes have a right of self-government and are not subject to the jurisdiction of the states within which they are located.<sup>14</sup> The basic premise of the *Worcester* decision was that each Indian tribe began its relationship with the federal government as a sovereign power whose acceptance of the stronger sovereign's protection did not constitute a surrender of the tribe's independence and right of self-government.<sup>15</sup> Chief Justice Marshall described the Indian nations as "distinct political communities, having territorial boundaries, [within which their authority is exclusive, and having a right to all the lands within those boundaries,] which is not only acknowledged, but guaranteed[sic] by the United States."<sup>16</sup>

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11. See notes 138-53 *infra* and accompanying text.

12. The phrase refers to the tribes' original status as autonomous governmental bodies prior to the arrival of the white man on the American continent. See *Navajo Tribe v. Orlando Helicopter Airways*, 6 AM. INDIAN L. NEWSLETTER 90, 92 (Navajo Ct. App. 1972); Powers of Indian Tribes, 55 INTERIOR DEC. 14, 22 (1934).

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

14. *Id.* at 561. More recent state enabling acts and constitutions incorporated disclaimers of state jurisdiction. U.S. DEP'T OF THE INTERIOR, *supra* note 3, at 503 n.17 (1958). The *Worcester* concept of tribal autonomy within its territory has been modified. States now have jurisdiction over non-Indian affairs within the reservation. See *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *United States v. McBratney*, 104 U.S. 621 (1881). See also *Thomas v. Gay*, 169 U.S. 264 (1898). Regulations governing Indian land and reservations appear at 25 U.S.C. § 231 (1976) (authorizing state inspection and investigation of sanitary and health facilities on Indian reservations). Some states have substantial jurisdiction over the tribes within their borders on the basis of congressional acts: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 18 U.S.C. § 1162 (1976); 28 U.S.C. § 1360 (1976).

15. 31 U.S. (6 Pet.) at 555, 560-61; Powers of Indian Tribes, 55 INTERIOR DEC. 14, 22 (1934). The United States government recognized this original sovereignty in early dealings with the Indian tribes. Treaties with the Indians were "couched in the language of international diplomacy." Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 953 (1975).

16. 31 U.S. (6 Pet.) at 557. "The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress." *Id.* at 561. See also *United States v. Kagama*, 118 U.S. 375 (1886); *Ex Parte Crow Dog*, 109 U.S. 556 (1883). Congress's power to declare war, to make treaties, and to regulate commerce served as an additional basis for preemption of state jurisdiction over Indian tribes. 31 U.S. (6 Pet.) at 557, 559.

The tribal entity deteriorated, and by 1871 Congress no longer recognized Indian tribes as "independent nations." Congress enacted legislation stating that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."<sup>17</sup> The Supreme Court followed this legislative mandate by ruling that Indian tribes were no longer sovereign nations.<sup>18</sup> Congress passed the General Allotment Act<sup>19</sup> in 1887, authorizing the division of reservation land among individual Indians.<sup>20</sup> The apparent purpose was to assimilate the Indian into contemporary society by eliminating the tribal structure.<sup>21</sup> The government's assimilation policy, however, had detrimental social and economic effects.<sup>22</sup> Congress responded, somewhat belatedly,<sup>23</sup> by enacting the Indian Reorganization Act (IRA) of 1934.<sup>24</sup> The IRA established mechanisms and procedures by which Indian tribes could organize and govern their internal affairs.<sup>25</sup> The Act provided for the tribes' adopting constitutions that were effective when approved by the tribe and by the Secretary of

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17. Act of March 3, 1871, ch. 120, 16 Stat. 566. The Act provided, however, that all previously enacted treaties would still be valid. *Id.*

18. *United States v. Kagama*, 118 U.S. 375 (1886). The Court rejected the argument that Indians were "nations" under the Constitution. "If so, the natural phrase would have been 'foreign nations and Indian nations,' or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been 'foreign and Indian nations.'" *Id.* at 379. *Accord*, *Montoya v. United States*, 180 U.S. 261, 265 (1901) (the term "nation" as applied to Indian tribes is a misnomer); *Stephens v. Cherokee Nation*, 174 U.S. 445, 484-86 (1899) (because the federal government controls the Indian tribes, they cannot be considered sovereign independent states); *Choctaw Nation v. United States*, 119 U.S. 1, 27 (1886) (Indian tribe is not an independent state or a sovereign nation).

19. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.

20. *Id.*

21. See F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 207-10 (1942).

22. Commenting on anticipated adverse effects, a minority report dealing with legislation similar to the General Allotment Act observed:

The real aim of this bill is to get at the Indian lands and open them up to settlement. . . . If this were done in the name of Greed, it would be bad enough; but to do it in the name of Humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves, whether he will or not, is infinitely worse.

H.R. REP. NO. 1576, 46th Cong., 2d Sess. 10 (1880). See 5 U.S. COMM'N ON CIVIL RIGHTS, JUSTICE: 1961 COMMISSION ON CIVIL RIGHTS REPORT 123 (1961). "What had been intended as a 'civilizing' agent, produced a generation of landless, impoverished Indians, shorn by the social cohesiveness of tribal culture." *Id.*

23. Forty-seven years passed between the enactment of the General Allotment Act and the passage of the Indian Reorganization Act.

24. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1976)).

25. 25 U.S.C. §§ 461-479 (1976).

the Interior.<sup>26</sup> Arguably, the IRA merely provided a framework within which tribes could exercise preexisting powers.<sup>27</sup> Thus, with the adoption of the IRA, federal policy had come full circle: from *Worcester's* recognition of tribal sovereignty to the General Allotment Act's policy of assimilation by destroying tribal structure, back to recognition—now by the IRA—of tribal autonomy. The IRA recognized tribal sovereignty as absolute, subject only to limitations by treaty or express congressional legislation.<sup>28</sup>

Courts were thus compelled to define the boundaries of the sovereignty doctrine. Courts have indicated that the doctrine provides tribes with power to define duties of tribal officials,<sup>29</sup> to repeal a provision in a treaty with the federal government by tribal legislative action,<sup>30</sup> and to determine tribal membership.<sup>31</sup> Although the courts have granted these extensive "internal powers,"<sup>32</sup> they have refused to grant Indians

26. *Id.* § 476.

27. *See* *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 94, 98-99 (8th Cir. 1956); F. COHEN, *supra* note 21, at 122.

28. The court in *Williams v. Lee*, 358 U.S. 217, 220 (1959), stated, "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Accord*, *Organized Village of Kake v. Egan*, 369 U.S. 60, 74-76 (1962); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970). *See* *United States v. Wheeler*, 435 U.S. 313 (1978) (Navajo Tribe retained power to punish tribal offenders); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (Sioux Tribe retained power to levy taxes); *Barnes v. United States*, 205 F. Supp. 97 (D. Mont. 1962) (Crow Tribe not subject to suit without consent of Congress).

29. *See* *Pueblo of Santa Rose v. Fall*, 273 U.S. 315 (1927).

30. *See* *Chickasaw Freedmen*, 193 U.S. 115 (1904).

31. *See* *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904); *Smith v. Bonnifer*, 154 F. 883 (D. Or. 1907), *aff'd*, 166 F. 846 (9th Cir. 1909). *But see* *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir. 1957) (power is qualified "where the question involved is the distribution of tribal funds and other property under the supervision and control of the federal government"), *cert. denied*, 356 U.S. 960, *rehearing denied*, 357 U.S. 924 (1958); 25 U.S.C. § 163. *See generally* *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971); *Pinnow v. Shoshone Tribal Council*, 314 F. Supp. 1157 (D. Wyo. 1970) (mem.), *aff'd sub nom. Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir. 1971); *Godfroy v. United States*, 458 F.2d 93 (Ct. Cl. 1972).

32. Other internal powers include tribal power to govern domestic relations, *United States v. Quiver*, 241 U.S. 602 (1916); voting age of tribal members in tribal elections, *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975); taxation of tribal members, *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); exclusion of trespassers from tribal reservations, *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975); and administration of criminal justice, *Ex Parte Crow Dog*, 109 U.S. 556 (1883). *See generally* *Powers of Indian Tribes*, 55 INTERIOR DEC. 14 (1934).

The powers of a local self-government should arguably be unlimited within its sphere of influence except to the extent checked by applicable federal statutory or regulatory provisions. No federal constitutional provisions control the powers of self-government because, except for the

"external powers" to govern affairs having effect outside the tribal territory.<sup>33</sup>

Although the internal-external powers distinction seemingly presents a clear-cut analysis of the Indian sovereignty doctrine, it does not resolve the sovereignty dilemma. The power of the federal government over Indian affairs is pervasive, regardless of the internal or external nature of the Indian-controlled activity.<sup>34</sup> The major source of this power is Article One, Section Eight, of the United States Constitution,<sup>35</sup> which grants Congress plenary power to regulate commerce with the Indian tribes.<sup>36</sup> Courts have defined this power as "full, entire,

commerce clause, the Constitution does not address the objectives for which tribal powers can be exercised. See U.S. CONST. art. I (giving Congress power to regulate commerce with Indians). Federal regulatory provisions authorized by statutes can impose standards or affect the reach of tribal sovereign powers by virtue of Congress' plenary power over Indian affairs. See generally *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *Barnes v. United States*, 205 F. Supp. 97 (D. Mont. 1962).

33. Felix Cohen described the reason for Indians' lack of external powers: "Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe . . ." F. COHEN, *supra* note 21, at 123.

34. See *Ex parte Webb*, 225 U.S. 663 (1911); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Armstrong v. United States*, 306 F.2d 520 (10th Cir. 1962); *United States v. Taylor*, 33 F.2d 608 (D. Wash. 1929), *rev'd on other grounds*, 283 U.S. 820 (1930); *United States v. Cattaraugus Country*, 67 F. Supp. 294 (W.D.N.Y. 1946); *Mashunkaskey*, 191 Okla. 501, 134 P.2d 976 (1943); *Chippewa Indians v. United States*, 88 Ct. Cl. 1, *aff'd*, 307 U.S. 1 (1938). The relationship between the United States and Indians is similar to that between guardian and ward. In *United States v. Kagama*, 118 U.S. 375, 384-85 (1886), the Court stated:

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 has never existed anywhere else; because the theatre 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 law on all the tribes.

See *United States v. Sandoval*, 231 U.S. 28 (1913); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Red Fox v. Red Fox*, 564 F.2d 361 (9th Cir. 1977); *Rainbow v. Young*, 161 F. 835 (8th Cir. 1908); *United States ex rel. Ildefonso v. Brewer*, 184 F. Supp. 377 (D.N.M. 1960). It is arguable that because the government has charged itself with the obligation of protecting the Indians, which involves a high degree of responsibility and trust, its conduct should "be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1941).

35. U.S. CONST. art. I, § 8, cl. 3 provides: [The Congress shall have Power] "To regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes".

36. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1972) (power to determine whether state may tax Indian tribe); *Ex parte Webb*, 225 U.S. 663 (1912) (power to control traffic of intoxicating liquors); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (power to tax Indian-owned livestock); *United States v. Taylor*, 33 F.2d 608 (W.D. Wash. 1929) (power is not limited by state police power), *rev'd on other grounds*, 44 F.2d 531, *cert. denied*, 283 U.S. 820 (1930); *United States*

complete . . . and unqualified."<sup>37</sup> Delegated officials, such as the Commissioner of Indian Affairs and the Secretary of the Interior, have the duty to exercise this power.<sup>38</sup> At times, this plenary power has allowed for almost total control over numerous aspects of Indian life.<sup>39</sup> For example, many Indian decisions, both tribal and individual, must be approved by the federal government before they become effective.<sup>40</sup>

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v. Vuller, 282 F. Supp. 829 (D. Mont. 1968) (power to deal with Indian land for benefit of Indians); *City of Tulsa v. Southwestern Bell Tel. Co.*, 5 F. Supp. 822 (D. Okla. 1934) (power to grant rights of way through Indian territory), *aff'd*, 75 F.2d 343 (10th Cir.), *cert. denied*, 295 U.S. 744 (1935); *Williams v. Lee*, 83 Ariz. 241, 319 P.2d 998 (power to grant state courts jurisdiction over certain Indian affairs), *rev'd on other grounds*, 358 U.S. 217 (1958).

37. *Mashunkaskey v. Mashunkaskey*, 191 Okla. 501, 134 P.2d 976 (1942). See *Chippewa Indians v. United States*, 88 Ct. Cl. 1, *aff'd*, 307 U.S. 1 (1938). Some federal courts, however, have refused to accept the full implications of the congressional plenary power and have "continued to operate under the theory that tribal sovereignty and federal plenary powers are not inconsistent." M. PRICE, *LAW AND THE AMERICAN INDIAN* 21 (1973).

38. 25 U.S.C. § 1(a) (1976).

39. See *Winton v. Amos*, 255 U.S. 373 (1921) (acquisition of tribal lands); *United States ex rel. West v. Hitchcock*, 205 U.S. 80 (1906) (adoption of Whites into Indian tribes); *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962) (regulation of use of peyote); *Armstrong v. United States*, 306 F.2d 520 (10th Cir. 1962) (management of health and water projects on Indian reservation); *Frazier v. Goddard*, 63 F. Supp. 696 (D. Okla. 1945) (power over procedure for partition of Indian land); *People ex rel. Ray v. Martin*, 294 N.Y. 61, 60 N.E.2d 541 (commission of crimes on Indian reservations), *aff'd*, 326 U.S. 496 (1945).

40. The following are a few statutory examples in which the government's consent is required: approval of contracts with Indian tribes, 25 U.S.C. §§ 476, 881 (1976); approval of tribal membership rolls for trust asset distribution, *id.* § 163 (1976); approval of wills disposing of trust or restricted property, *id.* § 373 (1976); approval of tribal constitutions and bylaws, *id.* § 476 (1976). The requirement of governmental approval stems from the notion that Indians occupy a wardship position under the guardianship of the United States. This guardian-ward relationship was first described in *United States v. Kagama*, 118 U.S. 375 (1886); the court stated:

These Indian tribes *are* the wards of the nation. They are communities *dependent* upon the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States and receive from them no protection. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

*Id.* at 383-84 (emphasis in original).

The court later pointed out that Congress has the power to determine when the wardship ceases to exist. See *Tiger v. Western Inv. Co.*, 221 U.S. 286, 315 (1911):

[I]t may be taken as the settled doctrine of this court that Congress, in pursuance of the long established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such a condition of tutelage.

Although some commentators suggest that the government rarely assumes its role as guardian, *Oliver, The Legal Status of American Indian Tribes*, 340 OR. L. REV. 193, 241 (1959), appropriations statutes indicate otherwise. See, e.g., 87 Stat. 1071, 1073 (1976); 87 Stat. 429, 430-33 (1973);

The semi-independent status of tribal governments dictates an interplay of federal and tribal jurisdiction within one territory. Tribal jurisdiction exists when federal law has conferred upon the tribe the power of self-government over the subject of the litigation or when there is a risk of conflicting adjudications.<sup>41</sup> The tribe has exclusive jurisdiction when a tribal member violates a tribal law within the territorial limits of the reservation.<sup>42</sup> If an individual alleges that federally secured rights have been violated by the tribal government, he must exhaust tribal remedies before enlisting federal court jurisdiction.<sup>43</sup> Unless specifically authorized by Congress, tribal courts do not have jurisdiction to try or to punish non-Indian offenders.<sup>44</sup>

Jurisdiction of federal courts to review exercises of tribal powers or tribal constitutional interpretations exists when the tribe is subject to federal statutory authority.<sup>45</sup> The jurisdiction of federal district courts over crimes committed by Indians on reservations is limited to murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, larceny, and embezzlement or theft of tribal funds.<sup>46</sup>

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86 Stat. 508, 509-12 (1972); 85 Stat. 45 (1971); 84 Stat. 669, 670-72 (1970); 82 Stat. 1190, 1195 (1968); 80 Stat. 1057, 1959-60 (1966).

41. See *Fisher v. District Ct.*, 424 U.S. 382 (1976) (adoption proceeding in state court may cause risk of conflicting adjudications affecting custody of child).

42. See *United States v. Wheeler*, 435 U.S. 313 (1978).

43. See *Olney Runs After v. Cheyenne River Sioux Tribe*, 437 F. Supp. 1035 (D.S.D. 1977).

44. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

45. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (Indians' recovery of fair rental value of lands); *United States ex rel. Chase v. Wald*, 557 F.2d 157 (8th Cir.) (Indians' recovery of federal statutory penalty from non-Indian defendant), *cert. denied*, 434 U.S. 1002 (1977); *Johnson v. Lower Elwah Tribal Community*, 484 F.2d 200 (9th Cir. 1973) (jurisdiction under Indian Civil Rights Act and 28 U.S.C. § 1343(4) (1976)); *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973) (protection of Indians' property rights when United States declines to act).

46. 18 U.S.C. §§ 1153, 1163 (1976) (Assimilative Crimes Act). In *Williams v. United States*, 327 U.S. 711 (1946), the Assimilative Crimes Act was held inapplicable to Indian reservations. The statute incorporated the criminal laws of the states into the laws of the United States, so that certain violations may be prosecuted as federal offenses. Compare *Williams* with 18 U.S.C. § 1152 (1976), which provides that the Assimilative Crimes Act "shall not extend to offenses committed by one Indian against the person or property of another Indian or to cases where exclusive jurisdiction is secured to the tribe." See *United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950). When federal courts assume jurisdiction over Indian affairs, they rely on familiar federal constitutional standards if the language of tribal constitutions is similar to that of the Federal Constitution. See, e.g., *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973) (Indian Civil Rights Act embraces one-person-one-vote principle); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973) (equal protection and due process clauses of Indian Civil Rights Act prohibit tribal governments from ignor-

Thus, the term "sovereign" does not accurately describe the current status of tribal governments. In reality, Indians have retained few vestiges of the pure sovereignty originally envisaged by the Court,<sup>47</sup> as evidenced by Congress' plenary power over Indian affairs<sup>48</sup> and Indian courts' restricted jurisdiction within Indian territory.<sup>49</sup> Stronger evidence of the subordinate status of Indian tribes is the judicial and legislative imposition of the federal constitutional amendments on tribal governments.<sup>50</sup>

## II. PRE-INDIAN CIVIL RIGHTS ACT APPLICATION OF CONSTITUTIONAL PROVISIONS TO TRIBAL GOVERNMENTS

Federal Constitutional provisions are inapplicable to Indian tribal actions<sup>51</sup> unless expressly made applicable by Congress.<sup>52</sup> Federal courts have repeatedly upheld this rule by refusing to extend constitutional restrictions to tribal activities.<sup>53</sup> Before the enactment of the ICRA in 1968, Indian affairs were largely governed by statutory, not

ing their own election rules). *But see* *Stands Over Bull v. Bureau of Indian Affairs*, 442 F. Supp. 360 (D. Mont. 1977) (tribal chairman's due process claims concerning his impeachment by Crow tribal council were not to be gauged against United States Constitution and procedure set forth therein for impeachment, but should be measured against tribal custom and structure of government).

Unlike federal courts, state courts have no power to regulate Indian governance of reservations except where Congress has specifically granted that power. *See Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1976).

47. *See* notes 16-19 *supra* and accompanying text.

48. *See* notes 35-40 *supra* and accompanying text.

49. *See* notes 41-44 *supra* and accompanying text.

50. *See generally* notes 51-118 *infra* and accompanying text.

51. *See Talton v. Mayes*, 163 U.S. 376 (1896) (fifth amendment); *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962) (first amendment); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (first amendment); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958) (fourteenth amendment), *cert. denied*, 358 U.S. 932 (1959); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957) (fifth amendment), *cert. denied*, 356 U.S. 960, *rehearing denied*, 357 U.S. 924 (1957); *United States v. Seneca Nation*, 274 F. 946 (W.D.N.Y. 1921). *See generally* Note, *The Constitutional Rights of the American Tribal Indians*, 51 VA. L. REV. 121 (1965) (discussion of federal courts' refusals to extend constitutional restrictions over Indian tribal activities because of respect for Indian sovereignty). The author argues in favor of imposing general provisions of the Constitution on tribal governments because, after the Supreme Court's ruling in *Talton*, all Indians have become citizens. *Id.* at 135. Imposition of the federal Constitution may also be justified as necessary to provide Indians' judicial structure with some firm basis. *Id.*

52. *See United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940); *Smith, The Constitutional Status of American Indians*, 6 C.R. DIG. 12, 14 (1973).

53. *See* Note, *supra* note 51.

constitutional, restrictions.<sup>54</sup>

In 1896 the Supreme Court considered for the first time whether the amendments to the United States Constitution should be imposed on tribal governments. In *Talton v. Mayes*<sup>55</sup> the Supreme Court held that the fifth amendment did not invalidate Cherokee legislation that prescribed criminal grand juries.<sup>56</sup> The Court reasoned that the Cherokee nation was an autonomous governmental unit with the right to punish offenses.<sup>57</sup> Federal treaties and statutes recognized this right, and, therefore, the tribe's punishment of offenders was an authorized act of a sovereign tribal unit and an exercise of powers derived from the federal government.<sup>58</sup> Because the fifth amendment is applicable only to federal governmental actions, it does not provide a basis for invalidating the grand jury procedure used by the Cherokee tribe.<sup>59</sup> The Court's conclusion was a logical extension of tribal sovereignty.

Since *Talton*, federal courts have used similar reasoning to decide that the Bill of Rights is not applicable to tribal governments.<sup>60</sup> In *Native American Church v. Navajo Tribal Council*<sup>61</sup> the Tenth Circuit held that the first amendment did not apply to the Navajo government.<sup>62</sup> The court reasoned that the Constitution is "binding upon Indian nations only where it expressly binds them, or is made binding by treaty or some act of Congress."<sup>63</sup> No such act of Congress or constitutional provision applies the first amendment to Indian governments.<sup>64</sup>

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54. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (attack based on fifth amendment).

55. 163 U.S. 376 (1896).

56. *Id.* at 382.

57. *Id.* at 383-84.

58. *Id.* at 384.

59. *Id.*

60. See, e.g., *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir.), *cert. denied*, 356 U.S. 960, *rehearing denied*, 357 U.S. 924 (1957), which relied on *Talton* to hold that a tribe may determine its membership without fifth amendment restrictions. Many courts adhered to the rule that the Constitution is binding on Indian tribes only where it expressly binds them or is made binding by treaty or by an act of Congress. Therefore, federal courts have no claim for violations by tribal governments of the first and fifth amendments. See *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D.N.M. 1954).

61. 272 F.2d 131 (10th Cir. 1959).

62. *Id.*

63. *Id.* at 134.

64. *Id.* at 134-35. See generally Note, *Indian Tribes and Civil Rights*, 7 STAN. L. REV. 285

In *Barta v. Oglala Sioux Tribe*<sup>65</sup> the Eighth Circuit held that the fourteenth amendment does not place limitations on Indian tribes because it is only applicable to state, and not tribal, action.<sup>66</sup> The court followed *Talton* in refusing to invoke the fifth amendment to invalidate a tribal legislative act.<sup>67</sup> Similarly, the Montana District Court, in *Glover v. United States*,<sup>68</sup> held that the sixth amendment right to counsel does not apply to prosecutions in Indian tribal courts because this right is protected only in actions brought by the United States.<sup>69</sup> Whether tribal Indians are entitled to protection from illegal search and seizure<sup>70</sup> or from interference with freedom of speech, press, or assembly<sup>71</sup> is questionable. Finally, the tribal government may impose a tax<sup>72</sup> or revoke tribal membership rights<sup>73</sup> without facing due process restrictions.

In *Colliflower v. Garland*<sup>74</sup> the Ninth Circuit questioned the inapplicability of federal constitutional provisions to tribal governments.<sup>75</sup> The court ruled, in a habeas corpus proceeding brought by an Indian, that Indian courts "function in part as a federal agency and in part as a tribal agency, and that consequently, it is competent for a federal court

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(1955); see also *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D.N.M. 1954) (claim of tribal infringement of religious freedom based upon Civil Rights Act failed).

65. 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959).

66. *Id.* at 556. See *Glover v. United States*, 219 F. Supp. 19, 21 (D. Mont. 1963); cf. *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D.N.M. 1954) (tribe not state or territory under 28 U.S.C. § 1343(3) (1964)).

67. 259 F.2d at 556-57.

68. 219 F. Supp. 19 (D. Mont. 1963).

69. *Id.* at 21. The denial of legal counsel has also been justified on the ground that, as tribal judges are usually legally unsophisticated, lawyers would only confuse them with technical subtleties. In addition, as a practical matter, the services of trained counsel would be of questionable value because tribal court actions are governed by Indian laws and customs that vary from tribe to tribe. *Hearings on the Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 24 (1961) [hereinafter cited as *1961 Hearings*].

70. See *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (by implication).

71. See COMMISSION ON THE RIGHTS, LIBERTIES, AND RESPONSIBILITIES OF THE AMERICAN INDIAN, *THE INDIAN* (1966).

72. See *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958) (tax on use of Indian trust lands by nonmembers of tribe), cert. denied, 358 U.S. 932 (1959); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (tax for privilege of grazing stock on reservation land).

73. See *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir.), cert. denied, 356 U.S. 960, rehearing denied, 357 U.S. 924 (1957).

74. 342 F.2d 369 (9th Cir. 1965).

75. *Id.*

in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court."<sup>76</sup> The reasoning is typical of that used by courts and Congress in the mid-1960's, when they attempted to assure Indian civil rights by relying upon the federal Constitution.

### III. THE INDIAN CIVIL RIGHTS ACT

In 1968 Congress, under its plenary authority over Indian tribes, enacted the Indian Civil Rights Act (ICRA).<sup>77</sup> The ICRA responded to a growing concern among legislators that tribal governments abused the civil rights of American Indian citizens.<sup>78</sup> Congress was specifically concerned that Indians, as citizens of the United States, did not enjoy the same constitutional rights as all other American citizens.<sup>79</sup>

The Act was intended to remedy the inequities caused by decisions holding that, despite the tribal constitution's failure to protect Indians from tribal abuses, federal courts would decline jurisdiction because such abuses were internal controversies.<sup>80</sup> Felix Cohen, writing for the Department of the Interior, described this dilemma in his *Handbook of Federal Indian Law*:

[I]f an Indian desires protection in this respect, the members of an Indian tribe must write the guarantees they desire into tribal constitutions. Such guarantees have been written into many tribal constitutions that are now in force. In absence of such provisions, an Indian reservation may be, in some respects, a civil rights no-man's land where there is no relief against tribal oppressions because of the failure of Congress to make federal civil rights provisions . . . applicable.<sup>81</sup>

76. *Id.* at 379.

77. Act of April 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77 (codified at 25 U.S.C. §§ 1302-1303 (1976)). See note 5 *supra* for text of statute.

78. See notes 82-91 *infra* and accompanying text.

79. See S. REP. No. 721, 90th Cong., 1st Sess. 33 (1967), which reads in pertinent part: The proposed Indian legislation, a result of the sub-committee's 6-year study, is an effort on the part of those who believe in constitutional rights for all Americans to give "the forgotten Americans" basic rights which all other Americans enjoy. These measures will not cure all the ills suffered by the American Indians, but they will be important steps in alleviating many inequities and injustices with which they are faced. These rights, fundamental to our system of constitutional freedoms, are not now secured by laws respecting the American Indian.

80. For example, in *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967), the court refused on the basis of the internal controversy doctrine to assume jurisdiction over a suit commenced by individual members of the tribe against the Tribal Council to invalidate a tribal election.

81. U.S. SOLICITOR FOR THE DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW 126 (1958).

Congressional hearings during the seven-year period before the adoption of the ICRA inquired into the status of Indian rights. Testimony before the Senate Subcommittee on Constitutional Rights revealed that of 247 tribes organized under the 1934 Indian Reorganization Act, 117 had adopted constitutions protecting individual civil rights and 130 had not.<sup>82</sup> The rights provided by these constitutions, however, were found to be inadequate.<sup>83</sup> One hundred eighty-eight other tribes operated with no constitution at all.<sup>84</sup> Although few tribal courts allowed representation by attorneys, they sometimes permitted representation by another member of the tribe.<sup>85</sup> Tribes with sufficient evidence-gathering resources generally protected the right to remain silent. Smaller tribes with limited resources rarely offered this protection.<sup>86</sup> Most tribes provided for jury trials, but insufficient compensation discouraged potential jurors from serving.<sup>87</sup> Generally, a majority vote was sufficient to decide a verdict, thus eliminating the necessity—and cost—of new trials because of hung juries.<sup>88</sup> Some tribes provided no right to jury trial—a denial that often resulted in grossly unfair trials.<sup>89</sup> Thus, despite the tribal desire to meet due process requirements, financial restrictions often rendered this goal improbable.<sup>90</sup>

The Senate Subcommittee on Constitutional Rights discovered numerous violations of Indians' civil liberties by local authorities enforcing state criminal laws in areas close to reservations.<sup>91</sup> Witnesses testified to arrests of Indians for crimes for which whites would not be

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82. *1961 Hearings*, *supra* note 69, at 121.

83. *Hearings on Constitutional Rights of the American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. 4, at 823 (1963) [hereinafter cited as *1963 Hearings*].

84. *1961 Hearings*, *supra* note 69, at 166.

85. *Id.* at 23.

86. *1963 Hearings*, *supra* note 83, at 862.

87. *Id.*

88. 25 C.F.R. § 11.7(d) (1979).

89. *1961 Hearings*, *supra* note 69, pt. 2, at 436.

90. Representative E. G. Berry informed Congress that the tribal judges had formed a group whose purpose was "to upgrade the Tribal court system through professional advancement and continuing education." 115 CONG. REC. 938 (1969).

91. *Hearings on Constitutional Rights of the American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., pt. 3, at 769 (1962) [hereinafter cited as *1962 Hearings*]. See *1961 Hearings*, *supra* note 69, at 224 (testimony of Arthur Lazarus, Jr.).

charged,<sup>92</sup> as well as to arrests of Indians outside the state's jurisdiction.<sup>93</sup> While in custody, Indians were sometimes forced to perform labor not required of non-Indian prisoners.<sup>94</sup> Deprivation of due process in arraignment was common, and the right to counsel often was not explained to Indian defendants or was refused upon request.<sup>95</sup> Local judges occasionally disallowed pleas of not guilty made by Indian defendants.<sup>96</sup> Indian witnesses charged that some state officials failed to provide adequate resources to those law enforcement agencies with jurisdiction to protect reservations.<sup>97</sup>

The Senate Subcommittee on Constitutional Rights was convinced, after hearing several years of testimony concerning violations of Indians' civil liberties, that Congress should take extreme and effective action. Congress decided to incorporate selectively the Bill of Rights into the ICRA.<sup>98</sup> Under the Act, Indians are guaranteed free exercise of religion,<sup>99</sup> freedom of speech,<sup>100</sup> freedom of the press,<sup>101</sup> and freedom to peaceably assemble and petition the government.<sup>102</sup> The Act protects against unreasonable search and seizures,<sup>103</sup> double jeopardy,<sup>104</sup>

92. See *Hearings on S-961-968 and S.J. Res. 40 Before Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 331 (1965).

93. See *1963 Hearings*, *supra* note 83, at 827; *1962 Hearings*, *supra* note 91, at 639.

94. See *1962 Hearings*, *supra* note 91, at 588. The discretionary treatment was evidenced by the testimony of the Chairman of the Crow Creek Sioux, who quoted a Police Commissioner as saying: "Well, I think the boys are going to have to get some more Indians in jail, because we need a lot of snow moved over there on the north side of town." *1963 Hearings*, *supra* note 83, at 898.

95. See *1962 Hearings*, *supra* note 91, at 598.

96. *1961 Hearings*, *supra* note 69, pt. 2, at 375.

97. *Id.* at 406-12.

98. Act of April 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77 (codified at 25 U.S.C. §§ 1302-1303 (1976)). The ICRA contains a habeas corpus provision that provides a remedy to enforce the statute. "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." 25 U.S.C. § 1303 (1976). This remedy alone, however, has been found to be insufficient to effectuate congressional intent. Thus, courts have fashioned other remedies when necessary. "[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414 n.13 (1968); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213 (1944). The district court of Arizona held proper an implied civil remedy under the statute. *Dodge v. Nakai*, 293 F. Supp. 673 (D. Ariz. 1968).

99. 25 U.S.C. § 1302(1) (1976).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* § 1302 (2).

104. *Id.* § 1302 (3).

and compelled self-incrimination,<sup>105</sup> and contains equal protection and due process clauses.<sup>106</sup> The Act differs from the Bill of Rights in that it does not prohibit an establishment of religion; presumably, this was excluded in deference to tribal cultural considerations. The Act guarantees the right to counsel only at the defendant's expense,<sup>107</sup> because tribal governments normally would be incapable of sustaining this financial burden. No right exists under the ICRA to indictment by a grand jury of six members in cases involving the possibility of imprisonment.<sup>108</sup>

Despite the similarities between the language of the ICRA and the Bill of Rights, it is clear that the majority of Congress did not intend to apply to tribal governments the same substantive standards the federal courts apply to enforce the Constitution within state and federal governments.<sup>109</sup> Although some senators disagreed with that conclusion,<sup>110</sup> the majority applied the constitutional language only in light of tribal customs and traditions.<sup>111</sup> After receiving many objections to the ICRA from the Pueblo tribe because of the similarity of the Act's language with that of the Constitution, Senator Sam J. Ervin responded:

I realize that the all Indian Pueblo Council of New Mexico has voiced serious objections to the provisions of the proposed act which employs language taken from the First and Fourth through Eighth amendments and has asked to be exempt from that Title. In all sincerity, I do not believe that [their fears] can be justified. The Pueblo Indians have a rich, colorful form of government founded on tradition and wise experience. In no conceivable way was it my intention, through the provisions of the [ICRA] to hamper, weaken or destroy the Pueblo tribal traditions or any Indian tribal governments in this Nation.<sup>112</sup>

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105. *Id.* § 1302 (4).

106. *Id.* § 1302 (8).

107. *Id.* § 1302 (6).

108. *See* U.S. CONST. amend. V. The Supreme Court recently summarized the differences between the ICRA and the Constitution in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 n.14 (1978).

109. *See generally* 1963 *Hearings*, *supra* note 83, pt. 4.

110. *See, e.g.* S. REP. NO. 841, 90th Cong., 1st Sess. 6, 10-11, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1864:

Title II of the [Indian Civil Rights Act] would grant to the American Indians enumerated constitutional rights and protection from arbitrary action in their relationship with tribal governments, state governments, and the Federal government. Investigations have shown that tribal members' basic constitutional rights have been denied at every level.

111. *See generally* 1963 *Hearings*, *supra* note 83.

112. *Hearings on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the*

Indians also challenged the Act as an infringement of tribal sovereignty because it does not allow for tribal consent to its application.<sup>113</sup> The National Tribal Chairman Association adopted a resolution in 1973 calling for an amendment to the Act.<sup>114</sup> The resolution stated that the ICRA violates the principle of self-government associated with Indian tribes because courts have construed the Act as granting federal courts jurisdiction over issues such as the right to membership in a tribe, the operation of tribal elections, the selection of tribal officials, and the right to conduct tribal governmental business.<sup>115</sup> Indians also objected to judicial interpretations of the ICRA that imposed federal constitutional law on Indian governments.<sup>116</sup>

The proposed amendment to section 1301(1)<sup>117</sup> would define "Indian tribe" as "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government *which has consented to the provisions of this subchapter by an affirmative vote of the adult members of the tribe, band, or other group of Indians in an election called by the Secretary of the Interior for that purpose.*"<sup>118</sup> The Indians hoped to recover, through this resolution, the sovereignty and independence lost through the implementation of the ICRA. Congress, however, did not adopt the proposed amendment.

#### IV. JUDICIAL CONSTRUCTION OF THE ICRA: PRO-INDIAN SOVEREIGNTY

Although the amendment proposed by the National Tribal Chair-

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*House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 14 (1968) (statement of Sen. Ervin).

113. See 1 INDIAN L. RPTR. 63-65 (1974). Some federal courts, however, have indicated that there is nothing in the Act showing that Congress intended to sweep aside the doctrine of Indian sovereignty. See, e.g., *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1236-37 (4th Cir. 1974); *McCurdy v. Steele*, 506 F.2d 653, 655-56 (10th Cir. 1974); *Groundhog v. Keeler*, 442 F.2d 674, 681-82 (10th Cir. 1971); *Lohnes v. Cloud*, 366 F. Supp. 619, 623 (D.N.D. 1973).

114. See 1 INDIAN L. RPTR. 63-65 (1974).

115. *Id.*

116. *Id.* at 64. This objection was based upon Indians' concern that the ICRA imposes legal standards that conflict with the customs and laws of the tribes.

117. *Id.* Before introducing its amendment, the Association claimed that "such erosion of the rights of the tribes, bands or other groups of Indians to self-government should not be implemented into the laws controlling such tribes, bands or other groups of Indians without the consent of the individual tribe, band or other group of Indians." *Id.*

118. *Id.* at 64-65 (proposed amendment italicized).

man Association failed, subsequent federal court decisions indicate a trend toward conscientious effectuation of Congress' intent to provide Indians with civil rights protection but minimize infringement upon tribal sovereignty.<sup>119</sup> In *Wounded Head v. Tribal Council of Oglala Sioux Tribe*<sup>120</sup> the Eighth Circuit recognized that the ICRA should protect the civil rights of individual Indians but not jeopardize tribal self-government and cultural identity.<sup>121</sup> The court held that the fourteenth amendment standard developed by the judiciary<sup>122</sup> did not control the interpretation of the equal protection clause of the ICRA.<sup>123</sup> In response to plaintiff's claim that the twenty-sixth amendment to the Constitution<sup>124</sup> should be applicable to tribal elections, the court concluded that the equal protection clause of the ICRA did not limit the power of an Indian tribe to use twenty-one as the minimum voting age for tribal elections.<sup>125</sup>

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119. See, e.g., *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975) (equal protection clause of ICRA is not coextensive with equal protection clause of United States Constitution); *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir. 1971) (ICRA is concerned primarily with the administration of tribal justice, not with particular aspects of tribal structure or officeholding); *Janis v. Wilson*, 385 F. Supp. 1143 (D.S.D.) (meaning and application of ICRA to tribes necessarily differs from established Anglo-American jurisprudential meaning), *remanded on other grounds*, 521 F.2d 724 (8th Cir. 1974); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973) (equal protection and due process clauses of ICRA prohibit tribal governments from ignoring their own election rules), *rev'd on other grounds*, 506 F.2d 653 (10th Cir. 1974). See also *Stands Over Bull v. Bureau of Indian Affairs*, 442 F. Supp. 360 (D. Mont. 1977) (tribal chairman's due process claims resulting from his impeachment by Crow Tribal Council were not to be gauged against United States Constitution and procedure set forth therein for impeachment, but should be measured against tribal custom and structure of government).

120. 507 F.2d 1079 (8th Cir. 1975).

121. *Id.* at 1082.

122. See note 6 *supra*.

123. 507 F.2d at 1083. *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976), and *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971), indicate that the terminology used in the Indian Civil Rights Act should be construed with due regard for historical, governmental, and cultural values of Indian tribes; thus, the meaning of those terms under the ICRA need not agree with the meaning of the same terms under the United States Constitution. *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973), and *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973), however, indicate that in some instances the equal protection clause of the ICRA should be interpreted in the same manner as the equal protection clause of the fourteenth amendment.

124. U.S. CONST. amend. XXVI (right to vote for 18-year-olds).

125. *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1083 (8th Cir. 1975). *But see White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973), in which the Eighth Circuit relied on the familiar standards of the federal Constitution's equal protection clause in determining the validity of tribal election procedures. The court held that the one-person-one-vote principle, developed under the equal protection clause, is applicable to tribal elections of an

In *Rosebud Sioux Tribe v. Driving Hawk*<sup>126</sup> the court held that each Indian tribe has the duty to establish a system by which election contests can be resolved in compliance with the guarantees of equal protection and due process in the ICRA.<sup>127</sup> Federal courts should not supervise decisions made by tribes concerning issues that arise in tribal elections. Indian tribes should make these decisions based on their own substantive standards, not on those of the United States Constitution.<sup>128</sup>

*Tom v. Sutton*<sup>129</sup> again emphasized Indians' use of their own substantive standards. In addressing the issue of mandatory appointment of counsel for tribal members in criminal proceedings before the tribal court,<sup>130</sup> the Ninth Circuit held that the terms "due process" and "equal protection" in the ICRA should be construed with regard for historical, cultural, and governmental values of Indian tribes.<sup>131</sup> The court reasoned that the phrases should not automatically be accorded

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Indian tribe that has established voting procedures precisely paralleling Anglo-American procedures. *Id.* at 1314. *Accord*, *Daly v. United States*, 483 F.2d 700, 704-05 (8th Cir. 1973).

The Indian Reorganization Act of 1934 established Indians' right to self-government over tribal affairs, including tribal elections. This right, however, is restricted because the Act requires approval by the Secretary of Interior for many governmental acts. IRA § 6, 25 U.S.C. § 476 (1976) provides:

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. . . .

*Compare* *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085 (8th Cir. 1977) (secretarial elections held within tribe pursuant to regulations prescribed by Secretary of Interior are federal elections regulated by federal statute to which twenty-sixth amendment applies), *with* *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975) (twenty-sixth amendment held inapplicable to tribal elections), *and* *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 530 (8th Cir. 1967) (IRA merely provided the authority and procedures by which an Indian tribe may organize itself and adopt a tribal constitution and bylaws; jurisdiction is not within its purview).

126. 534 F.2d 98 (10th Cir. 1976).

127. *Id.* at 100.

128. *Id.* (by implication).

129. 533 F.2d 1101 (9th Cir. 1976).

130. *Id.* at 1102.

131. *Id.* at 1104-05; *accord*, *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971). *But see* *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973) (federal one-person-one-vote principle imposed on Indian tribes); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973) (same).

their meaning under the Constitution.<sup>132</sup> Although the due process clause of the Constitution required appointment of counsel for indigent defendants in criminal cases, the ICRA “specifically provides that a person may have counsel [only] at his own expense.”<sup>133</sup> The court thus concluded that the due process clause of the ICRA cannot be construed to require appointed counsel for Indian offenders.<sup>134</sup>

Similarly, in *Janis v. Wilson*<sup>135</sup> the South Dakota District Court held that although Congress used language in the ICRA similar to that in the Bill of Rights, the meaning and application of the Act to Indian tribes may differ from the established Anglo-American interpretation and application of the Bill of Rights to federal and state governments.<sup>136</sup> The court recognized Congress’ concern that the ICRA not be used as a vehicle to impose federal constitutional law upon Indians.<sup>137</sup>

The Supreme Court in *Santa Clara Pueblo v. Martinez*<sup>138</sup> recently reaffirmed the judicial trend toward application of the ICRA without infringing upon tribal sovereignty. The decision will have substantial impact on the use of the ICRA to resolve disputes arising between Indians and their tribal governments. Julia Martinez, a member of the Santa Clara Pueblo tribe, challenged a 1939 tribal ordinance that granted tribal membership to the children of male members who married nonmembers but denied membership to the children of female

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132. 533 F.2d at 1104.

133. *Id.*; see 25 U.S.C. § 1302(6) (1976).

134. 533 F.2d at 1104; cf. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976) (tribes may structure their government in any manner that does not violate ICRA); *McCurdy v. Steele*, 506 F.2d 653 (10th Cir. 1974) (ICRA was not intended to encompass aspects of fifth, sixth, seventh, fourteenth, and fifteenth amendments); *O’Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973) (Indian Bill of Rights was not meant to diminish tribal judicial authority); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971) (Constitution applies to Indian nations only if it expressly binds them or is made binding upon them by treaty or act of Congress).

135. 385 F. Supp. 1143 (D.S.D.), *remanded on other grounds*, 521 F.2d 724 (8th Cir. 1974).

136. *Id.* at 1150.

137. By not including certain clauses of the Bill of Rights and by modifying the clauses that were finally incorporated into [the ICRA], Congress recognized as legitimate the tribal interest in maintaining traditional practices that conflict with constitutional concepts of personal freedom developed in a different social context. The legislative history of [the ICRA] indicates that the scope of the individual rights contained therein is to be determined by balancing them against the legitimate interests of the tribe in maintaining the traditional values of their unique governmental and cultural identity.

*Id.*

138. 436 U.S. 49 (1978).

members who married outside the tribe.<sup>139</sup> The Court avoided deciding whether the ordinance violated the equal protection provision of the ICRA by focusing upon the jurisdictional issue.<sup>140</sup> The Tenth Circuit had accepted the district court's ruling that the substantive provisions of the ICRA (Title I) impliedly authorize civil actions for declaratory and injunctive relief against the tribe.<sup>141</sup> The Supreme Court reversed and held that the tribe's sovereign immunity barred such suits<sup>142</sup> because the ICRA does not grant federal courts plenary jurisdiction to decide internal controversies affecting matters of tribal self-government.<sup>143</sup>

The Supreme Court reasoned that Indians should be free to resolve their internal disputes.<sup>144</sup> Subjecting tribal government actions to review in federal courts could seriously undermine the Indian officials' authority.<sup>145</sup> The Court recognized that one major objective of the ICRA was to strengthen "the position of individual tribal members vis-

139. *Id.* at 51.

140. *Id.* at 58-72.

141. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1042 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

142. The Court ignored holdings of most lower federal courts that the ICRA constituted an implied negation by Congress of tribal immunity from suit. *See Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. 1974); *Thompson v. Tonasket*, 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 416 U.S. 954 (1974); *Brown v. United States*, 486 F.2d 658 (8th Cir. 1973); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200 (9th Cir. 1973); *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973); *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698 (8th Cir. 1972); *Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194 (D.S.D. 1975); *White v. Tribal Council*, 383 F. Supp. 810 (D. Minn. 1974); *Means v. Wilson*, 383 F. Supp. 378 (D.S.D. 1974); *Hickey v. Crow Creek Hous. Auth.*, 379 F. Supp. 1002 (D.S.D. 1974); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973), *rev'd on other grounds*, 506 F.2d 653 (10th Cir. 1974); *Seneca Constitutional Rights Org. v. George*, 348 F. Supp. 48 (W.D.N.Y. 1972); *Solomon v. LaRose*, 335 F. Supp. 715 (D. Neb. 1971); *Loncasson v. Leekity*, 334 F. Supp. 370 (D.N.M. 1971); *Spotted Eagle v. Blackfeet Tribe*, 301 F. Supp. 85 (D. Mont. 1969); *cf. Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438 (D.S.D. 1974) (court lacked jurisdiction in absence of allegation that tribal membership provisions were not uniformly applied; equal protection requirements of fourteenth amendment should not be embraced by equal protection guarantees of ICRA); *Lefthand v. Crow Tribal Council*, 329 F. Supp. 728 (D. Mont. 1971) (complaint did not state a claim for relief where it alleged that tribal government irregularities deprived plaintiff of equal protection and due process under Indian Bill of Rights, but did not allege that plaintiff suffered arbitrary and intentional discrimination distinct from other tribal members). *But see Pinnow v. Shoshone Tribal Council*, 314 F. Supp. 1157 (D. Wyo. 1970), *aff'd sub nom. Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir. 1971).

143. 436 U.S. at 59.

144. *Id.* at 59-60.

145. *Id.*

à-vis the tribe.”<sup>146</sup> The Court, however, found this interest to be outweighed by the competing objective of furthering tribal self-government.<sup>147</sup> In addition, by providing habeas corpus as the sole means for federal court review, Congress attempted to balance these competing interests.<sup>148</sup> The Supreme Court suggested that its holding would insure that the ICRA be interpreted and applied on the basis of tribal customs and traditions as mandated by Congress.<sup>149</sup>

The *Martinez* decision represents a significant victory for tribal leaders, tribal court judges, and other supporters of Indian self-government. Tribal courts and councils are much better equipped to resolve internal disputes than are federal courts.<sup>150</sup> Tribal court systems are no longer incapable of adequately enforcing the substantive guarantees of the ICRA.<sup>151</sup>

Although supporters of Indian self-government may be encouraged by the manner in which courts have construed the ICRA,<sup>152</sup> concern remains over whether constitutional provisions beyond those in the

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146. *Id.* at 62.

147. *Id.* at 62-66. The Court stated:

Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums . . . , but it would also impose serious financial burdens on already “financially disadvantaged” tribes.

*Id.* at 64.

148. *Id.* at 66-67.

149. By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may . . . have considered that resolution of statutory issues under [the ICRA], and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.

*Id.* at 71.

150. *Id.* at 66. See *United States v. Mazurie*, 419 U.S. 544 (1975).

151. See Hall, *Santa Clara Pueblo v. Martinez*, *An Analysis*, 5 INDIAN L. REP. M-34, M-36 (1978):

The increasing sophistication of tribal judges, the greater presence of Indian lawyers working in reservation communities, the imaginative use of Indian trial advocates and paralegals in tribal courts are all indications of a commitment by the tribes to an upgrading of their judiciaries. *Martinez* makes it even more important that this progress continue.

152. The judicial trend toward respect for tribal self-government may have been triggered by a general change in federal policy occurring throughout the 1970's. See generally Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975); Werhan, *The Sovereignty of Indian Tribes: A Reaffirmation and Strengthening in the 1970's*, 54 NOTRE DAME LAW. 5 (1978). In 1975 Congress created the American Indian Policy Review Commission whose duty was to make a comprehensive investigation and study of Indian affairs. The purpose of the Commission was to develop, on the basis of Indian input, recommendations

ICRA should be imposed upon tribal governments. There is strong judicial support for the proposition that the ICRA has not incorporated all individual rights guaranteed by the Constitution of the United States.<sup>153</sup> Despite this precedent, one recent circuit court decision held that the twenty-sixth amendment, which lowers the voting age from twenty-one to eighteen, should be imposed upon tribal governments.<sup>154</sup>

## V. CONCLUSION

The ICRA has had both a beneficial and a detrimental impact upon the American Indian. The Act has provided individual Indians with fundamental civil liberties they formerly lacked in their relationships with tribal, state, and federal governments.<sup>155</sup> Because Congress enacted and imposed the ICRA on Indians without their consent, however, the Act has resulted in infringement on tribal sovereignty and on the right to self-government.<sup>156</sup> The infringement on tribal sovereignty has been mitigated by recent judicial decisions that use tribal customs and traditions as the basis for interpreting the ICRA.<sup>157</sup> The *Martinez* decision, in particular, places the primary power to enforce the Act in the tribal courts rather than in the federal courts.<sup>158</sup> Unless this decision is undermined by Congress, the Supreme Court has successfully struck a balance between the competing policies of the ICRA—provision of civil rights protections for Indians and reduction of infringement on tribal sovereignty.

*Judy D. Lynch*

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for future congressional policy. See Kiegingbird, *The American Indian Policy Review Commission: A Prospect for Future Change in Federal Indian Policy*, 3 AM. INDIAN L. REV. 243 (1975).

153. See, e.g., *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973) (fourteenth amendment); *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973) (fifth amendment); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973) (fourteenth amendment); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971) (fifth and fifteenth amendments); *Lohnes v. Cloud*, 366 F. Supp. 619 (D.N.D. 1973) (fifth, seventh, and fourteenth amendments); *Seneca Constitutional Rights Org. v. George*, 348 F. Supp. 51 (W.D.N.Y. 1972) (fifth amendment); *Spotted Eagle v. Blackfeet Tribe*, 301 F. Supp. 85 (D. Mont. 1969) (fourteenth amendment).

154. *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085 (8th Cir. 1977). But see *Motah v. United States*, 402 F.2d 1 (10th Cir. 1968); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967).

155. See notes 78-81 *supra* and accompanying text.

156. See notes 113-18 *supra* and accompanying text.

157. See notes 119-38 *supra* and accompanying text.

158. See notes 138-51 *supra* and accompanying text.