After *Martinez*: Civil Rights Under Tribal Government

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Santa Clara Pueblo v. Martinez,[1] decided last year, was the first Supreme Court review of the Indian Civil Rights Act of 1968 (ICRA).[2] The ICRA reflected a majoritarian view[3] that all Indian tribal governments must be required to respect the rights and liberties of persons coming under their authority.[4] While Indian tribes are not bound by the United States Constitution,[5] they are bound by acts of Congress, which have been held to have plenary authority over them.[6] Consequently, the ICRA which makes the constitutional guarantees of liberty and property binding on Indian tribes, has the effect of creating new rights against tribal governments. Strictly speaking, it is inaccurate to call them constitutional rights, since they derive from statute. The statute repeats the language of the Constitution, however, and covers most of the rights and liberties found there,[7] with some notable excep-

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[1] 436 U.S. 49 (1978).

[2] 25 U.S.C. §§ 1301-1341 (1976). The discussion in this article concerning the ICRA is directed to § 1302 which codifies the protection of individual rights.

[3] *See*, Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099, 1102 (1977); Ratner, *Constitutions, Majoritarianism and Judicial Review: The Function of a Bill of Rights in Israel and the United States*, 26 AM. J. COMP. L. 373 (1978).

[4] Prior to the passage of the Indian Civil Rights Act, 117 tribes had provisions protecting civil rights in their tribal constitutions, while 130 tribes had no such provision. In addition, 188 tribes or bands were not organized under any form of tribal constitution. *See* Burnett, *An Historical Analysis of the 1968 Indian "Civil Rights" Act*, 9 HARV. J. LEGIS. 557, 579 (1972).

[5] Talton v. Mayes, 163 U.S. 376 (1896); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).

[6] Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Lone Wolf v. Hitchcock, 187 U.S. 294 (1902); Talton v. Mayes, 163 U.S. 376 (1896); United States v. Kagama, 118 U.S. 375 (1886); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); *See also* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[7] 25 U.S.C. § 1302 (1976). Constitutional rights

tions. These exceptions were intended to avoid infringing upon the right of tribes to preserve their identity and cultural autonomy.[8]

With the exception of a narrow provision for habeas corpus review of detention,[9] the Act contains no reference to enforcement

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No Indian tribe in exercising powers of self government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

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

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

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

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

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of 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.

[8] Section 1302 omits the establishment clause language of the first amendment in order to permit Indian theocratic governments; the 2nd and 3rd amendment provisions dealing with the right to bear arms and protection against quartering of soldiers; and the 5th amendment grand jury indictment provisions. In the statute, the 6th Amendment right-to-counsel clause provides that counsel is at the expense of defendant. Section 1302 further deletes the 7th amendment guaranty of jury trial in civil cases and authorizes a jury of only six members in criminal cases. Finally, the ICRA omits the 13th amendment proscription against involuntary servitude and the 15 amendment prohibition against abridgement of voting rights on account of race or color. The latter omission presumably enables tribes to restrict voting rights to their members.

[9] 25 U.S.C. § 1303 (1976).

procedures. Lower courts, however, had ruled that both federal question[10] and civil rights[11] jurisdiction existed. Furthermore, these courts implied a federal cause of action as necessary to enforce the ICRA[12] and deemed Indian tribes' sovereign immunity[13] waived by implication.[14] The consequence of the lower court interpretations was a decade of litigation against Indian tribal governments and their officers.[15] The Supreme Court, however, had declined review of ICRA cases[16] until its May 1978 decision in *Santa Clara Pueblo v. Martinez*.[17]

In its landmark *Martinez* decision, the Court held that, except for habeas corpus petitions, federal courts have no jurisdiction to hear ICRA cases.[18] The Court considered the absence of any provision in the Act granting a remedy against tribes or their officers fatal to claims brought under the Act.[19] Thus, the Court concluded that tribal governments themselves are the proper forums for deciding questions arising under the ICRA.[20] Seemingly,

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[10] 28 U.S.C. § 1331(a) (1976).

[11] 28 U.S.C. § 1343(4) (1976).

[12] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Jones v. Mayer, 392 U.S. 409 (1968); Bell v. Hood, 71 F.Supp. 813 (S.D. Cal. 1947), *on remand from* 327 U.S. 678 (1946).

[13] Puyallup Tribe, Inc. v. Washington Department of Game, 433 U.S. 165 (1977); United States v. United States Fidelity & Guaranty Company, 309 U.S. 506 (1940); Turner v. United States, 248 U.S. 354 (1919).

[14] Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975); Dailey v. U.S., 483 F.2d 700 (8th Cir. 1973); Johnson v. Lower Elwha Tribal Community of Lower Elwha Indian Reservation, 484 F.2d 200 (9th Cir. 1973); Slattery v. Arapahoe Tribal Council, 453 P.2d 278 (10th Cir. 1971); Loncassion v. Leekity, 334 F.Supp. 370 (D.N.M. 1971).

[15] Fifty-eight published decisions are annotated as of 1978. *See* cases collected in 25 U.S.C.A. § 1302 (West Cum. Supp. 1978).

[16] Means v. Wilson, 522 F.2d 833 (8th Cir. 1974), *cert. denied* 424 U.S. 958 (1975); United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1975), *cert. denied*, 421 U.S. 999 (1975); Thompson v. Tonasket, 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 414 U.S. 871, 95 S.Ct. 132 (1974).

[17] 436 U.S. 49 (1978).

[18] *Id.* at 59. "Nothing on the face . . . . of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief."

[19] As to the tribe, the court said, "In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit." *Id.* at 59. As to tribal officers, *see* the discussion *Id.* at 59-70.

[20] *Id.* at 65-66, 71-72. Williams v. Lee, 358 U.S. 217 (1958). United States v. Quiver, 241 U.S. 601 (1916); Jones v. Meehan, 175 U.S. 1 (1899); Roff v. Burney, 168 U.S. 218 (1897); United States v. Kagama, 118 U.S. 375 (1886). The opinion restates the familiar language of Worcester v. Georgia, 31 U.S. (6 Pet.) 515

Martinez was not only the first ICRA case decided by the high court, but with the exception of habeas corpus cases, it well may be the last.

This article first examines the *Martinez* decision and some of the consequnces of the absence of federal jurisdiction to enforce the substantive provisions of the ICRA. The article then addresses the ability of tribal courts to undertake responsibility as the primary enforcement mechanism for the ICRA. It particularly discusses the authority and practical ability of tribal courts to exercise judicial review over the actions of tribal councils.

Since much of the earlier litigation under the ICRA involved challenges to the actions of tribal councils, *Martinez* is likely to result in increased pressure on the tribal court system to adjuciate ICRA complaints against the councils. Judicial review of legislative actions, however, is outside the experience of most tribal courts. The article focuses, therefore, on the resultant political and practical consequences of the absence of the peculiarly American institution of judical review of legislative decisions within the Indian tradition. It considers the institution of judicial review from a non-American perspective and then takes a case study of an attempt by the Navajo courts to exercise judicial review in the face of opposition from the tribal council.

The last section of the article considers the potential threat to tribal autonomy arising from the possibility of congressional amendment to the ICRA to authorize federal judicial remedies. This may act as a spur to improving tribal response to the ICRA and several methods are suggested by which the tribes could deal more effectively with ICRA violations within the traditions and present structure of tribal government. Finally, the article examines the existing threat to tribal autonomy arising from the view of the Interior Department that *Martinez* mandates

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(1832), that Indian tribes are 'distinct independent political communities retaining their original natural rights,' and goes on to recite the cases holding that Indian tribes retain the power of regulating their internal and social relations, making their own substantive laws in internal matters and enforcing that law in their own forums. United States v. Kagama, 118 U.S. 375 (1886); United States v. Wheeler, ___ U.S. ___, 98 S.Ct. 1079 (1978); Roff v. Burney, 168 U.S. 218 (1897); Jones v. Meehan, 175 U.S. 1 (1899); United States v. Quiver, 241 U.S. 602 (1916); Williams v. Lee, 358 U.S. 217 (1958). For some current views on the status of tribal sovereignty theory, *see* Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 Hastings L. J. 89; Werhan, *The Sovereignty of Indian Tribes: A Reaffirmation and Strengthening in the 1970's*, 54 NOTRE DAME LAW. 5.

that it intervene in tribal government in order to fill what it perceives to be the jurisdictional void left by the decision. That claim is critically examined. The article concludes that the objectives of the ICRA can be attained without compromising tribal autonomy by federal intervention.

I. The Martinez Decision

The holding of the Supreme Court in *Santa Clara Pueblo v. Martinez*[21] came as a surprise to many observers. Few expected the Court to invalidate ten years of decisionmaking by the lower federal courts.[22] The decision turned on the Court's reading of congressional intent underlying the ICRA: preservation of individual rights within tribal government.[23] The case is, therefore, a major restatement of the vitality of tribal sovereignty.

In *Martinez* the Santa Clara Pueblo petitioned from a Tenth Circuit decision holding the Pueblo's membership ordinance violated the ICRA's equal protection guaranty. The Pueblo raised fundamental jurisdictional questions by motion to dismiss, which were denied by the district court[24] and the Tenth Circuit.[25] The lower courts then decided the case on the merits.[26]

When the Supreme Court granted certiorari in *Martinez*,[27] most observers focused their attention on the equal protection issue. The question was whether a tribal ordinance which admitted into membership the offspring of male members who married outside the Pueblo, while denying membership to offspring of female members who married outside the Pueblo could stand under the ICRA.[28] The question was intriguing because the validity of tribal classifications which discriminate between the sexes on the basis of traditional values and beliefs was at issue.

In the Supreme Court, however, the Pueblo not only defended the legality of its ordinance, but also renewed its jurisdictional challenge. The ICRA, it asserted, vested no jurisdiction in federal courts except for writs of habeas corpus. The Pueblo argued further that the Act created no federal cause of action and did not

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[21] 436 U.S. 49 (1978).

[22] *See generally,* cases collected in 25 U.S.C.A. § 1302 (West Cum. Supp. 1978).

[23] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-72 (1978).

[24] Martinez v. Santa Clara Pueblo, 402 F.Supp. 5 (D. N.M. 1975).

[25] Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976).

[26] Martinez v. Santa Clara Pueblo, 402 F.Supp. 5 (D. N.M. 1975); Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976).

[27] Santa Clara Pueblo v. Martinez, 431 U.S. 913 (1977).

[28] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51-52 (1978).

waive tribal immunity from suit.[29] While these claims had been made in earlier cases under the ICRA, they had been uniformly denied.[30] These holdings had provoked some critical comment,[31] but most observers felt that these issues were clearly settled. Given the unanimity of four circuits on this issue,[32] most felt the Supreme Court was not likely to upset the jurisdictional apple cart. In a 7 to 1 decision, however, the Court ruled that the ICRA did not give federal courts jurisdiction over Indian tribes or their officers, except for the narrow remedy of habeas corpus to test the legality of detention.[33]

Justice Marshall, speaking for the Court, first considered the question of whether the ICRA waived tribal immunity from suit.[34] Despite the fact that four circuits had found waiver by implication, Justice Marshall disagreed and ruled that waiver of sovereign immunity cannot be implied. Intent to waive immunity must be "unequivocally expressed."[35] Since there is nothing in the Act expressing waiver, the tribe remained immune from suit.[36]

Justice Marshall analyzed the issue of tribal officers' liability under the ICRA differently, however, since tribal officers do not enjoy absolute immunity from suit.[37] The analysis dealt not with

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[29] *Id.*

[30] Luxon v. Rosebud Sioux Tribe, 337 F.Supp. 243 (D. S.D. 1971), 455 F.2d 698 (8th Cir. 1974); Loncassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971); Solomon v. La Rosa, 335 F. Supp. 715 (D. Neb. 1971); Spotted Eagle v. Blackfeet Tribe, 301 F.Supp. 85 (D. Mont. 1969); Dodge v. Nakai, 298 F.Supp. 17, 26 (D. Ariz. 1968).

[31] Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Constructon of the Indian Civil Rights Act,* 20 S.D.L.REV. 1 (1975); Note, *Implication of Civil Remedies Under The Indian Civil Rights Act,* 75 MICH. L. REV. 210 (1976).

[32] Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974); Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973); Luxon v. Rosebud Sioux Tribe, 337 F.Supp. 243 (D. S.D. 1971) *aff'd,* 455 F.2d 698 (8th Cir. 1972) *supra,* n.4.

[33] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

[34] *Id.* at 58-59.

[35] *Id.*, citing United States v. Testan, 424 U.S. 392 (1976).

[36] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

[37] *Id.* The Court's flat statement that one of the officers of the Pueblo was "not protected by the Tribe's immunity from suit" must be understood to mean that the officer does not have the absolute immunity of the Tribe. His immunity may be lost, for purposes of constitutional challenge, under the doctrine that an official who acts unconstitutionally is "stripped of his official character." *Id.* at 59, *citing* Ex Parte Young, 209 U.S. 123 (1908). However, Justice Marshall's citation of *Puyallup Tribe, Inc. v. Washington Department of Game,* 433 U.S.

whether the Act waived immunity, but rather with whether it implied a cause of action against tribal officials. The lower courts had overcome that obstacle by implying a cause of action.[38] But the Supreme Court, concerned over the interference with tribal autonomy which such an implication would create, turned to the legislative history of the ICRA to determine whether there was congressional intent to either create or deny a remedy.[39]

The Court, in analyzing the ICRA's legislative history found two separate but competing purposes for the ICRA: to impose protections for individual members of the tribes and to further Indian tribal self-government.[40] While implying a cause of action might further the former purpose, it would disserve the latter. The Court observed, for example, that implication of a remedy would impose serious financial burdens on already financially disadvantaged tribes.[41] Furthermore, citing, *Fisher v. District Court,*[42] the Court pointed out that resolution of a dispute arising on the reservation, affecting reservation Indians in a non-tribal forum might undermine the authority of the tribal court and thereby infringe on the right of Indians to govern themselves.[43] Such an infringement would constitute a greater interference with tribal autonomy and self government than the change effected by the ICRA in the substantive law. The Court concluded that the legislative history of the Act did not support the creation of a federal cause of action and indeed, would actually conflict with the congressional goal of protecting tribal self government.[44]

The Court rejected the argument that without federal court review, the substantive provisions of the ICRA would be mean-

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165 (1977) for the same proposition is puzzling since that case does not deal with the immunity of tribal officers and merely holds that tribal members have no immunity from suit. *Id.* Tribal officers have been held to enjoy the same immunity as other public officers when acting within the scope of their authority. Graves v. White Mountain Apache Tribe, 570 P.2d 804 (Az. 1977); White Mountain Apache Tribe v. Shelley, 480 P.2d 654 (Az. 1971); Davis v. Littell, 398 F.2d 83 (9th Cir. 1968).

[38] *See* note 13 *supra.*

[39] The Court thus followed the test enunciated in Cort v. Ash, 422 U.S. 66 (1975).

[40] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978). The Court stated, "In addition to its objective of strengthening the position of individual members vis-a-vis the tribe, Congress also intended to promote the well-established federal policy of furthering Indian self-government." *Id.* at 62.

[41] *Id.* at 60.

[42] 424 U.S. 382 (1976).

[43] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

[44] *Id.* at 72.

ingless, as lower courts had reasoned in ICRA cases. In a key passage,[45] the Court pointed out that the tribes' own forum might include both tribal courts and other, nonjudicial tribal institutions.[46]

In support, the Court noted that in 1973 there were 117 operating tribal courts which handled approximately 70,000 cases.[47] In some circumstances these tribal court decisions were found to be entitled to full faith and credit.[48] The Court emphasized that tribal courts were not the only appropriate forums, pointing out that the Santa Clara Pueblo had vested judicial authority in its tribal council by the terms of its constitution,[49] which had been approved by the Secretary of the Interior under the Indian Reorganization Act of 1934.[50]

Thus, the Supreme Court concluded that a federal judicial remedy was not essential to the effectiveness of the ICRA.[51] Rather the effectiveness of the ICRA would be realized within the framework of tribal government. The ICRA would not only guide the tribal government's actions and decisions, but would also challenge tribal governments to provide forums within which individual members could vindicate grievances under the Act.[52]

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[45] The Court states:

> Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. [citations omitted] Nonjudicial tribal institutions have also been recognized as competent law applying bodies. [citations omitted] Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.

Id. at 65-66.

[46] *Id.*

[47] *Id.* n.21.

[48] *Id.*

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

[50] 25 U.S.C. § 476 (1970).

[51] *See* note 45 *supra.*

[52] As the Court noted, Congress retains control to change the situation. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1976). Thus, the tribes have an incentive to provide effective redress. *See* discussion in text accompanying notes 126-128, *infra.*

Henceforth tribal councils and tribal courts would play the major roles in protecting and adjudicating individual rights in tribal life.[53]

The *Martinez* decision, however, emphasizes the need to understand the political structure of tribal governments. It would be a mistake to assume that tribal government's institutions will function like their counterparts in American government. There are crucial differences which require consideration. Furthermore, the elimination of federal court review appears to have made administrative intervention in tribal government by the Department of the Interior more likely. Both of these matters raise serious and difficult questions which the remaining sections discuss.

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[53] Since the decision holds there is no federal jurisdiction, all pending cases are subject to dismissal and a number have been dismissed. *See, e.g.,* Mousseaux v. Rosebud Sioux Tribe, 582 F.2d 1287 (8th Cir. 1978), reported in 5 I.L.R. C-34; Crowe v. Eastern Band of Cherokee Indians, Inc., No. 77-2631 (4th Cir. Sept. 28, 1978) reported in 5 Indian L. Rep. (hereinafter I.L.R.) § B at 26; Sturdevant v. Wilbur, No. 75-C-381 (E.D. Wisc. 1978), reported in 5 I.L.R. at 176; Salt River Project Agricultural Improvement & Power Dist. v. Navajo, Civ. No. 78-352 Phx. WPC (D. Ariz. 1978), reported in 5 I.L.R. § F at 116, (appeal pending); Boe v. Fort Belknap Indian Community of Fort Belknap Reservation, No. CV 78-10-GF (D. Mont. 1978); Olympic Pipeline Co. v. Swinomish Tribal Community, No. C 76-550V (D. Wash. 1978) (the ICRA claim was dismissed, but the plaintiff's counterclaim to the Tribe's complaint was allowed to stand); Wardle v. Ute Indian Tribe, No. C 74-330 (D. Utah 1978), reported in 5 I.L.R. § L at 20 (appeal pending). Since the decision in Martinez did not limit its retroactivity, presumably it will be retroactive in effect. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964); Great Northern R. R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932). At least three federal district courts have so ruled. Sturdevant v. Wilbur, No. 75-C-381 (E.D. Wisc. 1978); Mousseaux v. Rosebud Sioux Tribe, 582 F.2d 1287 (8th Cir. 1978); reported in 5 I.L.R. § C at 34; Dry Creek Lodge, 415 F.2d 926 (10th Cir. 1975); *on remand sub. nom.* Dry Creek Lodge, Inc. v. Canan, No. C-74-74A (D. Wyo. 1978), (appeal pending). In Dry Creek Lodge, the Martinez decision resulted in the trial court vacating a $525,000 verdict which had been awarded against the Shoshone-Arapahoe Tribes of the Wind River Reservation. *Id.*

Absent any jurisdiction, and given the retroactivity of Martinez, prior federal decisions would appear to be a nullity. *See* United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 513-514 (1939), holding that where an Indian tribe has been subjected to an adjudication in the absence of congressional waiver of sovereign immunity, the attempted exercise of judicial power is void.

One question of importance to tribal government is the weight to be given prior substantive rulings under the ICRA. While those decisions may no longer stand as conclusive and binding interpretations of the ICRA, they cannot safely be ignored. *See* Note, *Indian Law: The Application of the One-Man-One-Vote Standard of Baker v. Carr to Tribal Elections,* 58 MINN.L.REV. 668 (1974).

II. ICRA Enforcement Under Tribal Government

After *Martinez,* a fundamental problem with tribal enforcement of the ICRA still remains: which governmental entity will decide the legality of the acts of the tribal council? Because of the political and constitutional position of the tribal courts and council in tribal government, it may not be feasible for tribal courts to exercise the traditional American power of judicial review over council action. A functional analysis of tribal courts and tribal councils strongly suggests that in most cases judicial review is inappropriate—at least for the present. The attempt of the Navajo courts to exercise that power and the internal governmental strife which ensued is examined as a case study illustrating the general problem.

A. *Judicial Review in the American and Tribal Contexts.*

The United States Supreme Court exercises a power of judicial review of legislative actions unique in its scope compared to the judiciary of other nations.[54] Unlike most foreign judicial bodies, the American judiciary has the power to void legislative acts which conflict with the Constitution.[55] Although the United States Constitution nowhere expressly delegates this review power to the judiciary, nevertheless, since Chief Justice Marshall's opinion in *Marbury v. Madison,*[56] it has become well established in American jurisprudence.[57]

The American system of judicial review of legislative action is perhaps most attributable to the system of checks and balances created by the United States Constitution. Since the Constitution created the Supreme Court,[58] the Court does not owe its existence to the legislative body. Moreover, the Constitution mandates a separate federal judiciary.[59] The Constitution thus lays the foundation for the judicial independence vital to the effective exercise of judicial review of legislative actions.

In addition to the constitutional establishment of an independent judiciary as a coordinate branch of government,[60] there also existed a fundamental notion in American jurisprudence that the

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[54] *See* R. McCloskey, The American Supreme Court, 225 (1960).

[55] *See generally,* J. Nowak, R. Rotunda & J. Young, Constitutional Law, 1-22 (1978); L. Tribe, American Constitutional Law, 20-156 (1978).

[56] 5 U.S. (1 Cranch) 137 (1803).

[57] *See* R. McCloskey, *supra* note 54, at 77-80; J. Nowak, *supra* note 55, at 1.

[58] U.S. Const., art. III, § 1.

[59] *Id.*

[60] *See* text accompanying notes 54-60, *supra.*

legislature is bound by a "higher law"[61] at the time the judiciary adopted the notion of judicial review.[62] Moreover, this fundamental concept was considered to underlay the Constitution. Thus, it was the source of what Professor McCloskey described as the dualism between popular sovereignty and the doctrine of fundamental law.[63] In essence, the Court is the "guardian" of the fundamental law, yet, it is ultimately dependent on public acceptance for the legitimacy of its power. Thus, the successful development of judicial review has required thoughtful restraint by the Supreme Court and care not to overestimate its power.[64]

When we turn to tribal court systems, sharp contrasts are immediately apparent. Most tribal courts owe their existence to the tribe's legislative bodies.[65] Rather than providing for coequal branches, tribal constitutions generally assign the central role in tribal government to the tribal council. Tribal courts are, for the most part, the creatures of ordinances enacted by the tribal council.[66] Consequently, a different relationship exists between the legislature and judiciary in Indian and American governments. Historically, the role of tribal courts in tribal government has been quite limited. Furthermore, few tribal judges have had any formal training in law. This seriously undermines the respect of tribal members and other agencies of tribal government for the tribal courts.[66.1] Tribal courts, therefore, do not enjoy the general presumption accorded American judges that their decisions are the product of a learned and impartial application of systematic principles to the case before them.

Tribal councils are generally the central repositories of power on the reservation. Most tribal constitutions delegate to the tribal council the power to manage the economic affairs of the tribe,

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[61] MCCLOSKEY, *supra* note 54 at 11-16; *See also* NOWAK, *supra* note 55, at 11-14.

[61.1] *See,* AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS, 68 (1977). (Hereinafter cited as INDIAN SELF-DETERMINATION.) This study showed that 11 of 76 chief judges of tribal courts surveyed had less than a high school education and only 12 had any legal training.

[62] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[63] MCCLOSKEY, *supra* note 54, at 11-13.

[64] *Id.* at 225.

[65] *See,* NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS AND THE FUTURE—REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT, 37-40 (1978) (hereinafter cited as INDIAN COURTS).

[66] *Id.*

[66.1] Indeed, the Navajo Court of Appeals expressly rested its claim of the power of judicial review on this ground among others in *Halona v. MacDonald* (Navajo Nation Ct. App. filed Jan. 24, 1978) reported in 5 Indian L. Rep. § m at 119 (1978).

provide for law and order and the general welfare of the tribe. Councils function as legislative bodies and frequently as executive and quasi-judicial bodies dealing with individual requests and complaints of members as well as public issues. In addition to their political function, councils function in the business and economic sphere in the same manner as a corporate board of directors: planning, authorizing contracts and expenditures and setting policies. The council usually has power to hire and fire key tribal employees, such as the executive director or business manager, department heads and tribal judges. The council frequently establishes committees, usually headed by a council member, to oversee specific programs and projects in such areas of land and forestry management, finance, leasing, adoption, election procedures, law and order, hunting and fishing, and the like. The council thus has control over a great deal of employment and appointment to tribal governmental positions.

As a practical political matter, moreover, tribal councils tend to be intolerant of any action of other organs of tribal government which appears to challenge their authority. They usually regard themselves as representing the tribe and being the voice of the tribe. For most purposes, the council is the government.

Challenges to council actions, however, occur frequently. Indeed, a review of the pre-*Martinez* cases brought under the ICRA discloses that most involved precisely such challenges in the areas of election procedures, legislative apportionment, qualification and standards for office, tribal membership, and voting.[67] Since *Martinez* has now relegated resolution of ICRA disputes to tribal government,[68] those who challenge the actions of tribal councils in the future will no doubt argue that it is inappropriate for the council to sit as judge of the legality of its own actions. Many will seek to have tribal courts assume the power of judicial review of council action. An examination of the modern history of tribal government suggests that such judicial review is inconsistent with the traditions and the structure of tribal government and is likely to lead to disruptive conflict. In order to understand the difficulties associated with judicial review in tribal government, it is important to examine the origins of the modern tribal courts.

While Indian societies had their own laws and institutions for dealing with anti-social conduct before contact with Anglo-American culture, these institutions and codes gradually disappeared under federal "civilizing" policies.[69] The tribal court system was an outgrowth of the concept of Indian police. An Indian

[67] *See* cases collected in 25 U.S.C.A. §§ 1302-03 (West Cum. Supp. 1978).
[68] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978).
[69] *Supra* note 61.1, at 13-17.

agent established the first regular police force in 1874 on the San Carlos Apache Reservation.[70] Its effectiveness encouraged the establishment of similar Indian police forces on other reservations. The practice took on congressional approval under an 1878 Appropriations Act.[71]

While the official establishment of Indian police in 1878 made no provision for the trial and punishment of offenders, it was the common practice for the Indian agent to act as judge, or to delegate this duty to another subordinate or to a trusted Indian. In 1884, the Secretary of the Interior authorized the establishment of Courts of Indian Offenses, which were soon placed in operation on about two-thirds of the reservations.[72] Indian judges were appointed by agents, who thereafter exercised considerable control over them. These courts operated under Interior Department regulations.[73]

In 1934 Congress passed the Indian Reorganization Act (IRA)[74] to provide a framework for tribes to reestablish their governmental status. Many tribes adopted tribal constitutions under the Act. For the most part, the Interior Department drafted these constitutions. They generally provided for a council elected by tribal membership, which would exercise primary governing authority. They also provided for establishment of a tribal court system and judicial codes *if* the *council* so provided by ordinance. By 1935, most tribes had functioning tribal courts or Courts of Indian Offenses.[75]

Thus, at their inception, the tribal courts were subordinate to the tribal councils which created them. More recently, tribal courts on some reservations have established a degree of judicial independence. Nonetheless, while support for tribal courts is increasing they are still considered a subordinate arm of tribal government on a substantial proportion of the reservations.[76] For example in a 1977 survey, it was found that tribal judges were appointed by the tribal council on 64 reservations and elected by the membership at large only on 19 reservations.[77] Moreover,

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[70] *See* W. HAGAN, INDIAN POLICE AND JUDGES, 27-39 (1966) (hereinafter cited as HAGAN); Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act,* 9 HARV. J. LEGIS. 557, 558-570 (1972).

[71] *See* Hagan, note 70 *supra*, at 42.

[72] INDIAN SELF-DETERMINATION, *supra* note 61.1, at 17-18.

[73] *Id.* at 11-21.

[74] Act of June 18, 1934, Pub. L. 383, 48 Stat. 984 (current version at 25 U.S.C. §§ 461-492 (1976)).

[75] INDIAN SELF-DETERMINATION, *supra* note 61.1, at 27.

[76] INDIAN COURTS, *supra* note 60, at 40.

[77] *Id.* at 86.

many tribal courts report that it is not uncommon for political influence to be brought to bear upon them.[78]

In 1977 there were federally-recognized tribal court systems on 127 reservations.[79] In 1970 Indian judges formed the National American Indian Court Judges Association, whose function has been to organize judicial education programs for Indian court judges throughout the country and attempt to achieve greater separation of powers between the judicial and executive branches of Indian governments. About 200 tribal judges participated in regional seminars, taught by lawyers, judges and law professors, using case books and other publications specially prepared for Indian courts.[80]

Tribal courts, however, continue to function primarily to mete out punishment to misdemeanants. In a 1977 survey, most tribal courts reported that civil matters comprised less than ten percent of their caseload. The vast majority of these cases involved domestic relations and juvenile cases, with the balance comprised of contract, property and personal injury cases.[81] Unfortunately, most tribal judges have had little training in substantive and procedural civil law and feel ill-equipped to handle these cases.[82]

While tribal courts have acquired substantial familiarity with criminal due process concepts, they have had little experience with the body of constitutinal law applicable to individual liberties in the civil context of the first,[83] fifth[84] and fourteenth amendments.[85] This is not to say that tribal judges have no understanding of these matters, for no doubt many do. But most tribal judges will have great difficulty applying American constitutional analysis to the actions of the tribal councils. They will need substantial training, at least equivalent to what they have received in the area of criminal law.[86]

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[78] *Id.* at 70, 94. *See also,* BRAKEL, AMERICAN INDIAN TRIBAL COURTS, THE COSTS OF SEPARATE JUSTICE (1978). (The author is a severe critic of tribal courts and the continued existence of Indian reservations and tribal government.)

[79] Indian Courts *supra* note 65, at 36.

[80] Collins, Johnson, and Perkins, *American Indian Courts and Tribal Self-Government,* 63 A.B.A.J. 808 (1970).

[81] INDIAN COURTS, *supra* note 60, at 47; INDIAN SELF-DETERMINATION, *supra* note 61.1, at 46-47.

[82] INDIAN COURTS, *supra* note 60, at 47.

[83] U.S. CONST., amend. I.

[84] *Id.*, amend. V.

[85] *Id.*, amend. XIV.

[86] The National American Indian Court Judges Association, in their 1978 long-range planning project call for training programs in judicial review of tribal legislation. INDIAN COURTS, *supra* note 60, at 188. This is one of fifteen subjects

In addition to acquiring familiarity with American constitutional concepts, given the political organization of tribal government, tribal judges must familiarize themselves with the methods of judicial restraint developed in the American legal system. Otherwise, tribal judges will risk destructive clashes with their tribal councils. The development of judicial restraint by the federal courts exemplifies the need of tribal courts, also, to understand the need for judicial restraint if they are to review legislative action.

Indeed, in tribal government, since the judiciary is dependent upon election by the tribal members or council, development of judicial restraint is even more necessary to avoid conflicts with the legislative body which presumably reflects the popular will. Relevant judicial doctrines developed by the United States Supreme Court include avoiding constitutional issues wherever possible,[87] resting decisions on non-constitutional grounds when possible,[88] showing deference to the legislative judgment in policy matters,[89] and avoiding hypothetical or moot constitutional questions.[90] The political question doctrine would be a particularly useful one for tribal courts, since it is designed to avoid judicial invasion of the legitimate province of the legislative body.

Judicial review is ultimately a delicate institution. Courts must exercise restraint and remain sensitive to the popular will, particularly until the doctrine becomes well established. The tribal judicial system must continue to recognize that it is not yet a coequal branch of government. Because Indian tribes lack a tradition of judicial review, their courts may encounter serious difficulties in identifying the requisite boundaries of the doctrine while simultaneously discharging their responsibilities under the ICRA.

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proposed for future training curricula. The National Judicial College at Reno, Nevada, has been participating jointly with the National American Indian Court Judges Association in training seminars for Indian tribal judges in such areas as evidence, contracts and trial court procedures.

[87] *See, e.g.*, TRIBE, *supra* note 55, at 120-29.

[88] TRIBE, *supra* note 55, at 56. For a discussion on the extent to which this restraint may vary given the Court's makeup, *see* E. BARRETT, CONSTITUTIONAL LAW 63 (1977).

[89] *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972).

[90] *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974). *See generally* L. TRIBE, *supra* note 55, at 54, 56-57, 62-68.

[91] *See generally* J. NOWAK, *supra* note 55, at 100-111; and TRIBE, *supra* note 55, at 71-79. Historically, the "political question" doctrine has been one of the Supreme Court's major tools of judicial restraint. The Court will refrain from deciding issues which would require the invasion of the legitimate province of a coordinate branch of government. Although the future of the political question

Moreover, most tribal judges at present are likely to feel that they are without power to effectively overrule any action of the tribal council. This may be changing, however, as more lawyers, or people with some legal training, come to preside over tribal courts. But such people may also rashly assume that the American model of judicial review is the sole means for resolution of intragovernmental disagreement. Failure to appreciate the unique milieu in which tribal courts function could lead tribal courts to exacerbate tribal strife rather than alleviate it.[92] Furthermore, a glance at the legal systems of other countries suggests that judicial review of legislative action is not a necessary component of an effective and equitable legal system.

Judicial review of legislation has not been characteristic of most legal systems outside of the United States.[93] In Europe and Japan, there is, however, a centralized system which divorces judicial review from ordinary litigation and confines it to special proceedings brought directly before a constitutional court.[94] In England, Parliament is supreme and the courts do not question the constitutionality of its action. Accordingly, in the Commonwealth countries, judicial review has been exercised very sparingly.[95]

Although most of the Latin American republics provide for some sort of judicial review, in practice it is rarely exercised. Those countries have developed highly refined versions of the political question doctrine.[96] In Africa, where strong central gov-

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doctrine is in doubt, in light of the Court's decision in Baker v. Carr, 369 U.S. 186, 1962, the principles underlying the doctrine are nevertheless useful for avoiding disruptive conflict between the judicial and legislative branches of government. *Id.* at 217. Thus, tribal courts should heed the teachings of American judicial review. *See* Sharp, *Judicial Review & A Functional Analysis,* 75 YALE L.J. 517 (1966); *cf.* Hankin, *Is There a "Political Question" Doctrine?,* 85 YALE L.J. 597 (1976).

[92] *See* discussion accompanying notes 102-125, *infra.*

[93] Judicial review of administrative action is, of course, a wholly different matter.

[94] *See* Bishin, *Judicial Review in Democratic Theory,* 50 So.CAL. L.REV. 1099 (1977). Civil law countries have resorted to this system because they conceive of the process of determining constitutionality as a political function, and therefore unsuitable for the ordinary judiciary. This approach has been adopted in the Federal Republic of Germany, Japan, Norway, Denmark, Sweden, Austria and Switzerland. *See* Cappelleti, *Fundamental Guarantees of the Parties In Civil Litigation; Comparative Constitutional and Social Trends,* 25 STAN. L.R. 651 (1973).

[95] McWhinney, *Constitutional Review in Canada and the Commonwealth Countries,* 35 OHIO ST. L.J. 900, n.30 (1974).

[96] "Constitutions, like virgins, are born to be violated," goes a Latin American

ernments characterize the political systems, court decisions have rarely opposed governmental action.[97]

While some students admire the American institution of judicial review, others are critical. Professor Schmeiser of Canada argues that fundamental rights always involve the question of where to draw the line and this, he says, is basically a policy question, not a legal one.[98] He points to the United States Supreme Court's dramatic reversals of position over time in such areas as regulation of the conditions of employment of wage earners[99] and racial segregation.[100] Professor Schmeiser further argues that judicial review fosters litigation, since an attack on the constitutional validity of legislation is always possible. This, he says, has given rise to literally thousands of cases containing frivolous allegations of unconstitutionality.[101]

The total absence or restricted versions of the doctrine of judicial review in other countries suggests that it may not be absolutely necessary for the protection of fundamental human rights. It is a complex and difficult undertaking for courts in even the most advanced countries to overrule acts of the lawmaking body in the absence of an established tradition of judical supremacy. For Indian tribes which have no such tradition, the exercise of judicial review by a tribal court, may well lead to a confrontation. Such an event occurred on the Navajo Reservation in 1978. The entire episode is worthy of careful study.

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quip. While some Latin American courts have struck down legislation they deem unconstitutional, it is recognized that this power is fragile. Judicial independence is rare in Latin America. *See* Rosenn, *Judicial Review In Latin America,* 35 OHIO ST. L.J. 785 (1974).

[97] While all of the Anglophonic constitutions were designed to protect democratic liberties, the whole system has been described as basically a failure in Africa. The protection of fundamental freedoms has depended on the independence of the judges and institutions, and properly trained civil service employees. Seidman, *Judicial Review and Fundamental Freedoms in Anglophonic America,* 35 OHIO ST. L.J. 820 (1974); Paul, *Some Observations on Constitutionalism, Judicial Review and Rule of Law in Africa,* 35 OHIO ST. L.J. 851 (1974).

[98] D. SCHMEISER, CIVIL LIBERTIES IN CANADA, at 26 (1964) (hereinafter SCHMEISER).

[99] *Cf.,* Lochner v. New York, 198 U.S. 45 (1905), holding wage and hour laws unconstitutional and West Coast Hotel Co. v. Parrish, 300 U.S. 370 (1937), *reversing* Lochner.

[100] *Cf.,* Plessy v. Ferguson, 163 U.S. 537 (1895), upholding the constitutionality of segregation statutes, and Brown v. Board of Education, 347 U.S. 483 (1954), *reversing* Plessy.

[101] SCHMEISER, *supra* note 97 at 22-36.

B. *Judicial Review in the Navajo Courts: A Case Study*

The Navajos have what is probably the most highly developed and sophisticated tribal judicial system among the tribal governments in the United States. While it is not characteristic, it serves as a model for other tribal judicial systems.

The Navajo Tribe operates without a tribal constitution, instead having an extensive and highly-formal tribal code, promulgated by the Navajo Tribal Council. An entire title of the Code is devoted to courts and procedure.[102] The judicial branch is treated as a separate branch of the Navajo tribal government, and consists of the Trial Court and the Court of Appeals.[103] The Code provides that all of the Trial judges, and the Chief Justice of the Navajo Court of Appeals are appointed by the Chairman of the Tribal Council with the approval of the Tribal Council.[104] The initial appointment of these judges is for a two-year probationary term. Thereafter, they are eligible for permanent appointment. This is done by action of the Tribal chairman with approval of the council. From then on, they have tenure "during good behavior" or until age 70. Removal is by action of the tribal council.[105]

The Code does not expressly give the tribal courts jurisdiction over claims brought against the Tribe, the Council or tribal officers. Jurisdiction is merely described as reaching, "All civil actions in which the defendant is an Indian and is found within its territorial jurisdiction."[106] On the other hand, there is no limitation of tribal court jurisdiction in the code with respect to such claims.

The confrontation between the Navajo Tribal Court and the Navajo Council may be said to have begun in 1973 when the Navajo Court considered the case of *Dennison v. Tucson Gas and Electric Co.*[107] A claim was brought by the members of a Navajo family against the tribal chairman, tribal employees, the Council, the Tribe, a public utility company and its contractor. The family claimed illegalities and improprieties in connection with a power

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[102] Title 7, N.T.C. (1977).

[103] 7 N.T.C. § 201 (1977).

[104] *Id.* §§ 251, 301. The code's statement of background explains that the decision to change from elected to appointed judges was based on the desire to remove the judges from the pressure of politics in making decisions and enforcing the law. History, at 278.

[105] 7 N.T.C. § 352 (1977).

[106] *Id.* § 253.

[107] No. A-CV-12-74 (Navajo Ct. App., filed Dec. 23, 1974) reported in 2 Indian L. Rep. No. 4, at 52 (1975).

line right-of-way. The case was ultimately decided by the Navajo Court of Appeals in 1974.

Employees of the Navajo Office of Land Administration and employees of the Bureau of Indian Affairs and Tucson Gas and Electric Company had negotiated with the plaintiffs and secured their written consent to construct a power line over their traditional use area. The plaintiffs had accepted the public utility company's check in the amount of $5,000 but had never cashed it. They brought their action to cancel their consent on the ground of fraud, deceit and duress, and sought to enjoin all the defendants from trespass to their property. They also asked for punitive damages and offered to return the uncashed check.

Pointing out that the case involved the exercise of the power of eminent domain, the court found that all of the defendants had acted in disregard of Navajo statutory procedures in undertaking to negotiate a private consent with the plaintiffs. The court made no finding on the claim that the plaintiffs' consent was procured by "fraud, deceit and duress". Instead, the Court of Appeals found the written consent a nullity. The opinion chastised all those who had part in the transaction for ignoring the strict provision of Navajo law concerning the exercise of the power of eminent domain.

The court rejected the tribal officials' claim that they were shielded by the Tribe's sovereign immunity. In holding that tribal officials acted beyond their authority in attempting to negotiate a private consent to a right-of-way, the Court had, in effect, held that their acts were *ultra vires.* The court not only rejected the sovereign immunity defense, it expressed indignation and contempt that the defense would even be raised, saying:

> This court has always upheld and presently does uphold the sovereign immunity doctrine of the Navajo Nation, but for anyone to seriously impose that defense under the facts of this case causes concern among the court, regarding the competency of the legal advisors to the prosecutor and the competency of the legal advisers (sic) to the office of the Navajo land administration. *All that the plaintiffs would be entitled to from the Navajo Nation under the statute, in any event, would be, just compensation.* How could they be deprived of this simpy because some officials and employees in the executiv branch, to put it mildly, neglected to follow the law?[108]

The court's view of sovereign immunity seemed to be that since the plaintiffs were absolutely entitled to just compensation, they were not asking for anything from the Navajo Nation beyond what the Nation has already conceded to be their right—in effect,

[108] *Id.* at 55.

a waiver of immunity. In this respect, the court's opinion is in agreement with that of numerous state courts which have considered similar questions.[109]

The *Dennison* decision, however, seems to have been poorly thought out. It implied that a negotiated consent could never be lawful. Surely this was not the intention of the Navajo condemnation law. Indeed, it is doubtful that the court even intended such a sweeping rule. Furthermore, the court may have been remiss in not exercising restraint. Remanding for findings on the manner in which the consent was obtained might have led to a better result. The court seemed over-eager to chastise tribal officials, and this resulted in a decision which confused Navajo eminent domain law.

In *Dennison* the Navajo court was adjudicating the legality of executive rather than legislative action. However, its boldness in striking down the action of the Chairman of the Council as well as brushing aside the Chairman's claim of sovereign immunity no doubt had much to do with its confidence in approaching the problem of judicial review of Council action which was to come before it in 1978. *Dennison* may be seen as an important stepping-stone to the exercise of judicial review in the 1978 decision of *Halona v. MacDonald*.[110]

Halona v. MacDonald was an action brought by several tribal members, including some members of the Tribal Council, to enjoin an appropriation voted by the Tribal Council to pay the legal expenses of the Chairman, Peter MacDonald. Mr. MacDonald had been indicted for misapplication of tribal funds. He had retained a noted criminal attorney, to represent him, and the Council passed a resolution appropriating $70,000 in tribal funds to pay the attorney. The suit sought to enjoin the expenditure of any portion of the appropriation.

The plaintiffs contended that the Council's appropriation of funds was invalid because the measure had not first been submitted to the Budget and Finance Committee on the Council. A general ordinance of the Council requiring all appropriations to be so referred had been adopted only two months earlier. But the defendants claimed that the tribal court had no authority to review the legality of actions of the Council.

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[109] Boxberger v. State Highway Dept., 126 Colo. 438, 250 P.2d 1007 (1952); Anselmo v. Cox, 135 Conn. 78, 60 A.2d 767 (1948), *cert. denied* 335 U.S. 859; Grant Const. Co. v. Burns, 92 Idaho 408, 443 P.2d 1005 (1968); Ancelle v. State, 212 La. 1069, 34 So.2d 321 (1948).

[110] Navajo Ct. App. (filed Jan. 24, 1978) reported in 5 INDIAN L. REP. § M at 12 (1978).

The court squarely faced this challenge and ruled that it had such power. First, the court held that the Navajo Tribal Code did not exclude judicial review of council action. The court relied most heavily on the Indian Civil Rights Act, however, viewing it as a mandate for judicial review of any allegedly illegal activities by tribal government. The Navajo Court said, "We cannot imagine how any legislative body accused of violating these primary rights could be the judge of its own actions and at the same time comply with the federal law."[111]

The Navajo Court also attempted to claim that the doctrine of judicial supremacy had the hallowed status of Navajo traditon, stating:

> When all have been heard and the decision is made, it is respected. This has been the Navajo way since before the time of the present judicial system. The Navajo people did not learn this principle from the white man. They have carried it with them through history.[112]

Further, the court pointed out, if the Tribal Court cannot exercise this power, the only alternative is federal court review. In what seemed to be a message to the Council, the court said it was inconceivable that the Council would prefer review of its actions by "far-away federal courts unfamiliar with Navajo customs and laws" to review by the Navajo court. Finally, the court drew on the absence of legislative interference with the court jurisdiction following its decision in *Dennison,* concluding that acquiescence meant Council approval.

Having disposed of challenges to its right to decide the issue, the court ruled on the merits that the failure to submit the appropriation to the Budget and Finance Committee was fatal to the legislation. The court viewed its *ad hoc* character, making no reference to prior legislative procedure either repudiating or suspending the prior procedural ordinance, as raising a due process issue. To the court, due process apparently meant deliberate legislative action with full acknowledgment of and harmony with existing law.

The court suggested it was really avoiding disrespect to the Council by upholding its procedural ordinance while striking down its conflicting *ad hoc* ordinance. It rejected the argument that, in the absence of a constitution, prior legislation stood on no higher plane than the subsequent legislation and was thus impliedly amended or repealed. The court found that the "higher law" here was the due process clause in the Indian Civil Rights

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[111] *Id.* at 16.

[112] *Id.*

Act and that failure to give heed to this law could result in federal intervention to correct violations of federal law.

One may question whether the Navajo court in *Halona* decided the case wisely. The defendants had strongly argued that the issue was nonjusticiable—that it presented a political question which was not subject to judicial review. In the American legal system, the political question argument would carry great weight where the issue was whether a legislative appropriation of funds, otherwise validly enacted, could be struck down because of failure to submit it to a legislative committee, as required by a prior law.[113]

Regardless of how one views the wisdom or correctness of the decision, it is clear that the court was determined to establish its judicial supremacy. Its opinion pulled out all the stops; invoking the "higher law" of Navajo tradition,[114] the federal Indian Civil Rights Act,[115] the duty of the judiciary, the sanctity of the Council's own general laws and finally, suggesting that the Council could validily enact such an appropriations ordinance if it expressly recited that it suspended prior review procedures required by prior law. *Halona v. MacDonald* is the *Marbury v. Madison*[116] of Navajo jurisprudence. But the power which the Navajo court claimed for itself was soon to be taken from it by the Council.

The *Halona* decision made it clear that the tribal courts claimed judicial supremacy. Pending before the Tribal Court was a voting reapportionment plan which had been adopted by the Council. The *Halona* decision and the possibility that the Tribal Court would strike down the council's reapportionment plan triggered Council action. On January 27, 1978, the Tribal Council enacted a resolution stripping the tribal courts of jurisdiction over reapportionment plans and authority to determine the validity of any resolution of the Council in the absence of a specific grant of jurisdiction.[117]

Undaunted, the Navajo tribal courts ignored the resolution and proceeded in two cases to override the Council and the executive branch of the Navajo government. In *Yazzie v. Navajo Tribal*

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[113] *Cf.* dictum in Baker v. Carr, 369 U.S. 186, 214 (1962), to the effect that the judiciary should be reluctant to inquire into compliance with the formalities of legislative procedure.

[114] Halona v. MacDonald, (Navajo Nation Ct. App. filed Jan. 24, 1978) reported in 5 INDIAN L. REP. § M at 119 (1978).

[115] 25 U.S.C. §§ 1301-1341 (1976).

[116] 5 U.S. (1 Cranch) 137 (1803).

[117] Navajo Tribal Council Resolution CJA-14-78 (Jan. 27, 1978) (on file U.C. Davis Law Review Office).

Board of Election Supervisors,[118] the tribal court struck down the Tribal Council's reapportionment plan and ordered the Board of Elections Supervisors to implement a court-designed reapportionment plan. Shortly thereafter, the Court of Appeals of the Navajo Nation in *Gudac v. Marianito, et al.*[119] enjoined executive branch officers from terminating the employment of the plaintiff, the Judicial Branch Fiscal Officer. The court ruled that the ICRA precluded the executive branch from applying its personnel policies to judiciary employees since this would threaten judicial independence.

The defiance of the Council's restriction of tribal court jurisdiction led to a grave crisis in Navajo government. The Judicial Committee of the Navajo Trial Council requested the assistance of Edgar S. and Jean Camper Cahn, co-deans of the Antioch School of Law, to help find a solution. After studying the legal, plitical and cultural issues, the Cahns submitted a report to the Committee.[120] They concluded that the Council had the power to limit the Tribal Court's jurisdiction but pointed out that this would not resolve the problem. The Court would still have to decide whether to apply the resolutions and ordinances of the Council, and if they found them invalid, they could frustrate Council action. They also pointed out that some of these tribal disputes would end up in the federal courts under the Indian Civil Rights Act.

The Cahns report proposed five alternatives: (1) do nothing further and operate under the existing ordinance restricting the power of judicial review, (2) accept judicial review by the tribal court, (3) terminate the entire tribal court system and return to traditional Navajo methods of settling disputes, (4) discharge four of the five judges who were in probationary status and provide for elected judges, and (5) create a special court inside the Tribal Council and take political cases out of the tribal courts.[121]

The Cahns discussed the advantages and disadvantages of each of the proposed alternatives. In the end, however, they recommended establishment of a special tribunal composed of both tribal judges and Council members to consider cases involving

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[118] No. WR-C-216-77 (Navajo Ct. App., filed Feb. 15 and Feb. 24, 1978) reported in 5 Indian L. Rep. § L at 6.

[119] (Navajo Ct. App., filed Feb. 28, 1978) reported in 5 Indian L. Rep. § L at 6.

[120] E. Cahn & J. Cahn, *Preliminary Report to the Judicial Committee of the Navajo Tribal Council* (on file in U.C. Davis Law Review Office) (hereinafter cited as Cahn.)

[121] *Id.* at 4-12.

the propriety of the actions of the Council or officials of the Tribe.[122] With some changes the Council adopted this recommendation. On May 4, 1978, the Council established a new Navajo judicial institution: the Supreme Judicial Council of the Navajo Tribal Council.[122.1]

The Navajos' solution preserved the principle of judicial review but overturned the principle of judicial supremacy. It did this in a curious way. The Navajo Supreme Judicial Council functions as a review body to hear challenges of Navajo Court of Appeals rulings regarding the validity of any action of the Tribal Council or its advisory committee. The Supreme Judicial Council has power to stay any challenged acti n of the Navajo trial court or Court of Appeals.

The Judicial Council consists of eight members: three judges and five Tribal Council members.[123] In addition, there are two panels of advisors, one composed of licensed attorneys and the other of persons learned in "Navajo law, custom, tradition and culture, including medicine men, retired judges, chapter officers, anthropologists, advocates, professors, and other professionals."[124] The Supreme Judicial Council is to designate one qualified member of each panel to sit on each case that comes before it and provide advice and assistance.

The Supreme Judicial Council has authority to function as a court: to issue writs, to stay actions and to issue decisions reversing or sustaining lower court decisions involving the validity of Council action. The ordinance creating the new institution contains an elaborate mechanism to insure that the Tribal Council is given a substantial opportunity to adopt any of the Supreme Judicial Council's recommendations. But most important, the Tribal Council retains ultimate sovereignty. This is accomplished by providing

> that the Navajo Tribal Council shall retain the ultimate authority to overturn a decision of the Supreme Judicial Council by a vote of a majority of its total membership and that vote shall be final and conclusive, subject only to review in federal court or by federal officials in accordance with federal law.[125]

Thus the Navajo Tribal Council repudiated the confident assertions of the Navajo Trial Court in *Halona* that it alone could properly pass on the legality of Council action.

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[122] *Id.* at 15-17.

[122.1] Navajo Tribal Council Resolution, CMY-39-78 (May 4, 1978).

[123] Cahn at i-ii.

[124] *Id.* at iv.

[125] Navajo Tribal Council Resolution CMY-39-78 (May 4, 1978).

The method adopted by the Navajo Nation to deal with ICRA issues bears some resemblance to the special constitutional courts of Western Europe established to deal with questions of the constitutionality of legislative action. This is only a resemblance, however, and not an identity. The Council was careful to insure that it retained ultimate sovereignty.

The future of the Navajo judiciary might have been made more secure if the court had seen fit to apply a measure of judicial restraint in dealing with the challenge before it in *Halona*. The lesson is clear: lacking their own constituency and a tradition of judicial supremacy, the Tribal Court acted at its own risk in overruling Council action.

The conflict which embroiled the Navajo Tribal Court is by no means certain to arise elsewhere. But when a highly-sophisticated and well-established judiciary, such as that of the Navajo, found its authority challenged by the Tribal Council, the risk is certain to be greater on reservations where the tribal court is less solidly established.

It is a mistake to assume that institutions of tribal government will function like their counterparts in American government. There are crucial differences. Furthermore, the elimination of federal court review appears to have made administrative intervention in tribal government by the Department of Interior more likely. Both these matters raise serious and difficult questions which are discussed in the remaining sections.

III. Preservation of Tribal Autonomy

Any analysis of problems connected with tribal resolution of ICRA complaints must take into account Congress' ultimate power over tribal governments. Since Congress may always revise the ICRA to provide nontribal remedies, tribes are under some constraint to insure compliance with the Act. This is a federal power which only Congress can exercise, however, and should be used only if there is compelling evidence of need for federal intervention in tribal government. Any intervention by other branches of government, such as the Department of Interior, are inappropriate and of questionable legality after *Martinez*. This section discusses the implication of Congressional overview and problems with Interior Department interference.

A. *Congressional Power and Improving Tribal Response to the ICRA*

Martinez brought to an end federal court review of tribal gov-

ernmental action. If tribal governments fail, however, to deal responsibly with ICRA problems,[126] *Martinez* will only have resulted in a reprieve, and there will be calls for Congress to amend the Indian Civil Rights Act so as to empower federal courts to review tribal action.

Tribal councils can take steps to improve the handling of ICRA complaints, so as to avoid internal strife and external pressure. Given the lack of federal court review, it seems likely tribal courts will be placed under increasing pressure to decide whether council action violated the ICRA. While some tribal courts may disclaim any power to make such decisions,[127] others, like the Navajo Tribal Courts, will not be so reticent. Thus, in order to provide effective redress of ICRA complaints and retain ICRA jurisdiction, tribes should determine in advance the tribal court's authority rather than place burdens and risks on tribal judges. The alternatives available to tribal councils range from affirming broad tribal court authority to decide all questions of propriety of tribal action, to prohibiting courts from deciding any such questions.[128]

For instance, tribal councils could enact express limited waivers of immunity and grants of jurisdiction to tribal courts. Tribes might be well advised to draft ordinances waiving sovereign immunity from tort liability to the extent of insurance coverage in force and authorizing tribal courts to adjudicate any claims against the tribe, its agents or employees in tribal courts. Similarly, tribal councils can enact resolutions authorizing tribal courts to hear and determine claims against the tribe based on contract where the contract contains an express waiver of immunity.

Obviously, tribal courts must be able to deal with these new civil and constitutional issues. This will require vastly expanded training of tribal judges, and perhaps providing them with legal

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[126] *See, e.g.*, De Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. REV. 59 (1975).

[127] *See, e.g.*, Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (1976).

[128] For instance, the constitution for the Pueblo of Isleta, art. IX, § 5, declares that the Isleta Pueblo Tribal Court "shall determine the constitutionality of enactments of the [Isleta Pueblo] Council submitted to the court for review. *Id. cited in* INDIAN SELF-DETERMINATION, *supra* note 61.1, at 37 nn.5, 6. The Oglala Sioux Tribal Council, on the other hand, enacted a resolution which prohibits the tribal court from entertaining any action or suit against the Tribe, its agencies or officials unless the plaintiff has first exhausted his administrative remedies by filing his complaint with the Tribal Executive Committee. Oglala Sioux Resolution No. 76-03 (Sept. 16, 1977) (cited in Pine Ridge Village Council v. Trimble, 5 Indian Law Rep. § M, 6, 7).

advisors. Tribal courts are not likely to engender respect among tribal members if their handling of civil and constitutional issues reveals a lack of competency. Attainment of competency over the substance of civil and constitutional law is not enough. Tribal courts will have to learn the techniques of judicial restraint in order to cope with challenges to council action. Perhaps most importantly of all, tribal courts will have to achieve judicial independence.

Finally, tribal councils may desire to entrust the process of judicial review to courts in whose special competency they and their members may have some confidence. They can consider the establishment of a special constitutional court, such as the Navajo Judicial Supreme Council, or they may wish to improve the structure of their appellate court system. There is no reason why tribes cannot design an appellate court system utilizing intertribal judicial arrangements so as to insure maximum impartiality.

Regardless of the possible expansion of the role of the tribal court system in deciding ICRA issues, it is likely that the tribal councils will continue to dominate tribal government. Councils may deliberately reject the legitimacy of judicial review, either explicitly or by simply ignoring the rulings of tribal courts. In some cases there are good arguments for such a course of conduct. There is no denying that some tribal courts are not presently capable of dealing responsibly with constitutional issues. Some of the tribal courts are often as political as councils, thus accordingly impairing the acceptability of their decisions.

The Indian Civil Rights Act does not necessarily mandate judicial review. In *Howlett v. Salish and Kootenai Tribes,*[128.1] the Ninth Circuit ruled that the ICRA does not preclude the Indians from vesting the power to interpret the tribal constitution in the tribal council rather than in a tribal court. Moreover, *Martinez* makes it clear that the tribal council may well be an appropriate forum in which to decide ICRA issues.

There is still another reason why tribal councils may not see the wisdom of deferring to the judgment of tribal courts. At the present stage of development, the expertise of tribal judges in noncriminal constitutional law is not demonstrably superior to council members. In fact, the reverse may be the case. Furthermore, the tribal council usually has better access to legal advice than the tribal judge. Tribal councils are accustomed to dealing directly with tribal attorneys and requesting their assistance and

[128.1] 529 F.2d 233 (1976).

advice in the drafting of ordinances, or in the undertaking of official action. Tribal judges often seek advice from the very same sources. There is no reason then, why the tribal council cannot make decisions as responsibly as tribal courts. Moreover, it is necessary to remember that there is nothing sacrosanct about judicial review as the sole means of determining legality of legislative action, particularly under the circumstances of Indian tribal societies in America today.

B. *Department of the Interior Review of ICRA Complaints*

Martinez seems to have raised the possibility that there will be increased interference with tribal autonomy by the Interior Department. It would be ironic if the effect of *Martinez* was to end federal court intervention in tribal government, only to have it replaced by Interior Department intervention. Yet, recent actions of the Interior Department indicate this result.

Shortly after the *Martinez* decision, an Interior Department official stated that the lack of a federal court remedy would impel the Secretary of the Interior to assume greater responsibility over tribal members' complaints against the action of tribal government. Specifically, the official asserted that if an action of the tribe or its officers is found violative of the tribal constitution, the Department may take what it deems to be appropriate action. This may include withholding approval of tribal budgets, restricting the flow of Bureau of Indian Affairs (BIA) funds to tribal programs, and withdrawing recognition of tribal governments or officials.[129]

Interior Department intervention in tribal affairs is not new.[130] Indeed, prior to the Indian Reorganization Act,[131] the BIA completely dominated tribal affairs. Since then, however, particularly under the policy of Indian Self-determination,[132] and the

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[129] Letter from R. Lavis, Deputy Assistant Secretary, Indian Affairs, to Charles Moon (July 28, 1978).

[130] *See* Potts v. Bruce, 533 F.2d 527 (10th Cir. 1976); U.S. v. Pawnee Business Council, 382 F.Supp. 54 (1974). *See also* Note, *Administrative Law: Self-Determination and the Consent Power: The Role of the Government in Indian Decisions*, 5 AM. IND. L. REV. 195 (1977).

[131] 25 U.S.C. §§ 461-492 (1970) (Act of June 18, 1934, 48 Stat. 984, *as amended by*, Pub. L. 91-229, 84 Stat. 20).

[132] The self-determination policy is generally regarded as having first been propounded by President Nixon in his Special Message to Congress, July 8, 1970. It became the official policy of the Bureau of Indian Affairs thereafter. *See* TYLER, A HISTORY OF INDIAN POLICY (1973). It was expressed by law in the Indian

growing assertion of sovereign authority by the tribes, the Bureau has been considerably more restrained in interfering with tribal government.[133]

Two examples of post-*Martinez* Interior Department interventions in the affairs of tribal government suggest, however, that the Interior Department has no intention of allowing the tribal governments full autonomy after *Martinez*. In July of 1978, the BIA became involved in an intra-tribal dispute involving the Wichita and Affiliated Tribes of Oklahoma. A group of members had petitioned for removal of the President of the Tribe. The governing resolution appeared to require calling a special meeting. When this was not done, the Superintendent gave notice to the President that unless the meeting was called, the Bureau would withdraw its recognition of him. The President refused, apparently contending that the regular meeting of the Council sufficed. The Superintendent notified him that the BIA no longer recognized him as President and instead recognized the Vice President as the acting chief executive officer. The Superintendent then urged the Vice President to proceed to call the special meeting.[134]

The Office of the Assistant Secretary for Indian Affairs attempted to justify this action on two grounds. It asserted that whenever the Superintendent takes actions affecting trust property, or appropriated funds, he is required to deal with the individuals who hold elected office pursuant to the provisions of the Secretarially-approved governing document. In addition, the Assistant Secretary's Office contended that whenever the BIA approves a tribe's governing document, the BIA becomes a party to the document and is bound by its terms.[135]

The assertion that disposition of trust property or appropriated funds places the Secretary under a duty to deal only with properly elected officials stems from the Supreme Court ruling in *Seminole Nation v. United States*.[136] In that case the Court held that the United States could be liable for payment of funds appropriated for the benefit of tribal members to tribal officials known to be corrupt and faithless. The Court applied the equita-

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Self-Determination & Assistance Act of 1975, 25 U.S.C. §§ 450-450n. (Pub. L. 93-638, 88 Stat. 2203).

[133] M. PRICE, LAW AND THE AMERICAN INDIAN 724 (1973).

[134] Letter from Superintendent, Anadarko Agency, to Newton Lamar (Aug. 9, 1978).

[135] Letter from Superintendent, Anadarko Agency, to Newton Lamar (July 18, 1978); letter from R. C. Lavis, Acting Assistant Secretary, Indian Affairs, to Sen. Dewey F. Bartlett (Sept. 25, 1978).

[136] 316 U.S. 286 (1941).

ble principle of trust law that a third party paying a fiduciary for the beneficiary's benefit with knowledge that the fiduciary intends to misappropriate the money or to be otherwise false to his trust is a participant in the breach of trust and liable to the beneficiary.[137] The holding in *Seminole,* however, does not support intervention into the affairs of tribal government. Claims of election irregularities do not in themselves impair the ability of the United States to deal with *de facto* tribal officers.[138]

The other justification offered by the Assistant Secretary for Indian Affairs is based on the notion that Secretarial approval of tribal constitutions and law and order codes renders them tantamount to contracts or compacts with the United States. The theory was subsequently more fully articulated by the Assistant Secretary in the *Plumage v. Fort Belknap Election Board*[139] case.

In March, 1978, the Fort Belknap Community Court invalidated the results of a tribal election on the ground that one of the candidates did not meet the Tribe's constitutional qualifications.[140] The Billings Area Director recognized the tribal court's ruling as valid and binding. The aggrieved parties appealed the Area Director's action to the Secretary.[141]

On August 23, 1978, the Assistant Secretary issued a written decision upholding the tribal court.[142] He took pains to point out that the Department had no alternative but to scrutinize the decision of the Fort Belknap court once an appeal had been taken from the Area Director's determination to recognize that court's ruling. His decision emphasized that "the Department of the Interior *is not* a judicial appeal level above tribal judicial forums empowered to sustain or reverse decisions of those forums." But, he declared that the Department views tribal constitutions and law and order codes as contracts with the Interior Department and concluded: "We cannot be bound or compelled to recognize any tribal action which may be in violation of those agreements."

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[137] *Id.* at 296.

[138] *See* United States v. Royer, 268 U.S. 394 (1925); Lyons v. Woods, 153 U.S. 649 (1894); Re Manning, 139 U.S. 504 (1891); Ralls County v. Douglas, 105 U.S. 729 (1881).

[139] 5 Indian L. Rep. § L at 7 (Mar. 15, 1978).

[140] *Id.*

[141] 25 C.F.R. Pt. 2 authorizes appeals from administrative actions to the Commissioner of the BIA, and to the Board of Indian Appeals. This Board is also authorized to conduct appeals and make decisions for the Secretary. 43 C.F.R. Pt. 4.

[142] Assistant Secretary's opinion, reported in 5 Indian L. Rep. § H at 17 (Aug. 23, 1978).

In making this claim, however, the Assistant Secretary may have placed the Interior Department in precisely the position he earlier disclaimed. While the opinion went to great lengths to affirm the tribal court's authority to exercise judicial review,[143] it also reserved for the Department the right to decide whether the tribal court's interpretation was arbitrary or unreasonable. Thus, although the Department would give great weight to the decision of the tribal court, it would not accept any interpretation "so arbitrary or unreasonable that its application would constitute a violation of the right to due process or equal protection".[144]

Applying this standard, the Assistant Secretary upheld the tribal court's ruling in the *Plumage* case.[145] Thus, the Assistant Secretary now claims administrative authority to review and ultimately determine the constitutionality of the action of tribal governments. This promises to open up an entirely new field of ICRA administrative review, for it is certain that determined litigants will resort to the Interior Department and its appellate process. In light of the importance of this potential for interference with tribal self government, the Department of the Interior's rationale for intervention in tribal government deserves closer examination.

In the past, the Department of Interior has relied on the broad statutory authority contained in 25 U.S.C. § 2[146] to justify intervention in tribal affairs. This statute provides that the Commissioner of Indian Affairs shall "have the management of all Indian affairs and of all matters arising out of Indian relations"[147] under Secretarial regulations. The Secretary has construed this section to give a broad charter to do almost anything deemed advisable in the management of Indian Affairs.[148] That section, originally enacted in 1832,[149] was followed by a major policy change in 1934 with the enactment of the Indian Reorganization Act.[150] One of the principal features of the IRA provided for establishment of

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[143] The Assistant Secretary upheld the court's exercise of judicial review on the authority of Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803), in support of the proposition that the tribal court may interpret the tribe's organic documents, even where they do not explicitly give such authority to the court. Assistant Secretary's opinion, reported in 5 I.L.R. § H at 17, 18 (Aug. 23, 1978).

[144] *Id.* at 18.

[145] *Id.* at 17.

[146] 25 U.S.C. § 2 (1976).

[147] *Id.*

[148] *See* Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy,* 62 YALE L.J. 348 (1953).

[149] Acts of July 9, 1832, ch. 174, § 1, 4 Stat. 564 (1832).

[150] Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934).

tribal organizations and was expressly intended to eliminate the broad authority which the Interior Department had exercised over tribes.[151] The original bill retained broad governmental powers to review and even veto tribal actions,[152] but these provisions were ultimately discarded.[153]

The Indian Reorganization Act provides that Indian tribes shall have the right to organize and adopt appropriate constitutions and by-laws.[154] The Secretary of the Interior is to prescribe by regulation the manner of conducting a special election to adopt the tribal constitution and must thereafter approve the constitution adopted by the tribe. The only other reference to secretarial authority is the requirement that any amendment of the constitution and by-laws be ratified and approved in the same manner as the original constitution and by-laws. There is no mention in the IRA of any further authority in the Secretary once the tribe's constitution has been adopted and approved.

Moreover, Congress considered and rejected secretarial intervention in tribal affairs again while considering the enactment of the ICRA. The Interior Department proposed a substitute bill providing that the Secretary review any tribal action which infringed upon a right or freedom protected by the ICRA. The Interior Department's bill empowered the Secretary to require tribal government to take such corrective action deemed necessary. Review would have been available in the federal courts.[155] Congress rejected the Department's bill, however, and the ICRA as enacted contains no provision authorizing Secretarial review of ICRA complaints. The Supreme Court expressly noted Congres-

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[151] President Franklin D. Roosevelt wrote the Senate Indian Affairs Committee concerning the proposed bill and said, in part:

> . . . We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government. . . . Certainly the continuance of autocratic rule, by a federal department, over the lives of more than 200,000 citizens of this Nation, is incompatible with American ideals of liberty. . . .

SENATE COMM. ON INDIAN AFFAIRS, REPORT NO. 1080, 73D CONG., 2ND SESS. 3-4 (1934); *see also* Note, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

[152] S. 2755, 73rd Cong., 2d Sess., Tit. I, §§ 3-5, 9, (1934).

[153] Comment, *Tribal Self-Government and The Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 962-63, 967 (1972).

[154] 25 U.S.C. § 476 (1976).

[155] *Hearings on S. 961-968 & S.J.Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 1st Sess. 318-319 (1965) (hereinafter cited as *1965 Hearings).*

sional rejection of Interior Department review in the *Martinez* opinion.[156]

The Interior Department now appears to claim precisely that authority which it sought and Congress denied in 1934 and 1968. Regardless of the Department's rationale, there is no statutory support for the authority claimed by the Department. Moreover, such a claim directly contravenes congressional policy. In similar circumstances, the Supreme Court has struck down claims of executive authority.[157]

Admittedly, the Secretary is faced with a dilemma. On the one hand, direct review of complaints of violations of the ICRA and tribal constitutions should be precluded by virtue of congressional rejection of such authority. Conversely, the Secretary legitimately may be concerned about placing the federal government in complicity with illegal conduct. The fact remains, however, that Congress explicitly chose not to vest the Department with the power of administrative review.[158] Instead, the Congress deferred to the sovereignty of tribal governments and the Interior Department should respect that decision.

The Department now claims authority to withdraw tribal funding or recognition. Such a determination is a matter of utmost gravity. Prior to *Martinez,* a federal court would not issue a temporary restraining order or injunction without the necessary showing of irreparable harm, lack of alternate remedies and probability of success. The Interior Department should have no lighter burden. The Office of the Secretary should afford the tribal institutions and officers the same measure of due process heretofore afforded tribal governments by federal courts. At the very least, the Secretary should promulgate clear standards for administrative intervention and insure that all parties be afforded notice and the opportunity to be heard. The Secretary must bear in mind that *Martinez* was a mandate for tribal self government, not for the substitution of administrative review for judicial review.

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[156] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 68 (1978). The Court also noted, however, that many tribal constitutions require that tribal ordinances not be given effect until the Department of Interior gives its approval. The Court suggested that persons aggrieved by such laws might be able to seek relief from the Department of Interior. *Id.* at 66, n.22.

[157] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); New York Times Co. v. U.S., 403 U.S. 713, 746-747 (1971), (Marshall, J., concurring).

[158] *1965 Hearings, supra* note 154.

IV. CONCLUSION

The climate of opinion in the United States now is probably less sympathetic to Indian rights than at any time since the termination era of the early 1950's. The condition is sometimes referred to as the "backlash," a reaction to Indian claims and victories in the courts. The recent decision of the Supreme Court in *Oliphant v. Suquamish Tribe,*[159] holding that tribal courts have no inherent authority to try and punish non-Indians has relieved some political pressure to subject tribal government to judicial review in state or federal courts.[160] Nevertheless, if substantial numbers of Indians or non-Indians feel their rights have been denied by Indian tribes or their officials, there may be renewed pressures for legislative change. Although *Martinez* ends the potential for much litigation over tribal action, it certainly does not lessen tribal responsibility for observance of ICRA proscriptions. As the Supreme Court noted, the ICRA is binding on all organs of tribal government in all areas of tribal governmental activity. All that has changed is that tribal actions will no longer be subject to the scrutiny of federal judges.

Respect for the individual rights guaranteed by ICRA, and awareness of the restrictions placed on tribal government will require sensitivity and training on the part of all of the organs of tribal government. This includes not only the tribal council and tribal courts, but also such bodies as election committees, membership committees, and tribal police.

Frequently, tribal councils have the benefit of legal advice from tribal attorneys concerning the constitutionality of proposed action. Tribal courts and police have frequently been exposed to training programs which include criminal due process material. However, all branches of tribal government should have some education in the concepts of personal and property rights incorporated in the ICRA. Tribes and inter-tribal organizations should be able to organize seminars and workshops for council members and other officials of tribal government to familiarize themselves with the nature of the restraints imposed by the ICRA.

There will be many who will urge that tribal resolution of ICRA complaints requires that tribal courts rapidly expand their function to encompass judicial review. However, such a view may in part be attributed to a conscious or unconscious ethnocentricism

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[159] 435 U.S. 191 (1978).

[160] H.R. 9950, 95th Cong., 1st Sess. (1979), would have expressly abrogated tribal sovereign immunity and made tribes and their members subject to suit in state courts. The bill did not progress even to hearings.

regarding the role of courts. Moreover, given the diversity of tribal governments, each tribe should determine for itself the appropriateness of judicial review. Tribal courts and tribal councils must proceed thoughtfully if they are to continue to strengthen the institutions of tribal government.

The principle of judicial review may well take root in Indian government. However, it may require revision of tribal constitutions in order to establish the independence and coordinate status of the tribal judiciary. But even this is no guarantee that deadlock will not occur on important issues. In the meantime, greater attention must be given to helping tribal councils deal with their responsibilities under the ICRA to focus on protection of constitutional rights.

The Secretary of the Interior bears a heavy responsibility to avoid interfering with tribal self-government. Such interference is repugnant to the letter and spirit of the Indian Reorganization Act and is unwarranted by statute or congressional intent. The Secretary must proceed with great deference to the autonomy of tribal government. This is clearly required by the central principle of *Martinez:* in the absence of contrary congressional direction, ICRA complaints are to be resolved by the institutions of tribal government.

Admittedly, tribal sovereignty, like state sovereignty, has always been subject to the supreme authority of the United States. Where Secretarial action is deemed absolutely necessary, however, it must be exercised with full awareness of the position of the Indian tribes in the United States: a separate and autonomous system of government.

Martinez has provided tribes with the opportunity to demonstrate their capability of dealing fairly with their members and others while developing sensitivity to Anglo-American notions of individual rights and equality. The ICRA remains, of course, an imposition of values of the dominant American culture which sharply conflicts with the tradition of many tribes. But *Martinez* allows the tribes to implement the ICRA in a manner which preserves their ability to decide difficult questions in accordance with tribal values, and more importantly, in a manner consistent with tribal sovereignty.

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[61] U.S. v. Wheeler, 435 U.S. 313 (1978).