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Tribal Sovereignty: Federal Court Review of Tribal Court Decisions--Judicial Intrusion Into Tribal Sovereignty

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NOTE

TRIBAL SOVEREIGNTY: FEDERAL COURT REVIEW OF TRIBAL COURT DECISIONS—JUDICIAL INTRUSION INTO TRIBAL SOVEREIGNTY

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Background

In the latest developments concerning the authority of tribes to self-govern, the United States Supreme Court has moved closer to a position that allows the federal judiciary to act as appellate courts for decisions of tribal courts. In *National Farmers Union Insurance Co. v. Crow Tribe*,[1] the Supreme Court concluded that the question of whether the tribal forum had jurisdiction over a dispute involving non-Indians was an issue encompassed within the jurisdiction of federal courts by 28 U.S.C. § 1331 (1982).[2] The Court also held that a tribal court should be able to determine its own jurisdictional limits through the normal court processes.[3] The Court found that before a federal court could review the issue of whether tribal court jurisdiction had been exceeded, all tribal remedies must be exhausted.[4]

However, the Court also wrote that it

> [did] not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith" . . . or where the *action* is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.[5]

This part of the opinion concerned the possibility that a tribe would assert jurisdiction simply to harass or assert jurisdiction in bad faith. The action referred to by the Court was the actual assertion of jurisdiction. However, the Tenth Circuit Court of Appeals in *Superior Oil Co. v. United States*[6] used this language

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1. 471 U.S. 845 (1985).
2. *Id.* at 857.
3. *Id.* at 856.
4. *Id.* at 856-57.
5. *Id.* at n.21, quoting Juidice v. Vail, 430 U.S. 327, 338 (1977) (emphasis added).
6. 798 F.2d 1324 (10th Cir. 1986).

from *National Farmers* to reverse a district court decision that had granted a dismissal based on the sovereign immunity of the Navajo Nation.[7] The appellate court

> remand[ed] to the District Court with instruction to undertake such further proceedings deemed necessary to determine whether the actions of the Navajo Tribe of Indians and the named individual Navajo defendants in withholding consent to assignments of leases and requests for seismic permits were taken in bad faith or motivated by a desire to harass such as to render exhaustion of Navajo Tribal Court remedies futile.[8]

The Navajo Tribe, as landowner, has the right to approve or not approve leases, lease assignments, or seismic permits.[9] This right is no less outside the Court's review than the action, or inaction, taken by the Superintendent of the Uintah and Ouray Agency of the Bureau of Indian Affairs in not approving communitization agreements in *Kenai Oil & Gas v. United States*.[10]

These actions of the Navajo Tribe were ministerial and had nothing to do with Navajo Tribal Court jurisdiction. This indicates that the Tenth Circuit has taken the rule laid down by the Supreme Court in *National Farmers* and expanded it to allow the federal district court to review actions of tribal officials. This expansion of the rule allows the federal district courts to decide the merits of the case, rather than limiting the federal courts to determining whether the tribal court exceeded its jurisdiction.

The most recent Supreme Court case in this field shows the continued shift toward encroachment. In *Iowa Mutual Insurance Co. v. LaPlante*,[11] the Court was faced with the same scenario as in *National Farmers* except the plaintiffs were alleging federal jurisdiction on the basis of diversity of citizenship.[12] This case in-

7 *Id.* at 1331. See also Federal Recent Developments, this issue.

8. *Id.*

9 25 U.S.C. §§ 396a - 396g (1982).

10 671 F.2d 383 (10th Cir. 1982). In *Kenai* the Superintendent refused to approve a communitization form that would have prevented leases owned by Kenai Oil and others from expiring for lack of production at the end of the primary term of the leases. The Superintendent defended his action on the basis that letting the leases expire and releasing the land with bonus money and higher royalty rates was in the economic best interest of the tribe. The court did not consider this action as arbitrary and disgreed that the Superintendent was acting in bad faith to obstruct lease operations.

11 107 S. Ct. 971 (1987).

12 *Id.* at 974-75, claiming under 28 U.S.C. § 1332 (1982).

volved an Indian injured on the Blackfeet Reservation while working for a non-Indian farming operation. The plaintiff in the case was the operator's insurer.

The injured worker sued in tribal court to recover from the insurance company. When the tribal court ruled that the case was within its jurisdiction, Iowa Mutual filed its collateral case in federal district court, rather than complete the tribal court process. The insurance company alleged that the tribal court had no jurisdiction to hear the case, and the district court agreed. The court of appeals reversed, holding that the federal district court had no jurisdiction.

Instead of remanding the case to the district court and requiring the insurance company to exhaust all tribal remedies, as was done in *National Farmers*, the Court added language that may show the future trend. Speaking of *National Farmers*, the Court wrote that "[w]e refused to foreclose tribal court jurisdiction over a civil dispute involving a non-Indian."[13] This sounds as if the question of tribal court jurisdiction over non-Indians in civil matters was questionable but was saved by the Court.

The Court "remanded the case to the District Court to determine whether the federal action should be dismissed or stayed pending exhaustion of the remedies available in the tribal court system."[14] Then the Court added the following footnote: "As the Court's directions on remand in *National Farmers Union* indicate, the exhaustion rule enunciated in *National Farmers Union* did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite."[15]

In choosing this language the Court was analogizing to the relationship between federal and state courts.[16] This analogy simply does not hold up under the constitutional authority granted to the federal courts under article III, section 2, which states in part that the judicial power extends to controversies arising between citizens of different states. The Court itself points out that under *Cherokee Nation v. Georgia*,[17] tribes were not states at the time that language in the Constitution was

13 471 U.S. at 855
14 107 S. Ct. at 976
15 *Id.* n.8
16 *Id.*
17 30 U.S. (5 Pet.) 1 (1831)

approved.[18] The Court also points out that "Congress has amended the diversity statute several times since the development of tribal judicial systems, but . . . has never expressed any intent to limit the civil jurisdiction of the tribal courts."[19] Although the Court goes through an analysis of why the tribal court has jurisdiction,[20] it does not explain how a federal court might have concurrent jurisdiction.

While the Supreme Court has not presently decided to review tribal court decisions, the opinion written by Justice Stevens, concurring in part and dissenting in part, demonstrates what may be the direction of the Court. Justice Stevens wrote:

> The deference given to the deliberations of Tribal Court on the merits of a dispute, is a separate matter as to which *National Farmers Union* offers no controlling precedent. Indeed, in holding that exhaustion of the tribal jurisdiction issue was necessary, we explicitly contemplated later federal court consideration of the merits of the dispute.[21]

In addition to these decisions, Charles F. Wilkinson, in *American Indians, Time, and the Law*,[22] has taken the position that federal courts should have appellate review over cases in tribal court that involve a right granted under the Indian Civil Rights Act.[23] His reasoning for this position is that both Indians and non-Indians residing on a reservation would feel more secure about the fairness of the system, which would decrease conflicts and dispel bad feelings between the tribes and the non-Indians on the reservation.[24] Although Wilkinson admits that this type of review would be an intrusion into tribal sovereignty, he does not state what gives the courts the right to intrude in this manner. He states his conclusion and then goes on as if the courts simply have that power. A study of the history of the relationship between the tribal governments and the federal government will demonstrate that federal courts do not have the constitutional authority to exercise that power.

18 107 S Ct. at 977
19 *Id*
20 *Id* at 978
21 *Id.*
22 C WILKINSON, AMERICAN INDIANS TIME, AND THE LAW (1987).
23 *Id.* at 115
24 *Id.* at 116

Development of the Government-to-Government Relationship

Indian tribal governments existed before the European explorers came to this country. As the European nations occupied the land, each in turn dealt with the tribal nations that were already here.[25] The importance of establishing relations with the tribes was recognized by the new American government when the Continental Congress established committees to deal with Indian tribes.[26] When the United States Constitution was written, the authority of the new government to deal with tribes was granted to the Congress by article I, section 8. No other governmental unit was granted the power to deal with tribal governments in the Constitution.

The relationship between the United States government and the tribal governments was defined by the United States Supreme Court in the opinions written by Chief Justice Marshall in the early 1830s. In *Cherokee Nation v. Georgia* the Supreme Court dismissed the case because it did not have jurisdiction to hear the merits of the case.[27] This decision was based on the determination that the Cherokee Nation was not a foreign state within the meaning of the constitutional provision that gave the Supreme Court original jurisdiction over disputes between states and foreign nations.[28]

The following year, another case involving the Cherokee Nation, *Worcester v. Georgia*,[29] concerned the ability of the state of Georgia to enforce its laws within the lands of the Cherokee Nation. This time Marshall agreed to hear the case. The Chief Justice held that:

> [T]he political existence of the tribes continued after their relations with both the state and the federal government. As a consequence of the tribes' relationship with the federal government, tribal powers of self-government are limited by federal statutes, by the terms of treaties with the federal government, and by restraints implicit in the protectorate relationship itself. In all other respects the tribes remain independent and self-governing political communities.[30]

25 F. COHEN'S FEDERAL INDIAN LAW 50-58 (R. Strickland et al. eds. 1982)
26 *Id.* at 58
27 30 U.S. (5 Pet.) 1 (1831).
28 *Id.* at 19
29 31 U.S. (6 Pet.) 515 (1832)
30 The case was summarized in F. COHEN, *supra* note 25, at 235.

This concept of tribal self-government and sovereignty was embodied in most of the treaties during the first century of the United States' existence.[31] Although the treaty-making era of dealing with Indian tribes ended in 1871,[32] this concept of tribal sovereignty continued. In an opinion by the Solicitor of the Department of Interior in 1934, Solicitor Margold said:

> [T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which have never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which *in the judgment of Congress*, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. *What is not expressly limited remains with the domain of tribal sovereignty.*[33]

The Supreme Court has recognized this concept beginning with Chief Justice Marshall's opinion in *Worcester* in which he termed tribes as distinct but dependent sovereigns.[34] This concept was not recognized by the Court in 1886 in *United States v. Kagama*,[35] which only recognized two sovereignties, the federal government and the state governments, but it was resurrected by the Court in 1959 with the decision in *Williams v. Lee*.[36]

The doctrine of inherent tribal sovereignty was explicitly recognized by the Court in *United States v. Wheeler*.[37] In that case the Court held that successive prosecutions of Indians in tribal and federal courts were not barred by the double jeopardy provision of the fifth amendment because each is a sovereign with its own laws and jurisdiction.[38] Referring to *Wheeler*, Charles F.

31 *Id.* at 69
32 Act of Mar. 3, 1871, ch. 20, 16 Stat. 544, 566
33 Op. Sol. M27781, 55 I.D. 14, 19 (25 Oct. 1934) (emphasis added)
34. 31 U.S. (6 Pet.) at 560-61
35 118 U.S. 375 (1886)
36 358 U.S. 217 (1959)
37 435 U.S. 313 (1978)
38 *Id.* at 329-30

Wilkinson said, "The acceptance of the doctrine [of inherent tribal sovereignty], and the renunciation of the concept that tribal powers are delegated from the United States, lays the conceptual outlines for the field."[39]

The Supreme Court has used this doctrine many times during the last few years. In *Merrion v. Jicarilla Apache Tribe*, the Court held that tribal powers are inherent and cannot be found by looking at federal delegations.[40] The Court in *Merrion* also said that the tribes have regulatory authority because they are governments, not just proprietors.[41] In *Santa Clara Pueblo v. Martinez* the Court held that the tribes are possessed with tribal immunity from suit.[42] The Court also pointed out in *Martinez* that the existence of tribes as governments depends on their own will, not on any recognition by the United States.[43] This doctrine does not recognize the ability of the federal courts to review tribal court decisions, as was stated by the Court in *Martinez*.[44] These cases demonstrate that the United States Supreme Court, as well as commentators, have recognized and utilized the concept of inherent tribal sovereignty to decide cases that have arisen on Indian reservations.

Tribal Sovereignty and the Indian Civil Rights Act

Most of the limitations on the powers of the federal and state governments that were intended to protect the civil rights of its citizens were contained in the first fourteen amendments to the United States Constitution. However, these limitations were placed on Congress or the states and did not mention Indian tribes or tribal members. Except for acts pertaining to specific tribes, Indians did not become citizens of the United States until 1924.[45]

The question arose as to whether persons under the jurisdiction of a tribe were protected by the amendments. The answer came from the Supreme Court in *Talton v. Mayes*.[46] The Court in

39 C. WILKINSON, *supra* note 22, at 62
40 455 U.S. 130, 141 (1982)
41 *Id.* at 144-48
42 436 U.S. 49, 58 (1978).
43 *Id.* at 56.
44 *Id.* at 66-70
45 8 U.S.C. § 1401(b) (1982)
46 163 U.S. 376 (1896)

Talton held that the tribes were independent sovereigns free of constitutional constraints and general federal laws unless Congress had expressly limited their powers. For this reason the Court held that they were not limited by the grand jury requirement of the fifth and fourteenth amendments.[47] Subsequent cases have held that neither the due process clause of the fourteenth amendment[48] nor the freedom of religion clause of the first amendment apply as limitations to Indian tribes.[49]

This situation continued unchanged even through the height of the civil rights movement of the early sixties, when the tribes were not included in the Civil Rights Act of 1964.[50] The limitation on tribal governments to protect the rights of individuals within the jurisdiction of the tribes was not formally addressed until the passage of the Indian Civil Rights Act of 1968.[51]

For ten years following the passage of the Indian Civil Rights Act, persons who felt they had their protected rights violated by a tribe and were not satisfied with the tribal court determination customarily took their actions to federal district court.[52] This is much like the scenario envisioned by Wilkinson. However, this process of district court review of tribal court determinations was renounced by the Court in *Santa Clara Pueblo v. Martinez*.[53] In that case the original plaintiff, Ms. Martinez, had sought to have her children enrolled as members of the Santa Clara Pueblo Tribe. Without membership status, the children were ineligible to inherit their mother's property. The Santa Clara Pueblo has a patrilineal society, which means children are members of their father's pueblo. Since in this case the father was a member of the Navajo Nation, the children could not, under tribal custom, become members of the Santa Clara Pueblo. If the mother had been a Navajo and the father a member of the pueblo, the children could have been enrolled. That the children were raised

47 *Id.* at 384-85.

48 *See also* Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (10th Cir. 1959).

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

50 Civil Rights Act of 1964, 42 U.S.C. §§ 1981 - 2000h-6 (1982).

51 25 U.S.C. § 1301-03 (1982).

52 Crowe v. Eastern Band of Cherokee Indians, 506 F.2d 1231 (4th Cir. 1974); Laramie v. Nicholson, 487 F.2d 315 (9th Cir.), *cert. denied*, 419 U.S. 871 (1973); White Feather v. One Feather, 478 F.2d 1311 (8th Cir. 1973); Loncassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971); Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968).

53 436 U.S. 49 (1978).

at the pueblo and spoke the Pueblo language did not change the custom. When Ms. Martinez was unable to get her desired decision in the tribal forum, she brought action in federal district court to force the pueblo to enroll her children.

This case represented the type of interest the Indian Civil Rights Act (ICRA) was meant to protect. This was a sex-discrimination case, and the ICRA required that tribes provide equal protection under the law.[54] The district court held that it had subject matter jurisdiction,[55] which was affirmed by the Tenth Circuit Court of Appeals, although the court reversed on the merits.[56]

The Supreme Court reversed both courts on the issue of jurisdiction and, for that reason, did not reach the merits of the case.[57] The opinion was a glowing pronouncement of tribal sovereignty and self-government. The Court held that "providing a federal forum for issues arising under § 1302 [of the ICRA] constitutes an interference with tribal autonomy and self-government," and the Court would not interfere without express manifestation of congressional intent.[58] The Court found that "nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts for injunctive or declaratory relief."[59]

After an exhaustive study of the legislative history of the ICRA, the Court found "[t]he legislative history of Title I suggests that Congress' failure to provide remedies other than habeas corpus was a deliberate one."[60] The Court held that:

> Creation of a federal cause of action for the enforcement of rights created in Title I, *however useful it might be in securing compliance with §1302*, plainly would be at odds with the congressional goal of protecting tribal self-government. . . . 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*. . . . Congress considered and rejected proposals for

54 25 U.S.C. § 1302(8) (1982)
55 *Martinez*, 402 F. Supp. 5 (D.N.M. 1975)
56 540 F.2d 1039 (10th Cir. 1976)
57 436 U.S. at 72
58. *Id.* at 59
59 *Id.*
60 *Id.* at 61

federal review of alleged violations of the Act arising in a civil context.[61]

The Court closed its opinion with language that left no lingering questions concerning tribal inherent sovereignty, the role of tribal forums, and the role of the United States Supreme Court. The Court ruled:

> [W]e have . . . recognized that the tribes remain quasi-sovereign nations which, by government structure, culture and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments. . . . [U]nless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.[62]

The Court thus recognized its limited role in the government-to-government relationship between the tribes and the federal government. The Court also recognized that the tribes at one time enjoyed the full spectrum of sovereign powers. The tribes have given up some external and internal aspects of that sovereignty, by treaty initially, and then have had those powers limited by Congress. But since "[g]eneral acts of Congress [do] not apply to Indians, unless expressed as to clearly manifest an intention to include them," the Court is without power to do what the United States Congress has failed to do.[63]

How then, in the face of such explicit authority, can one consider federal court intrusion on tribal sovereignty without congressional action? Furthermore, how can Wilkinson put forth support for such policy without noting or suggesting that legislation be enacted to allow the courts to review such cases?

The Demise of True Sovereignty

The answer to these questions depends on whether inherent tribal sovereignty actually exists. A reader of Supreme Court opinions would say it must, because the Court has used the term

61 *Id.* at 64-65, 67 (emphasis added).
62 *Id.* at 71-72.
63 Elk v. Wilkins, 112 U.S. 94, 100 (1884).

when deciding case four times in five years.[64] But if it exists, why does it not set the limits of interference from state and federal governments? How can the Court justify balancing tribal, federal, and state interests?[65] If, as Justice Stevens claims in his dissent in *Iowa Mutual*, under the majority opinion tribal sovereignty is entitled to greater deference than so-called state sovereignty,[66] how is a state able to go onto a reservation and regulate tribal activities,[67] or to require the tribes to collect taxes from non-Indians on sales made on the reservation?[68]

The Court may have an answer to this, but if so, the answer is not found in the Constitution nor in any acts of Congress. Congress has never stated that tribes do not possess sovereignty. Except for specific instances, such as Public Law 280,[69] Congress has never authorized direct regulation by states on the reservation. Congress has never authorized the states to require tribes to collect taxes on sales to non-Indians. If Congress did not authorize these things, where is that authorization found? The answer must be that the United States Supreme Court is doing this on its own in excess of the authority granted to it in the United States Constitution.

The basis for the current Court's handling of tribal sovereignty goes back to 1882 in *United States v. McBratney*,[70] where, at the height of the assimilation era of congressional Indian policy, the Court upheld state jurisdiction over the murder of one non-Indian by another non-Indian on a reservation. As Wilkinson points out, there was no statutory authority for this decision.[71] Under the Indian Country Crimes Act such a crime should be tried in federal court.[72] This, however, did not deter the Court from allowing the state to exercise jurisdiction on the reservation. The Court's justification was that "some events occur in Indian

64 Iowa Mut. Ins. Co. v. La Plante, 107 S. Ct. 971 (1987); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985); Rice v. Rehner, 463 U.S. 713 (1983); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

65 358 U.S. at 220.

66 107 S. Ct. at 985.

67 Rice v. Rehner, 463 U.S. 713 (1983).

68 Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).

69 Act of Aug. 15, 1953, ch. 505, 67 Stat. 588.

70 104 U.S. 622 (1882).

71 C. WILKINSON, *supra* note 22, at 88.

72 18 U.S.C.S. 1152 (1982).

country that simply do not bear on legitimate tribal or federal concerns."[73] The Court seems to be saying that Indian tribal governments and tribal and federal law enforcement agencies should not be concerned about protecting the peace on the reservation as long as non-Indians are killing non-Indians. To indicate that tribal governments should not be concerned when violent crimes occur on the reservation is totally ludicrous. No one would question the absurdity of a statement that a state should not be concerned when a noncitizen kills another noncitizen within its borders.

Justice Black relied on the decision in *McBratney* to write his opinion in *New York ex rel. Ray v. Martin*,[74] which involved the power of the state of New York to extend its criminal laws to Indians while on the Allegheny Reservation. Referring to *McBratney*, Black wrote, "That case and others which followed it all held that in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries."[75] With judicial slight of hand, Black ignores the fact that *McBratney*, even if decided correctly, only pertained to particular states whose enabling acts did not reserve jurisdiction to the federal government and to the tribes. Furthermore, this apparent "presumption of state jurisdiction seems entirely inconsistent with *Worcester v. Georgia*,"[76] which is still good law.

As noted earlier, the concept of tribal sovereignty was resurrected by the Supreme Court in *Williams v. Lee*,[77] ironically written by Justice Black. In *Williams*, Justice Black completely reversed his prior position in *Ray* and wrote: "Congress has acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. . . . [W]hen Congress has wished the States to exercise this power it has expressly granted them the jurisdiction."[78]

But the damage had been done, for even in *Williams v. Lee* the Court did not exclude state jurisdiction because the tribe is a separate sovereign, but because the Court wanted to protect tribal

73. C. WILKINSON, *supra* note 22, at 88.
74. 326 U.S. 496 (1946).
75. *Id.* at 497-98.
76. R. BARSH & J. HENDERSON, THE ROAD 145 (1980).
77. 358 U.S. 217 (1959).
78. *Id.* at 220-21, 222-23. *See also* R. BARSH & J. HENDERSON, *supra* note 76, at 149.

self-government.[79] Therefore, sovereignty, in the true sense of the word, does not exist for tribes in the opinion of the United States Supreme Court. It appears that the ability of Indian tribes to govern within the boundaries of the reservation depends not only on the United States Congress, which has constitutional authority to deal with Indian tribes, but also on the current whim of the United States Supreme Court, which lacks any constitutional authority to exercise authority over tribes.

Tribal Sovereignty in the Current Era

The first significant indication of the downfall of the true sovereignty came in 1978 in *Oliphant v. Suquamish Indian Tribe*.[80] The Court in that case refused to recognize the authority of the tribe to exercise criminal jurisdiction over non-Indians for acts committed while on the reservation.[81] The facts of that case showed that the Suquamish Reservation had been allotted for some time. The population of non-Indians and the land holdings of non-Indians far exceeded the population and land holdings of the tribe and its members. In order for the Court to prevent a small minority to have authority over a nonvoting majority, the Court could not decide the case on tribal sovereignty. Therefore, the Court rejected the concept of tribal sovereignty in favor of the power of the United States to protect its citizens from unwarranted intrusions on their personal liberty.[82]

However, as pointed out in the dissent written by Justice Marshall and joined by Chief Justice Berger,

> "[P]ower to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed." . . . In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation.[83]

This view strongly contrasts with the one of Justice Rehnquist, who wrote that "[b]y submitting to the overriding sovereignty of

79 C. WILKINSON, *supra* note 22, at 133 n.2
80 435 U.S. 191 (1978)
81 *Id.* at 210-12
82 *Id.* at 210
83 *Id.* at 212, quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976).

the United States, Indian tribes . . . give up their power to try non-Indian citizens . . . except in a manner acceptable to Congress.'"[84] After considering two reasons why tribes may want jurisdiction over non-Indians, Rehnquist also stated that "these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians."[85] Obviously, the now Chief Justice Rehnquist sees tribal authority as something that Congress must bestow on tribes, rather than something that tribes possess because they are sovereign entities. This opinion also makes a statement that brings the current thinking of the Court into sharp focus and allows the Court to exercise power to do away with tribal sovereignty. Rehnquist wrote: "[T]he tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*'."[86] This would allow the courts to determine what powers a tribe may exercise, rather than having those powers determined by the tribe's sovereignty.

Oliphant was followed by a case directly on point with the main thrust of this paper. In *Dry Creek Lodge v. Arapahoe & Shoshone Tribes* there was a dispute between a non-Indian who had property on the reservation and an Indian family whose land had to be crossed to get to the non-Indian land.[87] The dispute arose when the tribes cut access to the non-Indian's land at the request of the Indian family. The plaintiff sued the tribes, claiming his constitutional rights had been violated. The tribal court refused to accept the case without the approval of the tribal council, which was not given.

The plaintiff then brought the case in federal court. The trial court originally dismissed for want of jurisdiction. The Tenth Circuit reversed and remanded for a trial on the damages. Before the case was finally resolved at the trial court level, the Supreme Court decided *Martinez*.[88] The district court then again dismissed for want of jurisdiction. The court reasoned that since the case

84. 435 U.S. at 210.
85. *Id.*
86. *Id.* at 208, quoting *Oliphant*, 544 F.2d at 1009 (emphasis in original).
87. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 118 (1981).
88. 436 U.S. 49 (1978).

was brought under the ICRA and since the Supreme Court had just held that federal courts do not have jurisdiction to hear cases under the ICRA, the court did not have jurisdiction to hear that case.[89]

But the Tenth Circuit again reversed, using *Oliphant* for authority rather than *Martinez*.[90] Although this was a circuit court case, the Supreme Court denied a writ of certiorari.[91] It is submitted that in this case, we see the beginning of the answer to the mystery of tribal sovereignty and how the Supreme Court will deal with it under the ICRA. The appeals court distinguished the Court's decision by pointing out that:

> [*Martinez*] was entirely an internal matter concerning tribal members and a matter of very great importance to the individuals. . . . The problem was thus strictly an internal one between tribal members and the tribal government relating to the policy of the Tribe as to its membership. *Of course, there were no non-Indians concerned.*[92]

How the fact that there were non-Indians involved in *Dry Creek Lodge* impacted on the sovereign right of an Indian tribe to handle disputes within the boundaries of the reservation was not given adequate analysis by the court. However, the court did say: "The reason for the [*Martinez* position by the Supreme Court] disappears when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian."[93] There is no basis given for this position nor any authority cited to substantiate the statement. The Supreme Court allowed the opinion to stand, giving, at least indirectly, its blessing to the position of the appeals court.

The theory of *Oliphant* next arose in *In re Sandmar*,[94] a bankruptcy case in which the Navajo Tribe was a creditor. In this case, the Navajo Tribe did not answer to a charge filed by the debtor in bankruptcy court and was cited for contempt. The court rejected the defense of tribal sovereignty immunity, which was held to exist by the Supreme Court in *Martinez*.[95] The court

89 623 F 2d at 683
90 *Id* at 684-85
91 449 U.S. 118 (1981)
92 623 F 2d at 685 (emphasis added).
93 *Id*.
94 12 Bankr 910 (Bankr D N.M. 1981).
95. 436 U.S. at 58

wrote that sovereignty was limited because "[the] matter is not 'internal' as it involves the rights of a non-member Debtor and the rights of other creditors. It is not essential to self-government as it involves creditor-debtor (contractual) relationships."[96]

The similarities running through these three cases are: (1) both an Indian tribe or tribal member and non-Indian are involved, and (2) the non-Indian had not consented to the exercise of tribal inherent sovereign powers upon him. But why does a person have to consent to jurisdiction in order to have the government exercise authority over him? This is obviously not true of an Indian who travels off the reservation. In that case there would be no question that the state could exercise jurisdiction over the Indian. In an article by Kevin Gover and Robert Laurence the authors examine these three cases and conclude that: "The 'unwarranted intrusions' exception of *Oliphant* threatens to swallow the principle of inherent sovereignty."[97] The authors probably meant that non-Indian involvement will be the key to whether sovereignty is used by the Court to rule for the tribe, or whether sovereignty is limited by the Court to decide against the tribe.

This position is strengthened by the line of cases decided by the Supreme Court on the sale of cigarettes.[98] These cases hold that if the incidence of the state excise tax on the sale of cigarettes falls on the consumer, the state may require the Indian retailer on the reservation to collect and account for the taxes on sales to nonmembers of the tribe.[99] This is so even if the tribe is assessing its own tax on the sale of cigarettes.[100] The tribe would not have to collect the state tax on sales to its own members.[101]

To be able to enforce this requirement, the states will have to be able to require the Indian or tribal retailer to keep sales to nonmembers separate from sales to members, to inspect the records of the Indian retailer on the reservation, and to actually

96 12 Bankr 910, 914 (Bankr D.N.M. 1981)

97 Gover & Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497, 508 (1985)

98 *See* California v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985); Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980); Moe v. Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976).

99 447 U.S. at 159

100 *Id.*

101 *Id.*

collect the tax from the retailer.[102] The problems raised if a tribe is the retailer are particularly acute because the Supreme Court has held that tribes have sovereign immunity,[103] and states do not have warrant authority on reservations.[104]

The Court will probably support the states in this regard because the matter does not involve only the tribe and its members. The tribe or Indian retailers, the state, and non-Indian purchasers of cigarettes are all involved. Therefore, the Supreme Court can use the precedent outlined in *In re Sandmar* to find that sovereign immunity has been limited by implication.[105] This means that the Court can decide that sovereignty has been limited, rather than Congress actually legislating a limitation.

Analysis

Much of this paper has been devoted to discussion of issues not directly related to federal court review of tribal court decisions. In order to acquire a proper understanding of what the Court may do in the future, however, one must understand what the Court is doing in the field of Indian law generally.

In every case the Supreme Court decides involving Indian issues, the terms "sovereignty" or "inherent sovereignty" are used when discussing the powers of Indian tribes. There seems to be no question that when the parties to a dispute are tribal members or the tribe and its members, the tribe has all of the attributes of sovereignty not limited by Congress. Should a case arise under the Indian Civil Rights Act that does not involve any nonmembers, *Martinez* will control and the federal courts will not have jurisdiction to review the decision.

As recently as February 25, 1987, the Supreme Court wrote the following:

> The Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory," and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government not the States." It

102. *Id.*

103. *Martinez*, 436 U.S. at 58.

104. *California v. Cabazon & Morongo Bands of Mission Indians*, 107 S. Ct. 1083, 1091 (1987).

105. 12 Bankr. 910 (Bankr. D.N.M. 1981).

is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.[106]

Unfortunately, rather than stopping at this quotation, the Court decided the case in favor of the tribes because the interests of the tribes outweighed the interests of the state.[107] The implication of the last sentence of the quote above is that if Congress does not expressly so provide, then state laws may not be applied to tribal Indians on their reservations. This would be a statement of true inherent tribal sovereignty, and the Court could have decided the case simply on that point. But the case involved more parties than the tribes and their members. Therefore, the Court did not use tribal sovereignty to decide the case even though it purported to recognize the concept.

This, then, is the manner in which the Court may decide to review tribal court decisions on the merits. A case might arise under the Indian Civil Rights Act involving a non-Indian defendant and an Indian tribe. Rather than allowing tribal sovereignty and *Martinez* to set the limits of federal court jurisdiction, the Court may follow the *Oliphant* line of cases and ignore sovereignty. This is probably what Wilkinson was considering when he took the position advocating federal court review. As a believer in the inherent powers of tribal governments, this author cannot concede to the federal judiciary the constitutional right to do so without congressional action. Gover and Laurence indicate that perhaps a limited federal court review may happen, but they at least recognize that congressional action is necessary.[108] If the Supreme Court would also recognize this fact, then it would be giving more than lip service to the concept of tribal sovereignty and the constitutionally mandated separation of powers.

106 *Cabazon*, quoting Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 154 (1980), United States v. Mazurie, 419 U.S. 545, 557 (1975).

107 107 S. Ct. at 1094-95.

108 Gover & Laurence, *supra* note 97, 542.