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# Martinez, Oliphant and Federal Court Review of Tribal Activity under the Indian Civil Rights Act

Robert Laurence

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# **MARTINEZ, OLIPHANT AND FEDERAL COURT REVIEW OF TRIBAL ACTIVITY UNDER THE INDIAN CIVIL RIGHTS ACT**

ROBERT LAURENCE\*

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\* Professor of Law, University of Arkansas; Visiting Professor of Law, Florida State University; B.S., Ohio State University; M. Ed., Alberta; J.D., New Mexico; LL.M., Illinois. Four valued colleagues at Florida State reviewed the early forms of this article and improved it with their comments. My thanks, then, to Professors Patricia Dore, Steven Gey, Anthony Herman and Margaret Baldwin. Errors and infelicities, of course, are my responsibility.

These remarks are an expanded and formalized version of my testimony before the United States Commission on Civil Rights, given in Washington, D.C., January 28, 1988. It is fitting, I think, to include in this initial footnote the preliminary observations that were made before the Commission:

1. I imagine that I will not be the first participant at these hearings to comment on the irony surrounding the Commission's project to study civil rights violations committed by Indian tribal governments. When one thinks of civil rights and of American Indians, one's mind turns first to the harms perpetrated *against* Indians: discrimination in housing and in the obtaining of credit; interferences with Indian religious freedoms; denials of health care and welfare benefits; the state of Indian education; the plight of urban Indians, to name a few. One does not have to deny that Indian governments, like all governments, occasionally tread on individual rights in order to observe that this treading is not at the top of the list of American Indian civil grievances. I will leave to other witnesses to question the Commission's motives, if they will; for myself, I begin by expressing puzzlement over the Commission's choice and will be pleased to hear that the Commission is pursuing with equal vigor its investigations of the civil rights of American Indians *vis a vis* the federal and state governments.

2. I have no particular expertise concerning what, in fact, is happening on Indian reservations. I assume that tribal governments occasionally overstep the bounds of what would be considered proper governmental activity in Anglo-American society. I assume that this is especially likely with respect to what non-Indian Americans consider to be the norms of procedural due process. In my experience, tribal governments, officers, and judges work more informally than the non-Indian institutions to which most of us are accustomed. From reading the cases decided under the Indian Civil Rights Act, I do know that both Indians and non-Indians have raised non-trivial complaints against tribal action. Nevertheless, to the extent that the Commission is engaged in a fact-finding mission regarding tribal governmental activity and the grievances, if any, of those who deal with tribes, I am unable to provide any meaningful insight.

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## I. INTRODUCTION

Amongst those who study and practice in the area of American Indian law, there are those who describe themselves as "tribal advocates." These lawyers and law teachers approach most Indian law questions from this perspective: the recognition of tribal sovereignty is, and ought to be, the mainstay of domestic American Indian law. Some would say that of all the rights due Indian people by the United States, the paramount right is that of self-determination.<sup>1</sup> Some would say that of all the depredations practiced on Indian peoples, the most egregious are those which limit the inherent sovereignty of tribes.<sup>2</sup> Tribal advocates follow the venerable

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3. Perhaps it goes without saying, but the views represented here are mine alone and are not those of the Universities or the faculties with which I am associated.

1. Statement of Robert N. Clinton before the United States Commission on Civil Rights, January 28, 1988, Washington, D.C. (oral testimony). Professor Clinton, of the University of Iowa, is one of the foremost authorities on American Indian Law, the co-author of one of the primary casebooks in the area, PRICE & CLINTON, *LAW AND THE AMERICAN INDIAN* (2d ed. 1983), and an editor of and contributor to the primary treatise in the area, COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (Strickland ed. 1982) [hereinafter cited COHEN'S HANDBOOK].

2. It is probably, in fact, more common even for tribal advocates to list European and American deprivations of the rights of Indians as individuals rather than as sovereign entities. *But see* Williams, *The Algebra of Federal Indian Law*,

**Felix Cohen's pronouncement that:**

Perhaps the most basic principle of all Indian Law . . . is the principle that those powers which are lawfully vested in an Indian Tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation . . . What is not expressly limited remains within the domain of tribal sovereignty.<sup>3</sup>

Such a perspective makes one, to some extent at least, unfriendly to suggestions that the federal government ought to provide a judicial forum for those who complain that they have been treated unfairly by tribes.<sup>4</sup> A tribal advocate's view of any individual case need not be predetermined, but his or her inclinations are to support tribal governments rather than the individuals who deal with them. This is, to be sure, an uncomfortably odd stance for those tribal advocates who would otherwise describe themselves as liberal and who otherwise advocate the rights of individuals *vis a vis* governments. But Indian tribes are old governments, whose claims to sovereignty, in fact, far predate our own,<sup>5</sup> and which have been made fragile through dealings with the United States government, dealings that have not always met modern standards of humanity and fairness.<sup>6</sup> Given this historical background, we non-Indians must be very careful that our later dealings with the Indians do not result in further degradation or destruction of these important governments. I begin this essay, then, as a tribal advocate.

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1986 Wisc. L. Rev. 219, 264-65 (listing denials of "fundamental human rights of Indian people in the United States," including "violent suppression of . . . traditional forms of government," *id.* at 265).

3. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942) (emphasis removed). This work is to be distinguished from COHEN'S HANDBOOK, *supra* note 1. The 1982 edition of the *Handbook*, compiled by a distinguished panel of Indian law scholars, has become a much-cited and influential text, but, as even its authors would admit, lacks the enormous Blackstonian merits of Felix Cohen's original work.

The last sentence of the quotation in the text, as with much of the 1942 text, has been modified by later case law, in this instance *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and later cases discussed below.

4. For one of many examples, see *Ziontz, After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1 (1979).

5. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

6. See, e.g., *Williams*, *supra* note 2.

I am not, however, as unfriendly to intrusions into tribal sovereignty as some tribal advocates. I have spoken and written, for example, approvingly of the Indian Civil Rights Act<sup>7</sup>; not all tribal advocates have been so kind.<sup>8</sup> In this essay I will accept, as I have publicly before, that the federal courts have a legitimate role to play in policing tribal activity.<sup>9</sup> I will even urge, in the very restric-

7. Civil Rights—Riots—Fair Housing—Civil Obedience, Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (1968) (codified as 25 U.S.C. §§ 1301-1341 (1982)). This is a lengthy act, little of which has anything to do with Indian civil rights. See COHEN'S HANDBOOK, *supra* note 1, at 202-03. Title II of the Act, codified at 25 U.S.C. §§ 1301-03, places constitution-like restrictions on tribal governments for the benefit of all "persons," not just Indians. Throughout this article I will follow common practice and use the terms "Indian Civil Rights Act," "the Act," and "the ICRA" to refer to sections 1301-03.

My previous discussions of the ICRA are found in the articles cited *infra* notes 9 and 34.

8. For example, Professor Milner S. Ball, of the University of Georgia Law School, discussing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), wrote:

But the case illustrates both the use of equal protection against tribes and the difficulties tribes confront in attempting to plead their case to civil rights advocates . . . . The Court did not allow use of the Indian Civil Rights Act against the tribe. However, the act itself, although supported by many Indians, is regarded by others as an act of aggression against the tribes. It is a further example of Good Samaritan non-Indians believing they know what is best for Indians.

In this instance it is assumed that individual Indians are in need of help against their tribes and that rights legislation is the help they need . . . .

The serious, complex damage inflicted upon tribes by the liberally motivated Indian Civil Rights Act is described by Vine Deloria: [here Professor Ball quotes a long passage from V. DELORIA & C. LYTTLE, *THE NATIONS WITHIN* (1984)].

Barsh and Henderson also point out that civil rights lawyers who supported the Indian Civil Rights Act from the belief that individual citizens need protection from government "failed to realize that tribal government is too weak to serve the basic welfare of Indians, much less to abuse their rights on the scale of state and national government." [citing R. BARSH AND J. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* (1980)] . . .

Notwithstanding the intrusion of the Indian Civil Rights Act and its Americanization of Indian institutions, the measures did not go far enough to suit the Supreme Court. The act merely imposed rights law on the courts. The Supreme Court went further. It divested tribal courts of jurisdiction — and it did so in the name of rights. [Professor Ball then discusses *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978)].

Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 123-24.

9. Laurence, *Learning to Live with the Plenary Power of Congress Over the*

tive context explained below, the legislative reversal of *Santa Clara Pueblo v. Martinez*,<sup>10</sup> a case as respectful of tribal sovereignty as any the Supreme Court has written lately.<sup>11</sup> However, the understanding of this position urging limited reversal of *Martinez* requires that this essay begin, as it has, with a statement of profound respect for tribal sovereignty and an admiration of our American legal system that recognizes it. Understanding the position also requires that the connection between *Martinez* and *Oliphant v. Suquamish Tribe*<sup>12</sup> be explored.

## II. OVERRULING *OLIPHANT*

From the vantage point of a tribal advocate, *Martinez* appears to be a finely crafted decision while *Oliphant* is anathema.<sup>13</sup> *Martinez* held that the Indian Civil Rights Act created no civil cause of action which could be brought in federal court.<sup>14</sup> Julia Martinez, complaining of sex discrimination in the application of tribal membership regulations to her children, was sent to tribal court with her complaint.<sup>15</sup> *Oliphant* held that there are implied limits on the

*Indian Nations*, 30 ARIZ. L. REV. \_\_\_\_ (1988); Gover and Laurence, *Avoiding Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497 (1985). Please note that while Kevin Gover and I wrote the latter article together and agreed to stand by each others' conclusions, it is not clear that he would choose to emphasize one part of a long article, and I offer the characterization in the text here as mine alone.

10. 436 U.S. 49 (1978).

11. For example, Professor Ball, no fan of the ICRA, writes with admiration of *Martinez*, Ball, *supra* note 8, at 123.

12. 435 U.S. 191 (1978).

13. See Ball, *supra* note 8, at 124.

14. 436 U.S. at 72.

15. Under the applicable rules of construction of the ICRA, discussed *infra* at notes 114-122, it was relevant to the determination on the merits whether the Santa Clara Pueblo in its discrimination against Julia Martinez was reflecting long-standing tribal traditions of patriarchy or, on the other hand, was implementing a newfangled Anglo-American patriarchal regulation. In my experience, people who find *Martinez* an easy case too often forget how difficult that question is. For example, Professor Ball writes as if it were undisputed, "Reflecting its commitment to traditional values, the Pueblo granted tribal membership to the children of male but not of female members who married outside the tribe." Ball, *supra* note 8, at 123. The Tenth Circuit, in holding for Ms. Martinez, was unable to find much tradition in the ordinance, which was adopted by the Pueblo in 1939. *Martinez*, 540 F.2d 1039, 1047 (10th Cir. 1976).

On the other hand, those others who find the case an easy one in the opposite direction tend to emphasize the Tenth Circuit's holding, forgetting the careful

analysis of the district court and its conclusion that the 1939 regulation was subtly but importantly related to tribal tradition, though phrased in Anglo-American legalese. *Martinez*, 402 F. Supp. 5, 15-16 (D.N.M. 1975).

Finally, there is an important feminist critique of *Martinez*, set forth for me in informal discussions with my Florida State colleague Margaret Baldwin. This view finds the long-standing, post-Columbian Santa Clara patriarchy to have replaced a longer-standing and purer pre-Columbian gynarchy. See, e.g., P. ALLEN, *THE SACRED HOOP* (1986). Professor Allen, a member of the Laguna Pueblo, writes:

Effecting the social transformation from egalitarian, gynecentric systems to hierarchical, patriarchal systems requires meeting four objectives . . . . The second objective is achieved when tribal governing institutions and the philosophies that are their foundation are destroyed, as they were among the Iroquois and the Cherokee, to mention just two. The conqueror has demanded that the tribes that wish federal recognition and protection institute 'democracy,' in which powerful officials are elected by majority vote. Until recently, these powerful officials were inevitably male and were elected mainly by nontraditionals, the traditionals being until recently unwilling to participate in a form of governance imposed on them by right of conquest. Democracy by coercion is hardly democracy, in any language, and to some Indians recognizing that fact, the threat of extinction is preferable to the ignominy of enslavement in their own land . . . . Now dependent on white institutions for survival, tribal systems can ill afford gynocracy when patriarchy — that is, survival — requires male dominance.

*Id.* at 41-42. In particular, Professor Allen believes that Judge Mechum, the trial judge in *Martinez*, may have gotten it wrong on the facts. She writes: "[P]aternity is not an issue among traditional Keres [or Laguna Pueblo] people; a child belongs to its mother's clan, not in the sense that she or he is owned by the clan, but in the sense that she or he belongs within it." *Id.* at 238. (Dr. Allen informed me by telephone that she is not certain whether the quoted sentence would apply to the Santa Clara Pueblo). See also *id.* at 250-52.

It is not clear from this feminist perspective whether Judge Mechum got it wrong on the law in dismissing Julia Martinez's suit, though, and Professor Allen does not suggest that he did. (Her book makes no mention of Julia Martinez or her lawsuit). Even given that this latter-day, European-imposed patriarchy was ratified and encouraged by the American patriarchy in 1939, perhaps Ms. Martinez's remedy lies back before the traditional decisionmaking bodies of the Pueblo. Judge Mechum's factual finding of a Pueblo patriarchy seems consistent with Dr. Allen's historical view of what happens when non-Indian men begin to analyze and meddle with Indian culture; one suspects that Dr. Allen would be uneasy with federal court supervision of tribal activity. (Dr. Allen confirmed to me this suspicion about the ICRA in general but admitted to considerable admiration of Julia Martinez and her challenge to the Pueblo).

This, then, leads to a different feminist view of *Martinez*. Julia Martinez's case can be seen as but one play in the struggle of women as a group against injustice and violence toward them, and, in this case, their children. Women, individually and as a group, are in as great a need for self-determination as any In-

reach of Indian tribal sovereignty.<sup>16</sup> Mark Oliphant was a non-Indian living on the Suquamish reservation in Washington state.<sup>17</sup> During a tribal festival to which he and other non-Indians were invited, he became rowdy, resisted the arrest of a tribal police officer and assaulted the officer in the process.<sup>18</sup> Facing a prosecution before the trial court, Mr. Oliphant sought habeas corpus in the federal district court, claiming that the Suquamish tribe was without criminal jurisdiction over him.<sup>19</sup>

Julia Martinez and Mark Oliphant are both persons with whom the Indian Civil Rights Act would seem to be concerned. Ms. Martinez's children could not be Santa Claran members because she had married outside the Pueblo.<sup>20</sup> The children of mixed marriages in the opposite gender direction are members.<sup>21</sup> The

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dian tribe, in this view; post-Columbian diminishment of the rights of Indian self-determination may be recent events compared to those of women under some cultures, though not Indian, Professor Allen insists. *Id.* at 192. It goes without saying, then, that Ms. Martinez is entitled to an effective forum to challenge the discrimination. That she must turn to a white male judiciary, under a statute enacted by a white male Congress, is unfortunate, but better than nothing. This feminist view, finally, finds it not at all surprising that it was a sex discrimination case that the Supreme Court used to reinforce tribal sovereignty at the expense of individual rights.

The previous paragraphs suggest the need for work to be done in the application of feminist jurisprudence to American Indian law. That is not to say that no women scholars are working in the field. Surely Professors Goldberg-Ambrose, Newton and others have set standards of scholarship that all of us might emulate. See, e.g., Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975); Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984). However, no scholar, to my knowledge, has attempted to deal with tribal sovereignty from a fundamentally feminist perspective, a development I find daunting to contemplate but exciting to anticipate.

16. 435 U.S. at 208.

17. *Id.* at 194.

18. As Mark Oliphant never went to trial on the merits of the criminal violations, I should be careful to call these *alleged* actions.

19. While, as I will mention below, Mr. Oliphant did not attack the Suquamish prosecution on ICRA grounds, he did take advantage of 25 U.S.C. § 1303, the habeas corpus provision of the ICRA. *Martinez*, which was decided about two months after *Oliphant*, held that there was no civil cause of action under the ICRA but accepted the validity of the ICRA itself. *Martinez*, 436 U.S. at 56. The Supreme Court in *Martinez* had no occasion to question the validity of the habeas corpus provision.

20. *Martinez*, 436 U.S. at 52.

21. The tribal ordinance is quoted in full in *Martinez*, 436 U.S. at 52 n.2.



ICRA prevents the denial of equal protection by the Pueblo.<sup>22</sup> Mark Oliphant was arrested by the Suquamish police<sup>23</sup>; he was about to face Suquamish justice. He could anticipate a fine or a short jail sentence.<sup>24</sup> He was apparently concerned with the workings of the Suquamish criminal justice system and the sense of fairness of his neighbors on the reservation. While it is true that there are other, more pervasive civil rights concerns on both the Santa Clara Pueblo and the Suquamish Reservation,<sup>25</sup> and without suggesting that the actions of the Pueblo and the Tribe were necessarily violations of the ICRA,<sup>26</sup> it is certainly fitting that Congress showed concern for Julia Martinez's and Mark Oliphant's civil rights before the tribal governments in question and passed the ICRA in 1968 in anticipation that such problems would and were arising.<sup>27</sup>

Given that Congress has passed the ICRA, given that the Act contains a habeas corpus provision and given further that Mark Oliphant was being "detained" by the tribe,<sup>28</sup> it would have been

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22. 25 U.S.C. § 1302(8).

23. *Oliphant*, 435 U.S. at 194.

24. 25 U.S.C. § 1302(7) restricts tribal punishments to imprisonments of one year and fines of \$5,000, or both.

25. *See supra* note \*.

26. With respect to Julia Martinez, the issue was whether the sex discrimination admittedly practiced by the Pueblo came within the ambit of the equal protection clause of the ICRA, 25 U.S.C. § 1302(8). The lower courts split on that question, *see Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976). With respect to Mark Oliphant, the issue was much less focused because he was never required to phrase his complaint in ICRA terms. (It is this lack of focus that I find objectionable about the posture of the *Oliphant* case. *See infra* text accompanying notes 38-42. One can anticipate, however, that Mr. Oliphant's ICRA objections would relate to due process, equal protection, trial by jury and, perhaps, right to counsel, all guaranteed by 25 U.S.C. § 1302.

27. *See COHEN'S HANDBOOK*, *supra* note 1, at 203-04.

28. He actually was released on his own recognizance, *Oliphant*, 435 U.S. at 194, but that should have no impact on the availability of habeas corpus. Courts have generally been rather open-minded about section 1303's requirement of "detention." *See, e.g., Settler v. Lameer*, 419 F.2d 1311 (9th Cir. 1969) (habeas corpus appropriate to attack the validity of a criminal fine). The opposite is probably true under 28 U.S.C. §§ 2241 and 2254. *See, e.g., Edmunds v. Won Bae Chung*, 509 F.2d 39 (9th Cir. 1975).

I am grateful to Professor Robert N. Clinton of the University of Iowa for this observation. *See* Statement of Robert N. Clinton before the United States Commission on Civil Rights, January 28, 1988, Washington, D.C. (written testimony p. 11 n.5).

perfectly appropriate under the ICRA as it exists today for a federal court to examine his treatment by the tribe. The court should have listened to arguments that his prosecution threatened to deprive him of due process, equal protection or the like.<sup>29</sup> The court should have listened to arguments that he was being treated differently because he was a non-Indian, that an all-Indian jury to try a non-Indian was inconsistent with the ICRA, that the tribe's procedures were inadequate, or whatever his ICRA arguments were.<sup>30</sup> But the Supreme Court, reversing the Ninth Circuit,<sup>31</sup> did not write the *Oliphant* opinion this way; Mark Oliphant was not released from custody because of ICRA violations. Instead the Supreme Court permitted a broad-based attack on Suquamish sovereignty and found that the tribe had impliedly surrendered the power to try Mark Oliphant for resisting arrest and assaulting a police officer.<sup>32</sup>

The *Oliphant* case is much, but not universally, disliked.<sup>33</sup> I

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29. These arguments, of course, would be based on the ICRA, 25 U.S.C. § 1302.

30. Once again, *see supra* note 18, I should call these *alleged* tribal violations, for they have never been proven and have only been very informally enumerated.

31. The Ninth Circuit's opinion, called *Oliphant v. Schlie*, is found at 544 F.2d 1007 (9th Cir. 1976).

32. *Oliphant*, 435 U.S. at 210. I should be careful not to suggest too much here. In certain instances, a broad-based challenge to the tribe's power would be appropriate. For example, if Mark Oliphant's defense was that his criminal offense, if any, occurred *off* the Suquamish reservation, then habeas corpus would be available to test the very power of the tribe in the situation given. I would limit such tests, though, to ones based on territorial jurisdiction. *Cf.* *Solem v. Bartlett*, 465 U.S. 463 (1984) (challenge to state criminal jurisdiction upheld where the offense occurred on-reservation). Here I find support in the works of Judge Canby and Professor Ball, who write with admiration of an essentially geographical base to tribal and state jurisdictional questions. *See* Canby, *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 4 (1987); Ball, *supra* note 8, at 20-34. Both writers, however, find the questions now more complicated than a geographical approach would be, to the decided disadvantage of Indian tribes, and the two articles cited trace the unfortunate evolution from John Marshall's territorial approach in cases such as *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), to modern cases like *Rice v. Rehner*, 463 U.S. 713 (1983).

33. *See* Ball, *supra* note 8, at 125; Williams, *supra* note 6, at 267-74, and sources cited at 268 n.174. As I have noted, Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. —, — n.90 (1988), I think that Professor Richard Collins' work, Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979), is kinder to *Oliphant* than Professor Williams gives it credit for being in his footnote cited.

shall not add substantially here to the literature of *Oliphant*-bashing; I have taken my shots already.<sup>34</sup> I will only note that the third type of the Court's trio of sovereignty-limiting events is getting out of hand.<sup>35</sup> That Indian tribes no longer possess those incidents of sovereignty that they have voluntarily surrendered by treaty is self-evident. I can also accept, unlike some of my colleagues, that Congress may, within limits not relevant here, unilaterally remove those aspects of sovereignty that it finds inconsistent with other national goals.<sup>36</sup> But for a court to determine, based on undesignated criteria, that certain aspects of tribal sovereignty are somehow "inconsistent with their status,"<sup>37</sup> in *Oliphant*'s now-famous words, raises difficult problems.

As a result of *Oliphant*, the ICRA, which Congress carefully crafted to limit tribal powers,<sup>38</sup> has been replaced, in the hands of non-Indian plaintiffs, with a judge-made assault on tribal sovereignty.<sup>39</sup> This misguided approach does not give due deference to

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34. See Gover & Laurence, *supra* note 9, at 515-23; Laurence, *Thurgood Marshall's Indian Law Opinions*, 27 How. L.J. 3, 34-40 (1984).

35. The Court in *Oliphant* found that limitations on tribal sovereignty might come from (1) surrenders of it by treaty, (2) express destruction of it by Congress, and (3) limitations implied by the tribe's dependent status. 435 U.S. at 208.

36. The issue involved here is whether Congress has the power to limit the sovereignty of Indian tribes by passing statutes such as the ICRA. The Supreme Court says it does, *Martinez*, 436 U.S. at 57, but as Professors Williams and Ball have pointed out, that conclusion may not stand careful jurisprudential analysis. Williams, *supra* note 6; Ball, *supra* note 8. My position, that I can live with the *Martinez* holding, is set forth in Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. \_\_\_\_ (1988). Professor Nell Jessup Newton of Catholic University Law School seems to be in reluctant and partial agreement with me. Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 265 (1984).

37. *Oliphant*, 435 U.S. at 208. The "status" referred to is apparently that the tribes are domestic dependent nations, a status attributable to John Marshall's dicta in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

38. Congress's well-known deliberations, which saw the ICRA evolve from a blanket application of the Bill of Rights to tribal governments to an enumeration and selective incorporation of those rights, are recounted in COHEN'S HANDBOOK, *supra* note 1, at 203-04.

39. That the *Oliphant* assault is "judge-made" is shown by the opinion itself. In Part I of Justice Rehnquist's opinion for the Court lies the closest the Justice comes to any statutory or treaty construction, seeking the "unspoken assumption" of Congress with respect to the question addressed. *Oliphant*, 435 U.S. at 203. Part II, then, begins: "While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable

the relevant Act of Congress. Worse, it prefers the imprecise test of "inconsistent with their status" to the ICRA's precise list of limitations.

Perhaps the most serious defect of *Oliphant* is that the case invited later plaintiffs — almost exclusively non-Indian plaintiffs — to make similar attacks on the existence of tribal power, though now usually in a civil, not criminal context. In the wake of *Oliphant*, for example, tribal taxes were challenged, not on the grounds that they were discriminatory or unfairly imposed, but because they were said to be inconsistent with the tribe's status.<sup>40</sup> The entry of a default judgment in tribal court was challenged, not because of lack of notice to the defendant, but because tribal court jurisdiction was said to be inconsistent with the tribe's status.<sup>41</sup> Tribal hunting and fishing rules were attacked, not because of any shortcomings in their promulgation or application, but because they were said to be inconsistent with the tribe's status.<sup>42</sup> The end is not in sight.

It is possible that the rule of *Martinez* is connected to the *Oliphant* holding.<sup>43</sup> *Martinez* took away from federal judges the authority to inspect tribal activity under the ICRA in the civil context.<sup>44</sup> Deprived of the ICRA as a tool, federal judges might understandably turn to the "inconsistent with their status" test of *Oliphant*. But only non-Indian plaintiffs have the *Oliphant* ploy available to them because of the tribe's acknowledged plenary power over its own members.<sup>45</sup> Indians, then, can rarely attack the *existence* of their tribe's power, but only its *exercise*, under the ICRA or tribal law. When an Indian is the civil plaintiff, like Julia Martinez, there is no recourse, under *Martinez*, but to tribal authorities.

Non-Indian plaintiffs, on the other hand, may finesse the ICRA question and *Martinez's* federal court barrier, because of *Ol-*

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weight," *id.* at 206, thus making clear that the Court is embarking on a common law inquiry.

40. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

41. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

42. *Montana v. United States*, 450 U.S. 544 (1981).

43. Judge Canby of the Ninth Circuit noted this connection in *Canby*, *supra* note 32, at 10.

44. *Martinez*, 436 U.S. 49.

45. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978).

*iphant*. When the plaintiff is white,<sup>46</sup> the complaint against tribal authority can often be rephrased out of ICRA terms which attack the exercise of tribal power and turned into an attack on the very existence of tribal power over the non-Indian.<sup>47</sup> So again, now in the civil context and only for white plaintiffs, the precise terms of the ICRA take a back seat to the imprecise "inconsistent with their status" test from *Oliphant*.

In my view, the mischievous *Oliphant* should be legislatively overruled and the "inconsistent with their status" test be taken away from the federal courts. Tribal sovereignty ought to remain in place unless the tribe surrenders it or Congress, in an intentional redirection of national goals, expressly takes it away.<sup>48</sup> Espe-

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46. Note that I have slipped effortlessly out of the "non-Indian" rubric and into "white," as if the two were synonymous. They are not, though in practical effect, most of the problems that have resulted in attacks on tribal power have involved Caucasians. Nevertheless, I concede the technical inaccuracy of the expression in the text. I further note that the extent of a tribe's power over Indians who are members of some other tribe is an issue nowhere near resolution. See, e.g., *Duro v. Reina*, 821 F.2d 1358 (9th Cir. 1987). The fact that *Oliphant* gives so little guidance on questions such as that one is one reason that I find it so attractive to contemplate the case's legislative overruling.

47. See *Gover & Laurence*, *supra* note 9, at 515-23 (1985). We called this the "*Oliphant* spin-off theory" of gaining access to federal court under 28 U.S.C. § 1331, alleging a federal common law limitation on tribal power flowing from *Oliphant*. The federal jurisdictional theory was ratified by the Supreme Court in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), although the Court left for another day the question whether *Oliphant's* reasoning extended to exercises of civil authority. In this regard, the Court noted: "[Thus] we conclude that the answers to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require." *Id.* at 855. The case was remanded to the federal trial court with instructions to await a decision by the tribal court on the question of whether the tribe had civil jurisdiction over non-Indians. While the opinion in *National Farmers Ins.* was clearly respectful of tribal sovereignty, it did not make plain what exactly the federal trial judge was to do with the tribal court determination. The tribal trial court refused to set aside the default judgment and the defendant school district and its insurer appealed to the Crow Tribe Appellate Court. That court reversed. *Sage v. Lodge Grass School Dist. No. 27*, 13 I.L.Rep. 6035 (Crow App. 1986). It agreed with the tribal trial court that civil jurisdiction over the non-Indian defendant exists in the tribe. *Id.* at 6037-40. It disagreed, however, on a matter of tribal law, to wit, whether the time had run for filing a motion for relief from a default judgment. *Id.* at 6040. No further proceedings are reported, but I am informed by the attorneys that the case was eventually settled and dismissed from federal court.

48. I would hope, of course, for some congressional reluctance toward doing

cially since *Oliphant* appears destined to evolve into a "White Plaintiffs Only" rule, its departure from the Indian law jurisprudential scene will be unlamented, except by those who would profit from or are pleased by the continued degradation of tribal identity.

Consistent with the *Oliphant* decision itself is that Congress do away with it, since the decision is based on the Court's view that Congress intended the result. The Court searched for and found an "unspoken assumption" of Congress that tribes had no criminal jurisdiction over non-Indians.<sup>49</sup> Congress should now speak the opposite assumption. The Court wrote that "Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States *except in a manner acceptable to Congress.*"<sup>50</sup> Congress should now state very clearly that the ICRA, with its habeas corpus entry into federal court, is exactly the manner acceptable to it.

It is also consistent with recent Supreme Court authority that *Oliphant* be overruled. In the case of *United States v. Dion*,<sup>51</sup> the Court had to decide whether various federal environmental protection laws, including the Endangered Species Act<sup>52</sup> and the Bald

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the latter. These old, resilient, yet fragile sovereignties need nurturing, not pruning.

Two further points should be made with respect to express congressional diminishments of tribal sovereignty. First, such diminishments will often run afoul of treaty-guaranteed rights. If so, the United States may be liable in money damages for the abrogation under the doctrine of *United States v. Sioux Nation*, 448 U.S. 371 (1980). Second, while these diminishments should come through conscious and unequivocal statements by Congress, occasionally that body will enact a statute of broad national application with little or no mention of Indians in the statute itself or the legislative history. In these cases it is for the courts to determine whether Congress intended to abrogate a treaty right or otherwise to limit tribal sovereignty. *United States v. Dion*, 106 S. Ct. 2216 (1986), *on remand*, 800 F.2d 771 (8th Cir. 1987), established the test for these "quiet" abrogations, and it is a very strong one, designed to prevent a court from mistaking congressional silence for congressional approval of the abrogation. The test is quoted *infra* text accompanying note 58. See generally Hanna & Laurence, *Justice Thurgood Marshall and the Problem of Indian Treaty Abrogation*, 40 ARK. L. REV. 797 (1987); Laurence, *Bald Eagles, Florida Panthers and the Nation's Word: An Essay on the "Quiet" Abrogation of Indian Treaties and the Proper Reading of United States v. Dion*, 4 J. LAND USE & ENVTL. L. \_\_\_\_\_ (1988);

49. *Oliphant*, 435 U.S. at 197-206.

50. *Id.* at 210 (emphasis added).

51. 476 U.S. 734 (1986).

52. Endangered Species Act, ch. 35, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1543 (1982 ed. and Supp. II)).

Eagle Protection Act,<sup>53</sup> worked a unilateral abrogation of the right to hunt guaranteed to the Yankton Sioux under one of their treaties with the United States.<sup>54</sup> The statutes themselves did not say precisely that the treaty was abrogated, nor did the legislative history indicate that Indian treaties had been much on Congress's mind during its deliberations.<sup>55</sup> The Eighth Circuit, on this basis, found the treaty unabrogated, an exception to the criminal sanctions under the statutes, and released the defendant.<sup>56</sup>

The Supreme Court reversed the Eighth Circuit,<sup>57</sup> formulating the test for unspoken treaty abrogations to be "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty."<sup>58</sup> The Supreme Court in *Dion* found such an "actual consideration" and the resulting "choice" to abrogate.<sup>59</sup>

The *Dion* "actual consideration and choice" test is a strong and demanding one, with much to recommend it.<sup>60</sup> The word "actual" has a special place in the law, reserved for those occasions where a court seeks evidence that something *in fact* occurred, not

53. Bald Eagle Protection Act, ch. 5A, 54 Stat. 250 (codified as 16 U.S.C. §§ 668-668d (1982)).

54. Treaty with the Yancton [sic] Sioux, April 19, 1858, 11 Stat. 743.

55. *Dion*, 476 U.S. at 740-46.

56. *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) (en banc).

57. *United States v. Dion*, 476 U.S. 734 (1986), *on remand*, 800 F.2d 771 (8th Cir. 1987).

58. *Id.* at 739-40.

59. *Id.* at 740-45. The Eighth Circuit had found no intent to abrogate expressed in either the statute or its legislative history, and further:

even if we ignore the express reference test and, instead, look for congressional intent to abrogate or modify treaty rights in less reliable sources, we reach the same conclusion . . . . [T]he fact that the acts are broadly worded conservation measures is inconclusive as to intent to abrogate Indian treaty rights. The plausible purpose behind conservation statutes gives rise to strong emotions, especially where bald eagles are concerned, but does not necessarily reveal a congressional intent to eliminate rights protected by federal treaties.

*Dion*, 752 F.2d at 1269-70.

60. See generally Laurence, *Bald Eagles, Florida Panthers and the Nation's Word: An Essay on the "Quiet" Abrogation of Indian Treaties and the Proper Reading of United States v. Dion*, 4 J. LAND USE & ENVTL. L. \_\_\_\_\_ (1988). Some of the thoughts at this point in the present essay are found in virtually identical form in that earlier article.

that something “constructively” occurred.<sup>61</sup> In this sense, the Court in *Dion* was searching for something more definite — *much* more definite — than the “unspoken assumption” of *Oliphant*. The “actual consideration and choice” test makes it clear that the question is not merely whether Congress would have been adverse to the notion that it was abrogating an Indian treaty, had it been brought to its attention.

The days are happily gone when the United States, with its divine arrogance of the last century, purposefully fails to keep its word to its Indian citizens as if there were something in the status of Indians that makes promises to them go for nothing.<sup>62</sup> More common these days is the choice of some otherwise worthy national goal — such as the protection of bald eagles or Florida panthers — that runs afoul of a treaty-made promise to an Indian tribe. Congress’s choice of whether to abrogate the treaty or not is one that should be done soberly, carefully and, one would hope, with some considerable disquietude to abrogate.

Furthermore, “quiet,” that is to say, unspoken abrogations, create for Congress all of the obvious problems of inadvertence and injustice. Similarly, when a court faces what is argued to be such a “quiet” abrogation, it ought to be hesitant, indeed reluctant, to reach the conclusion that the treaty right has been cast aside. The proper reading of the *Dion* opinion shows that the Supreme Court’s approach is fully consistent with that hesitancy and reluctance.

The same may be said of *Oliphant*’s talk of “unspoken assumptions” by Congress of the extent of tribal sovereignty. The *Dion* case is subtly — or perhaps not so subtly — inconsistent with the reasoning of *Oliphant*. It is true that the cases are not on all fours: *Dion* dealt with treaty abrogation and eagle feathers<sup>63</sup>; *Oli-*

61. Cf. U.C.C. § 1-201(25): “A person ‘knows’ or has ‘knowledge’ of a fact when he has *actual* knowledge of it.” (Emphasis added).

62. Some will find this sentence in the text to be hopelessly optimistic, enough so to make me as arrogant as any 19th century Indian country missionary, cavalry officer or federal law-maker. I confess to some optimism, not unlimited, in this field, and have done so publicly. See Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. \_\_\_\_\_ (1988). Those less optimistic, and toward whom that essay was one volley in a so-far friendly debate, include Professor Robert A. Williams, Jr., of the University of Arizona and Professor Milner S. Ball of the University of Georgia. See Ball, *supra* note 8; Williams, *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987); Williams, *supra* note 6.

63. *Dion*, 476 U.S. at 735.



*phant* dealt with tribal sovereignty and police-officer assaults.<sup>64</sup> But in both cases the sovereign rights of Indian tribes were at issue, in one case embodied in a treaty and in one case not.<sup>65</sup> In *Dion*, the sovereign right to hunt the animals that live in Indian country was thought to be inconsistent with a modern statute of admirable purpose.<sup>66</sup> In *Oliphant*, the sovereign right to control criminal activity in Indian country was thought to be an unwarranted intrusion into Mark Oliphant's personal freedom.<sup>67</sup> The holdings of both cases were against the tribal claim.

The inconsistency comes in the tests put forth in the two cases. *Oliphant's* is very vague: "Indian tribes are prohibited from exercising . . . those powers of autonomous states that are . . . 'inconsistent with their status.'"<sup>68</sup> *Dion's* is quite exact: "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty."<sup>69</sup> Granted, the Eighth Circuit's test in *Dion* was even more exact, requiring a direct mention of treaty abrogation either in the statute itself or the legislative history.<sup>70</sup> I have admitted elsewhere a fondness for the Eighth Circuit's test.<sup>71</sup> Nevertheless, it is clear that even the Supreme Court's *Dion* test is remarkably more precise than its *Oliphant* test.

If anything, the *Oliphant* situation, where the court is trying to determine the reach of tribal sovereignty in the absence of a congressional enactment, cries for more clarity than the *Dion* situation, not less. The two cases together create a stringent test for the diminishment of tribal power when Congress has acted, and a loose one when Congress has not acted, and that makes no sense. Furthermore, since the *Oliphant* rule is for whites only, it is espe-

64. *Oliphant*, 435 U.S. at 191.

65. Whether the Suquamish tribe's power to try non-Indians for crimes committed on the reservation was included in its treaty with the United States was discussed by the Supreme Court. *Oliphant*, 435 U.S. at 206-08. The holding was that the power was not treaty-recognized.

66. *Dion*, 476 U.S. at 745-46.

67. *Oliphant*, 435 U.S. at 210.

68. *Id.* at 208 (emphasis in the original).

69. *Dion*, 476 U.S. at 739-40 (emphasis added).

70. *Dion*, 752 F.2d at 1265. The Eighth Circuit's test originated in *United States v. White*, 508 F.2d 453 (8th Cir. 1974).

71. Laurence, *Bald Eagles, Florida Panthers and the Nation's Word: An Essay on the "Quiet" Abrogation of Indian Treaties and the Proper Reading of United States v. Dion*, 4 J. LAND USE & ENVTL. L. —, — (1988).

cially abhorrent. It is time that the Court be put back on a sensible track: tribal sovereignty should be limited only by tribal surrender and congressional diminishment. The latter should be found only by the *Dion* "actual consideration and choice" test when Congress does not speak with forthright clarity. The possibility of "inconsistent with their status" deprivations should be forgotten.

The congressional vehicle for overruling *Oliphant* should be the Indian Civil Rights Act. In *Oliphant*, the Supreme Court recognized that the ICRA might have worked the kind of direct congressional recognition of tribal power over non-Indians that would have settled the question without any inquiry into what was "inconsistent with their status."<sup>72</sup> In spite of some rather instructive legislative history of the ICRA, the Court found that the statute was not sufficiently unequivocal regarding the legitimacy of tribal exercise of criminal jurisdiction over non-Indians to settle the matter.<sup>73</sup> Congress now need only amend the ICRA to make clear to the Court what was unclear to it in *Oliphant*: that the exercise of criminal jurisdiction by the tribe over Mark Oliphant and other non-Indians is appropriate if done consistently with the Indian Civil Rights Act. If the protections of the ICRA are good enough for Julia Martinez, they are good enough for Mark Oliphant.

### III. OVERRULING *MARTINEZ*

Should Congress at the same time overrule *Martinez* and put the federal courts back in the civil ICRA business? While the ICRA is being legislatively adjusted to make clear that its protections are what Mark Oliphant needs, should Congress also give Julia Martinez a federal forum for her complaint? Strong tribal advocates say "No."<sup>74</sup> Some observers point to the vulnerability of poor tribes to harassing civil rights litigation in federal court, to the possibility of the smallest tribe being held to the most formal procedural due process requirements, to the unseemliness of airing before federal judges the most political of intra-tribal squabbles, to the irony of exacting from old, old non-European governments compliance with latter-day tidbits of American constitutional law.<sup>75</sup>

There is much to be said for this position. On balance, how-

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72. *Oliphant*, 435 U.S. at 195 n.6.

73. *Id.*

74. See Clinton, *supra* note 1.

75. *Id.*

ever, I favor a very careful overruling of *Martinez*. Civil rights are important, and only those whose notion of "Indian-ness" is more romantic than real think that Indian tribes are too pure to violate these important rights. Furthermore, *Martinez*, to me, leads too quickly to *Oliphant*; depriving federal judges of the ICRA sends them, understandably, in search of a loophole, looking for some other way to protect a sympathetic plaintiff. In a practical sense, asking Congress for the reversal of *Oliphant*, but not *Martinez*, is asking to be rebuffed. Likewise, taking away "inconsistent with their status" without replacing it with the ICRA invites judges to find ways to make more fundamental attacks on tribal sovereignty.

The easiest case for federal court intrusion into tribal decisionmaking is the one that is in place now: when tribes choose to incarcerate someone, federal habeas corpus is available to test the validity of the incarceration. The Grand Writ should run to those in custody within the jurisdiction of the United States, including the Indian reservations which lie within its borders. To argue otherwise is to argue that the Suquamish Tribe is as sovereign as Iraq. This position, as unassailable as it may be from certain historical or jurisprudential perspectives, is one that is folly to pursue.<sup>76</sup>

Julia Martinez and others, however, need injunctive relief, not habeas corpus. Her Pueblo had denied her children membership without restraining her freedom.<sup>77</sup> And, of course, to suggest that she should pursue her grievance so vigorously so as to force the authorities to imprison her is to suggest nonsense. The ICRA should not be interpreted in a way that will increase the likelihood of reservation violence. The question — an agonizing one for those tribal advocates for whom sex discrimination is abhorrent — is whether she should be permitted to seek an injunction in federal court.

Resort to first principles is the key. Some tribal advocates — those who see tribal sovereignty as the "first right" of Indians — return to this first right and deny her the forum because its existence would diminish Santa Clara sovereignty.<sup>78</sup> Other tribal advocates argue against civil ICRA jurisdiction on the grounds that tribal governments are too weak to do much damage to anyone.<sup>79</sup> It

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76. See Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. \_\_\_\_\_, \_\_\_\_\_ (1988).

77. *Martinez*, 436 U.S. at 52.

78. See *supra* note 1.

79. R. BARSH & J. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 254 (1980).

is true that there is a tremendous irony in characterizing allegations of tribal civil rights violations as involving "those with power acting against those without power," paraphrasing Chairman Clarence Pendleton of the United States Commission on Civil Rights at the January 28, 1988, hearings in Washington.<sup>80</sup> Compared to what they were before they began to deal with the Europeans and Americans, tribes have little power remaining.<sup>81</sup> On the other hand, it would be difficult to explain to Julia Martinez how her Pueblo is not in the position to deny her children the right to be Santa Claran, exactly the right that some tribal advocates call their "first right," and to base the denial entirely upon the sex of their mother.

Partly out of sympathy for Ms. Martinez's plight, I am a less extreme tribal advocate. Tribal sovereignty is not the "first right" of Indian law, but rather a fundamental tenet of Indian law — fundamental but only co-equal with the power of the United States to diminish Santa Claran sovereignty in the furtherance of legitimate national goals such as the protection of Julia Martinez from sex discrimination. These conflicting tenets, frankly contradictory, create the tension that holds the body of Indian law together. Each has the ability to dominate the other; neither should be given precedence or the system will collapse. The metaphor is to a piano, which must be tightly strung with strong conflicting forces in order to produce music.

Still, the time comes when one must decide. The tensions between the plenary power of Congress and the sovereignty of the Indian tribes will control the activity of both Congress and the tribes; a legislature or court that is exercising the plenary power while keeping a respectful eye on tribal sovereignty is one whose response will be tempered. This temperance will be reflected below in the guidelines under which *Martinez* might be overruled. But, in the end, one must decide the basic question of whether the federal courthouse doors will be open or closed to Julia Martinez. Within the guidelines set out below, they should be open, under the ICRA. As respectful as I am of tribal sovereignty, as much admiration as I have for tribal governance, in the end I am unable to tell Julia Martinez that her claim is *de minimis*, unworthy of note, or not cognizable. In the end she has a complaint that must be

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80. Remarks of Chairman, Hearings of the United States Commission on Civil Rights, January 28, 1988, Washington, D.C.

81. See Williams, *supra* note 2.

heard outside the jurisdiction of the entity alleged to be discriminating against her. The *Martinez* case, then, should be legislatively overruled, under these guidelines, briefly sketched.

#### A. *An ICRA Plaintiff Must First Exhaust Her Tribal Remedies*

This was the law as it developed under the pre-*Martinez* ICRA.<sup>82</sup> Which remedies? All of them. I am suspicious of any exception for so-called "fruitless" remedies. Often, under tribal procedures, the final appeal will be to the tribal council, a political body.<sup>83</sup> The plaintiff must take this step before suing under the ICRA to avoid a determination by the federal courts of whether internal tribal politics make such an appeal "fruitless."<sup>84</sup> The only exception ought to be if the federal court finds that the tribe acted in bad faith when delaying the operation of the tribal remedies.<sup>85</sup>

It can be seen in this strong ICRA exhaustion requirement how a respect for the co-equal tenet of tribal sovereignty tempers the federal court intrusion. The non-Indian analog to ICRA attack

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82. See, e.g., *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973). See *Gover & Laurence*, *supra* note 9, at 499-515. See also *White v. Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984), a post-*Martinez* case in which the white plaintiffs tried to distinguish *Martinez* on the theory set forth in *Dry Creek Lodge v. Arapahoe and Shoshone Tribe*, 623 F.2d 682 (10th Cir. 1980). The plaintiffs in *White v. Pueblo of San Juan* were unsuccessful even at raising that suspicious distinction as they had failed to exhaust their tribal remedies. 728 F.2d at 1313.

83. See, e.g., *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976).

84. See, e.g., *Brunette v. Dann*, 417 F. Supp. 1382, 1386 (D. Idaho 1976) (exhaustion was required where a dispute between tribal court judges could be decided by the tribal appellate court). *Contra* *Necklace v. Tribal Court of the Three Affiliated Tribes*, 554 F.2d 845, 846 (8th Cir. 1977) (per curiam) (no formal tribal habeas corpus procedures means that all tribal remedies were exhausted); *Rosebud Sioux Tribe v. Driving Hawk*, 534 F.2d 98, 101 (8th Cir. 1976) (per curiam) (both sides of the case sought federal court review so no exhaustion was required); *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 239-40 (9th Cir. 1976) (tribal judge, *ex parte*, admitted it was unlikely that the tribal court would overrule the tribal council; no exhaustion required); *Runs After v. Cheyenne River Sioux Tribe*, 437 F. Supp. 1035, 1037 (D.S.D. 1977) (no exhaustion required when the operation of the tribal appellate court was "erratic" and controlled by the tribal council). *Cf.* *St. Marks v. Chippewa-Cree Tribe*, 545 F.2d 1188, 1189 (9th Cir. 1976) (per curiam) (plaintiffs had exhausted tribal review by the time the circuit court heard the appeal from the district court's dismissal for failure to exhaust).

85. In *Runs After v. Cheyenne River Sioux Tribe*, 437 F. Supp. 1035 (D.S.D. 1977), the court specifically found that the tribal council was not acting in bad faith and nevertheless lifted the exhaustion requirement. *Id.* at 1037.

on tribal action is a 42 U.S.C. section 1983 (1982)<sup>86</sup> attack on state action. Federal court review is currently much more readily available under section 1983 than under the ICRA here proposed. There is no requirement that state remedies be exhausted under section 1983. Furthermore, when the plaintiff *does* use the state court system to challenge the state action under federal law, it is always possible, though statistically unlikely, that the United States Supreme Court will review the final state court decision on writ of certiorari.<sup>87</sup> No writ of certiorari is available to tribal courts.<sup>88</sup> The lack of certiorari and the presence of the exhaustion requirement will make the federal court intrusion into the fragile tribal legal environment as non-disruptive as possible.

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86. *Patsy v. Board of Regents*, 457 U.S. 496 (1982). There is an exhaustion of state remedies requirement under 28 U.S.C. § 2254(d) (1982), the federal habeas corpus statute directed at state detentions. See *Necklace v. Tribal Court of the Three Affiliated Tribes*, 554 F.2d 845, 846 (8th Cir. 1977) (per curiam). In *Necklace*, the petitioner had been involuntarily committed to a mental institution by the tribal court in 1972. *Id.* at 845. The tribe, having no facilities for the mentally ill, contracted with the state of North Dakota, and Ms. Necklace was confined in a state hospital. *Id.* Four years later she commenced an action under 25 U.S.C. § 1303 to obtain her release. The district court dismissed the petition and the court of appeals reversed. *Id.* at 846. No exhaustion of state remedies was required under 28 U.S.C. § 2254(d) (1982) because *Necklace* was not "in custody pursuant to a judgment of a State court," as the statute reads. Furthermore, the court held, North Dakota's interests were not sufficiently implicated for comity to require that the federal court stay its hand for the state's benefit. *Id.* With respect to the exhaustion of tribal remedies, the court of appeals found there to be no formal tribal habeas corpus procedure to be exhausted and remanded the case to the tribal court for a decision on the merits. *Id.* The case on remand is not reported, but I am told by the lawyers that it was settled without further hearing by the federal district court. Ms. Necklace was eventually released from confinement.

87. 28 U.S.C. § 1257 (1982).

88. Professor Clinton suggested to the Commission on Civil Rights in his testimony at the January 28th hearings that *Martinez* not be overruled and that, if any federal court relief be necessary — and Professor Clinton was of the strong conviction that it was *not* — certiorari to the Supreme Court was the most that should be allowed. He offered a draft provision. Statement of Robert N. Clinton before the U.S. Commission on Civil Rights, Hearings of January 28, 1988, Washington, D.C. (written testimony p. 16). This proposal has an attractive ring to it, leaving the federal doors open to litigants, but only on "appeal" from tribal court and only, we all know, in those few cases where the Supreme Court will take the case. The proposal has the further symbolic attraction of treating tribes with the same dignity as states. However, while deferring to those with more political savvy than my own, I judge the chance that Congress would ever add to the Supreme Court's workload by allowing certiorari to be sought from several hundred tribal courts to be approximately zero.

## B. *There Should Be a Meaningful "Amount-In-Controversy" Requirement*

Tribal governments are smaller, poorer and more fragile than state governments. They are very vulnerable to the threat posed by frequent and extended litigation.<sup>89</sup> They should be protected from all but the most important challenges to their actions.<sup>90</sup> This requirement would be similar to the one that exists in federal court diversity actions.<sup>91</sup> It is, of course, *more* similar to the one that did exist for general federal question jurisdiction and was recently removed by Congress.<sup>92</sup> That the amount-in-controversy requirement makes sense under the ICRA and not under general federal jurisdiction is explained by the fragile nature of tribal governments. The requirement, in this sense, is the civil analog of the habeas corpus remedy in criminal matters. Just as habeas corpus requires that tribal action amount to detention before it is actionable,<sup>93</sup> the amount-in-controversy requirement would mean only major tribal actions would be reviewable.

Claims made in suits for injunctive or declaratory relief based on free speech, right to counsel or other important civil rights are often not reducible to monetary amounts.<sup>94</sup> Such suits should not be inhibited by the amount-in-controversy requirement. Instead, the requirement should apply to suits such as *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*,<sup>95</sup> where the plaintiffs were seeking an injunction against tribal action that allegedly deprived them of the value of their property.<sup>96</sup> In cases such as that, the plaintiff should have to allege that substantial damages are at stake before the federal court should intervene. In *Dry Creek Lodge*, in fact, the plaintiff was seeking money damages as well as an injunction.<sup>97</sup> As the next point will show, I think damages

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89. See, e.g., *Oliphant*, 435 U.S. at 193 n.1, with respect to the Suquamish Tribe.

90. *Martinez*, 436 U.S. at 71.

91. 28 U.S.C. § 1332(a) (1982).

92. 28 U.S.C. § 1331 had a \$10,000 amount-in-controversy requirement until 1980, when it was removed by Pub. L. No. 96-486. See also, Pub. L. No. 94-574 (codified at 28 U.S.C. § 1391 (3) (1982) (eliminating the amount-in-controversy in actions brought against the United States).

93. See COHEN'S HANDBOOK, *supra* note 1, at 669 n.56.

94. See, e.g., *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980).

95. 623 F.2d 682 (10th Cir. 1980).

96. *Id.*

97. *Id.*

should never be recoverable against a tribe.

The setting of the exact amount-in-controversy that should be required is not the kind of problem that law professors are good at solving. In the context of any reconsideration of the ICRA, Congress should make findings of exactly what kinds of lawsuits in federal court present the most potential for harassment of tribal governments or unnecessary depletion of tribal resources. Based on such findings, a meaningful level might be set, keeping in mind that tribal tribunals are always available for plaintiffs alleging potential damage too small for the federal court to consider.

### C. Money Damages Should Not Be Recoverable Against the Tribe

The doctrine of tribal sovereign immunity should not be abolished.<sup>98</sup> Declaratory judgment should be the preferred remedy for prevailing plaintiffs, with injunctions available when necessary to effectuate the federal court's decision. An *Ex parte Young*<sup>99</sup> exception, to allow injunctions against tribal officers, but not against the tribe,<sup>100</sup> seems appropriate.

When speaking of *Ex parte Young* in federal court, there arises the related question of whether tribal courts must, under the ICRA, engraft that bit of federal jurisprudence into tribal law. Before a tribal court, must the doctrine of tribal sovereignty be limited to the extent of permitting suits for injunctions against named tribal officials? In spite of the fact that *Ex parte Young* is just the sort of Anglo-American legalism that one would expect tribal courts to reject, there is some meager authority for the proposition.<sup>101</sup>

The overruling of *Martinez* that I am proposing happily makes that poorly reasoned case just noted moot. A tribal court would be free to decide whether to permit, under federal law, a suit for an injunction, like Julia Martinez's, to proceed against the

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98. That tribal sovereign immunity exists even when an injunction is sought was one of the holdings of *Martinez*, 436 U.S. at 55, 58. *But see infra* text accompanying note 99. One of many things wrong with the *Dry Creek Lodge* case is that it ignored tribal immunity and affirmed the awarding of damages against the tribe, 623 F.2d at 685. *See generally* Gover & Laurence, *supra* note 9, at 499-515 (1985).

99. 209 U.S. 123 (1908).

100. *See Martinez*, 436 U.S. at 58-59.

101. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir. 1984). *See* Gover & Laurence, *supra* note 9 at 504.



named governor of the Pueblo. If it decides not to allow the suit, then Ms. Martinez has exhausted her tribal remedies and may proceed to federal court, against the governor, under *Ex parte Young*. The tribal court, of course, realizing that it will be able more effectively to influence the litigation, may decide to use *Ex parte Young* by analogy and have the first shot at the merits of Ms. Martinez's suit. As the next point will show, that could be an important strategic consideration.

#### D. *Federal Court Review Should Be on the Tribal Court Record, If Possible*

This will have the laudable effect of encouraging litigants to undertake full and good faith advantage of the tribal judicial system. Of course, some tribal courts operate rather informally, and the "record" will be not what a federal court is used to.<sup>102</sup> The ICRA should not be written or read to tax tribal judicial systems beyond their ability to bear. Tribal court records may be in a native tongue, and that should be the federal court's problem, not the tribal court's. Much of the record might be tape-recorded oral presentations. Sometimes, perhaps, the federal court will have no choice but to take supplementary evidence. But the requirement that the federal court look first to the record of the tribal court will help to keep the ICRA from being destructively intrusive.

#### E. *The "Political Question" Doctrine Should Be Applied Liberally*

The pre-*Martinez* history of ICRA litigation teaches that, if the case is overruled, many of the plaintiffs will be Indians suing their own tribes over election-related controversies.<sup>103</sup> The post-*Martinez* experience, admittedly presented here anecdotally, has been that those election controversies have had a way of working

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102. In reviewing labor arbitration decisions, courts regularly engage in the inspection of records far from salutary. Indeed, often no "record," in a formal sense, exists. See, e.g., *AT & T Technologies, Inc. v. Communications Workers of America*, 106 S. Ct. 1415 (1986); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). See generally, Elkouri & Elkouri, *How Arbitration Works* 280-83 (4th ed. 1985). I am grateful to my Florida State colleague Anthony Herman for this observation.

103. See, e.g., *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975); *Johnson v. Lower Elwha Tribal Comm.*, 484 F.2d 200 (9th Cir. 1973); *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973).

themselves through the normal electoral process if given the chance. In several cases, a one-time plaintiff, complaining of election improprieties, has later become an elected official, with no help from the federal court.<sup>104</sup> Such a situation bespeaks of the need for caution and restraint in fashioning judicial remedies for electoral disputes, and a political question doctrine seems appropriate.

For example, in *White Eagle v. One Feather*,<sup>105</sup> the Eighth Circuit was called upon to determine whether the "one person, one vote" constitutional requirement of *Reynolds v. Sims*<sup>106</sup> should apply, under the ICRA, to tribal elections.<sup>107</sup> It is easy to forget just how close the Supreme Court came, in *Baker v. Carr*,<sup>108</sup> to deciding that federal courts had no jurisdiction over matters of apportionment.<sup>109</sup> Under the ICRA, federal courts ought to rediscover that reluctance to intrude into political matters and dismiss what are essentially political controversies. Furthermore, the doctrine ought to be applied more liberally under the ICRA than it is under the Constitution; the statute, after all, is being imposed by the United States unilaterally on governments that have not ratified it.<sup>110</sup>

The "political question" doctrine is one that raises both the suspicions and the hackles of civil libertarians.<sup>111</sup> It has been likened informally to me as a judicial *carte blanche* with unlimited credit, to be presented by a government whenever it seeks to tread

104. For example, Clarence Runs After, who was a losing plaintiff in the post-*Martinez* case of *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985), now sits on the tribal council of the Cheyenne River Sioux Tribe.

105. 478 F.2d 1311 (8th Cir. 1973).

106. 377 U.S. 533 (1964).

107. *White Eagle*, 478 F.2d 1311.

108. 369 U.S. 186 (1962).

109. In *Baker v. Carr*, the Court took 29 pages in Volume 369 of the United States Reports to dispense with the political question issue. *Id.* at 208-37 (These pages include a discussion of the Indian cases at 215-17). Justice Douglas added nine more pages in his concurring opinion. *Id.* at 241-50. Justice Clark added two more. *Id.* at 251-53. Justice Frankfurter offered 64 pages in a wide-ranging dissent. *Id.* at 266-330. Justice Harlan, also in dissent, added ten pages, mostly on the merits of the case. *Id.* at 330-40.

110. The power of the United States to impose the ICRA on unconsenting tribes was assumed by the parties and the Court in *Martinez*, 436 U.S. at 58, 72, and is partially the subject of the debate in *Williams*, *supra* note 2, and in Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. \_\_\_\_\_ (1988).

111. See, e.g., Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

on the rights of its citizens.<sup>112</sup> Perhaps so. In any case, where the governments are so small and vulnerable, the history of litigation is so political, and the federal courts so unused to deciding issues of tribal law, the doctrine seems appropriate. If nothing else there is a wonderful irony in its use to the advantage of Indian tribes, which have for years suffered under a too-liberal political question doctrine to their detriment.<sup>113</sup>

F. *The Substantive Provision of the ICRA Should Be Read With Respect For Both Traditional Tribal Ways and For Valid, Modern Innovation*

The federal courts were, on the whole, rather respectful of tribal tradition in the pre-*Martinez* ICRA cases. Many cases might be cited here; perhaps the most instructive case in this regard was the federal district court opinion in *Martinez* itself.<sup>114</sup> In that case, the court considered carefully the regulation that Ms. Martinez was challenging and determined that it was the modern formula-

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112. I am indebted to my colleague Steve Gey of Florida State University for this characterization.

113. The Supreme Court has written:

In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations and concealment . . . since all these matters, in any event were solely within the domain of the legislative authority and its action is conclusive upon the courts.

We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. *In any event*, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned . . . by the use made of Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.

*Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903) (emphasis added). The continued validity of this language of *Lone Wolf* was drawn into question by the holding of *United States v. Sioux Nation*, 448 U.S. 371 (1980), in which the Sioux recovered a judgment in excess of \$100 million against the United States for the abrogation of a treaty. *Lone Wolf* was not precisely overruled, but the Supreme Court said: "*Lone Wolf's* presumption of congressional good faith has little to commend it as an enduring principle for deciding questions of the kind presented here." *Id.* at 414-15.

114. See, e.g. *Martinez*, 402 F. Supp. 5 (D.N.M. 1975).

tion of an old, old tribal tradition.<sup>115</sup> Even while conceding that sex discrimination was abhorrent to American society and that that abhorrence was reflected in the equal protection clause of the ICRA, the court denied the relief, based on the tribal patrilineal, patrilocal tradition.<sup>116</sup>

Of course, and as one would expect when Congress gives so little guidance as to how, if at all, a phrase like "the equal protection of *its* laws" in the ICRA differs from "the equal protection of *the* laws" in the fourteenth amendment, the pre-*Martinez* results were mixed. In some cases courts did little more than conclude that the ICRA applied the constitution to the tribe.<sup>117</sup> But the better-reasoned cases are clearly those that saw that the ICRA requires a balancing of tribal interests and individual interests<sup>118</sup> and, when the former carries more weight, the ICRA clauses should be construed with an eye more toward tribal ways than toward Anglo-American jurisprudence and history.

This respect should continue, and the federal courts should be reluctant to strike down tribal tradition in the name of Anglo-American legal philosophy. Too, tribes should not be required under the ICRA to remain frozen in pre-Colombian days, in the name of deference to tribal tradition. Indian tribes, like all governments, have a desire to evolve to meet modern problems, and new tribal solutions are also entitled to federal court deference.

On the other hand, the "take the tail with the hide" theory of cases like *White Eagle v. One Feather*,<sup>119</sup> which holds that Anglo-American standards may be applied when the tribe adopts an Anglo-American institution, seems relatively unobjectionable.<sup>120</sup> Even here, though, a court should remember how rarely tribes have truly had freedom of choice in "choosing" to adopt Anglo-American institutions. Most often this "choice" came in the context of the ratification of a tribal constitution under the Indian Reorganization Act of the early days of the Franklin D. Roosevelt administration. While the Reorganization Act had the worthy goal of ending once and for all the ill-advised allotment process<sup>121</sup> and embodied a

115. *Id.* at 12-18.

116. *Id.* at 17-18.

117. *See, e.g.*, *United States v. Alberts*, 721 F.2d 636, 638, n.1 (8th Cir. 1983).

118. *E.g.*, *Martinez*, 402 F. Supp. 5.

119. 478 F.2d 1311 (8th Cir. 1973).

120. Ch. 576, 48 Stat. 984 (1934). *See generally* COHEN'S HANDBOOK, *supra* note 1, at 147 n. 30.

121. *Id.* at 148.

healthy respect for tribal self-determination, it is also true that the tribes' "choice" of whether to adopt American-like constitutions with American-like secret ballot, representational elections was, for many tribes, more theoretical than real.<sup>122</sup> Even the tail might not come along, if the hide was forced on the tribe.

#### IV. CONCLUSION

Matters of space and deadline do not permit the exploration of these guidelines in the detail they deserve. Furthermore, it is folly to propose any ICRA revision in detail unless and until Congress undertakes an investigation of exactly who needs civil rights protection before tribal courts and why. In answering those questions, it is important to refuse to conclude, based on *Oliphant*, that non-Indians are not in need of any protection. *Oliphant* is a case whose time has passed and is a case that ought to be legislatively reversed.

Most important for a happy outcome of congressional re-deliberation of the ICRA is that it be undertaken with an appreciation of the importance of tribal sovereignty as a basic tenet of American Indian law. If Congress goes about its deliberations with a respect *both* for the rights of individual American citizens — Indians and non-Indians alike — *and* for the old, old governments that were here first, then I trust that, with the aid of vigorous tribal advocates, the details will work themselves out. Federal law in general, and the ICRA in particular, must remain flexible enough to advance the interests of tribal sovereignty *and* individual rights.

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122. *Id.* at 149-51.