

Warrantless Searches for Alcohol by Native Alaskan Villages: A Permissible Exercise of Sovereign Rights or an Assault on Civil Liberties?

PAT HANLEY*

This Article analyzes the legality of border searches employed by Native Alaskan villages ("NAVs") to prevent the importation of alcohol into their communities. The Article first discusses the application of the search and seizure requirements of the Fourth Amendment and Indian Civil Rights Act to NAVs, finding that the recent federal recognition of NAVs as tribes frees them from complying with the Fourth Amendment and that the requirements of the Indian Civil Rights Act are largely unenforceable due to judicial interpretation of the Act. The Article then addresses the extent of sovereign power possessed by NAVs and determines that their domestic dependent nation status reduces the scope of sovereign powers and likely would mandate against border searches. The Article advises that NAVs should not be permitted to conduct border searches due to the intrusion on personal liberty and restriction of free travel within the United States, yet concludes that it will be difficult to halt these searches as judicial review is highly unlikely.

I. INTRODUCTION

In 1980, the Alaska Legislature passed a statute permitting established villages and municipalities to prohibit the sale, importation, and/or possession of alcohol upon an affirmative majority vote of the electorate.¹ Presently, out of approximately 235 com-

Copyright © 1997 by Alaska Law Review

* Attorney from Anchorage, Alaska and former school teacher in the villages of Red Devil, Kwigillingok, and Quinhagak. J.D., University of Utah College of Law, 1996; B.A.E., Pacific Lutheran University, 1988. The author wishes to thank Judy Bush, formerly of Alaska Legal Services and currently Reservation Attorney for the Lummi Nation in Bellingham, Washington, for her review and suggestions, and Professor Alexander T. Skibine of the University of Utah College of Law, for his tutelage and enthusiasm for Indian Law.

1. See ALASKA STAT. § 04.11.490 (Michie 1980), *repealed by* 1995 Alaska

munities in Alaska, seventy-eight have banned the sale and importation of alcohol, while twenty-eight have banned the possession of alcohol completely.² Some Native Alaskan villages ("NAV's"), apparently frustrated with the statute's lack of effectiveness in deterring alcohol importation and use, have adopted more assertive means of enforcement. Most NAV's are remote and not accessible by road; therefore, travel to NAV's is predominantly by small airplane.³ Several NAV's in southwestern Alaska have set up stations at the village airplane runway in order to search people and their luggage for alcohol before they are permitted to enter the village.⁴ These searches are systematic and are conducted without warrants or any showing of probable cause.

The legal analysis of these searches begins with the Fourth Amendment to the United States Constitution, which states that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.⁵

The Supreme Court has interpreted the Fourth Amendment as requiring the use of search warrants based on probable cause in most searches.⁶ However, several exceptions have been allowed, in-

Sess. Laws § 69 ch. 101. The repealing law enacted ALASKA STAT. § 04.11.491 (Michie 1995) (permitting communities to ban the sale, importation, and/or possession of alcohol).

2. See ALCOHOLIC BEVERAGE CONTROL BOARD, SCHEDULE OF LOCAL OPTION COMMUNITIES (1997). Twenty-three villages have voted to ban both sale and importation, and possession of alcohol, resulting in 83 villages who have banned the sale and importation of alcohol and/or possession of alcohol.

3. Many NAV's can be reached by boat during the summer and by snowmobile during the winter. Air travel, however, is the only practical and regularly scheduled form of long distance travel to and from most NAV's.

4. NAV's known to have conducted such alcohol searches include Chefor-nak, Kipnuk, and Kwigillingok. Due to the informal nature of the political system in some NAV's, and the lack of any official reporting of unique law enforcement efforts, it is difficult to know if other NAV's have also conducted searches for alcohol. See Tom Kizzia, *Get Out of Town*, ANCHORAGE DAILY NEWS, July 2, 1997, at A1 (part of special news section *Indian Country: Two Destinies, One Land*, June 29-July 5, 1997).

5. U.S. CONST. amend. IV.

6. See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) ("Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral magistrates."); see also *State v. Lucero*, 692 P.2d 287 (Ariz. 1984); *People v. Nash*, 341 N.W.2d 439 (Mich. 1983); *State v. Mazur*, 280 N.W.2d 194 (Wis. 1979); *State v. Tant*, 287 So. 2d 458 (La. 1973).

cluding the United States's right to search the baggage or automobile of every person crossing its border without probable cause or even mere suspicion.⁷ This border search exception to the Fourth Amendment is grounded in the recognized right of the United States to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country.⁸ When the Supreme Court was confronted with the constitutionality of border searches in *United States v. Ramsey*, the Court clearly stated that

[b]order searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself. We reaffirm it now.⁹

On its face, the Fourth Amendment appears to prohibit NAVs from searching incoming travelers for alcohol without the showing of probable cause necessary for the issuance of a warrant.¹⁰ First, however, it must be determined whether the United States Constitution applies to the actions of NAVs. As explained below, the Constitution does not apply to the actions of recognized American Indian tribes because those tribes enjoy certain sovereign powers. However, language almost identical to the Fourth Amendment was incorporated into the Indian Civil Rights Act, which does apply to American Indian tribes.

Next, it must be determined whether the sovereign powers possessed by American Indian tribes grant them the right to conduct border searches. As discussed in this Article, the reasonable-

7. See, e.g., *United States v. Ramsey*, 431 U.S. 606 (1977) (upholding warrantless searches of envelopes containing heroin when sent through international mail into the United States). But see *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967) (qualifying the general rule that not even "mere suspicion" is required to justify searching the baggage of a person who crosses the United States border by concluding that "at least a real suspicion" is required before a person may be strip-searched).

8. See *Ramsey*, 431 U.S. at 616-17.

9. *Id.* at 619.

10. Under particular circumstances, searches do not violate the Fourth Amendment if the government has probable cause to believe a suspect possesses contraband and a warrant is impracticable to obtain. See, e.g., *Carroll v. United States*, 267 U.S. 132, 156 (1925) (upholding a warrantless search of an automobile containing suspected bootleggers, because in the time it would have taken to secure a warrant, the suspected bootleggers could have escaped with the car and its illegal cargo).

ness of *Ramsey* border searches does not necessarily apply to Indian border searches as there are significant differences between international borders and village borders, and Indian border searches restrict lawful travel within the United States.

Part II of this Article addresses whether NAVs are "Indian tribes" such that they possess certain sovereign powers and, thus, are free from the requirements of the Fourth Amendment. This discussion is brief, as recent Clinton Administration recognition of NAVs as Indian tribes resolves this question in the affirmative. Part III discusses the application of the Indian Civil Rights Act to NAV actions and whether it restricts Indian border searches. Part IV explores the extent of NAVs' sovereign powers and applies the domestic dependent nation status to test the validity of tribal border searches. Part V addresses whether several of the exceptions to Fourth Amendment rights, including the general urgency of law enforcement and consent to searches, can be utilized to justify NAV actions. Finally, Part VI briefly discusses the likelihood of judicial review of the NAV border searches.

II. APPLICATION OF THE FOURTH AMENDMENT TO TRIBAL BORDER SEARCHES

The most convincing arguments NAVs can assert to justify or defend warrantless searches for alcohol depend upon a finding that NAVs enjoy the status of "Indian tribes" and, as a result, are endowed with tribal sovereignty. If they do enjoy sovereignty, their actions will not be restricted by the Fourth Amendment because the United States Supreme Court has held that certain provisions of the United States Constitution do not apply to Indian tribes. For example, the Court held in *Talton v. Mayes*¹¹ that the Cherokee nation was not bound by the grand jury requirements imposed upon the federal government by the Fifth Amendment: "as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment."¹² The Court in *Santa Clara Pueblo v. Mar-*

11. 163 U.S. 376 (1896).

12. *Id.* at 384; *see also* United States v. Wheeler, 435 U.S. 313, 329-30 (1978) (holding the double jeopardy provision of the Fifth Amendment was not violated when successive federal and tribal prosecutions were brought); Native Am. Church of North Am. v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959) (holding that the First Amendment Free Exercise Clause does not apply to a tribe through any provision of the Constitution). The Court in *Wheeler* reasoned that the Navajo tribe was exercising governmental powers that are not delegated to the tribe by federal authority. 435 U.S. at 328. Citing *Talton*, the *Wheeler* Court iterated that the power to punish tribal offenders was not affected by the Fifth Amendment, even though the Amendment applied to the federal government

*tinez*¹³ explained the opinion in *Talton* by stating that

[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus in *Talton v. Mayes* . . . , this Court held that the Fifth Amendment did not “operat[e] upon” “the powers of local self-government enjoyed” by the tribes. . . . In ensuing years, the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.¹⁴

Judicial recognition of a tribe was outlined by the Supreme Court in *Montoya v. United States*,¹⁵ where the Court defined a tribe as “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.”¹⁶ Legislative or administrative recognition of a tribe by the federal government is also possible.¹⁷ The Court has ruled that it must follow the executive branch’s determination in recognizing tribes.¹⁸ The Court stated that

[i]n reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.¹⁹

Similarly, the Alaska Supreme Court has stated that “judicial recognition of tribal sovereign immunity” depends on “whether Congress, or the executive branch of the federal government . . . recognize[s] the particular group in question as a tribe”²⁰ and that this recognition is “a nonjusticiable political question, [and] the [c]ommunity is entitled to all of the benefits of tribal status.”²¹

However, federal and state courts have differed in their view of whether various congressional and executive branch actions

directly and to the states through the Fourteenth Amendment. *See id.* For further discussion of Indian tribes’ freedom from constitutional constraints, see ROBERT N. CLINTON, *AMERICAN INDIAN LAW* 318 (3d ed. 1991).

13. 436 U.S. 49 (1978).

14. *Id.* at 56 (citations omitted) (alterations in original).

15. 180 U.S. 261 (1901).

16. *Id.* at 266.

17. *See United States v. Sandoval*, 231 U.S. 28, 46-47 (1913) (suggesting that the courts should defer to executive and legislative recognition of Indian tribes).

18. *See United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1865).

19. *Id.* at 419.

20. *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 34-35 (Alaska 1988) (citing *Atkinson v. Haldane*, 569 P.2d 151, 161-63 (Alaska 1977)).

21. *Atkinson*, 569 P.2d at 162-63.

were intended to recognize NAVs as tribes.²² The most contentious interpretation of congressional intent surrounded the 1971 passage of the Alaska Native Claims Settlement Act ("ANCSA").²³ The Ninth Circuit held that ANCSA "was congressional recognition of the Native [v]illages."²⁴ The Alaska Supreme Court in *Native Village of Stevens v. Alaska Management & Planning*²⁵ disagreed: "[t]o the contrary, passage of [ANCSA] evidences Congress's intent that non-reservation villages be largely subject to state law."²⁶

Recent executive branch recognition of NAVs as tribes almost certainly will reconcile the inconsistent rulings of the Ninth Circuit and the Alaska Supreme Court such that NAVs will be recognized judicially as tribes and therefore will enjoy certain sovereign powers.²⁷ On January 11, 1993, five months after the Alaska Supreme Court restated its conclusion that the federal executive branch had not recognized NAVs as tribes,²⁸ the Clinton Administration, via the Department of the Interior, stated that NAVs listed in ANCSA are considered Indian tribes for purposes of federal law.²⁹ In response, the Bureau of Indian Affairs published a list of 225 NAVs on October 21, 1993 to express clearly those villages that

22. For example, the Ninth Circuit held that the Secretary of Interior's recognition of a NAV's Indian Reorganization Act ("IRA") council constituted tribal recognition. *See Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1160 (9th Cir. 1990). The Alaska Supreme Court disagreed, stating that "the mere approval of a[n] IRA] constitution . . . does not suffice to afford . . . tribal status for the purpose of application of the doctrine of tribal sovereign immunity." *Stevens*, 757 P.2d at 40 (finding that the fact that the Secretary of the Interior approved the constitution of a NAV was insufficient to show that they had tribal sovereignty because the village had never been granted a reservation).

23. 43 U.S.C. §§ 1601-1629(f) (1994 & Supp. I 1995).

24. *Noatak*, 896 F.2d at 1160.

25. 757 P.2d 32 (Alaska 1988).

26. *Id.* at 41. Furthermore, Justice Moore in his concurring opinion in *Nenana Fuel v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992), stated that "[a]ny finding that ANCSA did not abolish native sovereignty clearly would be at odds with Congress's desire to abolish the reservation system and to avoid prolonged wardship or trusteeship of Alaska Natives." *Id.* at 1239 (Moore, J., concurring).

27. Tribal status confirms that certain sovereign powers and defenses will be available to NAVs. However, NAVs may not be endowed with the same powers as Indian tribes in the contiguous United States unless the land owned by NAV corporations constitutes "Indian country." This issue will be decided by the United States Supreme Court as it reviews the Ninth Circuit's ruling in *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't (Venetie II)*, 101 F.3d 1286 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997). *See infra* notes 70-75 and accompanying text.

28. *See Nenana*, 834 P.2d at 1237.

29. *See Op. Sol. Gen. of Dep't of the Interior*, M-36,975, 58-59 (Jan. 11, 1993).

enjoy tribal status,³⁰ stating that

[t]he purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 CFR 83.6(b) and to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous [forty-eight] states.³¹

Due to the expressed intention of the United States Supreme Court and Alaska Supreme Court to honor executive branch tribal recognition, it appears that NAVs now indeed are "Indian tribes" for purposes of federal law. This classification is significant in the context of NAV warrantless searches for alcohol because, as Indian tribes, NAVs will not be directly restricted by the Fourth Amendment to the United States Constitution. Sovereign status arguably could justify warrantless customs searches at NAV borders.

III. APPLICATION OF THE INDIAN CIVIL RIGHTS ACT TO TRIBAL BORDER SEARCHES

Tribes are subject to the Indian Civil Rights Act of 1968 ("ICRA").³² ICRA places on Indian tribes many of the civil liberties restrictions found in the Bill of Rights, including the restraint against unreasonable searches and seizures.³³ The issue of whether NAV border searches will be considered per se reasonable under ICRA by analogy to the United States's border search powers or, alternatively, whether ICRA will preclude NAV border searches is explored below.

Congress can impose restrictions on Indian tribes based on its plenary authority over tribal relations.³⁴ Because the important civil liberties protections set forth in the Bill of Rights and the Fourteenth Amendment were unenforceable against Indian tribes, Congress exercised its plenary power and passed ICRA.³⁵ Section

30. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,368-69 (1993).

31. *Id.* at 54,365.

32. 25 U.S.C. §§ 1301-1341 (1994).

33. See *id.* § 1302(2).

34. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-65 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); see also DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 4 (1984) ("Congress has full or 'complete' power in the field of Indian affairs.").

35. 25 U.S.C. §§ 1301-1341. Although ICRA imposes many of the Bill of Rights's civil liberties guarantees upon the actions of Indian tribes, there are sev-

1302(2) of ICRA is of particular importance, stating that “no Indian [t]ribe in exercising powers of self government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause”³⁶ While the Fourth Amendment does not apply directly to Indian tribes, Congress essentially has imposed Fourth Amendment restrictions upon the tribes through ICRA. Therefore, ICRA restricts, at least textually, Indian tribes from performing unreasonable searches and seizures.

Ten years after Congress passed ICRA, however, the Supreme Court crippled the Act’s effectiveness by severely limiting its federal enforcement. In *Santa Clara Pueblo v. Martinez*,³⁷ the Court held that federal courts have jurisdiction only to provide relief for alleged ICRA violations if a tribe has physically detained a person.³⁸ Examining the legislative history of the Act, the Court found that Congress had been committed to the goal of tribal self-determination, and that Congress had intended that a writ of habeas corpus would provide the appropriate and exclusive federal remedy under ICRA.³⁹ This conclusion is puzzling because the legislative history demonstrates a concern for the preservation of Indians’ personal liberties against abuses by governments, including Indian tribal governments.⁴⁰ To buttress its logic, the Court

eral notable exceptions. For example, 25 U.S.C. § 1302(1) does not prevent Indian tribes from establishing a religion, and 25 U.S.C. § 1302(6) does not require free counsel in criminal cases.

36. *Id.* § 1302(2).

37. 436 U.S. 49 (1978).

38. *See id.* at 66-70.

39. *See id.* at 66-67. Section 1303 of ICRA states that “[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.” 25 U.S.C. § 1303.

40. The Senate Report, which accompanied ICRA and clearly expressed frustration with the federal courts’ refusal to extend the protections of the Bill of Rights to Indian tribal governments, resulting in tribal members being denied basic constitutional rights: “[u]nder this rationale . . . tribes have been permitted to impose a tax without complying with the due process requirements, tribal membership rights can be revoked at the will of tribal governing officials, and Indians have been deprived of the right to be represented by counsel.” S. REP. NO. 90-721, at 24 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837, 1864. The report continued:

The proposed Indian legislation . . . is an effort on the part of those who believe in constitutional rights for all Americans to give ‘the forgotten Americans’ basic rights which all other Americans enjoy. These measures will not cure all the ills suffered by the American Indians, but they will be important steps in alleviating many inequities and injustices with which they are faced.

Id. at 26-27, 1968 U.S.C.C.A.N. at 1867.

noted the express congressional concern that remedies other than habeas corpus would likely lead to “undue or precipitous interference in the affairs of the Indian people.”⁴¹ As a result, the ostensible congressional intent of ICRA is frustrated because many potential violations of the Act will lack a federal forum unless a tribe detains the individual whose rights under ICRA are violated. Thus, the effect of *Santa Clara Pueblo* is that existing tribal courts retain much of the responsibility to provide remedies under ICRA.⁴² The Court further stated that Congress retains the authority to provide other remedies if it finds tribes are deficient in applying and enforcing ICRA.⁴³

Thus, tribal status frees NAVs from the restrictions of the Fourth Amendment. While ICRA technically prohibits their searches for alcohol without probable cause, alleged violations thereof are not judicially reviewable unless a NAV has detained an individual. Of course, a person could effectively force the issue by refusing to be searched and still enter the village, despite orders to leave. Village authorities then could either capitulate, thereby

41. *Santa Clara Pueblo*, 436 U.S. at 67 (quoting SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE JUDICIARY COMM., 89TH CONG., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN: SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS PURSUANT TO S. RES. 194, 11 (Comm. Print 1966)).

42. An exception to the *Santa Clara Pueblo* rule has emerged in the Tenth Circuit, in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). There the court permitted federal judicial relief against a tribe when a non-Native lacked a tribal forum in which to litigate his claim. *See id.* at 684-85. Some Indian tribes have voluntarily adopted major portions of ICRA into their tribal Constitution, including the prohibition of unreasonable searches and seizures. *See* 1 N.T.C. § 4 (1977) (Navajo Tribal Code) (adopting the text of the Fourth Amendment to the United States Constitution); 22 C.N.C.A. § 1223 (1992) (Cherokee Nation Code Annotated) (“A search warrant shall not be issued except upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.”); CONST. OF THE CHEROKEE NATION OF OKLAHOMA art. I (“The Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law.”).

43. *See Santa Clara Pueblo*, 436 U.S. at 72. While it appears that ICRA is an anemic protector of civil rights, it is possible that its effectiveness could be bolstered through the power of federal funding. Parties who believe that a tribe is blatantly disregarding ICRA could lobby the various congressional committees handling Indian-related issues, such as the Bureau of Indian Affairs, to pressure the tribe into compliance. In turn, Congress could condition spending on Indian-related projects to effect stronger adherence to ICRA. Finally, if NAV practices were viewed as radical and overly variant from mainstream civil rights protections, Congress could assert its plenary powers and prohibit NAV warrantless searches outright.

avoiding an ICRA violation, or enforce their order by detaining the individual. Enforcing their order would give rise to a claim for an ICRA violation which would be reviewable in federal court. Currently, then, unless travelers confront village authorities by refusing to be searched, ICRA does not effectively prevent NAVs from conducting warrantless alcohol searches at their borders.⁴⁴

IV. APPLICATION OF DOMESTIC DEPENDENT NATION STATUS TO TRIBAL BORDER SEARCHES

The United States Supreme Court consistently has ruled that Indian tribes possess sovereignty and the powers that accompany it,⁴⁵ including the power to

(1) adopt and operate a form of government of the tribe's choosing, (2) define conditions of tribal membership, (3) regulate domestic relations of members, (4) prescribe rules of inheritance, (5) levy taxes, (6) regulate property within tribal jurisdiction and (7) control the conduct of tribal members.⁴⁶

Tribes also enjoy sovereign immunity and thus cannot be sued without their consent.⁴⁷ Since tribal sovereign powers are inherent, no authority from the federal government is required for the tribe to assert them.⁴⁸

However, tribal sovereign powers are limited. First, Congress's power over Indian affairs is plenary, granting it legal freedom to limit tribal sovereignty.⁴⁹ Second, tribal sovereignty is lim-

44. Also note that civil suits against NAVs for violating civil liberties would be unsuccessful because NAVs as tribes are endowed with tribal sovereign immunity. See, e.g., *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 636 (9th Cir. 1992) (remanding for a factual finding as to whether a NAV was an Indian tribe protected by sovereign immunity and whether its property was "Indian country," which would immunize it against a suit challenging a NAV leasing ordinance on the basis of racial discrimination); *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 34 (Alaska 1988) (holding that the doctrine of sovereign immunity does not bar a breach of contract action against a NAV because the NAV was not sufficiently self-governing to meet the court's standard for sovereignty). Sovereign immunity will, of course, depend upon a finding that NAVs are tribes. After the recent express recognition of NAVS as tribes by the Department of the Interior and Bureau of Indian Affairs, the NAVs are almost certain to enjoy similar sovereign immunity.

45. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

46. CASE, *supra* note 34, at 439 (citation omitted).

47. See *id.*

48. See *Merrion*, 455 U.S. at 130 (holding that the Apache Tribe had the inherent power to impose a tax as part of its power to pay for the costs of self-government).

49. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896) ("Indian tribes are subject to the dominant authority of Congress."); *Santa Clara Pueblo v. Martinez*, 436

ited by tribes' "domestic dependent" status.⁵⁰ More than 150 years ago, Chief Justice John Marshall laid down principles that still form an important part of the relationship between Indian tribes and the federal government. In *Cherokee Nation v. Georgia*,⁵¹ Marshall established the principle that Indian tribes are under the dominion of the United States:

They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.⁵²

However, in *Worcester v. Georgia*⁵³ Marshall also recognized a certain degree of tribal sovereignty:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, . . . and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.⁵⁴

These two principles appear incompatible. Chief Justice Marshall summarized the status of Indian tribes as "domestic dependent nations,"⁵⁵ meaning they retain sovereignty with regard to internal matters of the tribe. This allows Indians to make their own laws and be governed by them.⁵⁶ Justice Marshall then expressly identified two powers that Indian tribes did not possess based on

U.S. 49, 58 (1978) ("[T]he common-law immunity from suit traditionally enjoyed by sovereign powers is an aspect of tribal sovereignty . . . subject to the superior and plenary control of Congress."). Examples of Congress exercising its superior and plenary power and interfering with tribal self-government include the Indian Appropriations Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (1885) (divesting tribes of the power to punish its own members for major crimes); Act of Aug. 15, 1953, Pub. L. No. 83-280, § 4, 67 Stat. 588, 589 (extending state civil and criminal jurisdiction over tribes in certain states, including Alaska); and the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1994) (imposing most of the Bill of Rights's liberty protections upon tribes).

50. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

51. *Id.*

52. *Id.* at 17-18.

53. 31 U.S. (6 Pet.) 515 (1832) (holding that Georgia laws had no effect on Cherokee Reservation).

54. *Id.* at 559-61.

55. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

56. See *Williams v. Lee*, 358 U.S. 217, 220 (1959).

their status. As noted above, tribal governments cannot conduct foreign affairs,⁵⁷ nor can they alienate tribal lands without federal consent.⁵⁸

For approximately 150 years following the *Cherokee* cases, no additional limitations on tribal sovereignty were found as a result of the domestic dependent status of tribes. Then in 1978, the Supreme Court established a standard to assist in determining whether tribes can exercise certain powers. In *United States v. Wheeler*,⁵⁹ the Court reasoned that

our cases recognize that the Indian tribes have not given up their full sovereignty The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, *Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status*⁶⁰

The Court then began expanding Chief Justice Marshall's list of powers that tribes do not possess due to their domestic dependent status. Powers denied to tribes now include (1) the exercise of criminal jurisdiction over non-Indians,⁶¹ (2) the power to regulate hunting and fishing by non-Indians on non-Indian-owned land within a reservation (at least where it cannot be shown that tribal interests are affected),⁶² and (3) the power to regulate liquor sales on reservations.⁶³ However, powers held to be consistent with a tribe's domestic dependent status include (1) the power to punish their own members⁶⁴ and (2) the power to tax non-Indians for their activities on reservations.⁶⁵

Presumably, NAVs would be endowed with these same powers due to their recent recognition as tribes by the executive branch of the federal government. However, because NAVs have a history different from Indian tribes of the contiguous forty-eight states and have been treated differently by Congress, NAVs do not

57. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18.

58. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

59. 435 U.S. 313 (1978) (holding Indian tribes retain the power to punish their own members).

60. *Id.* at 323 (emphasis added) (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

61. See *Oliphant*, 435 U.S. at 208.

62. See *Montana v. United States*, 450 U.S. 544, 564-65 (1981).

63. See *Rice v. Rehner*, 463 U.S. 713, 726 (1983).

64. See *United States v. Wheeler*, 435 U.S. 313, 326-28 (1978).

65. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980); see also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

necessarily have the same sovereign powers as Indian tribes. The most notable difference between NAVs and Indian tribes is the passage of ANCSA,⁶⁶ through which the Alaska Natives received forty-four million acres of land and \$962.5 million in exchange for the termination of aboriginal land claims in Alaska.⁶⁷ This land conveyance in fee to the Alaska Natives stands in contrast to the earlier establishment of reservations for most Indian tribes.⁶⁸ While NAV land has not been considered as “Indian country” until recently, when the Ninth Circuit ruled that ANCSA did not extinguish Indian country in Alaska,⁶⁹ reservation lands historically have been considered “Indian country.” The following sections will determine if NAVs enjoy the same sovereign powers as other Indian tribes residing on Indian country, will address the power to exclude people from NAVs, and will discuss the domestic dependent status limitations of NAVs in the context of warrantless searches for alcohol.

A. Indian Country — Does it Make a Difference for NAVs?

Most tribal sovereign powers flow directly from tribal status. Some powers, however, are dependent upon a finding that the tribes are located in Indian country. An excellent illustration is the case of *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*,⁷⁰ where the United States District Court for the District of Alaska recently considered whether the land owned by a NAV in fee constituted Indian country such that it could impose taxes on non-members.⁷¹ The court concluded that the NAV constituted a tribe, but that the lands of the NAV were not Indian country, “and, therefore, the Tribal Government did not have the power to impose a tax upon non-members of the tribe such as the plaintiffs.”⁷² Thus, according to the district court, at least the power to tax non-members requires not only a showing of tribal status, but also a finding of Indian country.⁷³

66. Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 689 (codified as amended at 43 U.S.C. §§ 1601-1629 (1994)).

67. See 43 U.S.C. § 1603.

68. See *id.* § 1613.

69. See *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1301-02 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

70. No. F87-0051 CV, 1995 WL 462232, at *1 (D. Alaska Aug. 2, 1995), *rev'd*, 101 F.3d 1286 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

71. See *id.*

72. *Id.* at *20.

73. Certain other powers granted to Indian tribes depend on a finding that the tribes reside on “Indian lands.” For example, the Indian Gaming Regulatory

The Ninth Circuit reversed, ruling that ANCSA did not extinguish Indian country in Alaska,⁷⁴ and the Supreme Court granted certiorari to review the issue.⁷⁵ If the Court concludes that NAVs do not occupy Indian country, they will not possess the same range of sovereign powers as do Indian tribes in the lower forty-eight states. The difficulty in determining which powers are dependent upon a finding of Indian country is that most Indian cases involve tribes that reside on reservations, which constitute Indian country, and therefore the issue is rarely addressed. Thus, it is difficult to predict whether NAVs will be determined to inhabit "Indian country," which in turn will affect their powers to conduct warrantless border searches.

B. The Power to Exclude People from NAVs

The Supreme Court in *Worcester v. Georgia*⁷⁶ stated that persons were allowed to enter Cherokee land only "with the assent of the Cherokees themselves."⁷⁷ The Ninth Circuit has relied on this principle, stating that "intrinsic in the sovereignty of an Indian tribe is the power to exclude trespassers from the reservation,"⁷⁸ and that "the tribe has the inherent power to exclude non-members from the reservation."⁷⁹ Indian law scholar Felix S. Cohen has concluded that a tribe needs no grant of authority from the federal government to exercise, either as a government or as a landowner, the inherent power of exclusion from tribal territory.⁸⁰ It is not clear from the Ninth Circuit rulings whether the power to exclude is restricted to tribes living on reservations, as the deci-

Act, 25 U.S.C. §§ 2701-2721 (1994), allows Indian tribes to operate gaming in certain states. Gaming is only allowed, however, on "Indian lands," defined by the Act to include (1) lands within an Indian reservation, (2) lands held in trust by the United States for the benefit of Indian tribes, or (3) lands held by tribes subject to restriction by the United States against alienation. *See id.* § 2703. The ANCSA lands owned by NAVs do not satisfy this definition. Therefore, unlike most Indian tribes, which usually occupy lands within a reservation, NAVs are not permitted to operate gaming on their lands.

74. *See Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't (Venetie II)*, 101 F.3d 1286, 1302 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

75. *See Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 117 S. Ct. 2478 (1997).

76. 31 U.S. (6 Pet.) 515 (1832).

77. *Id.* at 561.

78. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975).

79. *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 410 (9th Cir. 1976) (citations omitted).

80. *See* FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 291-94, 306 (Rennard Strickland & Charles F. Wilkinson eds., Michie 1982).

sions state, or if tribes as landowners can exclude people from "tribal territory," as Cohen stated.⁸¹ While this distinction may appear trivial, it is significant because NAVs are not situated on reservations. NAVs do, however, own the land on which they reside, which could fairly be characterized as "tribal territory."⁸²

Moreover, ANCSA should not be read to strip NAVs of their exclusionary powers. ANCSA does not clearly express intent to open NAV lands to the general public, and the Supreme Court has adhered to "the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians."⁸³ Thus, NAVs may maintain whatever tribal exclusionary powers they had before ANCSA.

NAVs may also be able to rely on their status as private entities. Private individuals can generally prevent people from entering their homes, or condition entry upon certain circumstances,⁸⁴ such as a border search. However, private land can become public in nature such that the private land owner can no longer indiscriminately prohibit entry upon it or abridge people's constitutional rights once they are upon the land. In *Marsh v. Alabama*,⁸⁵ Grace Marsh was arrested and convicted of distributing religious literature in the town of Chickasaw, Alabama, contrary to the rules of the town's management.⁸⁶ Marsh contended, *inter alia*, that the town's rules violated the First Amendment of the United States Constitution.⁸⁷ The Supreme Court reversed Marsh's conviction, holding that private ownership of the town did not exempt it from the freedom of speech clause of the First Amendment:

We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for the use by the public in general, the more do his rights become circumscribed by the statutory and

81. *Id.*

82. *Id.*

83. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).

84. *See Barrett v. Kunzig*, 331 F. Supp. 266, 272 (1971) ("[T]he United States Government . . . could make use of its property as could any private citizen with his home. Hence, it could prevent entry or make such conditions as it deemed proper as a precedent to entry.").

85. 326 U.S. 501 (1946).

86. *See id.* at 502. Chickasaw was a company town owned by the Gulf Shipbuilding Corporation.

87. *See id.*

constitutional rights of those who use it.⁸⁸

Thus, when a privately owned town assumes the functions of a government, it becomes subject to constitutional limitations in its relations with the public.

NAVs, bearing many of the public attributes listed in *Marsh*, may be subject to such limitations. While most NAVs are not accessible by road, travelers arriving by plane generally are free to access public facilities such as the state-maintained airport runway and roads, post office, state-owned schools, and stores owned by village corporations. While NAVs can assert that they do not open their villages to the public as did the town of Chickasaw, many NAVs have acknowledged their public status by incorporating themselves as cities.⁸⁹ Furthermore, federal regulations require that roads constructed with federal funds on Indian reservations be kept open to the public.⁹⁰ If NAVs use federal funds to build roads, boardwalks, or other components of transportation, they would presumably be required to keep them open to the public, including non-Natives. Arguably, NAVs could not condition entry by the public on submission to searches that would violate both the Fourth Amendment and ICRA. While the State of Alaska does not have the same plenary powers over Indians as does Congress, the state arguably could condition the use of public money to fund state projects upon NAVs allowing public access to those projects. Thus if the state funds roads, boardwalks, schools, airport runways, runway maintenance, or other projects in NAVs, the public may have the right to access them, notwithstanding fee ownership of lands by NAVs.⁹¹

However, a ruling by the Supreme Court that NAVs occupy Indian country would bolster NAVs' contention that they retain the power to exclude. As United States Attorney for Alaska Bob Bundy recently stated, "[i]n Indian country, [NAVs] have authority to throw anybody out. If there's no Indian country, people are free to exercise the right to travel."⁹²

In short, the issue of exclusionary powers is not clear as applied to NAVs. It is noteworthy, however, that many NAVs are

88. *Id.* at 505-06 (footnote omitted).

89. One NAV is incorporated as a home rule city, ten as first class cities, and 98 as second class cities. See THE ALASKA MUNICIPAL LEAGUE, ALASKA DEPT. OF COMMUNITY & REGIONAL AFFAIRS, 1997 ALASKA MUNICIPAL OFFICIALS DIRECTORY (1997). Chefornek, one of the villages known to conduct warrantless searches for alcohol, is incorporated as a second class city. See *id.* at 1.

90. See, e.g., 25 C.F.R. § 170.8 (1980) (requiring that roads constructed by Bureau of Indian Affairs remain open to the public).

91. See CASE, *supra* note 34, for a brief discussion of state funding in NAVs.

92. Kizzia, *supra* note 4, at A1.

incorporated as cities, and are endowed with many of the public attributes of the privately owned town in *Marsh*. Therefore, while NAVs still maintain many rights of private ownership, they may not have the general right to deny to the public the use of federally or state funded public facilities.⁹³

C. The Domestic Dependent Status Limitation of NAVs

NAVs almost certainly possess some sovereign powers in the wake of their recognition as tribes by the federal executive branch. Given such powers, NAVs may contend they have the concomitant power to protect their territorial integrity with whatever force is necessary, including searching visitors, and that this power has never been divested by Congress. As discussed above, however, tribal sovereign powers are limited by the status of Indian tribes as domestic dependent nations. Therefore, the NAV assertion of border search powers must withstand the test established in *United States v. Wheeler*.⁹⁴

In *Wheeler*, the Supreme Court held in part that “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”⁹⁵ Since Alaska Natives did not sign a treaty with the United States,⁹⁶ treaties did not divest them of sovereignty. As for statutes, ICRA arguably divests from Alaska Natives the power to search people without probable cause⁹⁷; however, as discussed

93. In *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973), the court concluded, based on legislative history, that ANCSA was not intended to extinguish civil tort claims like trespass by third parties on land under Indian title. *See id.* at 1371. The alleged trespassers in this case, however, were the State of Alaska, oil companies, and other commercial entities who had used Arctic Slope lands prior to ANCSA, not private individuals with personal liberties guaranteed by the United States Constitution. *See id.* at 1364-65.

94. 435 U.S. 313, 322 (1978) (holding that Indian tribes retain the power to punish their own members).

95. *Id.* at 323 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

96. *See* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 911 (1993) (“Alaska Natives, because of Alaska’s history, harsh climate, and remote location, did not enter into the special treaty relationships with the United States that had secured unique legal and political status for tribes in the ‘lower 48.’”); *Atkinson v. Haldane*, 569 P.2d 151, 154 (Alaska 1977) (“[T]he government never intended to enter into treaties with Alaskan Natives.”).

97. *See* 25 U.S.C. § 1302 (1994) (“No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures”); *see also* GETCHES ET AL., *supra* note 96, at 499 (“The resulting legislation [(ICRA)] imposed on tribes regiments tracking many of the constitutional restraints on

above, ICRA is essentially unenforceable against tribes. Therefore, the inquiry must focus on whether NAV border search powers are withdrawn "by implication as a necessary result of their dependent status."⁹⁸ In that light, the discussion below will explore recent Supreme Court cases addressing intrusions on personal liberties by a tribe in a criminal context and the restriction of free travel within the United States.

1. *Intrusions on personal liberties by Indian tribes.* NAV warrantless searches for alcohol may well be ruled inconsistent with their domestic dependent status, and prohibited because the searches interfere with the interest of the United States in protecting its citizens from intrusions on their personal liberty without justification. In the 1978 case of *Oliphant v. Suquamish Indian Tribe*,⁹⁹ tribal authorities arrested Oliphant, a non-Indian, and charged him with assaulting a tribal officer and resisting arrest.¹⁰⁰ He was arraigned before a tribal court and released on his own recognizance, but the tribal court proceedings against him were stayed when Oliphant challenged the tribal court's jurisdiction over him.¹⁰¹ Ultimately, the Supreme Court ruled that the exercise of criminal jurisdiction by Indians over non-Indians was inconsistent with the domestic dependent status of Indian tribes.¹⁰² The reasoning the Court employed in making this determination is of particular importance to the validity of NAV alcohol searches. The Court found that the tribe's power to punish non-Indian offenders was inconsistent with its dependent status because the surrender of a tribe's full sovereignty entailed the surrender of certain rights.¹⁰³ Moreover, the Court stated that "the United States has manifested . . . [a] great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."¹⁰⁴ While incarceration or other forms of punishment may be greater intrusions on one's personal liberty than personal searches for alcohol, the Court's statement reveals its willingness to strike down tribal actions that infringe upon individual liberties. Also, because both the Fourth Amendment and the Indian Civil Rights Act¹⁰⁵ provide for freedom from unreasonable searches and seizures, the Court has a

states and the federal government.").

98. *Wheeler*, 435 U.S. at 323.

99. 435 U.S. 191 (1978).

100. *See id.* at 194.

101. *See id.* at 194-95.

102. *See id.* at 208-10.

103. *See id.* at 210.

104. *Id.*

105. 25 U.S.C. § 1302(2) (1994).

strong basis for striking down tribal action that violates this right.

In 1981, the Supreme Court articulated a narrow view of the sovereignty retained by tribes. In *Montana v. United States*,¹⁰⁶ the Court held that Indian tribes lacked the inherent power to regulate hunting and fishing by non-Indians on non-Indian owned land within a reservation – at least where the tribe could not show that tribal interests were affected.¹⁰⁷ The Court stated that “exercise of tribal power beyond what is *necessary* to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”¹⁰⁸ Therefore, unless NAVs can establish that warrantless searches for alcohol are necessary to protect tribal self-government or internal relations, their efforts will be struck down.¹⁰⁹

NAVs can argue that border searches are necessary to prevent the deleterious effects of alcohol among Native Americans from seriously damaging their internal relations.¹¹⁰ However, this justifi-

106. 450 U.S. 544 (1981).

107. *See id.* at 564-66.

108. *Id.* at 564 (emphasis added).

109. Not all (if, in fact, any) Indian tribes conduct warrantless searches for alcohol, as do some NAVs. Therefore, it appears that in general such searches are not necessary for tribal self-government (assuming these tribes are successfully exercising tribal self-government).

110. “The alcoholism mortality rate among American Indians [including Native Alaskans] is 612 % higher than that of all other races in the United States.” Paul Levy, *Caught Between Cultures Despite Barriers, A Few Indians Become Physicians—But Many More Are Needed*, STAR TRIBUNE (Minneapolis), July 7, 1991, Sunday Magazine, at 06SM. In addition, Alaska has one of the highest rates of fetal alcohol syndrome in the country. *See* Sandi McDaniel, *How Alaska Battles FAS Disease With No Cure is 100% Preventable*, ANCHORAGE DAILY NEWS, June 16, 1995, at A5. The recent ban of alcohol from Barrow, Alaska illustrates the tremendous effect alcohol can have on a community and arguably the internal relations of many NAVs. The voters in Barrow banned alcohol from the town for one year, until another election reversed the ban. *See* Charles McCoy, *Booze Flows Back Into Barrow, Alaska, After Yearlong Ban*, WALL ST. J., Nov. 15, 1995, at A1. As the Wall Street Journal reported:

The dry time in Barrow was the most peaceable in decades. Crime fell 70% during the one-year period. [Hospital director] Dr. Tim Coalwell says alcohol-related emergency-room visits to the town hospital dropped from 118 in the month before the ban to 23 the next month and remained low.

Id. The article also noted:

Alcohol-related calamities have afflicted nearly every village in Alaska. Anne Walker, executive director of the Alaska Native Health Board, and herself an Inupiat [Eskimo], calls alcohol abuse ‘the worst problem facing native communities.’ She cites a recent survey by the Alaska Justice Center, a state agency, in which natives ranked alcohol and drug

cation of warrantless searches presumably would apply to searches for other damaging substances or materials, such as illegal drugs or dangerous weapons. While none will dispute the tremendous effect alcohol has on NAVs, courts may nevertheless hold that warrantless searches for alcohol are so invasive that they constitute unjustified intrusions upon personal liberties of NAV members and non-members alike, and therefore divest NAVs of their border search powers.

The unique exercise of NAV sovereign powers is anything but clear. However, it is clear that, while NAVs enjoy sovereignty, the Supreme Court has significantly limited the inherent power of Indian tribes.¹¹¹ Thus, NAVs must overcome the argument that warrantless searches for alcohol are inconsistent with NAV domestic dependent status because they are unjustified intrusions on the personal liberties of people entering NAVs.

2. *Restrictions on free travel within the United States.* NAV searches for alcohol will not be viewed favorably by courts because the searches interrupt the free passage of travelers lawfully present within the United States and intrude upon individual privacy more than international border searches. While the United States may stop travelers at its international border, once they are lawfully within the country, travelers are to be free from searches not supported by probable cause.¹¹² As Justice Rehnquist quoted in *United States v. Ramsey*,¹¹³

“It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of

abuse as the No. 1 problem in their society The state’s suicide rate, for example, is the highest in the nation; while the rate among non-natives is slightly higher than the national average, the rate among natives is four times the national average, according to the Alaska Native Health Board.

Id.

111. Recent Supreme Court language reinforces the Court’s earlier decisions in *Oliphant* and *Montana* limiting tribal sovereignty:

[T]he retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order. The power of a tribe to prescribe and enforce rules of conduct for its own members “does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.”

Duro v. Reina, 495 U.S. 676, 685-86 (1990) (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)); see also *Harrison v. State*, 791 P.2d 359, 363 (Alaska Ct. App. 1990) (holding that NAVs lack the authority to register vehicles and license drivers).

112. See *Carroll v. United States*, 267 U.S. 132, 153-54 (1925).

113. 431 U.S. 606 (1977).

finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. *But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.*"¹¹⁴

While the Court does not address Indian tribes or NAVs, this statement reflects the Court's disapproval of extending the scope of border search powers within the United States and interfering with people's right to free passage.

In *Torres v. Puerto Rico*,¹¹⁵ the United States Supreme Court held that the search of Torres's baggage upon his arrival in Puerto Rico, pursuant to Puerto Rico's Public Law 22, violated the probable cause and warrant provisions of the Fourth Amendment.¹¹⁶ In this case, Puerto Rico emphasized that federal courts had recognized a variety of "intermediate borders" allowing searches not in compliance with the Fourth Amendment.¹¹⁷ Examples included "state inspections of goods in furtherance of health and safety regulations, . . . airport metal detector searches, and certain searches on military bases."¹¹⁸ Puerto Rico then asked the Supreme Court to recognize an intermediate border between the Commonwealth and the rest of the United States.¹¹⁹ To support this proposal, Puerto Rico pointed to its "unique political status."¹²⁰ Chief Justice Warren Burger curtly rejected Puerto Rico's suggestion to extend border search powers in this manner, stating that

Public Law 22 cannot be justified by any analogy to customs searches as a functional equivalent of the international border of the United States. The authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity Puerto Rico has no sovereign authority to prohibit entry into its territory.¹²¹

114. *Id.* at 618 (quoting *Carroll*, 267 U.S. at 153-54) (emphasis added).

115. 442 U.S. 465 (1979).

116. *See id.* at 471. The Puerto Rican law at issue, P.R. Laws Ann., Tit. 25 § 1051 (Supp. 1977), was designed to halt importation of narcotics and weapons.

117. *See id.* at 472.

118. *Id.*

119. *See id.*

120. *Id.*

121. *Id.* at 472-73.

In *United States v. Hyde*,¹²² the United States District Court for the District of the Virgin Islands rejected the proposal by the government of the Virgin Islands to extend border search powers to their islands.¹²³ Furthermore, in a later case, the same court ruled that the islands “occup[y] a unique position with respect to customs regulations,” but did not constitute a border for purposes of the border search exception to the Fourth Amendment.¹²⁴ The court held that “persons lawfully in the United States Virgin Islands are entitled to the full panoply of rights enjoyed by citizens travelling within the United States.”¹²⁵

As sovereign entities, NAVs can distinguish their position from that of Puerto Rico and the Virgin Islands, but they still face an uphill battle to overcome the right to uninterrupted travel described by the *Ramsey* court. While Indian tribes do have the power to exclude people from their reservations,¹²⁶ as discussed above, NAVs own their land in fee, not in reservations, and approximately half of the NAVs acknowledge their public status as incorporated cities. Therefore, it is not clear if NAVs possess this same exclusionary power; this determination may depend on the Supreme Court’s ruling on whether NAVs occupy Indian country. Even if NAVs are found to have exclusionary powers, however, they may still be denied border search powers because the Court has found significant differences between searches at international borders and internal borders, and has shown low tolerance for the interruption of lawful travel within the country.

Specifically, if NAVs do have the power to exclude non-members from their villages, border searches deny non-members the expectation of uninterrupted travel. Likewise, village members can persuasively argue that once in the United States, their travel should not be impeded without probable cause, especially when traveling to their home villages. In addition, NAV searches, unlike international border searches, come close to invading the privacy of a person’s home. NAV searches for alcohol are con-

122. No. 1993-65, 1993 WL 733094 (D.V.I. Oct. 21, 1993).

123. *See id.* at *4-5.

124. *United States v. Douglas*, 854 F. Supp. 383, 385 (D.V.I. 1994) (citing *Hyde*, 1993 WL 733094, at *4).

125. *Id.*

126. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, the Court held that a state law preventing “white persons” from exerting “assumed and arbitrary power . . . under pretext of authority from the Cherokee Indians” or residing in lands occupied by the Cherokee Indians was unconstitutional. *Id.* at 521. Federal laws had granted the Cherokees “their rights of occupancy, of self-government, and the full enjoyment of those blessings which might be attained by their humble condition.” *Id.* at 595.

ducted at the airport runways of the village. Whereas American citizens re-entering the United States are entering the nation they only in a broad sense call home, resident villagers entering their NAVs are entering the specific community in which they and their families live. In that sense, the port of entry *is* the traveler's home, compared to a person entering the more general territory of a nation.

Furthermore, most citizens of the United States are able to provide for their basic needs within the nation, without having to travel to other countries. NAVs, however, are small communities without the full range of services available to provide villagers with their basic needs. Much medical treatment, for example, cannot be provided in the village, as there are generally no nurses or doctors stationed in NAVs.¹²⁷ Instead, villagers must travel to larger communities with more developed medical facilities and more highly trained personnel. If these villagers are then subjected to warrantless searches each time they return to their home village, their privacy is intruded upon in a manner greater than international travelers, most of whom do not need to leave the country for such necessities.

Overall, while NAV searches for alcohol are noble in cause, they force individual citizens to sacrifice one personal liberty in order to exercise another. Such a scheme relegates the solemnity of personal liberties to schoolyard constitutional card trading — "I'll give you the right to live with your family in your home if you give me your right to be free from unreasonable searches." Certainly this was not the intent of the Framers nor does it comport with the Supreme Court's interpretation of the Constitution:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."¹²⁸

The passion and spirit of this statement could lead courts to prohibit such warrantless searches because they are so contrary to

127. See, e.g., STATE OF ALASKA DEP'T OF HEALTH & SOC. SERVS., VILLAGE HEALTH CLINIC SURVEY (1992).

128. *Schneekloth v. Bustamonte*, 412 U.S. 218, 228-29 (1973) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)). *Boyd* held that the Fourth and Fifth Amendments apply to civil actions as well as criminal. See 116 U.S. at 634-35.

fundamental tenets of American life that they are inconsistent with the domestic dependent status of NAVs.

V. OTHER FOURTH AMENDMENT ANALYSES

Several exceptions to the restrictions of the Fourth Amendment may also apply to ICRA. These exceptions are particularly significant in the case of those Indian tribes which have voluntarily adopted major portions of ICRA into their tribal Constitution, including the prohibition of unreasonable searches and seizures.¹²⁹ These tribes, and any NAVs who might also choose to comply with ICRA, may find the analysis of these exceptions helpful.

A. General Urgency of Law Enforcement

The Supreme Court has strongly denounced the proposition that the Fourth Amendment can be disregarded "simply because of a generalized urgency of law enforcement."¹³⁰ In *Torres*, Puerto Rico attempted to search travelers upon arrival without probable cause in order to enforce their laws against weapons and narcotics importation.¹³¹ The Supreme Court flatly rejected Puerto Rico's claim that the searches were justified due to the seriousness of the problems created by the influx of weapons and narcotics:

Puerto Rico's position boils down to a contention that its law enforcement problems are so pressing that it should be granted an exemption from the usual requirements of the Fourth Amendment. Although we have recognized exceptions to the warrant requirement when specific circumstances render compliance impracticable, we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement.¹³²

Puerto Rico's efforts to characterize its law enforcement problems as "unique" did not persuade the Supreme Court to allow Puerto Rico to circumvent the Fourth Amendment. NAVs'

129. See 1 N.T.C. § 4 (1977) (Navajo Tribal Code) (adopting verbatim the Fourth Amendment to the United States Constitution); 22 C.N.C.A. § 1223 (1993) (Cherokee Nation Code Annotated) ("A search warrant shall not be issued except upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched."); CONST. OF THE CHEROKEE NATION OF OKLAHOMA, art. I (1975) ("The Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme Law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with any federal law."); see also *supra* note 42 and accompanying text.

130. *Torres v. Puerto Rico*, 442 U.S. 465, 474 (1979).

131. See *id.* at 466-67.

132. *Id.* at 473-74 (citations omitted).

unique law enforcement needs likely will fail to persuade the Court as well. This likelihood of failure is evidenced by the Court's statement in *Torres* specifically addressing the relative uniqueness of Alaska: "[i]n any event, Puerto Rico's law enforcement needs are indistinguishable from those of many states. Puerto Rico is not unique because it is an island; like Puerto Rico, neither Alaska nor Hawaii [is] contiguous to the continental body of the United States."¹³³

Ultimately, the Supreme Court's explicit disapproval of circumventing Fourth Amendment protections without a compelling reason could lead federal courts to hold that NAV warrantless searches for alcohol are so contrary to the nature of the United States and the personal protections of its citizens that they are inconsistent with the domestic dependent status of NAVs and are thus prohibited. This position is supported by the Court's unanimous ruling in *Torres* and Justice Brennan's concurrence:

"The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government."¹³⁴

B. Consent to Searches

NAV warrantless and systematic searches for alcohol cannot be justified by the consent exception to the Fourth Amendment if travelers must agree to such searches in order to enter NAVs; in such cases, the consent that searchers obtain is likely coerced. It is well established that searches conducted pursuant to valid consent are an exception to the Fourth Amendment's warrant and probable cause requirements.¹³⁵ The validity of consent under the Fourth Amendment is to be determined by reference to "the traditional definition of 'voluntariness,'"¹³⁶ and does not require a

133. *Id.* at 474. The Court also rejected Puerto Rico's assertion that its border searches could be "sustained by analogy to state inspection provisions designed to implement health and safety legislation." *Id.* at 473. Alcohol creates no more of an emergency situation than the weapons and narcotics against which the law in *Torres* was directed. In such a case, invocation of health and safety concerns amounts to little more than "a pretense employed to justify a warrantless search for criminal law enforcement purposes," *Barusch v. Calvo*, 685 F.2d 1199, 1200 (9th Cir. 1982), and is unlikely to survive Fourth Amendment scrutiny.

134. *Torres*, 442 U.S. at 476 (Brennan, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)).

135. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (upholding the conviction of a defendant who consented to a car search).

136. *Id.* at 229.

showing that the traveler was aware of his rights.¹³⁷ However, the Alaska Supreme Court reads the analogous provision of the Alaska Constitution¹³⁸ more restrictively: “‘consent to a search, in order to be voluntary, must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred.’”¹³⁹

Even under the somewhat more relaxed federal standard, consent for NAV border searches likely is coerced. Most NAVs are readily accessible by small airplane only, and because many NAVs are not equipped to provide a full range of services, many villagers must fly to bigger towns or cities to receive medical attention, find employment, and/or to shop for goods not available in the small village stores. Upon their return, if they do not wish to consent to a search for alcohol and are denied entry to the village as a result, they will find themselves stranded on the airplane runway, awaiting another plane to take them away from their homes and families.

Any search pursuant to such conditions does not satisfy the consent exception to the Fourth Amendment’s warrant and probable cause requirements. Only if travelers are permitted to enter NAVs without being searched – rendering such searches virtually impotent – would consent be possible.¹⁴⁰

VI. LIKELIHOOD OF JUDICIAL REVIEW OF TRIBAL BORDER SEARCHES

Even if NAV warrantless searches for alcohol violate the Fourth Amendment or ICRA, it may be that courts will never make this determination. First, neither state nor federal prosecutors will likely bring criminal charges against a person based on evidence seized in a search not supported by a warrant or probable

137. See *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (holding that the key question is “whether . . . police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ request”); *Schneckloth*, 412 U.S. at 231-32 (distinguishing searches from the “structured atmosphere of a trial” and balancing the rights of the searched individual against the need for effective on-the-spot law enforcement).

138. ALASKA CONST. art. I, § 14.

139. *Erickson v. State*, 507 P.2d 508, 515 (Alaska 1973) (quoting *Rosenthal v. Henderson*, 389 F.2d 514, 516 (6th Cir. 1968)). *But cf. Sleziak v. State*, 454 P.2d 252, 257-58 (Alaska 1969) (informing a searched individual of his exact rights under the Alaska or United States Constitutions was not essential to establish consent).

140. *Cf. Bostick*, 501 U.S. 429, 436 (1991) (warrantless search of bus passenger for cocaine was permissible because he was advised that he could refuse to be searched without consequence).

cause or satisfying an exception to the Fourth Amendment.¹⁴¹ Second, the decision in *Santa Clara Pueblo v. Martinez*¹⁴² does not permit federal courts to review ICRA claims unless a tribe or NAV detains a person.¹⁴³ And third, civil suits against NAVs will likely be extinguished by their sovereign immunity. As a result, it appears that a fortuitous compromise has emerged. NAVs will not likely be able to secure any convictions for alcohol importation based on evidence seized in a warrantless search. However, NAVs can search incoming travelers for alcohol without a warrant or probable cause, pour out any alcohol discovered, and refuse entry to offenders or those who refuse to be searched. While offended travelers may bring suit for civil rights violations, such action should be blocked by tribal sovereign immunity. Courts could reach the issue, however, if an offended traveler litigates his claim not as an ICRA violation, but rather as a domestic dependent nation limitation, and incorporates Fourth Amendment case law, as well as the policy of protecting personal liberties, to demonstrate that the searches are inconsistent with NAV domestic dependent nation status. As explored above, however, the result is far from apparent.

VII. CONCLUSION

Alcohol abuse has a devastating effect on the lives of many rural Alaskans. In 1980, the Alaska Legislature passed a law allowing NAVs to outlaw the sale, importation, and/or possession of alcohol. Presently eighty-three NAVs outlaw the sale, importation, and/or possession of alcohol. Some of these NAVs have attempted to further combat alcohol importation by conducting searches of incoming travelers and their luggage. While NAVs should be commended for actively trying to protect their communities, their systematic searches for alcohol are problematic because they are not supported by warrants or any showing of probable cause. The analysis arising from such circumstances would appear to be simple. Searches not supported by a warrant or probable cause generally violate the Fourth Amendment. Several unique factors, however, complicate the inquiry.

141. If the tribe attempts to prosecute a defendant searched without a warrant or probable cause, and detains the defendant, the search would be subject to federal court review via a writ of habeas corpus and would almost certainly be held to violate ICRA, resulting in suppression of any alcohol discovered in the search.

142. 436 U.S. 49 (1978).

143. *See id.* at 58-59. As stated above, a traveler to the village could force the issue by refusing to consent to a search by bypassing the officials performing the searches and entering the village. If he or she is detained by village authorities, an ICRA claim in federal court would then be cognizable.

First, the Department of the Interior and the Bureau of Indian Affairs recently recognized NAVs as Indian tribes.¹⁴⁴ As such, NAVs are sovereign entities and enjoy certain sovereign powers. Most importantly, this means NAVs are not limited by the United States Constitution, including the Fourth Amendment. While NAVs are textually restricted by the Indian Civil Rights Act from conducting searches without warrants or probable cause, ICRA is only enforceable by federal courts if NAVs physically detain a person. Therefore, neither the Fourth Amendment nor ICRA effectively prohibit NAV warrantless alcohol searches.

Furthermore, NAVs can argue that as sovereigns, they are entitled to conduct customs searches at their borders without probable cause, just as the United States does at its international borders. NAV sovereignty arguably justifies warrantless searches at their borders. However, the United States Supreme Court has held that the sovereign powers of Indian tribes, which now include NAVs, are limited by their status as "domestic dependent nations." The Supreme Court cases *Oliphant v. Suquamish Indian Tribe*¹⁴⁵ and *Montana v. United States*¹⁴⁶ illustrate the Court's willingness to find limitations of tribal power based on their domestic dependent status. In *Oliphant*, the Court narrowly construed the sovereign powers of Indian tribes and used the limitation of their dependent status to deny them powers that intrude on the personal liberties of citizens of the United States.¹⁴⁷ NAV systematic and warrantless searches are especially intrusive upon villagers' expectation of privacy because in effect the villagers are denied access to their homes and families each time they leave the village unless they consent to having their personal liberties violated upon return. Because this is so contrary to fundamental tenets of American life, the Supreme Court may find that these searches are inconsistent with the domestic dependent status of NAVs and are therefore prohibited.

Finally, NAVs cannot employ traditional exceptions to the Fourth Amendment such as general urgency of law enforcement or consent. Although these exceptions are technically irrelevant because NAVs are not subject to the Fourth Amendment, they may constitute grounds for courts to conclude that NAV warrantless searches are inconsistent with the domestic dependent status of NAVs.

In short, while the objective of combating the deleterious effect of alcohol abuse is noble, the means employed by NAVs vio-

144. See *supra* notes 29-31 and accompanying text.

145. 435 U.S. 191 (1978).

146. 450 U.S. 544 (1981).

147. See *Oliphant*, 435 U.S. at 198.

1997]

NAV WARRANTLESS SEARCHES

499

late the personal civil liberties that are cherished in the United States. Nevertheless, judicial scrutiny may not arise. It is unlikely that a prosecutor will try to secure a conviction based on evidence seized in a search not supported by a warrant or probable cause. Additionally, civil suits against NAVs will likely be extinguished by sovereign immunity. The result is that NAVs may be able to search travelers without a warrant or probable cause and destroy any alcohol discovered, but they cannot detain violators, and any evidence discovered in such searches will not be able to be used to secure criminal convictions. Presently, a sea of questions and confusion surround NAV powers and status. Perhaps the Supreme Court's anticipated Indian country ruling will calm the waters with answers, including the permissibility of NAV warrantless searches for alcohol.