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NOTE

ALVAREZ V. LOPEZ: THE NINTH CIRCUIT OVEREXTENDS CONGRESS'S INTENDED USE OF PLENARY POWERS WITH ITS INTERPRETATION OF THE ICRA JURY PROVISION

Teddy Webb[*]

I. Introduction

While Congress has plenary powers to impose sovereignty restricting statutes on tribes, the Supreme Court and the lower courts have a duty to interpret those statutes with the goal of respecting tribal sovereignty as much as possible. The Indian Civil Rights Act ("ICRA") is a sovereignty-restricting statute, and throughout interpreting the nuances of the ICRA, the courts confront many crossroads at which they must restrain themselves from imposing federal standards that too heavily tread on tribal sovereignty. The judicial duty is challenging due to the intrinsic concerns for individual rights shared by federal judges, which sometimes conflict with the community-oriented foundations of tribal jurisprudence. It is at these instances of conflict, however, that federal judges must show restraint when interpreting the ICRA against tribal courts in order to respect tribal sovereignty over their own personal beliefs.

In *Alvarez v. Lopez*,[1] the Ninth Circuit took a biased approach when answering the question of whether criminal defendant Alvarez's rights were violated when the Gila Indian River Community ("the Community") tribal court informed him of his right to a jury trial, but did not inform him that he was required to request a jury in order to receive one.[2] As is evident by the venomous criticisms laid out in the majority opinion, the Ninth Circuit judges struggled to separate their views of federal jurisprudence from Congress's goal of respecting tribal sovereignty when the tribal actions

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1. 835 F.3d 1024 (9th Cir. Aug. 2016). This case was originally filed on August 30, 2016, as *Alvarez v. Tracy*. However, Ron Lopez succeeded Randy Tracy as Chief Administrator for the Gila River Indian Department of Rehabilitation and Supervision. The court substituted Lopez for Tracy pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

2. Part I of the case, exhaustion, is not discussed in this Note. This Note will focus on Part II of the case, habeas relief.

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conflicted with federal procedural norms. The Ninth Circuit had a duty to tread lightly when imposing the ICRA upon the Community tribal court, but it failed to meet this duty by reading into the ICRA a mandate to inform the defendant of the requirement to request a jury; a requirement that is not supported by the canons of federal Indian law nor by the text and context of the ICRA.

The delineation of power between federal and tribal governments and the interpretation of congressional plenary power over tribes has developed through cases such as *Talton v. Mayes*,[3] *United States v. Wheeler*,[4] *Santa Clara Pueblo v. Martinez*,[5] and *United States v. Lara*.[6] As discussed in detail below, history and precedent requires federal courts to take a deferential approach when reviewing tribal court cases in order to promote and secure tribal sovereignty. Over a century of federal precedent calls for restraint from reading mandates out of congressional silence, which the majority did not follow when it found an implicit mandate to inform. The ICRA provision at issue states that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person accused of an offense punishable by imprisonment the right, *upon request*, to a trial by jury,"[7] clearly lacking an explicit mandate to inform and imposing instead a requirement to not deny requested jury trials.

Along with the lack of textual and contextual support for the mandate to inform, the *Randall* balancing test employed by the majority is inappropriate and outdated. The appropriate test for review is provided in *Martinez*.[8] *Martinez* calls for construing against the tribe only in the face of arbitrary and unjust tribal action.[9] This is a highly deferential standard; years of precedent have held that standards of tribal courts are not replicas of federal standards, and in some cases the standards vary greatly.

The opinion offers the opportunity to discuss the appropriate judicial application of congressional plenary powers and the appropriate method of construing the ICRA's right to jury provision. Due to the lack of conformity with the congressional goal of respecting tribal sovereignty when interpreting congressional plenary powers and the use of an inappropriate

3. 163 U.S. 376 (1896).
4. 435 U.S. 313 (1978).
5. 436 U.S. 49 (1978).
6. 541 U.S. 193 (2004).
7. 25 U.S.C. § 1302(a)(10) (2012) (emphasis added).
8. 436 U.S. 49.
9. *Id.* at 61.

balancing test, the majority erred in its decision against the Community tribal court.

II. Law Before the Case

A. Plenary Powers

1. Constitutional Grant of Congressional Plenary Powers

Congress, by the Supreme Court's interpretation of the Constitution, holds plenary powers that enable it to either impose or relax restrictions on tribal sovereignty.[10] The constitutional provisions from which Congress's plenary powers originate are the Indian Commerce Clause[11] and the Treaty Clause.[12] Although treaty-making power is granted to the President, it is normally extended to authorize Congress to "deal with 'matters.'"[13] Congressional plenary powers are also supported by Congress's historical role in setting Indian policy.[14] *United States v. Lara* reveals important issues that are still hotly debated today, such as whether there is truly a broad constitutional grant of congressional plenary powers and the compatibility of the doctrines of inherent tribal sovereignty and federal plenary powers.[15] The relationship between the jurisdictional powers of the federal government and the tribes, and the application of congressional plenary powers, took shape in the 1896 decision *Talton v. Mayes*.

2. The Tribal Relationship to the Federal Government

The Court laid the framework for understanding the dual sovereignty that exists between tribal governments and the federal government in *Talton v. Mayes*.[16] The Court held that although the tribal sovereignty of the Cherokee Nation is "restrained by the *general* provisions of the Constitution" and "subject to the dominant authority of Congress," the Tribe's authority did not *arise out of* the Constitution, as the Cherokee

10. *Lara*, 541 U.S. at 200.

11. U.S. CONST. art. I, § 8, cl. 3.

12. U.S. CONST. art. II, § 2, cl. 2

13. *Lara*, 541 U.S. at 201 (quoting Missouri v. Holland, 252 U.S. 416, 434 (1920)).

14. *Id.* at 201.

15. CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM CASES AND MATERIAL 235, 256 (6th ed. 2010) (referencing Justice Thomas' concurrence in *Lara*, 541 U.S. at 214-26); *see also* United States v. Bryant, 136 S. Ct. 1954, 1968-69 (2016), *as revised* (July 7, 2016).

16. 163 U.S. 376 (1896).

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Nation existed before the Constitution.[17] Because the Cherokee Nation's sovereignty did not arise out of the Constitution, as the federal government's did, the Tribe is not bound by the Fifth Amendment.[18]

There is an important distinction, however, between the "general provisions of the constitution" and other rights carried in the Constitution.[19] *Talton*, and later *Wheeler*, affirm the position that constitutional rights that act specifically as restraints on federal and state powers cannot operate on tribal sovereigns.[20] Examples of rights that operate on federal and state powers but not on tribes include the absence of just compensation requirements for tribes[21] and a lack of First Amendment rights for tribal members.[22] However, the Constitution's general provisions, those directed at *any* actor, private or otherwise, such as the Civil Rights Act and proscriptions against slavery, do apply to tribal sovereigns.[23] For example, the Ninth Circuit has heard claims against tribal leaders alleging racist acts and remarks in violation of 42 U.S.C. § 1981.[24]

3. Drawing the Line Between Sovereigns

The Court further explained the framework for defining the line between tribal and federal powers in *United States v. Wheeler*.[25] The Court was asked to determine whether the Fifth Amendment's Double Jeopardy Clause precluded federal courts from trying a case against a tribal member that included acts that had already been tried in a tribal court.[26] The question boiled down to whether the Navajo Tribe's authority to try the defendant in its own courts was part of the Tribe's "inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government

17. *Id.* at 384 (considering the Tribe's use of a less than twelve-member grand jury panel).

18. *Id.* at 382-83, 385.

19. *Id.* at 384.

20. GOLDBERG ET AL., *supra* note 15, at 235 (citing Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); Civil Rights Cases, 109 U.S. 3 (1883)).

21. Barona Grp. of Capitan Grande Band of Mission Indians v. Am. Mgmt. & Amusement, Inc., 840 F.2d 1394 (9th Cir. 1987) (holding there is no just compensation requirement for tribes).

22. Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (denying First Amendment rights to tribal members).

23. *Id.* at 235 (citing United States v. Choctaw Nation, 38 Ct. Cl. 558 (1903), *aff'd*, 193 U.S. 115 (1904); *In re* Sah Quah, 31 F. 327 (D. Alaska 1886)).

24. Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989).

25. 435 U.S. 313 (1978).

26. *Id.* at 315-16.

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which has been delegated to the tribes by Congress[.]"[27] The Court acknowledged that the tribal interests in self-governance were similar to state interests in self-governance, and therefore federal preemption into either area would be a substantial infraction.[28] Finding no congressional act or treaty that created the sovereignty of the Navajo Tribe, the Court held the power to try native members in tribal courts was an inherent power.[29] "The powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished*.'"[30] The Court outlined that in order for tribal sovereignty to be restricted there must either be a treaty or an act of Congress allowing such restriction.[31]

> [The Indian tribes'] incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By *specific treaty provision* they yielded up other sovereign powers; *by statute*, in the exercise of *its* plenary control, *Congress* has removed still others.[32]

The prime examples of federal statutes that impose limits on tribal sovereignty are the relevant sections of the Indian Reorganization Act of 1934,[33] and the Indian Civil Rights Act of 1968.[34]

4. The Power to Extinguish Tribal Sovereignty

With cases such as *Oliphant v. Suquamish Indian Tribe*,[35] and *Duro v. Reina*,[36] the Court moved from standing on explicit congressional acts to relying on implicit inferences drawn from applicable federal statutes or treaties.[37] For example, in *Oliphant*, the Court found that a lack of an explicit grant of tribal authority over non-natives equaled a lack of inherent

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27. *Id.* at 322.
28. *Id.* at 332.
29. *Id.* at 328.
30. *Id.* at 322 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (4th prtg. 1945)).
31. *Id.* at 323.
32. *Id.* (footnote omitted and emphasis added).
33. 25 U.S.C. § 476 (2012).
34. 25 U.S.C. § 1302 (2012).
35. 435 U.S. 191 (1978).
36. 495 U.S. 676 (1990).
37. *See* GOLDBERG ET AL., *supra* note 15, at 256-57, 273-74, 276.

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authority over non-tribal members.[38] Similarly in *Duro*, the Court found that there was an implicit divestiture of tribal power over non-members, natives who are not members of the governing tribe, due to the dependent status of tribes.[39] *Oliphant* and *Duro* are examples of the Court seizing the opportunity to determine the scope of tribal self-governance. The Court strayed from the *Wheeler* analysis that relied on finding explicit grants from Congress, and moved to an analysis that drew implicit inferences from federal sources.[40] The Court's movement towards using implicit inferences to override tribal sovereignty runs the risk of overextending congressional plenary powers and may place the sovereignty-extinguishing power in the hands of the Court.[41] *Oliphant* and *Duro* also highlight the struggle that the Court endures when trying to find the correct method of construction for federal sources that acknowledges both inherent tribal sovereignty that existed before the Constitution and the ability of the federal government to extinguish tribal sovereignty.[42] This struggle comes to light most prominently when the Court interprets the ICRA.

B. Indian Civil Rights Act

The ICRA is an exercise of congressional plenary powers over tribal sovereignty.[43] The Act grants many of the rights afforded to persons appearing in federal courts from the Bill of Rights and the Fourteenth Amendment to persons appearing in tribal courts. However, the Court's application of the sovereignty-restricting statute is not a total incorporation of the Bill of Rights.[44] For example, when a tribal court's criminal sentence gives rise to a severe restraint on a tribal member's personal liberty, that member may petition federal courts for a writ of habeas corpus;[45] access to federal courts is guaranteed to tribal members by the ICRA.[46] As the Court has previously recognized, limitations on sovereignty can only come from

38. *Oliphant*, 435 U.S. at 212, *superseded by statute*, Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, *as recognized in* United States v. Lara, 541 U.S. 193, 205 (2004) ("Congress has the power to relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority.").

39. *Duro*, 495 U.S. at 686 (citing United States v. Wheeler, 435 U.S. 313, 326 (1978)).

40. *See* GOLDBERG ET AL., *supra* note 15, at 256-57, 273-74, 276.

41. *See id.*

42. *Id.* at 277 (showing *Oliphant* employed a historical methodology, while *Duro* ignored the historical recognition of tribal authority over non-member natives).

43. *Wheeler*, 435 U.S. at 327-28.

44. GOLDBERG ET AL., *supra* note 15, at 256.

45. *Id.* at 246 (citing Alire v. Johnson, 65 F. Supp. 2d 1124 (D. Ore. 1999)).

46. *Id.*

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Congress and not from the Supreme Court; application of the ICRA creates a challenge for the Court to not overextend Congress's plenary powers when interpreting ICRA provisions.[47]

When interpreting the ICRA to answer the question of whether tribal courts have the authority to try natives who are not members of the governing tribe,[48] the Court, in *United States v. Lara*, found that ICRA provisions are not delegations of federal power, but are instead an outline of the "bounds of the inherent tribal authority."[49] Subsequently, tribal actions taken or challenged under the ICRA are not subject to the full gamut of rights and restrictions conferred by the Constitution, but instead are to be analyzed under the scope of federally recognized inherent tribal authority.[50] When analyzing the ICRA provision at issue in *Lara*, the Court employed a construction method of looking at the statute's text and legislative history.[51] In *Lara*, the Court held that it is Congress who may wield the power to either increase or relax restrictions on tribal authority. The ICRA provision at issue in *Lara* is an example of Congress engaging in its constitutional right to relax previously recognized tribal authority restrictions.[52]

While *Talton*, through inference, denied application of the Bill of Rights in tribal courts, it still maintained the existence of congressional plenary powers over tribes.[53] In an exercise of the right to restrict tribal sovereignty, Congress enacted the ICRA, expressly making applicable some, but not all, Bill of Rights provisions on tribal governments.[54] An example of one of the specifically omitted provisions includes the right to free counsel.[55] In addition, *Santa Clara Pueblo v. Martinez* interprets the extent of the restrictions the ICRA actually imposes on tribes and outlines how the courts should analyze congressional intent.[56]

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47. *Id.* at 256 (citing Kansas Indians, 72 U.S. (5 Wall.) 737, 756-57 (1866) ("[C]onferring rights and privileges on these Indians cannot affect their situation . . . .")).

48. United States v. Lara, 541 U.S. 193, 196, 210 (2004) (comparing 25 U.S.C. § 1301(2) with Duro v. Reina, 495 U.S. 676 (1990)).

49. *Id.* at 207.

50. *Id.* at 207, 210.

51. *Id.* at 199.

52. *Id.* at 207, 210.

53. GOLDBERG ET AL., *supra* note 15, at 412 (citing Talton v. Mayes, 163 U.S. 376, 383-84 (1896)).

54. *Id.* at 412 (citing Indian Civil Rights Act of 1968 (ICRA), Pub. L. No. 90-284, 82 Stat. 77).

55. *Id.* at 413.

56. 436 U.S. 49, 58, 60, 62, 64, 66-72 (1978).

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When answering the question of tribal immunity from federal suits brought under the ICRA, the Court, in *Martinez*, rejected arguments that the ICRA created an implicit federal cause of action[57]. The Court called for "tread[ing] lightly" on tribal sovereignty when judicially interpreting congressional plenary powers.[58] The Court found the sole express remedy of habeas corpus, reserved only for questions on tribal imprisonment, to be a deliberate congressional choice that the Court had no authority to expand by allowing additional implicit inferences.[59] The Court reasoned that the ICRA was not an attempt to bring tribal governments under the full restrictions of the Constitution, instead it "selectively incorporated and . . . modified [some] of the . . . Bill of Rights [provisions] to fit the unique political, cultural, and economic needs of tribal governments."[60] The Court found that imposing an implicitly created cause of action in the ICRA was an overextension of congressional plenary powers; finding otherwise would frustrate the congressional goal of protecting tribal sovereignty, would result in a financial burden, and lacked of basis in the legislative history and the discussions on the remedy issue.[61]

Martinez provides the proper construction analysis for interpreting the ICRA. However, in *Alvarez* the Ninth Circuit relied on a balancing method set out in *Randall v. Yakima Nation Tribal Court*.[62]

C. The Randall *Balancing Test*

The Ninth Circuit used the *Randall* balancing test to determine to what standard tribal court actions should be held during a habeas proceeding in federal court.[63] This concept, derived from Eighth Circuit opinions,[64] is intended to grant proper respect for tribal sovereignty while also granting

57. *Id.* at 64-66.
58. *Id.* at 60.
59. *Id.* at 61.
60. *Id.* at 62.
61. *Id.* at 58, 60, 62, 64, 66-72.
62. 841 F.2d 897, 899-900 (9th Cir. 1988).
63. *Id.*
64. White Eagle v. One Feather, 478 F.2d 1311, 1314 (8th Cir. 1973) ("The tribe itself . . . has established voting procedures precisely paralleling those commonly found in our culture . . . . Here, then, we have no problem of forcing an alien culture, with strange procedures, on this tribe."); Daly v. United States, 483 F.2d 700, 704-05 (8th Cir. 1973) (adopting the *One Feather* equal protection voting holding and adding that "[w]hile the Indian Civil Rights Act does not abrogate the sovereign immunity of Indian tribes by specific language, we read the Act to do so by implication.").

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federal constitutional rights to individuals.[65] The *Randall* case primarily focused on a question of due process, and the Ninth Circuit found that because the due process provision language of the ICRA "substantially track[ed]" the due process provision language of the Bill of Rights, federal constitutional standards applied.[66] The method of looking to substantially tracked language is coupled with looking for tribal procedures that mirror procedures of Anglo-Saxon courts.[67] Though the *Randall* Court premised its use of this construction method on the view that the substantially tracked language should be treated "as a conduit to transmit federal constitutional protections," it hedged this statement with the *Martinez* statement that the ICRA supplies individuals subject to tribal authority with "broad constitutional rights" in order to prevent arbitrary and unjust tribal actions.[68]

For tribal questions that do not substantially track procedural language and Anglo-Saxon court norms, the Ninth Circuit developed a weighing test pieced together by the dual opinions of *Howlett v. Salish & Kootenai Tribes* and *Stands Over Bull v. Bureau of Indian Affairs*.[69] *Howlett* provides the Anglo-Saxon measure, and *Stands Over Bull* provides the weighing standard: "the individual right to fair treatment under the law must be weighed against the clearness of the particular guarantee afforded the individual, taken together with the magnitude of the tribal interest as applied to the particular facts."[70] Both *Howlett* and *Stands Over Bull* were decided before the Supreme Court ruled on *Martinez v. Santa Clara Pueblo*,[71] and lower courts in both the Ninth and the Tenth Circuits declined to apply principles from *Howlett* and *Stands Over Bull* in light of *Martinez*.[72] Because *Randall* is based upon outdated reasoning and, in

65. Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238 (9th Cir. 1976).

66. *Randall*, 841 F.2d at 899-900 (citing Red Fox v. Red Fox, 564 F.2d 361, 364 (9th Cir. 1977)).

67. *Id.* at 900.

68. *Id.* (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978)).

69. *Randall*, 841 F.2d at 900 (dicta) (citing *Howlett*, 529 F.2d at 238; Stands Over Bull v. Bureau of Indian Affairs, 442 F. Supp. 360, 375 (D. Mont. 1977)).

70. *Stands Over Bull*, 442 F. Supp. at 375 (citing Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976), *cert. granted*, 431 U.S. 913 (1977), *rev'd by* 436 U.S. 49 (1978)).

71. 436 U.S. 49.

72. *See* MacDonald v. City of Henderson, 818 F. Supp. 303, 306 (D. Nev. 1993) (abrogating *Howlett* by stating that strict scrutiny review of tribal decisions is not appropriate after *Martinez*, and instead applying rational basis review); Ordinance Fifty Nine Ass'n v. Babbitt, 970 F. Supp. 914, 926 (D. Wyo. 1997), *aff'd sub nom.* Ordinance Fifty Nine Ass'n v. U.S. Dep't of Interior Sec'y, 163 F.3d 1150 (10th Cir. 1998) (stating that to the extent *Howlett* differs from *Martinez*, *Howlett* is no longer good law); Maldonado v. Yakima

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operation, ignores the "tread lightly" demands of both Congress and Court precedent, the Ninth Circuit should have relied on the construction method set out in *Martinez*. Only upon a finding of arbitrary and unjust tribal action should the Ninth Circuit have ruled against the Community tribal court. The facts of the case coupled with the appropriate standard of review from *Martinez* reveal that Alvarez's jury rights were not violated.

III. Statement of the Case: Alvarez v. Lopez

A. Facts

In 2003, a twenty-year-old intoxicated Alvarez (an enrolled member of the Community)[73] went to his fifteen-year-old girlfriend's house, struck her with a flashlight, and threatened her with a knife.[74] The altercation ended after Alvarez also struck the girlfriend's brother, and threatened to kill the entire family.[75] Alvarez was arrested by the Community police, charged with assault and other related offenses, and was given a "Defendant's Rights" form.[76] This form notified Alvarez that he had the right to a jury trial, but did not specify that in order to invoke that right, he must request a jury.[77] At trial, Alvarez represented himself, did not present a defense, did not ask questions, or indicate that he was interested in requesting a jury.[78] Alvarez was charged with assault, domestic violence, and misconduct involving a weapon.[79] It is an undisputed fact that Alvarez was not notified that he had to request a jury trial.[80]

B. Procedural History

Alvarez sought relief from his tribal court conviction from the United States District Court for the District of Arizona.[81] The district court

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Tribal Gaming Corp., No. CV-06-3065-FVS, 2008 WL 4459453, at *2 (E.D. Wash. Sept. 30, 2008) (dismissing due to *Stands Over Bull* no longer proving federal jurisdictional basis in light of *Martinez*); Tenney v. Iowa Tribe, 243 F. Supp. 2d 1196, 1199 (D. Kan. 2003) (finding no jurisdictional basis from *Stands Over Bull* in light of *Martinez*).

73. Alvarez v. Lopez, 835 F.3d 1024, 1026 (9th Cir. Aug. 2016).
74. *Id.* at 1026, 1031.
75. *Id.* at 1031.
76. *Id.* at 1026.
77. *Id.* at 1031.
78. *Id.* at 1026, 1031.
79. *Id.* at 1026.
80. *Id.* at 1035.
81. *Id.* at 1025-26.

dismissed his federal habeas petition.[82] The appellate panel affirmed the district court's decision in 2014, but after rehearing, withdrew the 2014 decision, and reversed and remanded the federal habeas petition back to the district court.[83]

C. Majority Opinion

1. Issue Framing

"We consider whether an Indian tribe violated a criminal defendant's rights by failing to inform him that he could receive a jury trial only by requesting one."[84] The majority ignored arguments set forth in the pleadings, which debated whether or not jury rights included in the ICRA mirrored the Sixth Amendment's jury rights, and instead adopted the *Randall* balancing test due to tribal court proceedings differing substantially from federal court proceedings.[85]

2. Holding

Because the text of the ICRA jury provision states "upon request" and because Alvarez's interests in understanding his rights outweighs any Community interest, the Community violated Alvarez's right to jury trial by failing to inform him of the need for an affirmative request in order to invoke the right to jury trial.[86] The notice requirement is mandatory, as the text of the ICRA reads: "No Indian tribe in exercising powers of self-government shall . . . deny to any person accused of an offense punishable by imprisonment the right, *upon request*, to a trial by jury . . . ."[87]

3. Reasoning

The majority reached its holding by analyzing the arguments under the *Randall* balancing test.[88] The *Randall* balancing test pits the individual's right to fair treatment against the tribe's interest in order to evaluate a procedure's compliance with the ICRA standard.[89] The majority conceded

82. *Id.* at 1031.
83. *Id.* at 1030.
84. *Id.* at 1026.
85. *Id.* at 1029.
86. *Id.* at 1029-30.
87. 25 U.S.C. § 1302(a)(10) (2012) (emphasis added), *quoted in Alvarez*, 835 F.3d at 1028.
88. *Alvarez*, 835 F.3d at 1028-29 (citing Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988)).
89. *Id.*

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that the *Randall* test has never before been applied to section 202(10) of the ICRA, but maintained that the *Randall* test "sweep[s] beyond" the sections to which it was previously applied.[90]

The majority concluded that Alvarez was not granted the right to fair treatment when he was given a form that told him he had a right to a jury trial, as opposed to what he actually had, which was the right to request a jury trial.[91] The majority supported its position by pointing out that other rights listed on the form did not have to be affirmatively requested.[92] The majority went so far as to state that the "Defendant's Rights" form is misleading.[93] The majority also emphasized Alvarez's age ("barely out of his teens"), seventh grade education, and his lack of defense counsel during his arrest and trial by the Community.[94] The majority concluded that Alvarez's right to be informed of the condition attached to his right to a jury far outweighed any intrusion into the tribe's interest "in using a boilerplate form that gives defendants a misleading picture of their rights."[95]

D. Kozinski Concurrence

Circuit Judge Kozinski launched a scathing criticism of the Gila River Indian Community's criminal justice system in a short concurrence, finding "a rat's nest of problems with the Community's justice system."[96] Kozinski mourned the fact that Alvarez would receive little justice from the court's ruling since he had already been released from his prison sentence.[97] However, Kozinski hoped the Community would take this opportunity to rectify the list of judicial shortcomings he set out in the concurrence.[98] Kozinski suggested that the Community "reflect on whether it is proud to have" committed such errors.[99]

90. *Id.* at 1029 n.5 (explaining that the *Randall* test was developed to analyze section 202(8) of the ICRA but extends beyond section 202(8)).

91. *Id.* at 1029.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1030.

96. *Id.* at 1030 (Kozinski, J., concurring).

97. *Id.* at 1031.

98. *Id.*

99. *Id.* at 1030.

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E. O'Scannlain Dissent

1. Issue Framing

Did the Community breach Alvarez's "right, *upon request*, to a trial by jury" under the scope of the ICRA when Alvarez never requested a jury?[100] The dissent called into question the majority's use of the "unmoored" *Randall* balancing test and argued that the question before the court should be analyzed under the standards of the ICRA alone.

2. Holding

Because Alvarez did not request a jury trial, the Community did not violate his right to receive a jury trial upon request. The ICRA text demands that a jury trial be granted upon request; it does not demand that the defendant be notified of the need to request the right in order to invoke that right.

3. Reasoning

The dissent began by reminding the court of the basic concepts of civil rights in a tribal court context: tribal civil rights are guaranteed based on the "'tribal bill of rights . . . and federal statues" such as the ICRA; however, tribal civil rights are not the same as the federal Bill of Rights.[101] The dissent then explained that due to (1) the inapplicability of the *Randall* test, (2) the ICRA text, (3) the context of section 202(10)of the ICRA, and (4) the need to balance congressional plenary powers against tribal sovereignty, the Community did not violate Alvarez's jury rights under the standards of section 202(10) because he did not request a jury.[102]

a) Inapplicability of the Randall Balancing Test

The dissent accused the majority of injecting a due process claim in order to employ the *Randall* test, which has only ever been employed in analyzing the ICRA's due process standard and not in the ICRA's jury right standards.[103] The dissent critiques the majority's lack of reasoning for applying the *Randall* test, contending the majority's belief that "the

100. *Id.* at 1034 (O'Scannlain ,J., dissenting) (quoting Indian Civil Rights Act of 1968, Pub. L. No. 90-824, § 202, 82 Stat. 73, 77-78 (codified as amended at 25 U.S.C. §§ 1302(a)(6)-(8),(10) (2012)).

101. *Id.* at 1032 (O'Scannlain ,J., dissenting) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.03[1], at 944 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN]).

102. *Id.* at 1031-37 (O'Scannlain ,J., dissenting).

103. *Id.* at 1032 (citing *id.* at 1029 n.5).

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language and principle of *Randall* sweep beyond Section 202(8)" is insufficient and that the "*absence* of reasons" is not how the court should decide what standard to apply to a dispute.[104] The *Randall* test is even more inappropriate because Alvarez did not raise it as an argument, therefore, the Community cannot have been expected to argue against it.[105] Lastly, the dissent argued that a test designed to analyze general due process rights has no place in the analysis of a right that is explicitly accounted for in the ICRA text.[106] The dissent supported its position by citing *Tom v. Sutton*, which determined that the due process provision in section 202(8) of the ICRA was not to be applied to a question of indigent defense rights when a more specific provision, section 202(6), addressing the right to counsel, existed in the statute.[107] Having argued the inapplicability of the *Randall* test, the dissent set forth the appropriate method for deciding the case: construe the ICRA provision in an analysis of Alvarez's argument that the ICRA provision should be applied in the same way as the federal Bill of Right's Sixth Amendment.[108]

b) Textual Construction of the ICRA

Alvarez's argument that the federal standard for the right to a jury trial should apply is flawed because the federal Bill of Rights is not imposed on tribes.[109] Instead, the Bill of Rights was used, via selective incorporation or modification, as a model for tribal rights.[110] This is evidenced by the key distinctions between many provisions in the ICRA and the Bill of Rights.[111] Just as section 202(6) of the ICRA, the right to counsel at the expense of the defendant, does not exactly mirror the Sixth Amendment, which grants the right to free counsel, section 202(10) does not exactly mirror the Sixth

104. *Id.*

105. *Id.* at 1032-33.

106. *Id.* at 1033 (citing County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998); United States v. Lanier, 520 U.S. 259, 272 n.7 (1997); Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 805 (9th Cir. 2014) (en banc) (O'Scannlain, J., dissenting)).

107. *Id.* at 1033 (O'Scannlain, J., dissenting) (citing *Tom*).

108. *Id.* at 1034 (O'Scannlain, J., dissenting) (contrasting the majority's quick dismissal of Alvarez's argument, and taking this argument as a relevant question that should be determined).

109. *Id.* at 1032 (O'Scannlain, J., dissenting) (citing United States v. Bryant, 136 S. Ct. 1954, 1962 (2016)).

110. *Id.* at 1032 (O'Scannlain, J., dissenting) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978)).

111. *Id.* at 1032 (O'Scannlain, J., dissenting).

Amendment.[112] "Subsection 202(10) expressly required a request to receive a jury, it did not require an impartial jury, and it did not require a jury 'of the State and district wherein the crime shall have been committed.'"[113] The Sixth Amendment makes a jury trial a default in criminal cases, where the ICRA provision only grants jury rights when requested.[114]

While the Sixth Amendment and section 202(10) are similar, they are intentionally different.[115] The plain text of section 202(10) demands a requested jury be granted, but does not require notification.[116] The lack of such a notification requirement "strongly suggests" Congress's intent to not require notification.[117]

c) Context of ICRA Section 202(10)

"Context reinforces that the right to receive a jury trial does not include a right to be notified of the need to request a jury trial."[118] While section 202(10) does not contain an explicit notice mandate, its neighboring provision, section 301, does.[119] Section 301 mandates that the Court of Indian Affairs grant the same rights to defendants as if they were appearing in federal court, and it also contains explicit text requiring notice of said rights.[120] However, 301 pertains only to the Court of Indian Affairs, a court established by the Bureau of Indian Affairs for tribes who could not establish their own criminal courts.[121] The lack of an explicit notice mandate in section 201(10), in the context of section 301, is strongly suggestive that Congress did not intend to impose a notice requirement on

112. *Id.*

113. *Id.* at 1034 (comparing section 202(10) of the ICRA with the Sixth Amendment).

114. *Id.* (O'Scannlain, J., dissenting).

115. *Id.* at 1032 (O'Scannlain, J., dissenting) ("ICRA . . . [']selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments.'") (quoting *Martinez*, 436 U.S. at 62).

116. *Id.* at 1035 (O'Scannlain, J., dissenting).

117. *Id.*

118. *Id.*

119. *Id.* at 1035-36 (O'Scannlain, J., dissenting) (citing Indian Civil Rights Act of 1968, Pub. L. No. 90–284, § 301, 82 Stat. 73, 78 (codified at 25 U.S.C. § 1311 (2012))).

120. *Id.* (O'Scannlain, J., dissenting) (citing Indian Civil Rights Act of 1968, § 301, 82 Stat. at 78 (codified at 25 U.S.C. § 1311) ("Thus, in federally established Courts of Indian Offenses, a model code would assure that defendants there both *have* rights—the full slate of rights provided by our Constitution—and that they *have notice* of these rights.").

121. *Id.* (O'Scannlain, J., dissenting) (citing Indian Civil Rights Act of 1968, § 301, 82 Stat. at 78 (codified at 25 U.S.C. § 1311); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 n.12 (1978); COHEN, *supra* note 101, § 4.04[3][c], at 263-64).

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criminal courts established by tribes, such as the Community's criminal court.[122]

d) Substantive Canons of Federal Indian Law

The dissent calls for the court to "tread lightly" when interpreting federal statutes that affect tribal sovereignty.[123] The dissent acknowledges that Congress has plenary authority over tribal officers with respect to habeas corpus relief,[124] but cautions that that authority be carefully balanced with respect for tribal sovereignty.[125] The dissent emphasizes that precedent demands a careful balance "in the absence of clear indications of legislative intent."[126]

IV. Analysis and Discussion

The dissent is correct in every facet of its analysis and the following section adds an analysis of precedent that supports the dissent's conclusion.

Federal precedent has set a clear directive for decades: "[A]void undue or intrusive interference in reviewing Tribal Court procedures."[127] Where the majority gives only a passing nod to this clearly established directive, the dissent rests its reasoning squarely on this principle. The matter at issue in Alvarez was procedural. The Community's procedural choice to employ a "Defendant's Rights" form that did not specify the need to request a jury in order to receive a jury was squarely within the tribe's procedural authority and should not be infringed upon by federal courts. Comity to tribal procedural decisions is demanded by the precedent set by the Ninth Circuit's decision in *Smith v. Confederated Tribes of Warm Springs Reservation of Oregon*,[128] and the majority gives no reason why it should be abandoned.

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122. *Id.* at 1036 (O'Scannlain, J., dissenting).

123. *Id.* (O'Scannlain, J., dissenting) (quoting *Martinez*, 436 U.S. at 60, quoting in turn McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973)).

124. *Id.*

125. *Id.*

126. *Id.* (quoting *Martinez*, 436 U.S. at 60, quoting in turn McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973)).

127. Smith v. Confederated Tribes of Warm Springs Reservation, 783 F.2d 1409, 1412 (9th Cir. 1986) (citing *Martinez*, 436 U.S. at 67).

128. *Id.* ("Comity towards the Tribal Courts requires that deference be given to the procedures which those courts choose to follow.").

The *Randall* test improperly assumed a greater plenary power than Congress intended because the test, in operation, imposes federal constitutional standards upon tribal court actions. As has been clearly described by decades of precedent, inherent tribal powers that are not delegated by Congress are not subject to federal constitutional standards.[129] *Lara* informs the courts that the ICRA is not a delegation of federal powers to the tribes subject to federal standards,[130] and instead that the appropriate construction method is to stay within the text and the legislative history of the statue.[131] The *Alvarez* dissent abides by the narrow construction standard set forth in *Lara* with its argument that the text of the provision at issue clearly lacks an informing mandate.[132] The text of the ICRA provision at issue does not explicitly contain a mandate to inform. Instead, it commands that tribal sovereigns do not deny "the right, *upon request*, to a trial by jury."[133] The context of the ICRA provision also demonstrates that when Congress requires a mandate to inform, it uses explicit language, such as in section 301, applicable only to Courts of Indian Affairs and not tribal courts such as the Community tribal court, which mandates certain rights and distinctly mandates *notice* of said rights.[134] Section 202 has no such notice mandate. Therefore, to draw a rule out of congressional silence is anathema to the mandate of precedent and the goals of the ICRA to secure and promote tribal sovereignty.[135]

The reasoning behind the *Randall* test rests too much on implications drawn from silences,[136] and congressional plenary powers are overextended when interpreted by the courts from anything but explicit statutory text.[137] *Martinez* warned against drawing implicit rules from silence when the Court said "[w]here Congress seeks to promote dual objectives in a single statute, *courts must be more than usually hesitant to infer from its silence* a cause of action that, while serving one legislative purpose, will disserve the other."[138] The *Martinez* Court based its reasoning on "[t]he canon of construction applied over a century and a half by this Court . . . that the

129. United States v. Wheeler, 435 U.S. 313, 322 (1978). *See generally* United States v. Lara, 541 U.S. 193 (2004).

130. *Lara*, 541 U.S. at 196, 210.

131. *Id.* at 199.

132. *See supra* Part III.E.3.b.

133. 25 U.S.C. § 1302(a)(10) (2012) (emphasis added).

134. *See supra* Part III.E.3.c.

135. *See supra* Part III.E.

136. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 (1978); *see supra* Part III.E.3.b.

137. *See supra* Part III.E.3.b.

138. *Martinez*, 436 U.S. at 64 (emphasis added).

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wording of treaties and statutes ratifying agreements with the Indians *is not to be construed to their prejudice*."[139] The *Randall* test finds its roots in an Eighth Circuit opinion that contains troubling phrases such as this: "While the Indian Civil Rights Act does not abrogate the sovereign immunity of Indian tribes by specific language, we read the Act to do so by implication."[140] This line of reasoning runs completely contrary to the canon of respecting tribal sovereignty by searching only for explicit directives reinforced by *Lara* and *Martinez*. The application of the *Randall* balancing test is wrong due to the test's precedential basis being supplanted by *Martinez*. The *Randall* test rests on cases decided before *Martinez* and their reasoning is no longer useful due to the clarity shed by *Martinez*.

Although the majority claims to be applying a balancing test in lieu of applying federal standards, due to the difference in tribal and federal court proceedings, the majority's numerous criticisms of the Community tribal court's lack of federal conformity suggests otherwise.[141] Judge Kozinski reprimanded the Community's criminal court for several alleged shortcomings not at issue in *Alvarez*, such as a lack of appointed indigent defense counsel.[142] The recently upheld inapplicability of the Sixth Amendment to tribal courts in *United States v. Bryant* is a shining example of a constitutional right that is guaranteed in federal courts but not in tribal courts.[143] To reprimand the Community for employing a method of criminal justice that has been held to be completely within its right is acrimonious toward the federal and tribal delineation of sovereignty. Respecting tribal sovereignty means respecting differences between tribal cultural and Anglo-Saxon jurisprudence. It is important for the federal government to remember, as the Court remembered in *Bryant* and the *Alvarez* court forgot, that tribal jurisprudence focuses more on community-oriented goals as opposed to the federal norm of fixating on the rights of the individual. What the *Bryant* Court understood is that, in cases where the tribal procedure most directly conflicts with federal procedural norms, it is imperative to temper any intrinsic beliefs and apply a deferential standard toward tribal

139. Antoine v. Washington, 420 U.S. 194, 199 (1975) (emphasis added) (citing Choate v. Trapp, 224 U.S. 665, 675 (1912) (holding that construction should be liberal, not strict, and resolved in favor of the tribes who are the wards of the federal government)).

140. Daly v. United States, 483 F.2d 700, 705 (8th Cir. 1973).

141. Alvarez v. Lopez, 835 F.3d 1024, 1030-31 (9th Cir. 2016) (Kozinski, J., concurring).

142. *Id.*

143. 136 S. Ct. 1954, 1958 (2016), *as revised* (July 7, 2016).

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actions in order to achieve the congressional goal of protecting tribal sovereignty.

The balancing of tribal sovereignty against the individual's rights is an Anglo-Saxon construction that does not comport with the tribal culture of community-oriented policies. While the U.S. Bill of Rights seeks to elevate individual freedoms above state intrusion, many tribal cultures show a desire to protect community harmony by imposing responsibilities on individuals.[144] Because of these differences, even similarly worded provisions between the Bill of Rights and the ICRA can be interpreted very differently between tribal and federal courts.[145] As seen in *Winnebago Tribe of Nebraska v. Bigfire*, retaining tribal culture and identity was the paramount tradeoff in the decision of many tribes to accept leaving their ancestral homelands for reservations.[146] The decision in *Winnebago* to not apply the federal equal protection standard to tribal governments in favor of tribal traditions and governing norms is an example of the restraint federal courts should apply when reviewing tribal cases. *Martinez* also discussed another example of the restraint required, citing *Native American Church of North America v. Navajo Tribal Council*, where it was held that the First Amendment's religious freedom guarantees did not apply to tribal governments.[147] Respect for tribal culture is at the root of all policies regarding respect for tribal sovereignty.[148]

In addition to respecting tribal culture, there is also no need to apply an outdated and inappropriate balancing test because *Martinez* provides the appropriate test to apply when reviewing tribal court actions in federal court. *Martinez* commands that the ICRA provides "broad constitutional rights" in order to prevent arbitrary and unjust tribal actions.[149] This broad grant of constitutional rights should be interpreted as a general grant, not a specific grant, of each Bill of Rights provision coupled with federal standards of constitutional review. The ICRA did not impose a total

144. GOLDBERG ET AL., *supra* note 15, at 408 (citing Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799 (2007); Bruce G. Miller, *The Individual, the Collective, and Tribal Code*, AM. IND. CULTURE & RESEARCH J., vol. 21, no. 1, at 107 (1997)).

145. *Id.*

146. 25 Ind. L. Rep. 6229 (Winn. Sup. Ct. 1998), *reprinted in* GOLDBERG, *supra* note 15, at 408-11.

147. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 80 n.5 (1978) (citing Native Am. Church of N. Am., 272 F.2d 131, 132, 135 (10th Cir. 1959)).

148. *See id.* at 62; *Bigfire*, 25 Ind. L. Rep. 6229, *reprinted in* GOLDBERG, *supra* note 15, at 409.

149. *Martinez*, 436 U.S. at 61.

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incorporation of the Bill of Rights onto tribal courts. Instead, a commitment to tribal sovereignty led Congress to selectively incorporate the principles found in the Bill of Rights in order to make allowances for the customs and needs of the tribes. The test created in *Martinez* leans heavily towards tribal deference. As the District Court of Nevada noted, after *Martinez*, strict scrutiny is inappropriate and rational basis is the correct test to ensure deference to tribal sovereignty.[150] The appropriate review of tribal actions is to ask whether the action was arbitrary and unjust.[151] Based on the congressional goal of respecting tribal sovereignty this must be interpreted as a high bar against tribal incursions.[152] The *Martinez* test sets a high bar for showing restraint when interpreting congressional plenary powers, and the limitation on tribal sovereignty incursions is exactly in line with the "tread lightly" approach called for by *Martinez* and over a century of judicial precedent.[153]

The "Defendant's Rights" form's lack of the phrase "upon request" hardly rises to the level of "unjust" *Martinez* requires before federal incursion is appropriate. Alvarez, as the dissent points out, had ample opportunity to ask questions throughout the process and during his defense of himself. Alvarez should have at least noticed that there was not a jury present, and thereby he could have indicated a desire to have a jury at that time. He did not request a jury, and nothing in the record shows he indicated to the court that he wanted one during his trial process. Therefore, Alvarez's rights to a jury trial were not violated, because the court did not deny a request for a jury.

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150. MacDonald v. City of Henderson, 818 F. Supp. 303, 306 (D. Nev. 1993).

151. *Martinez*, 436 U.S. at 61.

152. *See id.* at 66-67 ("[ICRA accommodates] goals of 'preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people.'" (quoting SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE JUDICIARY COMM., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN: SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS PURSUANT TO S. RES. 194, 89TH CONG., 2D SESS., at 12 (Comm. Print 1966)); Smith v. Confederated Tribes of Warm Springs Reservation, 783 F.2d 1409, 1412 (9th Cir. 1986) (employing the *Martinez* mandate of avoiding undue intrusions into tribal sovereignty when interpreting ICRA).

153. *Martinez*, 436 U.S. at 60; Antoine v. Washington, 420 U.S. 194, 199 (1975); Choate v. Trapp, 224 U.S. 665, 675, (1912); *see also* Alvarez v. Lopez, 835 F.3d 1024 (9th Cir. 2016) (O'Scannlain, J., dissenting).

V. Conclusion

The majority erred in its decision to read into the ICRA text a mandate for notice of the need to request a jury in order to invoke the right. As the dissent argues, to do so is a misinterpretation of the text and context of the ICRA and an overextension of congressional plenary powers.

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