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Index

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Editor

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INDEFINITE DETENTION

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Uniting and Strengthening America by Providing Appropriate Tools Requiring to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, act of Oct. 26, 2001, 115 Stat. 272

See also **Due Process of Law**; *Gerstein v. Pugh*, 420 U.S. 103 (1975), **Material Witnesses**; **9/11 and the War on Terrorism**; **Speedy Trial**; **Suspended Right of Habeas Corpus**

CITY OF INDIANAPOLIS v. EDMOND, 531 U.S. 32 (2000)

Under what circumstances may the police stop vehicles randomly at roadblocks? The use of checkpoints to stop vehicles, question drivers, and search vehicles implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. Highway checkpoints to combat drunk driving and checkpoints to intercept illegal immigrants have been held consistent with the Fourth Amendment. However, the Supreme Court in *City of Indianapolis v. Edmond* held that Indianapolis's highway checkpoint program violated the Fourth Amendment because its primary purpose was to advance the city's general interest in crime control.

Indianapolis began operating vehicle checkpoints in August 1998 in an effort to intercept illegal drugs. Police officers stopped a random group of vehicles at roadblocks on Indianapolis roads. Officers viewed the driver and the vehicle from the outside while narcotics-detection dogs sniffed the vehicle's exterior. Officers generally spent less than five minutes viewing each vehicle. Two individuals who were stopped at a checkpoint filed suit, claiming that the checkpoints were an unlawful search and seizure in violation of the Fourth Amendment.

The Supreme Court noted that there are very limited exceptions to the general rule that the government may not establish checkpoints unless there is particularized suspicion of wrongdoing. Such exceptions include checkpoints that were regulatory in nature, such as for highway safety as in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), or

border control as in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In contrast to these other checkpoints, the primary purpose of Indianapolis's checkpoint was to interdict illegal narcotics. Because the Indianapolis checkpoint's primary purpose was to advance its general interest in crime control, Indianapolis could not stop vehicles without particularized suspicion of wrongdoing as required by the Fourth Amendment.

KATY H. H. YANG-PAGE

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United States v. Martinez-Fuerte, 428 U.S. 543 (1976)

See also **Checkpoints (roadblocks)**; *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990); **Probable Cause**; **Search (General Definition)**; **Seizures**

INDIAN BILL OF RIGHTS

Congress enacted the Indian Civil Rights Act (ICRA) in 1968 as Title II of the 1968 Civil Rights Act. Portions of the ICRA that substantially mirror the Bill of Rights are popularly called the "Indian Bill of Rights." The Indian Bill of Rights extends most of the constitutional protections of the Bill of Rights to individuals under the jurisdiction of Indian tribal governments. In order to preserve certain aspects of tribal government and sovereignty, some parts of the Bill of Rights were modified or left out. The individual rights protections include:

- rights to free exercise of religion, free speech, press, assembly, and to petition for a redress of grievances
- right to be free of unreasonable searches and seizures without a search warrant to be issued only upon a showing of probable cause
- right to be free from being placed in double jeopardy and from self-incrimination
- right to due process and equal protection
- right to be free from taking of property without just compensation
- rights to a speedy trial, confront witnesses, and the assistance of counsel

freedom from excessive bail and cruel and unusual punishment
 freedom from bills of attainder and ex post facto laws
 right to a jury of at least six persons (less than in federal law) in all criminal cases carrying the possibility of imprisonment

The main differences include the absences of an establishment clause, a right to counsel at the government's expense, and the lack of a right to a jury trial in civil cases. Also, the ICRA prohibited Indian tribes from sentencing convicted criminals to more than six months in prison and \$500 in fines (later amended to one year and \$5,000).

Foundational Cases and Legislative History

The Supreme Court had originally decided in *Talton v. Mayes*, 163 U.S. 376 (1896) that, since tribal sovereignty flowed from a time immemorial and tribes had not participated in the drafting of or consented to the U.S. Constitution, the individual rights protections that limited federal (and later state) governments did not apply to tribal governments. The Court reaffirmed earlier decisions such as *Worcester v. Georgia*, 31 U.S. (6 Pet.) 536 (1832) that labeled Indian tribes as "domestic dependent nations," whose sovereignty derived not from federal or state authority, but flowed from inherent tribal sovereignty that had never been extinguished.

In *Talton*, a non-Indian convicted of murder in the courts of the Cherokee Nation petitioned for a writ of habeas corpus in federal court. He argued that the Cherokee Nation had indicted him with a five-person grand jury. Under Cherokee Nation law, thirteen persons were required to indict a defendant validly for murder. The Court rejected the petition on the basis that the Fifth Amendment, by its terms, only applies to the federal government, not tribal governments.

In the 1950s, non-Indians had brought several cases to the federal courts seeking a civil rights remedy for actions taken against them by tribal governments. In *Martinez v. Southern Ute Tribe* (249 F.2d 915, 10th Cir. 1957, cert. denied, 356 U.S. 960, 1958), for example, the Tenth Circuit Court rejected a due-process challenge to a tribal decision to deny membership rights to an individual Indian. In that case, the Southern Ute Tribe allegedly refused to allow a woman with a tribal member mother and a nonmember Indian father to participate pro rata in the economic benefits of the tribal corporation.

In *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), the Tenth Circuit

ruled that the Navajo Nation was not bound by the First Amendment and could prohibit the ritual use of peyote by members of the Native American Church within its territory. Members of the church had argued that they had used peyote for religious purposes from time immemorial. In *Barta v. Oglala Sioux Tribe* (259 F.2d 553, 8th Cir. 1958, cert. denied, 358 U.S. 932, 1959), the Eighth Circuit Court ruled that the Fifth Amendment's due process clause and the Fourteenth Amendment's equal protection clause did not restrict an Indian tribe from imposing a tax on non-Indians for use of tribal lands, but not on tribal members. In that case, non-Indian lessees of tribal trust lands on the Pine Ridge Reservation sought to avoid a grazing and farming license tax imposed by the tribe.

In 1961, the Senate Subcommittee on Constitutional Rights began an investigation of constitutional rights in Indian Country by sending out two thousand questionnaires to persons familiar with Indian tribes, followed thereafter by a series of hearings in states with relatively large tribal populations that took place over several years. Judicial concern over civil rights violations by tribal courts in criminal cases came to a head when the Ninth Circuit Court decided *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965). In that case, the Gros Ventre tribal court sentenced a woman to five days in jail for failure to remove her cattle from land leased to another person.

The Ninth Circuit took jurisdiction over the case—even though the events took place on the reservation and the parties were all tribal members—on the theory that the federal government had funded the tribal jail. It is likely that the court took the case because the tribal court had not allowed Colliflower to have an attorney or to confront witnesses against her—serious civil rights violations. Normally, federal and state courts would not have had jurisdiction over these internal tribal matters.

The Senate's concern related to tribal government practices centered on the criminal procedure provided by tribal courts. The Senate took testimony that suggested that most tribal courts were relatively crude in comparison to state and federal courts. Tribal judges rarely had legal training and tribal court records were poor at best. The Senate pounced on the fact that most criminal defendants before tribal courts confessed easily and without the advice of counsel. But this ignores the fact that, in nearly all tribal communities, the concept of punishment for criminal acts is a foreign notion. Under tribal traditions and customs, those who commit crimes are taught to admit the infraction with the understanding that they will not be severely punished. Tribal criminal jurisprudence is more restorative than retributive.

Many Senators and advocates were also more generally concerned of the possibility that somewhere in the United States were enclaves in which there were no civil rights protections from governmental activity. The Senate took testimony from numerous individuals who claimed to have been treated unfairly by tribal governments. Others were concerned that many Indian tribes did not provide an independent adjudicative body apart from the tribal council. Though the Senate hearings were replete with much anecdotal evidence of tribal government unfairness and concerns about tribal government structures, the legislature was far more concerned with procedural rights of criminal defendants in tribal courts. The provision for habeas corpus review of tribal court convictions evidences that this concern weighed more heavily with Congress than civil cases did. Significantly, the ICRA makes no other provision for federal court jurisdiction over tribal court decisions or for civil rights violations by tribal governments.

Specific provisions in the final version of the ICRA strongly imply that Congress intended to preserve as much of tribal culture as possible. Congress left out a provision equivalent to the establishment clause in order to preserve the rights of tribes to form and maintain theocratic government structures if they wished, as some tribes had. Even in the area of criminal procedure, the Senate subcommittee explicitly questioned whether imposition of certain criminal procedures would injure tribal culture or exert a significant impact on the tribal governmental capability. On the question of whether Indian tribes should be obligated to provide attorneys to indigent defendants, the subcommittee appeared particularly concerned that Indian tribes did not have the financial capacity to fund public defender offices. The Department of Justice also testified that few attorneys were available on reservations and that, since most tribal prosecutions dealt with tribal customary and traditional law, attorneys were not necessary.

***Santa Clara Pueblo v. Martinez* and the Development of Tribal Courts**

After the enactment of ICRA, numerous individuals brought civil rights cases in federal court that attempted to vindicate the rights protected in the ICRA. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), Julia Martinez brought a sex discrimination claim under the ICRA against her tribe, seeking membership for her children. The Pueblo had enacted an enrollment ordinance that denied membership to the children of women who were tribal members when

the father was not a member. Conversely, children of Santa Clara Pueblo men and nonmember women would be enrolled. The father of Martinez's children was a Navajo man and the Pueblo denied her children membership.

The Supreme Court held that Congress, in enacting the ICRA, did not confer federal court jurisdiction to resolve civil rights complaints against tribal governments and, in any event, tribal sovereign immunity barred Martinez's claim. The Court, per Justice Marshall, stated that complainants against tribal government actions must pursue a tribal forum. The Court also noted the possibility that individual officers of Indian tribes could be sued for prospective equitable relief, similar to how federal officials could be sued under *Ex parte Young*, 209 U.S. 123 (1908).

Following *Martinez*, many Indian tribes began to develop their tribal courts more intensely. Tribes began to incorporate their versions of the Bill of Rights into new or amended tribal constitutions. As a result, tribal courts apply their tribal customs and traditions to civil rights cases. For example, the Navajo Nation Supreme Court in *Navajo Nation v. Crockett*, 7 Navajo Reporter 237 (1996), applied Navajo traditional principles in upholding a restriction on free speech enacted by the Navajo Tribal Council. In *Snowden v. Saginaw Chippewa Indian Tribe*, 32 Indian Law Reporter 6047 (2005), the tribal court applied important tribal values to a civil rights case related to a long-standing membership dispute. The Turtle Mountain Band of Chippewa Indians in *Turtle Mountain Judicial Board v. Turtle Mountain Band of Chippewa Indians* (No. 04-007, Turtle Mountain Band Appellate Court, 2005), adopted sophisticated rules relating to judicial independence from the political branches of the tribe.

Not all Indian tribes provide a tribal court for the resolution of disputes. Shortly after the Court decided *Martinez*, the Tenth Circuit decided *Dry Creek Lodge v. Arapahoe and Shoshone Tribes* (623 F.2d 682, 10th Cir. 1980, cert. denied, 449 U.S. 1118, 1981). There, the tribal council had blocked a road on the reservation that led to the private property of non-Indians who had built a resort on the parcel. The parcel had once been owned by an Indian family that resided on the reservation, but they had lost it due to a tax foreclosure. The tribal council refused to grant the property owners access to the tribal court for review of their decision, forcing them to seek a federal court injunction.

Ignoring *Martinez*, the court took jurisdiction and granted the injunction on the basis that the tribes' action had been egregious and that there was no tribal dispute resolution forum available. The Tenth Circuit has limited *Dry Creek Lodge* to its facts and has not

invoked this so-called "exception" to *Martinez* again. Other federal circuits, such as the Ninth Circuit in *Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir. 1999), refuse to adopt this holding, questioning its validity.

Habeas Corpus Review of Tribal Detention

The lone federal cause of action contained in ICRA is the provision allowing individuals convicted of a tribal offense to petition for a writ of habeas corpus in federal courts. The meaning of this phrase has been extended by some federal courts to include banishment or exclusion from reservation lands. In *Poodry v. Tonawanda Band of Seneca Indians* (85 F.3d 874, 2nd Cir., cert. denied, 519 U.S. 1041, 1996), the Second Circuit Court granted a petition for a writ of habeas corpus when the tribal council banished several tribal members for treason. The council also stripped them of their property and citizenship within the tribe. The banished individuals received no hearing prior to being deprived of their membership and property.

The court concluded that the order requiring the members to leave the reservation amounted to a restraint on liberty sufficient to invoke the habeas corpus review provision in the ICRA. The tribe argued that summary banishment was consistent with tribal customary law and that federal court intervention into tribal affairs violated the spirit and intent of the ICRA. The court rejected that argument, noting that Congress, through its enactment of the ICRA, had already limited tribal customary law by imposing the series of individual rights and the possibility of habeas review—both of which were Anglo-American legal concepts—upon Indian tribes. One federal district court, however (in *Alire v. Jackson*, 65 F. Supp. 2d 1124, D. Or. 1999), declined to extend federal habeas review to a Warm Springs Indian Reservation tribal council order excluding a nonmember. The tribal council based its exclusion on the fact that the petitioner had been convicted of child abuse and had been employed as a caregiver to children on that reservation.

Others have sought habeas review of tribal court decisions in matters resulting in civil fines. In *Moore v. Nelson*, 270 F.3d 789 (9th Cir. 2001), a Yurok Indian who had violated a tribal court order not to harvest timber on the Hoopa Valley Reservation sought review of that court's order to impound his logging equipment and fine him over \$18,000. The Ninth Circuit refused to grant the petition, emphasizing that the petitioner had never been criminally

prosecuted or sentenced and never subjected to detention of any kind. Similarly, in *Shenandoah v. Halbritter* (366 F.3d 89, 2nd Cir. 2004, cert. denied, 125 S. Ct. 1824, 2005), the Second Circuit refused to grant habeas review to a petitioner who claimed her house had been condemned by the Oneida Indian Nation in retaliation for her political activities. In contrast to *Poodry*, the court held that the action taken against the petitioner's home did not amount to a restraint on liberty sufficient to invoke the ICRA habeas provisions.

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- Talton v. Mayes*, 163 U.S. 376 (1896)
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- Worcester v. Georgia*, 31 U.S. (6 Pet.) 536 (1832)
- Ex parte Young*, 209 U.S. 123 (1908)

INDIAN BILL OF RIGHTS

Blackfeet Tribe of the Blackfeet Indian Reservation of Montana Constitution and By-Laws, Art. VIII
Cherokee Nation of Oklahoma Constitution, Art. II
Chickasaw Nation Constitution, Art. IV
Civil Rights Act of 1968, act of April 11, 1968, Pub. L. 90-284, Tit. II, 82 Stat. 77, codified as 25 U.S.C. §§ 1301-1303
Grand Traverse Band Constitution, Art. X
Sisseton-Wahpeton Sioux Tribe, South Dakota Constitution and By-Laws, Art. IX

See also *Barron v. Baltimore*, 7 (U.S.) 243 (1833); **Bill of Rights: Structure; Habeas Corpus: Modern History; Plenary Power Doctrine; Santa Clara Pueblo v. Martinez**, 436 U.S. 49 (1978)

INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment provides that a criminal defendant shall "have the Assistance of Counsel" for his defense. The Supreme Court has interpreted this clause as guaranteeing the effective assistance of counsel, beginning with one of the appeals from a trial in the *Scottsboro* cases (*Powell v. Alabama*, 287 U.S. 45, 1932). The modern standard for evaluating claims of ineffective assistance of counsel was set in 1984 in *Strickland v. Washington*, 466 U.S. 668.

Strickland involved an appeal from a habeas corpus petition filed by a capital defendant who claimed that his lawyer had been ineffective at trial. The lawyer did not investigate potential mitigating evidence that might have persuaded the trial judge to impose a sentence of life imprisonment, rather than death. The Supreme Court set out a two-part test for evaluating claims of ineffective assistance of counsel.

First, the defendant must show that his or her lawyer failed to provide reasonably effective assistance. The reasonableness of the lawyer's performance is to be evaluated with reference to prevailing professional norms, and courts should be reluctant to second-guess the lawyer's tactical judgments. Perhaps in hindsight, it appears that a lawyer should have pursued a particular line of investigation or tried a different strategy at trial, but if the decision was reasonable under the circumstances at the time it was made, the lawyer's performance should not be judged ineffective. The Court declined to adopt a set of rules for the evaluation of counsel's performance at trial out of concern for restricting the flexibility a defense lawyer must have in making tactical decisions. It also emphasized that review of counsel's performance should be highly deferential, with a heavy presumption in favor of a finding of effective representation.

The second prong of the *Strickland* test is that the defendant will not be entitled to reversal of the conviction unless the lawyer's deficient performance resulted in prejudice to the defendant. To make a showing of prejudice, the defendant must establish that, except for the lawyer's errors, there is a reasonable probability that the result of the proceeding would have been different. As the Court recognized, it is possible to avoid the first prong of the test entirely and resolve a case on prejudice. If the evidence of guilt against the accused is overwhelming, it is unlikely that even a serious error of counsel would change the result of the proceedings. Following *Strickland*, lower federal courts frequently resolved ineffective assistance claims on the prejudice prong.

In certain cases, prejudice is presumed. The most significant category of these cases involves the attorney's representation of conflicting interests. If a conflict of interest actually affects the lawyer's performance, the defendant need not show prejudice to obtain a new trial (*Cuyler v. Sullivan*, 446 U.S. 335, 1980). The requirement of showing actual effect means that the defendant must specifically identify some act or omission that is traceable to the lawyer's multiple loyalties. Courts have been unwilling to expand the categories of cases in which prejudice is presumed, and the Supreme Court has actually suggested that only the concurrent representation of clients with conflicting interests should trigger the presumption of prejudice (*Mickens v. Taylor*, 535 U.S. 162, 2002).

The Court's approach to ineffective assistance of counsel has been criticized on a number of grounds. First, by deferring to the norms prevailing in the practicing bar, the Court has abandoned any attempt to improve the standards of practice of criminal defense lawyers. If the overall performance of the criminal defense bar is deficient, a given lawyer's performance may not violate the first prong of *Strickland*.

Because of the overwhelming caseloads of many public defender offices and lack of adequate funding for indigent defense, it is possible that the average level of competence of lawyers who represent poor people may not be very high. Several notorious cases involving defense lawyers who slept through substantial portions of trials in capital cases brought this problem to public attention. Two recent Supreme Court decisions seem responsive to this concern and may reinvigorate the efforts of courts to set minimum standards for the competence of criminal defense lawyers (*Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S., 2005). Both cases involved inadequate investigations of mitigating circumstances performed by lawyers representing capital defendants.