

# Up in Smoke? Narragansett, Hicks, and the Erosion of Tribal Sovereign Immunity

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## INTRODUCTION

The Supreme Court has long recognized the doctrine of tribal sovereign immunity from suit.<sup>1</sup> The doctrine developed exclusively under federal common law, and is firmly rooted in American Indian law.<sup>2</sup> Despite its benefit to Indian tribes, in recent years, the Supreme Court has suggested the need for Congress to abrogate, or at least substantially curtail, the reach of tribal sovereign immunity.<sup>3</sup> However, the Court has consistently refused to limit or alter the scope of the doctrine, and has instead explicitly affirmed and extended it to purely economic transactions beyond a reservation's borders.<sup>4</sup>

A tribe's immunity from state civil and criminal processes is a distinct, important derivative of general tribal sovereign immunity from suit.<sup>5</sup> Immunity from process includes exemption from judicial proceedings, as well as quasi-judicial procedures such as investigations, executions of warrants, or state tax collection proceedings.<sup>6</sup> Recently, the Supreme Court, in *Nevada v. Hicks*,<sup>7</sup> suggested that state law enforcement may enter tribal lands without consent, to investigate and prosecute off-reservation violations of state law.<sup>8</sup> The First Circuit Court of Appeals, in *Narragansett Indian Tribe v. Rhode*

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<sup>1</sup> COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 635 (§ 7.05[1][a]) (Lexis [Matthew Bender], rev. ed. 2005); see generally Jon W. Monson, Note, *Tribal Immunity from Process: Limiting the Government's Power to Enforce Search Warrants and Subpoenas on American Indian Land*, 56 RUTGERS L. REV. 271 (2003) (discussing the extent to which tribal sovereign immunity bars either federal or state authorities from enforcing criminal or civil process on Indian tribes in connection with civil and criminal investigations).

<sup>2</sup> WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 95 (4th ed., 2004); see COHEN, *supra* note 1, at 635 (§ 7.05[1]).

<sup>3</sup> See *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 758-60 (1998); see also *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549 (9th Cir. 2003) (holding that County violated tribe's sovereign immunity when it obtained and executed a search warrant against the tribe and tribal property), *reversed on other grounds*, 538 U.S. 701 (2003) (dismissing tribe's claims on § 1983 grounds).

<sup>4</sup> *Kiowa Tribe*, 523 U.S. at 760 (refusing to draw a distinction between suits on contracts involving governmental or commercial activities and whether made on or off reservation).

<sup>5</sup> COHEN'S HANDBOOK ON FEDERAL INDIAN LAW states that tribal sovereign immunity from suit includes immunity from state quasi-judicial proceedings, such as criminal or civil investigation and related processes. COHEN, *supra* note 1, at 638 (§ 7.05[1][b]).

<sup>6</sup> COHEN, *supra* note 1, at 635 (§ 7.05[1][a]); CANBY, *supra* note 2, at 98 (noting that the Supreme Court has rejected the argument that a State can sue to collect taxes merely because the State's tax scheme applies to the Tribe) (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991)).

<sup>7</sup> *Nevada v. Hicks*, 533 U.S. 353 (2001).

<sup>8</sup> *Id.* at 374; see Richard L. Warren, Note, *The Potential Passage of Proposed Senate Bill 578 and its Implications on Nevada v. Hicks and Twenty Years of Supreme Court Jurisprudence*, 29 AM. INDIAN L. REV. 383 (2005) (discussing the impact of the then-proposed Tribal Government Amendments to the Homeland Security Act of 2002 on the Supreme Court's modern tribal sovereignty jurisprudence).

*Island*,<sup>9</sup> seized upon this recent trend to hold that state law enforcement may execute a search warrant upon tribal settlement lands and confiscate tribal property as contraband under the state's criminal tax laws.<sup>10</sup> The First Circuit Court of Appeals obfuscated all Supreme Court precedent addressing tribal sovereign immunity from state judicial or quasi-judicial proceedings. While the Court of Appeals relied less heavily on *Hicks*, the district court opinion invoked Justice Scalia's broad opinion in *Hicks*, to overcome any claim of immunity by the Narragansett Indian Tribe. Because it failed to adequately distinguish *Hicks* and disapprove of the district court's analysis, the First Circuit Court of Appeals has set the stage for other courts to dismantle the doctrine of tribal sovereign immunity under *Hicks*. Instead, the Court of Appeals should have distinguished *Hicks* on its narrow set of facts, and more carefully applied the leading Supreme Court cases addressing tribal sovereign immunity.

By denying certiorari in *Narragansett Indian Tribe*, the Supreme Court refused to decide whether a tribe's immunity shields it from state criminal process—i.e., quasi-judicial proceedings—and once again left open the question of whether state officers may execute a search warrant against a tribal government for activity occurring on tribal lands.<sup>11</sup> Although the Supreme Court has consistently held that state cigarette tax laws apply to tribal government transactions with non-Indians on tribal lands,<sup>12</sup> resort to criminal process to enforce those laws on tribal lands exceeds the scope of state authority.<sup>13</sup> As Justice Kennedy noted, in *Kiowa Tribe v. Manufacturing Technologies*,<sup>14</sup> the difference remains the ability “to demand compliance with state laws, and the means available to enforce them.”<sup>15</sup> Here, Rhode Island's “means” of enforcement violated the Narragansett Indian Tribe's firmly established sovereign immunity from state criminal process, and blatantly ignored all the various alternative remedies available to collect its cigarette taxes.

Section I gives an overview of the dispute at issue in *Narragansett Indian Tribe*, and briefly discusses the different holdings of the United States District Court for Rhode Island and the First Circuit Court of Appeals. Section II provides a summary of the historical relationship of Rhode Island and the Narragansett Indian Tribe. Section III explains the history and current state of the doctrine of tribal sovereign immunity from suit and state process. Section IV critiques the district court and First Circuit Court of Appeals en banc holding which uniformly upheld Rhode Island's right to employ its criminal process to enforce its cigarette tax laws directly against the Narragansett Indian Tribe. Additionally, Section IV argues it is inappropriate to apply *Nevada v. Hicks* to

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<sup>9</sup> *Narragansett Indian Tribe v. Rhode Island (Narragansett III)*, 449 F.3d 16 (1st Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 673 (November 27, 2006)

<sup>10</sup> *Narragansett III*, 449 F.3d at 31.

<sup>11</sup> See *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549 (9th Cir. 2003) (holding that County violated tribe's sovereign immunity when it obtained and executed a search warrant against the tribe and tribal property), *reversed on other grounds*, 538 U.S. 701 (2003) (dismissing tribe's claims on § 1983 grounds).

<sup>12</sup> *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157-58 (1980) (holding State of Washington could validly require Indian tribal smoke shops to affix tax stamps purchased from State to individual packages of cigarettes prior to time of sale to nonmembers of tribe).

<sup>13</sup> *But see Narragansett Indian Tribe of Rhode Island v. Rhode Island (Narragansett II)*, 407 F.3d 450 (1st Cir. 2005), *vacated in part, aff'd in part*, 449 F.3d 16 (1st Cir. 2006) (en banc).

<sup>14</sup> *Kiowa Tribe of Oklahoma Mfg. Technologies, Inc.*, 523 U.S. 751 (1998).

<sup>15</sup> *Id.* at 755 (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 513-14 (1991)).

cases addressing a tribe's immunity from suit or process, and that if applied to such cases, *Hicks* has the potential to substantially limit the Supreme Court's affirmation of tribal immunity in *Kiowa Tribe*.

Finally, Section V advocates for a congressional statutory framework to address a state's interest in collecting improperly withheld cigarette taxes, and a tribe's overwhelming interest in retaining its sovereign immunity. The Proposed Act may stand alone or be amenable to existing congressional legislation. Section One of the Proposed Act operates as an incentive and catalyst for tribes and states to forge cooperative agreements, concerning both tax collection and law enforcement within tribal lands. If Section One fails to trigger a cooperative agreement, Section Two requires states to make a good faith attempt to exhaust feasible alternatives of enforcement, including but not limited to, seizing contraband cigarettes en route to the reservation or seeking to enjoin tribal officials. Section Three of the Proposed Act allows states, in limited circumstances and pursuant to a stringent federal magistrate proceeding, to obtain a federal order to execute a narrow search for contraband on tribal lands.

## I. NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND V. RHODE ISLAND

### a. *Historical Background and Relationship of the Narragansett Indian Tribe and Rhode Island*

For many years, the Narragansett Indian Tribe cohabited with Roger Williams and the early English settlers, of what is now Charlestown, Rhode Island.<sup>16</sup> This relatively tranquil state of affairs ended in 1675, when the Tribe was nearly decimated by the colonists in King Philip's War.<sup>17</sup> In 1880, after years of resistance from state assimilation efforts, the Tribe sold all but two acres of its ancestral home for \$5,000.<sup>18</sup> The Tribe later acted to recover its ancestral lands through a "protracted legal and political battle."<sup>19</sup> In 1975, the Tribe filed two complaints in the United States district court, alleging that the 1880 land sale violated the federal Trade and Non-Intercourse Act.<sup>20</sup> Because the Tribe's aboriginal title had never been legally extinguished, the litigation clouded the titles of many Charlestown, Rhode Island landowners.<sup>21</sup>

On February 28, 1978, in an effort to clear title, the Tribe and Rhode Island executed the Joint Memorandum of Understanding (JMOU), which settled the litigation and memorialized the agreement between state and Tribe.<sup>22</sup> The JMOU provided that the

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<sup>16</sup> *Narragansett III*, 449 F.3d at 18; see WILLIAM G. MCLOUGHLIN, RHODE ISLAND 4-5, 9-10 (1978).

<sup>17</sup> *Narragansett III*, 449 F.3d at 18; *Narragansett Indian Tribe of Rhode Island v. Rhode Island (Narragansett I)*, 296 F. Supp. 2d 153, 163 (D.R.I. 2003) (citing MCLOUGHLIN, *supra* note 16).

<sup>18</sup> *Narragansett III*, 449 F.3d at 18-19; see MCLOUGHLIN, *supra* note 16.

<sup>19</sup> *Narragansett III*, 449 F.3d at 19; see *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1336 (D.C. Cir. 1998).

<sup>20</sup> *Narragansett III*, 449 F.3d at 19; see 25 U.S.C. § 177 (2007).

<sup>21</sup> *Narragansett III*, 449 F.3d at 19.

<sup>22</sup> See generally *Narragansett I*, 296 F. Supp. 2d at 161 (discussing the JMOU and Rhode Island Indian Claims Settlement Act); JMOU (reprinted at H. REP. NO. 1453, 95TH CONG., 2D SESS. 6 (August 8, 1978); see also *Town of Charlestown v. United States*, 696 F. Supp. 800, 802-03 (D.R.I. 1988). The JMOU provided, among other things, that the Tribe would receive a total of

laws of Rhode Island would remain in “full force and effect” on the settlement lands.<sup>23</sup> Subsequently, Congress and the State passed the requisite enabling legislation.<sup>24</sup> Under its plenary authority over Indian affairs, Congress enacted the Rhode Island Indian Claims Settlement Act.<sup>25</sup> The Rhode Island Settlement Act provided a fund to purchase 900 acres of privately owned land, and also required the establishment of a state-chartered corporation to conclude the purchase and transfer of land.<sup>26</sup> Pursuant to the Settlement Act, Rhode Island created a state-chartered corporation (the “State Act”), which was to hold the settlement lands for the Tribe, and make payments to Charlestown for various governmental services related to the Settlement Lands.<sup>27</sup> On February 2, 1983, Congress federally recognized the Narragansett Indian Tribe.<sup>28</sup> Accordingly, the Rhode Island General Assembly amended the State Act, terminated the state-chartered corporation, and transferred the settlement lands directly to the Tribe.<sup>29</sup> The amendments contained a provision conferring State jurisdiction over the settlement lands, in similar terms to Section 1708(a) of the Rhode Island Settlement Act.<sup>30</sup> Finally, in 1988, the Tribe conveyed the settlement lands to the Bureau of Indian Affairs (BIA) as trustee,<sup>31</sup> and the BIA continues to hold the lands in trust for the Tribe.<sup>32</sup>

During the last twenty-five years, the Tribe and Rhode Island have endured a tense relationship, in which the Tribe was denied the opportunity to engage in gaming as a source of tribal revenue.<sup>33</sup> After its futile effort to initiate a gaming enterprise, the Tribe sought to sell tobacco products as a potential source of income.<sup>34</sup> However, as will be discussed below, the Tribe believed it was not subject to Rhode Island’s tax scheme, and refused to purchase cigarette tax stamps. Instead of seeking to engage the Tribe in negotiations, the State raided the Tribal smoke shop and seized its property, as discussed immediately below.

*b. The Smoke Shop Raid*

“This is *our* property; this is *our* land,” screamed a Narragansett woman as her son’s ankle was shattered beneath the force of an officer’s restraint, and her Tribe’s territory was invaded by Rhode Island law enforcement.<sup>35</sup> On July 14, 2003, state police

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1800 acres of settlement land, in exchange for dropping the lawsuits against the State.

*Narragansett III*, 449 F.3d at 19.

<sup>23</sup> *Narragansett I*, 296 F. Supp. 2d at 161.

<sup>24</sup> R.I. GEN. LAWS §§ 37-18-1 to 37-18-15 (2007); 25 U.S.C. §§ 1701-1716 (2007).

<sup>25</sup> 25 U.S.C. §§ 1701-1716 (2007).

<sup>26</sup> *Id.* §§ 1703-1707.

<sup>27</sup> 1979 R.I. PUB. LAWS 402; *see Narragansett I*, 296 F. Supp. 2d at 162.

<sup>28</sup> 48 Fed. Reg. 6177-78 (Feb. 2, 1983).

<sup>29</sup> R.I. GEN. LAWS §§ 37-18-12, 37-18-13 (2007); *see Narragansett I*, 296 F. Supp. 2d at 162.

<sup>30</sup> *Compare* R.I. GEN. LAWS § 37-18-13(b), *with* 25 U.S.C. § 1708(a) (2007); *see also* *Narragansett Indian Tribe of Rhode Island v. Rhode Island (Narragansett III)*, 449 F.3d 16, 19-20 (1st Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 673 (2006).

<sup>31</sup> *Narragansett III*, 449 F.3d at 20.

<sup>32</sup> *Id.* (citing *Rhode Island v. Narragansett Indian Tribe of Rhode Island*, 19 F.3d 685, 689, 695 n. 8 (1st Cir. 1994)).

<sup>33</sup> *Narragansett III*, 449 F.3d at 20 (citing *Rhode Island v. Narragansett Indian Tribe of Rhode Island*, 19 F.3d at 690-91).

<sup>34</sup> *Narragansett III*, 449 F.3d at 20.

<sup>35</sup> Video: Rhode Island State Police Video of Narragansett Tribal Smoke Shop Raid, July 14, 2003, available at <http://www.projo.com/extra/2003/smokeshop/> (last visited May 1, 2007).

infiltrated the borders of the Narragansett Indian Tribe and executed a search warrant of the tribal smoke shop.<sup>36</sup> State police officers then seized unstamped cigarettes as contraband<sup>37</sup> pursuant to a complex statutory scheme for the collection of cigarette taxes. The cigarette tax scheme imposes an excise tax on all cigarettes sold or held for sale within state borders.<sup>38</sup> Rhode Island collects this tax through the sale of stamps, which are to be placed on every package of cigarettes within the State.<sup>39</sup> The sale of unstamped cigarettes is a criminal misdemeanor, and the unstamped cigarettes are contraband and subject to seizure.<sup>40</sup>

On July 12, 2003 the Tribe opened the smoke shop's doors, offering cigarettes for sale to both Indians and non-Indians.<sup>41</sup> The Tribe believed that Rhode Island "lacked the legal authority to compel its compliance with the cigarette tax scheme," and accordingly refused to purchase or affix the required cigarette stamps.<sup>42</sup> As mentioned above, two days later Rhode Island law enforcement raided the smoke shop and seized the contraband cigarettes pursuant to an otherwise validly-issued state search warrant.<sup>43</sup> The Tribe's Chief Sachem, Matthew Thomas, and seven other tribal members were arrested during an incredibly violent altercation.<sup>44</sup>

*c. The District Court Opinion*<sup>45</sup>

The district court first addressed whether Rhode Island's cigarette tax scheme applied to the sale of unstamped cigarettes sold by the tribal smoke shop to non-Indian consumers.<sup>46</sup> The state claimed that the legal incidence of the tax fell on the non-Indian consumer, because the statute contained what is known as a "pass-through" provision. "Pass through" provisions contain language expressly stating that the retailer is to pass on the tax directly to the consumer via the purchase price of the cigarettes.<sup>47</sup> The district court agreed that the legal incidence fell on the consumer,<sup>48</sup> and held that Rhode Island's criminal tax laws applied to the tribal smoke shop.<sup>49</sup>

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<sup>36</sup> *Narragansett III*, 449 F.3d at 20.

<sup>37</sup> *Id.*

<sup>38</sup> R.I. GEN. LAWS §§ 44-20-12, 44-20-13 (2007); *see Narragansett III*, 449 F.3d at 20.

<sup>39</sup> R.I. GEN. LAWS §§ 44-20-13, 44-20-18, 44-20-29 (2007); *see Narragansett III*, 449 F.3d at 20.

<sup>40</sup> R.I. GEN. LAWS §§ 44-20-33, 44-20-35, 44-20-36, 44-20-37 (2007); *see Narragansett III*, 449 F.3d at 20.

<sup>41</sup> *Narragansett III*, 449 F.3d at 20.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; *see also* *Jennings v. Jones*, 479 F.3d 110 (1st Cir. 2007) (involving tribal officials arrested pursuant to raid on Narragansett Tribal Smoke Shop), *rehearing granted and opinion withdrawn*, 499 F.3d 2 (1st Cir. 2007). The First Circuit Court of Appeals' Judge Lipez, who dissented in *Narragansett III*, found in *Jennings v. Jones* that a reasonable jury could have found that a state police officer used excessive force and violated one of the tribal member's Fourth Amendment rights. *Jennings*, 479 F.3d at 119-20.

<sup>45</sup> *Narragansett Indian Tribe of Rhode Island v. Rhode Island (Narragansett I)*, 296 F. Supp. 2d 153, 163 (D.R.I. 2003).

<sup>46</sup> *Id.*

<sup>47</sup> R.I. GEN. LAWS § 44-20-53 (stating that "[a]ll taxes paid in pursuance of [the cigarette tax scheme] are conclusively presumed to be a direct tax on the retail consumer, pre-collected for the purpose of convenience and facility only"); *see Narragansett I*, 296 F. Supp. 2d at 164 (citing *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 461 (1995)).

<sup>48</sup> *Narragansett I*, 296 F. Supp. 2d at 164; *see, e.g.*, *Dept. of Taxation and Finance of New York v. Milhem Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994) (upholding a cigarette tax scheme specifying that "the ultimate incidence of and liability for the tax [is] upon the consumer"); *Moe v. The Confederated Salish and*

The district court then considered whether and to what extent Rhode Island law enforcement could invade the Tribe's settlement lands to enforce its cigarette tax laws.<sup>50</sup> The court suggested that Section 1708(a) of the Rhode Island Indian Claims Settlement Act made "clear" the grant of Rhode Island's criminal laws and jurisdiction over the settlement lands.<sup>51</sup> It further stated that if Section 1708(a) is to have any meaning, "it must include the right of state law enforcement officials to enter tribal property pursuant to a validly issued search warrant to seize contraband."<sup>52</sup> Supporting its reasoning, the district court cited *Nevada v. Hicks*,<sup>53</sup> in which the Supreme Court discussed the extent of state law enforcement on tribal lands.<sup>54</sup> In *Hicks*, the central issue was whether a tribal court possessed jurisdiction over tort claims initiated by a tribal member against state police officers, for excessive conduct taken in executing a search warrant within the reservation for off-reservation activity.<sup>55</sup> However, the district court extended *Hicks* to apply to situations involving state criminal enforcement of its tax laws for activity occurring on the reservation conducted by a tribal entity.

The court also referred to *Washington v. Confederated Tribes of Colville Reservation*,<sup>56</sup> in which the Supreme Court upheld state seizures of contraband cigarettes while en route to a reservation.<sup>57</sup> The district court read *Hicks* and *Colville* together with Rhode Island Settlement Act Section 1708(a)'s conferral of criminal jurisdiction to conclude "it is beyond doubt that criminal law enforcement, including the seizure of contraband, on the Settlement Lands is permissible."<sup>58</sup> Essentially, the district court

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Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 483 (1976) (holding that Montana's cigarette taxing scheme, containing similar language to Rhode Island's scheme, placed the legal incidence of the tax directly on the consumer, and that the State may require the Indian tribal seller to add the tax to the sales price); *Chickasaw Nation*, 515 U.S. at 461 (noting that pass-through provisions dispositive when determining legal incidence of tax); *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1986) (holding that an "express pass-on and collect" provision is not required to place the legal incidence of the tax on the ultimate non-Indian consumer).

<sup>49</sup> *Narragansett I*, 296 F. Supp. 2d at 167.

<sup>50</sup> *Id.* at 168.

<sup>51</sup> *Id.* at 170 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15) ("Our cases, however, have not established an inflexible per se rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent.").

<sup>52</sup> *Id.* at 170.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (citing *Nevada v. Hicks*, 533 U.S. 353, 362-63 (2001)) (holding that the tribal court did not have jurisdiction over a suit against state law enforcement officers for conduct arising from a search and seizure of an individual Indian's home, stemming from the individual Indian's off-reservation illegal activity). Justice Scalia observed that *Colville* reserved the question of whether state law enforcement officials could enter the reservation and seize the contraband cigarettes. *Hicks*, 533 U.S. at 363 (citing *Washington v. Colville Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980)).

<sup>55</sup> *Hicks*, 533 U.S. at 357; see CANBY, *supra* note 2, at 83.

<sup>56</sup> 447 U.S. 134 (1980) (holding that state cigarette tax laws applied to transactions with non-Indians on the reservation and upheld seizure of contraband cigarettes en route to the reservation).

<sup>57</sup> *Id.* at 161-162.

<sup>58</sup> *Narragansett I*, 296 F. Supp. 2d. at 170-71 The district court concluded that:

"While the *Colville* Court expressly reserved judgment on the question of whether state officials could seize cigarettes held for sale on tribal land in violation of a state cigarette tax scheme, this writer believes that when the holdings of *Colville* and *Hicks* are read in conjunction with the conferral of criminal and civil (which includes regulatory) jurisdiction contained in section 1708, it is beyond doubt that criminal law enforcement, including the seizure of contraband, on the Settlement Lands is permissible." *Id.*

combined *Hick*'s grant of unilateral state police authority over tribal lands with *Colville*'s approval of seizures of contraband in transit in lieu of tax collection proceedings, to find that Rhode Island properly enforced its criminal tax laws on tribal lands via search and seizure. The district court's analysis and application of *Hicks* demonstrates how courts might manipulate those decisions in the future to limit or overrule the Supreme Court's affirmation of tribal sovereign immunity in *Kiowa Tribe*,<sup>59</sup> as will be analyzed in more depth in Section III.

*d. First Circuit Court of Appeals – Panel Opinion*

A panel of the First Circuit Court of Appeals (“Panel”) affirmed the district court’s ruling that the legal incidence of the cigarette tax fell on the non-Indian consumer, but reversed its decision concerning the criminal enforcement of cigarette tax laws directly against the Narragansett Tribal government.<sup>60</sup> The court first found that because the legal incidence of the cigarette tax fell on the non-Indian consumer, the Tribe had violated Rhode Island’s criminal tax law.<sup>61</sup> In addressing to what extent the state could enforce its laws on the Tribe’s settlement lands, the Panel determined Section 1708(a) of the Rhode Island Indian Claims Settlement Act did not expressly abrogate the Tribe’s sovereign immunity.<sup>62</sup> However, the Panel refused to view the Tribe’s immunity as a wholesale shield against state encroachment upon settlement lands to enforce its tax laws.<sup>63</sup>

The Panel then addressed whether Rhode Island may enforce its criminal laws on settlement lands, by entering those lands and executing a search warrant and seizing contraband property of the Tribe.<sup>64</sup> The Tribe argued its sovereign immunity was a complete defense to enforcement of Rhode Island’s criminal laws against the Tribe on settlement lands.<sup>65</sup> The Panel, agreeing with the district court’s synthesis of *Hicks* and *Colville*,<sup>66</sup> found that Rhode Island “may have the power to enter onto the settlement lands and seize unstamped cigarettes as contraband, from the Indian distributor, provided that the action does not violate the Tribe’s sovereign immunity.”<sup>67</sup> The Panel resolved the issue left unanswered by *Colville*—whether state law enforcement can enter a reservation for enforcement purposes—<sup>68</sup> and filled in the silence with Justice Scalia’s expansive grant of state jurisdiction and enforcement in *Hicks*.<sup>69</sup> Ultimately, the Panel held that although operating the smoke shop without complying with the cigarette tax laws was not a sovereign right, the Tribe’s sovereign immunity barred enforcement of those laws directly against the Tribe, noting there were numerous remedial alternatives

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<sup>59</sup> *Kiowa Tribe of Oklahoma Mfg. Technologies, Inc.*, 523 U.S. 751 (1998).

<sup>60</sup> *Narragansett Indian Tribe of Rhode Island v. Rhode Island (Narragansett II)*, 407 F.3d 450, 466-67 (1st Cir. 2005), *vacated in part, aff’d in part en banc*, 449 F.3d 16 (1st Cir. 2006).

<sup>61</sup> *Id.* at 459.

<sup>62</sup> *Id.* at 462.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 463.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 162 (1980) (refusing to address whether the state was authorized to enter onto the reservation to seize cigarettes).

<sup>69</sup> *Narragansett Indian Tribe of Rhode Island v. Rhode Island (Narragansett II)*, 407 F.3d 450, 462 (1st Cir. 2005), *vacated in part, aff’d in part en banc*, 449 F.3d 16 (1st Cir. 2006).

available to the State.<sup>70</sup> Consequently, even though in accord with the district court concerning *Hicks* and *Colville*'s effect on the case, the Panel held that Rhode Island had violated the Tribe's sovereign immunity by "executing a warrant against the Tribal Government smoke shop, forcibly entering the shop, and seizing the Tribe's stock of unstamped cigarettes."<sup>71</sup>

*e. Court of Appeals – Opinion En Banc*

In its opinion en banc, the First Circuit Court of Appeals withdrew the Panel's decision, and affirmed the district court's ruling, holding that the Rhode Island Settlement Act and the JMOU authorized law enforcement to execute a search warrant and seizure of contraband cigarettes on Tribal settlement lands. Additionally, the Court of Appeals held that Rhode Island did not violate federal law or the Tribe's sovereign immunity by enforcing its criminal tax laws through use of criminal process directly against the Tribe.

The Court of Appeals suggested the history preceding the JMOU "make[s] this case strikingly different from the mine-run cases that have struggled to reconcile the sovereignty of Indian tribes with the legitimate interests of host states."<sup>72</sup> The Court of Appeals determined that both the agreement and enabling legislation "extinguished the Tribe's right to resist the application of state authority as to matters occurring on settlement lands," and that the Tribe "had abandoned any right to an autonomous enclave."<sup>73</sup> The First Circuit Court of Appeals further concluded that the JMOU and Settlement Act subjected the settlement lands to conventional means of state law enforcement, such as the execution of a search warrant.<sup>74</sup>

In addition to the wholesale grant of state jurisdiction under the JMOU and Settlement Act, and the "idiosyncratic features" of the Tribe's historical relations with Rhode Island,<sup>75</sup> the en banc court also turned generally to federal Indian law.<sup>76</sup> In addressing whether Rhode Island could enforce its cigarette tax scheme by resort to the criminal process, the court sought to balance the state, federal, and tribal interests. The First Circuit Court of Appeals noticeably declined to consider both the district court and Panel's discussion of *Hicks* and *Colville*. The court only cited *Hicks* and *Colville* to denounce the doctrine of inherent tribal sovereignty "as an independent impediment to state action on tribal lands," noting the principle is "no more than a piece of the background against which [federal] preemption analysis must be conducted."<sup>77</sup>

Conducting federal preemption analysis,<sup>78</sup> the court noted that "in the absence of special [congressional] legislation, the balance of state, federal, and tribal interests in regard to cigarette taxation leaves considerable room for state intervention on tribal

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<sup>70</sup> *Id.* at 466.

<sup>71</sup> *Id.*

<sup>72</sup> *Narragansett Indian Tribe of Rhode Island v. Rhode Island (Narragansett III)*, 449 F.3d 16, 22 (1st Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 673 (2006).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 24.

<sup>78</sup> *Id.* at 23.

lands.”<sup>79</sup> The court favored Rhode Island’s interest in maintaining the integrity of its tax scheme, as opposed to the Tribe’s interest in operating a “tax haven,”<sup>80</sup> and held that enforcement was necessary to prevent the Tribe from marketing a tax exemption.<sup>81</sup> The Court of Appeals downplayed the Tribe’s interest in “generating revenue for its social programs free from unwarranted state interference,”<sup>82</sup> noting the tribal interest is weaker where the Tribe sells products made by outsiders to non-Indians.<sup>83</sup> Consequently, the court tipped the scales “in favor of recognizing the State’s authority to execute a search warrant on the settlement lands.”<sup>84</sup>

The First Circuit Court of Appeals next addressed whether the Tribe’s sovereign immunity prohibited Rhode Island from executing a search warrant against the Tribe.<sup>85</sup> Refusing to recognize the subtle distinction between tribal sovereignty and a tribe’s sovereign immunity, the First Circuit court overruled one of its earlier decisions, *Aroostook Band of Micmacs v. Ryan*.<sup>86</sup> The Court of Appeals, in *Aroostook*, had characterized tribal sovereignty as entirely insulating a tribe from application of state law, in certain circumstances, while describing tribal sovereign immunity as a tribe’s shield against “state judicial or quasi-judicial proceedings to enforce those laws.”<sup>87</sup> However, the Court of Appeals, in *Narragansett III*, disagreed and stated that “tribal sovereign immunity is most accurately considered an incidence or subset of tribal sovereignty.”<sup>88</sup>

The First Circuit Court of Appeals held that the Tribe had waived its sovereign immunity from enforcement of Rhode Island’s criminal process when it signed the JMOU.<sup>89</sup> Further, the court determined Congress expressly abrogated such immunity when it passed the Rhode Island Settlement Act.<sup>90</sup> As for the JMOU, the Court of Appeals stated that when read in the light of the unique historical relations leading up to the JMOU, the provision therein “clearly and unambiguously establishe[d] that the parties to the JMOU intended to subjugate the Tribe’s autonomy (and, thus, its sovereign immunity).”<sup>91</sup> Any other reading of the JMOU, the court asserted, “would defy common sense, and . . . nullify the State’s most important quid pro quo. Hence there was a waiver.”<sup>92</sup>

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<sup>79</sup> *Id.* (citing Dept. of Taxation and Finance v. Milhem Attea & Brothers, 512 U.S. 61, 73 (1994)).

<sup>80</sup> *Narragansett III*, 449 F.3d at 23 (“[I]t is readily evident that the State’s interest in maintaining the integrity of that scheme contrasts favorably with the Tribe’s interest in operating the smoke shop as a tax haven.”).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> The Court also addressed whether the Tribe’s sovereign immunity prohibited the State from arresting tribal members acting pursuant to a tribal ordinance. *Id.* at 24.

<sup>86</sup> 404 F.3d 48, 68 (1st Cir. 2005), *remanded decision reversed in part*, 484 F.3d 41 (1st Cir. 2007), *overruled in part*, 449 F.3d 16 (1st Cir. 2006) (en banc).

<sup>87</sup> *Id.* at 68 (emphasis in original).

<sup>88</sup> *Narragansett III*, 449 F.3d at 24-25.

<sup>89</sup> *Id.* at 25.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

Further flouting specific Indian law canons of construction, the Court of Appeals held that Congress had abrogated the Tribe's sovereign immunity, by enacting the Rhode Island Settlement Act. The court stated that it must presume Congress "act[ed] with knowledge of relevant Supreme Court precedent,"<sup>93</sup> and that at the time it passed the Settlement Act, the "Supreme Court had already adopted the approach of permitting the exercise of state jurisdiction within Indian lands where the exercise of such jurisdiction had not been preempted by federal law."<sup>94</sup> In holding that Section 1708(a) of the Settlement Act abrogated the Tribe's sovereign immunity, the Court of Appeals noted the Tribe may continue to possess a certain non-specific core group of sovereign functions.<sup>95</sup> However, it held that those core interests were not implicated where the state is "seeking to enforce laws binding on the Tribe's commercial transactions with outsiders."<sup>96</sup> Thus, under the provisions of the JMOU and Settlement Act, the Tribe's immunity did not prohibit the execution of a search warrant and seizure against the Tribe.<sup>97</sup>

It is possible the holding in *Narragansett Indian Tribe* will undermine the sovereign immunity for many similarly-situated tribes. Thus, it is essential to understand why such negotiated agreements and settlement acts do not intrinsically abrogate or waive tribal sovereign immunity, and to look toward congressional legislation which affirms tribal sovereign immunity, but also recognizes the states' need to enforce their tax laws.

## II. TRIBAL SOVEREIGN IMMUNITY FROM STATE CRIMINAL PROCESS

The doctrine of tribal sovereign immunity stems from both the general concept of tribal sovereignty and common law immunity.<sup>98</sup> This section first briefly develops the nature of tribal sovereignty and its corollary tribal sovereign immunity. Second, it sets forth the history and current state of tribal sovereign immunity from suit. Finally, tribal sovereign immunity from state criminal process is discussed.

### a. Tribal Sovereignty

The Supreme Court has characterized Indian tribes as "separate sovereigns preexisting the Constitution."<sup>99</sup> Chief Justice John Marshall, in *Worcester v. Georgia*,<sup>100</sup> labeled tribes as "distinct, independent political communities, retaining their original

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<sup>93</sup> *Id.* at 26 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988)).

<sup>94</sup> *Narragansett III*, 449 F.3d at 26.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 27.

<sup>98</sup> *Id.* at 32 (Lipez J., dissenting); see *Blatchford v. Native Village of Noatok*, 501 U.S. 775, 782 (1991) (noting that tribes could not have surrendered their immunity from suit by States of the Union because they were not a party to the Constitution, similar to foreign sovereigns); see also *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992) (stating that sovereign immunity attaches to a tribe because of its status as a domestic dependent nation) (citing *United States v. Wheeler*, 435 U.S. 313 (1978)).

<sup>99</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As 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.").

<sup>100</sup> 31 U.S. (Pet. 6) 515, 559 (1832).

natural rights” over their members and lands.<sup>101</sup> Congress possesses the plenary power to “limit, modify, or eliminate” any of these attributes of inherent sovereignty.<sup>102</sup> However, all inherent sovereign powers not clearly and unequivocally limited or taken away by Congress are retained, including sovereign immunity.<sup>103</sup> Consequently, a tribe’s immunity from suit remains in full force, unless clearly waived by the tribe or expressly abrogated by Congress.<sup>104</sup>

*b. Common Law Sovereign Immunity*

The doctrine of sovereign immunity dates back to early English common law, “which declared that the king was immune from suit,” under the rationale “the king can do no wrong.”<sup>105</sup> Professor David E. Wilkins has stated that the doctrine is more practically “meant to protect the official actions of the government from undue judicial interference.”<sup>106</sup> The Framers of the United States Constitution viewed immunity from suit as an inherent aspect of sovereignty, retained unless expressly surrendered.<sup>107</sup> For example, federal and state governments enjoy sovereign immunity from suit.<sup>108</sup> Although both entities have consented to suit in certain areas, the general force of the doctrine remains in effect.<sup>109</sup>

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<sup>101</sup> *Id.*; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *see* *United States v. Wheeler*, 435 U.S. 313 (1978); *see also* *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

<sup>102</sup> *Santa Clara Pueblo*, 436 U.S. at 56.

<sup>103</sup> *See Narragansett III*, 449 F.3d at 24-25 (noting that “tribal sovereign immunity is most accurately considered an incidence or subset of tribal sovereignty,” and overruling earlier, contrary First Circuit precedent) (citing *Potawatomi*, 498 U.S. at 509 (indicating tribal sovereign immunity is an incidence of tribal sovereignty)); *contra Narragansett III*, 449 F.3d at 32 (Lipez, J. dissenting) (noting that even if a tribe lacks the sovereign authority to sell tax-free cigarettes, its sovereign immunity remains intact to bar state suit for collection of taxes) (citing *Potawatomi*, 498 U.S. at 512-13); *see also contra* *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 68 (1st Cir. 2005), *overruled in part on distinction at issue*, 449 F.3d 16 (1st Cir. 2006) (*Aroostook I*) (recognizing subtle distinction between tribal sovereignty and tribal sovereign immunity, and noting that the doctrines are not interchangeable, but instead, that when tribal sovereignty is claimed the tribe is claiming “it is not subject to state laws . . . at all,” while tribal sovereign immunity connotes that the tribe “is not amenable to state judicial or quasi-judicial proceedings to enforce those laws,” even if obligated to comply with them).

<sup>104</sup> *Kiowa Tribe of Oklahoma v. Mfg. Technology, Inc.*, 523 U.S. 751, 754 (1998); *Potawatomi*, 498 U.S. at 509 (holding that tribal sovereign immunity from suit barred state suit to collect state cigarette sales tax).

<sup>105</sup> DAVID E. WILKINS AND K. TSAININA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 220-221 (2001).

<sup>106</sup> *Id.* at 221.

<sup>107</sup> *Id.* at 221; *see* THE FEDERALIST NO. 81, at 446 (Alexander Hamilton) (E.H. Scott ed., 2002) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*”) (discussing the inherent sovereign immunity of the original States of the Union) (emphasis in original).

<sup>108</sup> *Id.* at 223.

<sup>109</sup> *Id.* at 224.

c. *Tribal Sovereign Immunity from Suit*

“The doctrine of tribal sovereign immunity is rooted in federal common law.”<sup>110</sup> Indian tribes are “immune from lawsuits or court process in both state and federal court unless “Congress has authorized the suit or the tribe has waived its immunity.”<sup>111</sup> Under its plenary power, Congress maintains the “constitutional power to abrogate tribal sovereign immunity by explicit legislation.<sup>112</sup> Additionally, Indian tribes may “waive immunity by tribal law or by contract, as long as it is ‘clearly done.’”<sup>113</sup> The Supreme Court has consistently deferred to Congress to reexamine or limit tribal sovereign immunity, even suggesting it should entirely discard the doctrine.<sup>114</sup> Although *Turner v. United States* is cited as authority for the doctrine,<sup>115</sup> the Supreme Court has noted the case was “but a slender reed” of justification, because *Turner* did not even turn upon a question of sovereign immunity.<sup>116</sup>

However, to date the Court has affirmed tribal sovereign immunity, applying the doctrine broadly for conduct whether on or off-reservation.<sup>117</sup> Additionally, the Court has refused to draw a distinction between commercial and governmental activity.<sup>118</sup> In *Kiowa Tribe v. Manufacturing Technologies*, the petitioner, Kiowa Tribe, agreed to buy stock and signed a promissory note in the name of the tribe.<sup>119</sup> The note obligated the tribe to make its payments off the reservation.<sup>120</sup> The respondent argued that immunity should be confined to government-related transactions within the reservation.<sup>121</sup> The Supreme Court refused to draw these distinctions. Consequently, the Court extended the doctrine arguably beyond its common law purpose, to transactions entirely commercial in nature and only remotely linked to governmental activity.

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<sup>110</sup> COHEN, *supra* note 1, at 635 (§ 7.05[1][a]); CANBY, *supra* note 2, at 95 (noting that it is well-established that the common law doctrine of sovereign immunity provides Indian tribes immunity from suit). For a comprehensive and exhaustive discussion concerning the history of tribal sovereign immunity, see Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 667 (2002) (tracing the evolution of tribal sovereign immunity and noting that doctrine remains firmly intact and subject only to express abrogation by the federal government).

<sup>111</sup> COHEN, *supra* note 1, at 635 (§ 7.05[1][a]) (quoting *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998)). Under its plenary power over Indian affairs, Congress maintains the “constitutional power to abrogate tribal sovereign immunity by explicit legislation.”

<sup>112</sup> COHEN, *supra* note 1, at 638 (§ 7.05[1][b]).

<sup>113</sup> *Id.* at 642 (§ 7.05[1][c]).

<sup>114</sup> *Kiowa Tribe*, 523 U.S. at 760; see Matthew L. M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 150-51 (2006) (discussing the current status of tribal sovereign immunity).

<sup>115</sup> 248 U.S. 354 (1919); see *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512-13 (1940); see also *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 171 (1977).

<sup>116</sup> *Kiowa Tribe*, 523 U.S. at 757 (citing *Turner*, 248 U.S. at 357-58). In *Turner*, a landowner sought relief for property damage from the Creek Nation. *Turner*, 248 U.S. at 357-58. In denying relief, the Court noted the “fundamental obstacle to recover[y] [was] not the immunity of the sovereign from suit,” but instead the lack of a substantive right to sue upon for the failure of a government or its officers’ failure to keep the peace.

<sup>117</sup> *Kiowa Tribe*, 523 U.S. at 754-55 (holding that the immunity contemplates on or off-reservation activity that involves either a governmental or commercial purpose).

<sup>118</sup> *Id.* at 755; see *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (upholding tribal immunity from state suit to collect cigarette sale taxes).

<sup>119</sup> *Kiowa Tribe*, 523 U.S. at 753.

<sup>120</sup> *Id.* at 754.

<sup>121</sup> *Id.* at 755.

In *Kiowa Tribe*, Justice Kennedy skeptically observed that the doctrine had developed “almost by accident.”<sup>122</sup> The Court further doubted the wisdom of retaining the doctrine in present day, suggesting it had exceeded its scope to protect tribes from state interference with tribal affairs.<sup>123</sup> While suggesting a need for congressional abrogation of tribal immunity,<sup>124</sup> the Court deferred to Congress,<sup>125</sup> analogizing tribal immunity to foreign sovereign immunity.<sup>126</sup> Congress had decided to limit foreign sovereign immunity through the Foreign Sovereign Immunities Act,<sup>127</sup> but had neglected to do so regarding tribal immunity.<sup>128</sup> As a result, Justice Kennedy reasoned, tribes still enjoy rather broad immunity from suit whether for on-reservation or off-reservation activity, and whether the activity is commercial or governmental.<sup>129</sup>

But, as the Supreme Court noted, a tribe’s immunity may often exceed that which is needed to protect from state interference.<sup>130</sup> Use of such a broad immunity has inevitably created disputes between tribal and state governments over matters including tax collection,<sup>131</sup> campaign finance regulations,<sup>132</sup> and state criminal fraud investigations.<sup>133</sup> Although the Supreme Court has encouraged the use of state-tribal

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<sup>122</sup> *Id.* at 756-57 (noting that *Turner* rested upon an assumption of tribal immunity for the sake of argument, and “not a reasoned statement of doctrine”)

<sup>123</sup> *Id.* at 758.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 758-59 (noting that Congress has restricted tribal immunity from suit in certain, limited situations, while in other instances it has refused to alter the doctrine); see Seielstad, *supra* note 110, at 679-80.

<sup>126</sup> *Kiowa Tribe*, 523 U.S. at 759.

<sup>127</sup> 28 U.S.C. §§ 1604, 1605, 1607; see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-87, 488-89 (1983) (discussing the FSIA).

<sup>128</sup> *Kiowa Tribe*, 523 U.S. at 759 (“Congress has occasionally authorized limited classes of suits against Indian tribes [and] has always been at liberty to dispense with such tribal immunity or to limit it.”) (quoting *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991)).

<sup>129</sup> *Kiowa*, 523 U.S. at 760; see generally Christopher W. Day, Note, *Kiowa Tribe v. Manufacturing Technologies, Inc.: Doing the Right Thing for All the Wrong Reasons*, 49 CATH. U. L. REV. 279, 308-311 (1999).

<sup>130</sup> *Kiowa Tribe*, 523 U.S. at 758.

<sup>131</sup> Compare *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980), and *Potawatomi*, 498 U.S. 505 (1991) (permitting States to tax tribal smoke shop sales of cigarettes to non-members, and requiring tribe to collect and remit the tax; however, not allowing State to collect the tax by suing the tribe).

<sup>132</sup> See *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126 (Cal. 2006) (rejecting tribal sovereign immunity as a constitutional imperative, and holding that the Guarantee Clause and Tenth Amendment of the Constitution limits such immunity where the tribe seeks to avoid compliance with state campaign finance regulations); see also Paul Porter, Note, *A Tale of Conflicting Sovereignties: The Case Against Tribal Sovereign Immunity and Federal Preemption Doctrines Preventing States’ Enforcement of Campaign Contribution Regulations on Indian Tribes*, 40 U. MICH. J. L. REFORM 191, 195-98, 201 (2006) (arguing that courts should limit the scope of tribal sovereign immunity from suit because allowing it to subjugate State campaign finance regulations is contrary to the doctrine’s purpose of protecting tribes from State encroachment).

<sup>133</sup> See *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 558-59 (9th Cir. 2002) (holding that even though subject to Public Law 280 criminal jurisdiction, the tribe’s sovereign immunity from suit and criminal process barred State enforcement of a search warrant to inspect tribal employee records on tribal lands, pursuant to a State welfare fraud investigation), *reversed on other grounds*, 538 U.S. 701 (2003) (dismissing on § 1983 grounds because tribe was not “person” for purposes of the statute).

cooperative agreements to settle differences between states and tribes, it is apparent states such as Rhode Island prefer to utilize force rather than diplomacy.<sup>134</sup>

*d. Tribal Sovereign Immunity from State Criminal Process*

The Supreme Court has only peripherally addressed whether a state may enforce its criminal process on tribal lands for conduct arising on the reservation.<sup>135</sup> However, it is widely accepted a tribe's immunity from suit protects it from state criminal process.<sup>136</sup> Tribal immunity from process has nevertheless undergone an "erratic and unavailing history" within the courts.<sup>137</sup> As a result, the lower courts have been left with the needless task of tailoring preexisting rules of immunity from suit to develop principles concerning tribal immunity from process.<sup>138</sup>

In early cases, the Supreme Court held that Congress could implicitly abrogate tribal sovereign immunity.<sup>139</sup> However, in *Santa Clara Pueblo v. Martinez*,<sup>140</sup> the Supreme Court disapproved of implied abrogation,<sup>141</sup> substantially limiting the reach of earlier decisions.<sup>142</sup> While some courts have nevertheless applied the theory of "implicit congressional abrogation,"<sup>143</sup> the Ninth Circuit Court of Appeals, in *United States v. James*,<sup>144</sup> rejected the "implied abrogation" approach and "expanded the scope of tribal immunity from process . . . beyond mere congressional intent analysis."<sup>145</sup> In *James*, the Ninth Circuit Court of Appeals held that the tribe's sovereign immunity protected it

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<sup>134</sup> *But see* Nevada v. Hicks 533 U.S. 353, 372 (2001); Seielstad, *supra* note 110, at 741-42; *see* Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit, 449 F.3d 16 (2006), September 21, 2006, 2006 WL 2725962 at 27.

<sup>135</sup> *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (reserving the question of whether State could properly enter a reservation and seize contraband cigarettes).

<sup>136</sup> COHEN, *supra* note 1, at 636-38 (§ 7.05[1][a]).

<sup>137</sup> For a thorough discussion of the history of tribal immunity from process, *see* Monson, *supra* note 1, at 282 (noting that the Supreme Court has consistently refused to decide cases involving tribal immunity from state or federal process).

<sup>138</sup> *Id.* at 283 ("[T]he circuit courts have formulated their own inconsistent rules in desperate attempts to conform with analogous Supreme Court rules applicable to the more general tribal immunity to suit.").

<sup>139</sup> In *In re Long Visitor*, two defendants claimed that tribal sovereign immunity barred federal grand jury subpoenas. 523 F.2d 443, 445-46 (8th Cir. 1975). Rejecting this argument the court held that pursuant to the Major Crime Act's grant of criminal jurisdiction, Congress had implicitly waived the tribe's immunity from process and authorized the federal government to subpoena witnesses. *Id.* at 446-47. *See generally* Monson, *supra* note 1, at 283. The courts and commentators reference to implicit congressional waiver of tribal sovereign immunity should more accurately be described as implicit congressional abrogation. Tribes possess the power to clearly waive their own immunity, while Congress maintains the authority to unilaterally abrogate tribal sovereign immunity by clear and unequivocal legislative statements or intent. *Id.* <sup>140</sup> 436 U.S. 49 (1978).

<sup>141</sup> *Id.* at 59 ("It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976); *see* Monson, *supra* note 1, at 283 (noting the Supreme Court's "apparent disapproval" of implied congressional abrogation of inherent sovereign rights).

<sup>142</sup> Monson, *supra* note 1, at 283.

<sup>143</sup> *Id.* at 283-84 (citing *United States v. Boggs*, 493 F. Supp. 1050, 1053-54 (D. Mont. 1980) (holding that the court should infer congressional [abrogation] of tribal immunity where a failure to do so would render the statute "almost universally unenforceable").

<sup>144</sup> 980 F.2d 1314 (9th Cir. 1992).

<sup>145</sup> Monson, *supra* note 1, at 284.

against enforcement of a federal subpoena.<sup>146</sup> The Ninth Circuit Court of Appeals noted that a tribe's immunity is based upon its status as a "dependent domestic nation."<sup>147</sup> Further, it held the tribe was not amenable to federal criminal process merely because Congress had authorized federal criminal jurisdiction over tribal members under the Major Crimes Act.<sup>148</sup> Accordingly, the tribe's immunity barred enforcement of the subpoena.<sup>149</sup>

Eleven years later, in *Bishop Paiute Tribe v. County of Inyo*,<sup>150</sup> the Ninth Circuit Court of Appeals similarly held that state law enforcement had violated a tribe's sovereign immunity from process when the state obtained and executed a search warrant against a tribe on its lands, for activity occurring off the reservation.<sup>151</sup> In *Bishop Paiute Tribe*, state officials executed a warrant against a tribal gaming corporation pursuant to a welfare fraud investigation of three tribal employees.<sup>152</sup> State law enforcement cut the locks off of secured facilities to seize confidential personnel records.<sup>153</sup> The Court of Appeals found the state and its "agents violated the Tribe's sovereign immunity when they obtained and executed a search warrant against the Tribe and tribal property."<sup>154</sup> The Supreme Court ultimately reversed on the grounds that the tribe could not seek a remedy against the state under 42 U.S.C. § 1983, because it was not a "person" for purposes of the statute.<sup>155</sup> Unfortunately, the Supreme Court failed to address either whether the state violated the tribe's immunity, or what other federal remedies might have been pursued by the tribe.<sup>156</sup>

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<sup>146</sup> *James*, 980 F.2d at 1319-20; see CANBY, *supra* note 2, at 96; *contra* *United States v. Velarde*, 40 F. Supp. 2d 1314 (D.N.M. 1999). In *United States v. James*, a convicted, Indian rape offender appealed his conviction and asserted that the district court erred in quashing a subpoena served upon the Quinalt Indian Nation. *James*, 980 F.2d at 1319. The appellant had requested documents from the Quinalt Indian Nation, and the tribe had moved to quash the subpoena based on tribal immunity. *Id.* While *United States v. James* involved a federal subpoena initiated by an Indian defendant, it is closely analogous to the issuance of a state search warrant or subpoena, and its reasoning should be followed when dealing with the execution of state criminal process.

<sup>147</sup> *James*, 980 F.2d at 1319.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* However, the court in *James* dealt with an issue of first impression—namely, as an "uninvolved witness, whether the tribe had waived its immunity. *Id.* at 1320. The court ultimately held the tribe had waived its sovereign immunity as to Housing Authority documents by providing certain documents to the State, while refusing to disclose others. *Id.* The court noted the tribe could not "selectively provide documents, and then hide behind a claim of sovereign immunity when the defense requests different documents." *Id.* But, the court refused to find a waiver as to documents from the tribe's Department of Social and Health Services, because the tribe had not indicated an intent to release documents from all agencies under its control. *Id.*

<sup>150</sup> 291 F.3d 549 (9th Cir. 2002), *reversed on other grounds*, 538 U.S. 701 (2003). For an in-depth discussion of the *Bishop-Paiute* case, see Monson, *supra* note 1.

<sup>151</sup> *Id.* at 554.

<sup>152</sup> *Id.* at 554-55.

<sup>153</sup> *Id.* at 555.

<sup>154</sup> *Id.* at 554.

<sup>155</sup> *Inyo County, California v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701, 704 (2003) ("We hold that, in the situation here presented, the Tribe does not qualify as a "person" who may sue under § 1983. Whether the Tribe's suit qualifies for federal-court jurisdiction because it arises under some federal law other than § 1983 is an issue the parties have not precisely addressed, and the trial and appellate courts have not clearly decided. We therefore remand the case for close consideration and specific resolution of that threshold question.").

<sup>156</sup> See CANBY, *supra* note 2, at 96.

### III. TRIBAL SOVEREIGN IMMUNITY BARS ENFORCEMENT OF THE STATE'S CRIMINAL PROCESS AGAINST A TRIBE ON SETTLEMENT LANDS

Rhode Island's cigarette tax scheme was properly applied to the Narragansett Indian Tribe. The First Circuit Court of Appeals correctly applied federal law to determine whether the legal incidence of the tax fell on the Tribe.<sup>157</sup> The Supreme Court has consistently held that state cigarette tax schemes containing "pass-through" provisions place the legal incidence of the tax on the non-Indian consumer."<sup>158</sup> Rhode Island's cigarette tax law contained such a pass-through provision, thus passing the tax directly on to the non-Indian consumer.<sup>159</sup>

#### *a. Section 1708(a) of the Rhode Island Indian Claims Settlement Act Fails to Abrogate the Tribe's Sovereign Immunity*

The First Circuit Court of Appeals held that the Rhode Island Indian Claims Settlement Act granted civil and criminal jurisdiction over the Tribe's settlement lands, and expressly abrogated the Tribe's sovereign immunity.<sup>160</sup> Additionally, the Court of Appeals found that in negotiating the JMOU, the Tribe had clearly waived its sovereign immunity to Rhode Island's criminal process.<sup>161</sup> This section first argues that the language of Section 1708(a) essentially tracks Public Law 280, which gave states criminal and limited civil jurisdiction over tribal lands. However, the Supreme Court has explicitly held that Public Law 280's grant of jurisdiction does not abrogate a tribe's sovereign immunity. Additionally, the well-established Indian law canons of construction<sup>162</sup> should have been applied to interpret the Rhode Island Settlement Act and the JMOU. Under the Indian law canons, the Supreme Court has consistently required a clear and express abrogation or waiver of tribal sovereign immunity in every context.

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<sup>157</sup> See, e.g., *Sac and Fox Nation v. Pierce*, 213 F.3d 566, 578 (10th Cir. 2000); see also *United States v. Miss. Tax Comm'n*, 421 U.S. 599, 609 n. 7 (1975); *Narragansett II*, 2005 WL 1119758 at \*6.

<sup>158</sup> See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 142 (1980); *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (affirming that legal incidence of Washington's cigarette tax fell on consumers); see also *Sac and Fox Nation*, 213 F.3d at 578 (noting whether legal incidence of fuel tax fell on tribe was a matter of federal law); *Coeur D'Alene Tribe v. Hammond*, 384 F.3d 674, 681 (9th Cir. 2004) ("The incidence of a state tax on a sovereign Indian nation inescapably is a question of federal law that cannot be conclusively resolved in and of itself by the state legislature's mere statement."); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482 (1976); *Dept. of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994).

<sup>159</sup> R.I. GEN. LAWS § 44-20-53 (2007) ("All taxes paid in pursuance of this chapter are conclusively presumed to be a direct tax on the retail consumer, pre-collected for the purpose of convenience and facility only."); see R.I. GEN. LAWS §§ 44-20-1 to 44-20-55 (2007).

<sup>160</sup> *Narragansett Indian Tribe of Rhode Island v. Rhode Island (Narragansett III)*, 449 F.3d 16, 22 (1st Cir. 2006) (en banc), cert. denied, 127 S. Ct. 673 (2006) ("The [JMOU and Settlement Act] effectively extinguished the Tribe's right to resist the application of state authority as to matter occurring on settlement lands. And that arrangement drew no distinction between tribal members and the tribe itself, on the one hand, and the general public, on the other hand.")

<sup>161</sup> *Id.*

<sup>162</sup> See generally CANBY, *supra* note 2, at 109-17 (discussing the Indian law canons of construction as applied to treaties).

Thus, absent explicit language in Section 1708(a), the Tribe retained its immunity from state criminal prosecution and enforcement.

*i. The Rhode Island Indian Claims Settlement Act and JMOU*

The First Circuit Court of Appeals found both waiver and abrogation of the Tribe's sovereign immunity.<sup>163</sup> Waiver, the Court of Appeals held, was obtained by Rhode Island pursuant to the JMOU, whereby the Tribe ultimately received 1800 acres of land.<sup>164</sup> The JMOU states that "all the laws of . . . Rhode Island shall be in *full force and effect* on the settlement lands."<sup>165</sup> The majority claims the Tribe conceded jurisdiction and its sovereign immunity from process when it negotiated the JMOU.<sup>166</sup> The majority's argument follows that Congress later codified the JMOU, incorporating the "mutual consent of all parties" to Rhode Island's jurisdiction over the settlement lands.<sup>167</sup> The court states that Section 1708(a) would be "mere surplusage" if Rhode Island's jurisdiction was limited by the Tribe's immunity.<sup>168</sup> But, the First Circuit Court of Appeals only concluded that Section 1708(a) "largely abrogated" the Tribe's sovereign immunity,<sup>169</sup> recognizing that the "Tribe may continue to possess some degree of autonomy 'in matters of local governance'."<sup>170</sup>

A tribe can waive its sovereign immunity,<sup>171</sup> but such waiver must be clear and unequivocal.<sup>172</sup> Congress refused to include the phrase "full force and effect" in Section 1708(a) of the Settlement Act, instead providing that the "settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island."<sup>173</sup> Even if one downplays Congress' "linguistic choice" and implies "continuity in purpose" from the JMOU to Section 1708(a) to assess its jurisdictional scope,<sup>174</sup> the reserved

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<sup>163</sup> *Narragansett III*, 449 F.3d at 25.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (quoting the JMOU) (emphasis added).

<sup>166</sup> *Id.* (noting that when read in light of the "unique" context of the case the Settlement Act "clearly and unambiguously establishe[d] that the parties to the [JMOU] intended to subjugate [its] autonomy over the settlement lands (and, thus its sovereign immunity) to the due enforcement of the State's criminal and civil laws").

<sup>167</sup> *Id.* (citing JMOU (reprinted in H.R. REP. NO. 95-1453 at 11)).

<sup>168</sup> *Narragansett III*, 449 F.3d at 26 ("[S]ection 1708(a) would be mere surplusage if, as the Tribe contends, it contemplates no more than that the State may exercise within the settlement lands subject to the constraints of tribal sovereign immunity.").

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* (quoting *Rhode Island v. Narragansett Indian Tribe of Rhode Island*, 19 F.3d 685, 701 (1st Cir. 1994) (noting that "internal matter of local governance" include "matters such as membership rules, inheritance rules, and the regulation of domestic relations").

<sup>171</sup> *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998).

<sup>172</sup> *See C & L Enterprises v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001).

<sup>173</sup> 25 U.S.C. § 1708(a) (2007).

<sup>174</sup> *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d at 696 (construing Section 1708(a) of the Settlement Act to grant Rhode Island civil regulatory, as opposed to simply civil adjudicatory, jurisdiction over the Settlement Lands). However, *Rhode Island v. Narragansett Indian Tribe* inquired into whether the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. §§ 1166-68 (2007), applied to the Tribe's Settlement Lands. *Id.* at 688. The First Circuit Court of Appeals held in the affirmative, and further authorized Rhode Island civil regulatory jurisdiction over the Settlement Lands under the Settlement Act. *Id.* at 688-89, 695. The Court of Appeals declined to limit the scope—of civil adjudicatory jurisdiction—due to the change in language between the JMOU, the Senate draft of the bill, and the final Settlement Act. But, the court found that the Settlement Lands were subject to the "benefits and burdens" of IGRA, and that to the extent the

phraseology indicates Congress' inclination to attach narrower jurisdiction, similar to Public Law 280, discussed below.<sup>175</sup>

Twelve years prior to *Narragansett III*, the First Circuit Court Appeals, in *Maynard v. Narragansett Indian Tribe*,<sup>176</sup> held that neither the Settlement Act, nor the JMOU abrogated or waived the Tribe's sovereign immunity.<sup>177</sup> The majority in *Narragansett III* claimed *Maynard* was inapplicable because it was limited to civil suits brought against tribes for off-reservation activity,<sup>178</sup> suggesting somehow that sovereign immunity was limited to civil suits and reservation activity.<sup>179</sup> But, as stated above, the doctrine applies to both civil suits and criminal process,<sup>180</sup> so *Maynard* remains extremely persuasive authority.

In *Maynard*, a landowner brought civil suit against the Narragansett Indian Tribe, claiming that its members had trespassed on his non-settlement land.<sup>181</sup> The First Circuit Court of Appeals noted that waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed."<sup>182</sup> The Court of Appeals acknowledged, that pursuant to the JMOU, the Tribe had agreed to subject the settlement lands to the "civil and criminal laws and jurisdiction of the State of Rhode Island."<sup>183</sup> The court refused to find implied abrogation of sovereign immunity, because neither the JMOU nor the Settlement Act contained any provision addressing sovereign immunity.<sup>184</sup> As addressed above, the same immunity which protects tribes from civil suit protects them from a state's criminal process.<sup>185</sup> Judge Lipez, in his separate dissent, joined by Judge Torruella, correctly noted that:

"there is a stronger rationale for recognizing the Tribe's sovereign immunity here than in *Maynard* because, while *Maynard* involved an injunctive suit to stop the Tribe's . . . interference with a private

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Settlement Act conflicted with the IGRA concerning gambling, it was preempted. *Id.* at 703-04. For an excellent discussion surrounding the Tribe's attempt to obtain gaming under IGRA, see Bryan J. Nowlin, Note, *Conflicts in Sovereignty: The Narragansett Tribe of Rhode Island*, 30 AM. INDIAN L. REV. 151 (2006).

<sup>175</sup> See *Narragansett III*, 449 F.3d at 33-34 (Lipez, J. dissenting) (noting that the JMOU and Settlement Act contain differing jurisdictional language, but that even broad, categorical language does not waive tribal sovereign immunity); *contra Narragansett Indian Tribe*, 19 F.3d at 695-96 (rejecting the comparison of Section 1708(a) to Public Law 280 and *Bryan v. Itasca County*).

<sup>176</sup> 984 F.2d 14, 16 (1st Cir. 1993) (holding that the Tribe's sovereign immunity could not be waived by inferences of the Tribe-State settlement documents)

<sup>177</sup> *Id.* at 16 (citing *C & L Enterprises*, 532 U.S. at 418).

<sup>178</sup> *Narragansett III*, 449 F.3d at 29 (citing *Maynard*, 984 F.2d at 15-16).

<sup>179</sup> *Id.* at 29.

<sup>180</sup> COHEN, *supra* note 1, at 636-38 (§ 7.05[1][a]).

<sup>181</sup> *Maynard v. Narragansett Indian Tribe*, 798 F. Supp. 94, 95 (D.R.I. 1992), *aff'd on other grounds*, 984 F.2d 14 (1st Cir. 1993).

<sup>182</sup> *Maynard*, 984 F.2d at 15 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

<sup>183</sup> *Id.* at 16 (citing 25 U.S.C. § 1708(a)).

<sup>184</sup> *Id.*

<sup>185</sup> See *Narragansett Indian Tribe v. Rhode Island (Narragansett III)*, 449 F.3d 16, 36 (1st Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 673 (November 27, 2006) (Lipez, J., dissenting).

landowner's activities on his own lands, this case involves the State's effort to execute its [criminal] process on tribal lands."<sup>186</sup>

The holding in *Maynard* applies to the present case because tribes enjoy immunity from both suit and the state's criminal process. Furthermore, Congress has never amended the Rhode Island Settlement Act to explicitly abrogate the Tribe's sovereign immunity, even in light of the First Circuit court's decision in *Maynard*. The First Circuit Court of Appeals overlooked the doctrine's dual nature in rejecting *Maynard*'s straightforward application of the principle that a Tribe's sovereign immunity cannot be implicitly abrogated by a federal statute or equivocal statements in the legislative history.

ii. *Public Law 280*

Public Law 280<sup>187</sup> gives states concurrent criminal and limited civil jurisdiction over Indian country.<sup>188</sup> As for criminal jurisdiction, Public Law 280 provides that "the criminal laws of such [states] shall have the same force and effect within such Indian country as they have elsewhere within the State."<sup>189</sup> Similarly, Section 1708(a) provides that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of [Rhode Island]."<sup>190</sup> As mentioned above, the JMOU provided that those same laws would have "full force and effect" on Settlement Lands.<sup>191</sup> Taken together, the language almost directly tracks that of Public Law 280, and the Supreme Court has repeatedly held "such language—however categorically stated—does not waive or abrogate tribal sovereign immunity."<sup>192</sup>

Two years prior to the Rhode Island Settlement Act, the Supreme Court, in *Bryan v. Itasca County*,<sup>193</sup> rejected the argument that Public Law 280 abrogated tribal sovereign immunity by its "force and effect" provision.<sup>194</sup> Indeed, the Supreme Court later acknowledged that it has "never read Pub. L. 280 to constitute a waiver of tribal

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<sup>186</sup> *Id.* (citing *Kiowa Tribe of Okalahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 763-64 (Stevens, J., dissenting) (noting that the doctrine of tribal sovereign applies primarily to activities taking place on tribal lands, as opposed to off-reservation conduct).

<sup>187</sup> Pub. L. 280, 67 Stat. 589 (1953) (as codified in 18 U.S.C. § 1162(a) (2007)).

<sup>188</sup> *CANBY*, *supra* note 2, at 232 ("[Public Law 280] radically shifts the balance of jurisdiction away from the federal government . . . . It does not . . . confer total jurisdiction on the states, nor . . . [e]nd the sovereign immunity of the tribes.").

<sup>189</sup> Pub. L. 280, 67 Stat. 589 (1953) (as codified in 18 U.S.C. § 1162(a) (2007)).

<sup>190</sup> 25 U.S.C. § 1708(a) (2007).

<sup>191</sup> JMOU (reprinted at H. REP. NO. 1453, 95TH CONG., 2D SESS. 6 (August 8, 1978)).

<sup>192</sup> *Narragansett Indian Tribe v. Rhode Island (Narragansett III)*, 449 F.3d 16, 34 (1st Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 673 (November 27, 2006) (Lipez, J., dissenting).

<sup>193</sup> 426 U.S. 373 (1976).

<sup>194</sup> *Id.* at 389 (noting that "there is notably absent any conferral of state jurisdiction over the tribes themselves"). *Bryan v. Itasca County* primarily involved an Indian's claim that Public Law 280's civil jurisdictional grant, did not authorize the State to tax his personal property—a mobile home—on reservation land. In citing the Indian law canons of construction, the court noted that the first, there was no clear statement in the statute or legislative history specifically abrogating tribal sovereign immunity, and in any event the statute was ambiguous and should be interpreted for the benefit of the Indians. *See id.* at 387-93.

sovereign immunity.”<sup>195</sup> The First Circuit Court of Appeals, in *Narragansett III*, stated that “we must presume . . . Congress acts with knowledge of relevant Supreme Court precedent.”<sup>196</sup> Congress would unlikely choose language similar to Public Law 280, if it had intended to abrogate the Tribe’s immunity concerning activity on its settlement lands.<sup>197</sup> Two Supreme Court decisions in the two years preceding the Settlement Act held such language ineffective in abrogating tribal sovereign immunity relative to Public Law 280’s grant of civil adjudicatory jurisdiction within Indian country.<sup>198</sup> As the dissent in *Narragansett III* stated, this prior knowledge of *Bryan* and *Three Affiliated Tribes* should have guided the Court of Appeal’s construction of the “force and effect” language contained in the JMOU.<sup>199</sup>

Additional evidence suggests Congress understood, in light of Public Law 280 and relevant Supreme Court precedent, how to expressly abrogate a tribe’s sovereign immunity.<sup>200</sup> In 1980, Congress enacted the Maine Indian Claims Settlement Act,<sup>201</sup> which unequivocally abrogated tribal sovereign immunity.<sup>202</sup> Section 1725(a) of the Maine Settlement Act provides:

“[A]ll Indians, Indian nations, or tribes or bands of Indians in [Maine], . . . and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians . . . shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.”<sup>203</sup>

Congress knew the language contained in the Rhode Island Settlement Act failed to abrogate sovereign immunity, and two years later placed explicit language in the Maine Settlement Act. In addition to traditional rules of construction, the First Circuit Court of Appeals failed to apply special rules of construction related to American Indian law, as discussed immediately below.

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<sup>195</sup> *Three Affiliated Tribe of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 885-86, 887-88, 892 (1986) (invalidating state law that disclaimed civil jurisdiction over claims by Indian tribes conflicted with Public Law 280’s civil adjudicatory grant of jurisdiction, and holding that state law which requires Indian tribal consent to all civil causes of action before gaining access to state court as a plaintiff violated tribal sovereign immunity).

<sup>196</sup> *Narragansett III*, 449 F.3d at 26 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988)).

<sup>197</sup> See *Narragansett III*, 449 F.3d at 34 (Lipez, J., dissenting).

<sup>198</sup> *Bryan*, 426 U.S. at 389; *Puyallup Tribe, Inc. v. Dept. of Game of State of Washington*, 433 U.S. 165, 172-73 (1977); see *Narragansett III*, 449 F.3d at 34 (Lipez, J., dissenting) (“[i]f Congress had wanted to abrogate the Tribe’s sovereign immunity in 1978, it would not have done so by repeating language that the Supreme Court had held in each of the previous two years did not result in “any conferral of state jurisdiction over the tribes themselves.”) (quoting *Bryan*, 426 U.S. at 389).

<sup>199</sup> See *Narragansett III*, 449 F.3d at 34-35 (Lipez, J. dissenting).

<sup>200</sup> *Id.* at 35 (Lipez, J. dissenting).

<sup>201</sup> See generally 25 U.S.C. §§ 1725-1735 (2007).

<sup>202</sup> 25 U.S.C. § 1725(a) (2007).

<sup>203</sup> *Id.*

### iii. *The Indian Law Canons of Construction*

The First Circuit Court of Appeals refused to apply the Indian law canons of construction to interpret the Rhode Island Settlement Act.<sup>204</sup> The Court of Appeals concluded that the Settlement Act clearly abrogated the Tribe's sovereign immunity "when read in light of the JMOU and the unique historical context surrounding its enactment."<sup>205</sup> The First Circuit further elaborated that because "there was no ambiguity in the meaning and purport of [the Settlement Act]," the "hoary [Indian] canon of construction" was not implicated.<sup>206</sup>

According to the well-established Indian law canons of construction, treaties, agreements, executive orders, and "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."<sup>207</sup> Additionally, "treaties and agreements are to be construed as the Indians would have understood them."<sup>208</sup> Finally, "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is *clear and unambiguous*."<sup>209</sup>

Courts must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"<sup>210</sup> Originally developed to aid in treaty interpretation, the canons have consistently been applied to "non-treaty sources of positive law."<sup>211</sup> Professor Philip Frickey has argued that the Indian law canons possess a "quasi-constitutional status,"<sup>212</sup> and that Chief Justice Marshall first employed the canons to interpret treaties as "fundamental, constitutive document[s]," whose very nature could not be terminated absent explicit congressional abrogation.<sup>213</sup> Felix S. Cohen analogized the Indian law canons to the "Supreme Court's canons of interpretation protecting the States

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<sup>204</sup> *Narragansett III*, 449 F.3d at 27.

<sup>205</sup> *Id.* at 27.

<sup>206</sup> *Id.*

<sup>207</sup> *Montana v. Blackfeet Indian Tribe of Indians*, 471 U.S. 759, 766 (1985); see COHEN, *supra* note 1, at § 2.02[2], p. 119 ("The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians; and all ambiguities are to be resolved in favor of the Indians."); see also Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation of Federal Indian Law*, 107 HARV. L. REV. 381, 406-17 (1993) (discussing Chief Justice John Marshall's interpretative methodologies utilized in *Worcester v. Georgia*).

<sup>208</sup> COHEN, *supra* note 1, at 119 (§ 2.02[1]) (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) ("[T]his Court has often held that treaties with the Indians must be interpreted as they would have understood them.")).

<sup>209</sup> COHEN, *supra* note 1, at 119 (§ 2.02[1]) (citing *United States v. Dion*, 476 U.S. 734, 739-40 (1986)).

<sup>210</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)); see CANBY, *supra* note 2, at 109; for an excellent discussion of the Indian law canons of construction as applied to IGRA, see George Jackson, III, *Chickasaw Nation v. United States and the Potential Demise of the Indian Canon of Construction*, 27 AM. INDIAN L. REV. 399 (2003) (discussing the interpretation of the IGRA and whether Tribes were subject to certain taxes under language of the Act, and causing Tribes to grow concerned over whether the Supreme Court was abandoning the Indian canon of construction, which requires that ambiguous statutes and treaties are to be interpreted in favor of the Indians).

<sup>211</sup> COHEN, *supra* note 1, at 120 (§ 2.02[1]).

<sup>212</sup> Frickey, *supra* note 207, at 416; see COHEN, *supra* note 1, at 124 (§ 2.02[2]).

<sup>213</sup> Frickey, *supra* note 207, at 408-410.

against federal statutory regulation unless Congress has spoken quite clearly, and immunizing the federal executive branch against all but crystal-clear congressional intrusions.”<sup>214</sup>

In the present case, the First Circuit Court of Appeals violated the canon requiring a clear, congressional statement or evidence of intent to abrogate the Tribe’s inherent sovereign immunity from suit or criminal process. The First Circuit claimed that the Settlement Act, in light of the JMOU, clearly subjected the settlement lands to Rhode Island civil and criminal law.<sup>215</sup> However, both the Settlement Act and the JMOU—along with their respective legislative history—fail to even address sovereign immunity, much less “clearly” abrogate it.<sup>216</sup> In *Santa Clara Pueblo v. Martinez*,<sup>217</sup> the Supreme Court addressed whether the Indian Civil Rights Act (ICRA) abrogated the Santa Clara Pueblo’s sovereign immunity from a suit brought by one of its members for an equal protection violation.<sup>218</sup> The ICRA did not “expressly authorize the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions,” and Justice Marshall, writing for the majority, held that the ICRA could not be “interpreted to impliedly authorize such actions, against a tribe or its officers in federal courts.”<sup>219</sup> Accordingly, the majority held that because the ICRA on its face failed to authorize declaratory or injunctive relief, and its legislative history failed to reveal “any unequivocal expression of contrary legislative intent,” suits against the Santa Clara Pueblo were barred because of its immunity from suit.<sup>220</sup>

The *Narragansett III* majority stated that the language of the Settlement Act would be “mere surplusage” if the Tribe’s sovereign immunity was not limited with respect to Rhode Island’s criminal law enforcement on settlement lands.<sup>221</sup> This argument was expressly rejected by the Supreme Court in *Santa Clara Pueblo*.<sup>222</sup> The Settlement Act, on its face, does not purport to limit or abrogate any aspect of the Tribe’s sovereign immunity. In fact, the Act is silent in this regard, and the legislative history does not reveal any contrary intent to abrogate sovereign immunity. Thus, under the “clear statement” canon, the Settlement Act fails to abrogate the Narragansett Indian Tribe’s sovereign immunity from Rhode Island’s criminal process.

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<sup>214</sup> COHEN, *supra* note 1, at 124 (§ 2.02[2]) (citing *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221 (1986)).

<sup>215</sup> *Narragansett Indian Tribe v. Rhode Island (Narragansett III)*, 449 F.3d 16, 27 (1st Cir. 2006) (en banc), cert. denied, 127 S. Ct. 673 (November 27, 2006).

<sup>216</sup> JMOU (reprinted at H. REP. NO. 1453, 95TH CONG., 2D SESS. 6 (August 8, 1978)); *see also* *Town of Charlestown v. United States*, 696 F. Supp. 800, 802-03 (D.R.I. 1988).

<sup>217</sup> 436 U.S. 49 (1978).

<sup>218</sup> *Id.* at 51. The female claimant claimed a tribal ordinance violated the equal protection clause of the ICRA, because it denied her children tribal membership because the father of the children was from outside the tribe. *Id.*

<sup>219</sup> *Id.* at 52.

<sup>220</sup> *Id.* at 59.

<sup>221</sup> *Narragansett Indian Tribe v. Rhode Island (Narragansett III)*, 449 F.3d 16, 26 (1st Cir. 2006) (en banc), cert. denied, 127 S. Ct. 673 (November 27, 2006) (“Thus, section 1708(a) would be mere surplusage if, as the Tribe contends, it contemplates no more than that the State may exercise jurisdiction within the settlement lands subject to the constraints of tribal sovereign immunity.”).

<sup>222</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54-55 (1978).

The First Circuit Court of Appeals applied traditional canons of statutory interpretation,<sup>223</sup> while refusing to apply the ambiguity canon to the Rhode Island Settlement Act, which the majority characterized as clear and unambiguous.<sup>224</sup> The Court of Appeals analyzed the language of both the JMOU and the Settlement, because the Settlement Act essentially codified the mutual assent present in the JMOU. Section 1708(a) provides: “[T]he settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.”<sup>225</sup> Similarly, paragraph thirteen of the JMOU provides that “all Laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands.”<sup>226</sup> The majority focused upon the JMOU’s use of the phrase “full force and effect” and held such language “ensure[d] that the State may use its entire armamentarium of legal means for redressing noncompliance.”<sup>227</sup>

However, tribal sovereign immunity “may not be stripped from an Indian tribe by statutory silence or by inference extracted from ambiguous language.”<sup>228</sup> The legislative history of both the Settlement Act and the JMOU are silent concerning the abrogation or waiver of tribal sovereign immunity.<sup>229</sup> Section 1708(a) and the JMOU granted jurisdiction to Rhode Island to apply its criminal cigarette tax laws relative to transactions involving non-Indians on settlement lands, but as discussed above, this alone does not imply a grant of jurisdiction to prosecute or enforce those laws against the tribe itself. The language of Section 1708(a) and the JMOU is ambiguous because application of state law within the settlement lands does not on its face authorize Rhode Island to enforce those laws against the Tribe. Thus, whether the Act applies to the Tribe itself, or only tribal members within the settlement lands, is ambiguous on its face and the legislative history sheds no light on congressional intent. Accordingly, under the ambiguity canon of Indian law, the Settlement Act—along with the JMOU’s “full force and effect” language—should be construed liberally in favor of the Narragansett Indian Tribe, to retain the Tribe’s sovereign immunity and repel enforcement of Rhode Island’s criminal tax laws on settlement lands.

Because the legislative history does not lend itself to resolving the ambiguity of both Section 1708(a) and the JMOU, another brief examination of the Maine Indian Claims Settlement Act compels the conclusion that neither Congress nor the Tribe intended to alter the Tribe’s sovereign immunity.<sup>230</sup> Two years after Congress adopted Section 1708(a), it passed the Maine Indian Claims Settlement Act.<sup>231</sup> The Maine Settlement Act authorized state jurisdiction over “all Indians, Indians nations, or tribes or

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<sup>223</sup> Cohen’s Handbook on Federal Indian Law states that “[i]n some instances, the Indian law canons clash with competing canons,” and in such cases, “the Indian law canons, which are rooted in structural, normative values, should usually displace other canons to the contrary.” COHEN, *supra* note 1, at 124 (§ 2.02[3]).

<sup>224</sup> *Narragansett III*, 449 F.3d at 27 (“Section 1708(a) . . . clearly abrogates the Tribe’s sovereign immunity with respect to the State’s enforcement activities on the settlement lands. And because there is *no ambiguity* in the meaning and purport of [RISA], this case does not implicate the hoary canon of construction relied on by the dissent.”).

<sup>225</sup> 25 U.S.C. § 1708(a) (2007).

<sup>226</sup> *Narragansett III*, 449 F.3d at 19.

<sup>227</sup> *Id.* at 26.

<sup>228</sup> *Id.* at 41-42 (Torruella, J., dissenting).

<sup>229</sup> *Id.* at 42 (Torruella, J., dissenting).

<sup>230</sup> *See id.* at 43 (Torruella, J., dissenting).

<sup>231</sup> 25 U.S.C. § 1725 (2007).

bands of Indians . . . and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States.”<sup>232</sup> Choosing such specific language that clearly contemplates jurisdiction over Indian nations or tribes provides a clear statement of intent to abrogate immunity, and helps to resolve any ambiguity which the Rhode Island Settlement Act’s legislative history fails to address. After its *Narragansett III* decision, the First Circuit Court of Appeals actually held that Section 1725(a) of the Maine Settlement Act abrogated the Aroostook Band of Micmacs’ tribal sovereign immunity from an employment discrimination claim by the Maine Human Rights Commission.<sup>233</sup> The Maine Settlement Act demonstrates Congress’s ability to clearly articulate its intent to abrogate a tribe’s sovereign immunity, and highlights its failure to do so in the Rhode Island Settlement Act.

Section 1708(a) of the Rhode Island Settlement Act essentially codified the mutual assent memorialized in the JMOU. Thus, it is necessary to switch hats under the Indian law canons and determine how the Narragansett Indian Tribe would have viewed the terms of the JMOU in 1978. In *Narragansett III*, the en banc court held that the “Tribe abandoned any right to an autonomous enclave, submitting itself to state law as a quid pro quo for obtaining the land that it cherished.”<sup>234</sup> The majority goes on to state that if the language of Section 1708(a) is not read as a grant of jurisdiction against the Tribe itself, the statute and the JMOU become effectively “meaningless.”<sup>235</sup> However, we must look to what the Tribe understood of the agreement, and because similar language used in the JMOU has been consistently interpreted to retain sovereign immunity from suit or state criminal process, presumptively the Tribe read it this way. If Rhode Island desperately wanted to enforce its laws by use of its criminal process against the Tribe itself, it would have lobbied for language specifically subjecting the Tribe to its means of law enforcement. Whether such a failure to do so resulted from negotiation or incompetence, a court cannot charge the Tribe with being aware that it was waiving its immunity from criminal process by ceding jurisdiction as to only the “settlement lands.” Further, the absence of more explicit language was likely the result of the respective bargaining positions of the parties. The 1970s litigation clouded a significant number of landowners’ title in the Charlestown area. In giving up its right to proceed in litigation against the state and landowners, the Tribe would likely have focused its efforts to protect against a waiver of immunity from suit and criminal process in the negotiated agreement.

The language of both the JMOU and Settlement Act, along with the circumstances surrounding their execution, implicated all three of the Indian law canons of construction, but the majority simply refused to apply them. Such a course defies a responsible Indian law analysis, and equally subverts the federal policy of tribal self-

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<sup>232</sup> *Id.*; see *Narragansett III*, 449 F.3d at 43 (Torruella, J., dissenting) (noting that the “omission of the ‘tribal’ language” from [Section 1708(a)] was not an “unintended oversight by Congress without any purpose in mind”) (quoting *Brewster v. Gage*, 280 U.S. 327, 337 (1930) (“The deliberate selection of language so differing from that used in . . . earlier acts indicates a change of law was intended.”)).

<sup>233</sup> *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 50-51 (1st Cir. 2007). In *Aroostook Band of Micmacs v. Ryan*, the First Circuit Court of Appeals held that Section 1725(a) of the Maine Indian Claims Settlement Act of 1980 abrogated “any aspects of [the Aroostook Micmac Band’s] tribal immunity which might have prevented application of Maine’s employment laws.” *Aroostook Band*, 484 F.3d at 50-51.

<sup>234</sup> *Narragansett III*, 449 F.3d at 22.

<sup>235</sup> *Id.*

determination and economic development. Applying the Indian law canons compels a finding that neither the Settlement Act nor the JMOU abrogated or waived the Tribal government's sovereign immunity from Rhode Island's criminal process. The next logical question to address is whether the Tribe's retained sovereign immunity actually prohibited Rhode Island from executing its criminal process on settlement lands.

*b. Tribal Sovereign Immunity Bars Enforcement of State Criminal Process Against Tribal Entities*

The majority in *Narragansett III* based its decision in large part on its construction of the JMOU and the Settlement Act, which it held to waive and abrogate the Tribe's sovereign immunity.<sup>236</sup> The First Circuit Court of Appeals briefly cited *Nevada v. Hicks*,<sup>237</sup> to attack the proposition that the Tribe's sovereign immunity bars enforcement of the state's criminal process,<sup>238</sup> but the district court and Panel decision earlier made clear the full import of *Hicks* and *Colville*'s application to cases involving state criminal law enforcement on tribal lands.<sup>239</sup> As discussed above, the district court utilized Justice Scalia's "guidance" in *Hicks* to find that Section 1708(a) authorized state power to enter the settlement lands and enforce its criminal process against the Tribe.<sup>240</sup> Essentially, the district court and Panel decision utilized Justice Scalia's sweeping language in *Hicks* to extend *Colville*'s approval of en route seizures outside the reservation, to search and seizures by state law enforcement within tribal lands. Possibly the First Circuit Court of Appeals en banc majority recognized the recklessness of directly applying *Hicks* to the present case,<sup>241</sup> but the district court reasoning reflects the potential conflict between *Hicks*, the possible extension of *Colville*, and tribal sovereign immunity from process.<sup>242</sup> However, before addressing *Hicks* it is necessary to explain why Rhode Island's authority to enforce its criminal process is barred under existing federal Indian law.

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<sup>236</sup> *Id.* at 25-28.

<sup>237</sup> 533 U.S. 353 (2001). For an excellent discussion explaining the potentially far-reaching effects of *Hicks*, see Bryan H. Wildenthal, *Fighting the Lone Wolf Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 TULSA L. REV. 113, 137-43 (2002); see also David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267, 329-35 (2001) (arguing that *Nevada v. Hicks* "epitomizes the use of states' rights as the lodestar for deciding an Indian case while disregarding or dismissing traditional Indian law principles).

<sup>238</sup> *Narragansett III*, 449 F.3d at 24-25.

<sup>239</sup> *Id.* at 24; see *Narragansett Indian Tribe of Rhode Island v. Rhode Island (Narragansett I)*, 296 F. Supp. 2d 153, 170 (D.R.I. 2003) ("Section 1708[a] of the Settlement Act makes clear that the tribal lands are subject to the "criminal laws and jurisdiction" of the State. If that phrase is to have any meaning, it must include the right of State law enforcement officials to enter tribal property pursuant to a validly issued search warrant to seize contraband.")

<sup>240</sup> *Narragansett I*, 296 F. Supp. 2d at 170 (quoting *Hicks*, 533 U.S. at 362-63).

<sup>241</sup> *Narragansett III*, 449 F.3d at 24-25 (discussing *Nevada v. Hicks* only in support of its decision to overrule an earlier First Circuit Court of Appeals case that distinguished tribal sovereignty from tribal sovereign immunity).

<sup>242</sup> See generally *Narragansett I*, 296 F. Supp. 2d at 169-71 (relying on *Nevada v. Hicks* to find that state law enforcement officials legally entered tribal lands to seize tribal property pursuant to the Rhode Island Indian Claims Settlement Act).

In *United States v. James*,<sup>243</sup> the Ninth Circuit Court of Appeals held that a tribe's sovereign immunity properly quashed a federal subpoena for tribal agency health documents, stemming from a criminal defendant's request.<sup>244</sup> The tribe had chosen to release more general documents from another one of its agencies, instead of the particular documents requested.<sup>245</sup> The court held the subpoena was unenforceable, explicitly stating that the Major Crimes Act<sup>246</sup> did not implicitly or explicitly address the "amenability of the tribes to the processes of the court in which the prosecution commenced."<sup>247</sup> Thus, the Ninth Circuit Court of Appeals upheld the tribe's sovereign immunity, even in the face of a federal criminal subpoena and the grant of federal criminal jurisdiction under the Major Crimes Act.<sup>248</sup>

The Ninth Circuit Court of Appeal's reasoning is instructive for two reasons. First, *James* involved a federal—as opposed to state—quasi-judicial order, i.e., a subpoena as opposed to a search warrant. It must be remembered that federal authority over Indian affairs is exclusive and plenary in its scope.<sup>249</sup> On the other hand, state authority, while expanded in certain respects, is traditionally subordinated to the federal government when Indian affairs are involved. Thus, the invocation of tribal sovereign immunity to shield a tribe from federal criminal process, argues in favor of finding the same immunity to protect a tribe from analogous criminal process initiated by the state. Furthermore, the Ninth Circuit Court of Appeals recognized Congress could not abrogate a tribe's immunity, simply by enacting a statute addressing and authorizing federal criminal jurisdiction. Similarly, in the case of the Rhode Island Settlement Act, Congress granted criminal jurisdiction to Rhode Island, but failed to even mention the Tribe's immunity. As a result, the Tribe's sovereign immunity was left intact and protected against state criminal process. *United States v. James* was one of the first cases to invoke the doctrine as a bar to state or federal enforcement.<sup>250</sup> Unfortunately, other courts have not followed the Ninth Circuit's reasoning, instead applying an ill-defined balancing approach.<sup>251</sup>

The Ninth Circuit Court of Appeals holding in *James* is also instructive because the subpoena was based upon a criminal defendant's request for health documents related to his constitutional right to a defense.<sup>252</sup> In essence, the Ninth Circuit court found, quite matter-of-factly, that the tribe's interest in its own immunity from federal criminal process outweighed the defendant's constitutional right to a defense.<sup>253</sup> In *Narragansett III*, the Tribe's sovereign immunity from state criminal process was not only at stake; the

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<sup>243</sup> 980 F.3d 1314 (9th Cir. 1992).

<sup>244</sup> *Id.* at 1319.

<sup>245</sup> *Id.*; see Monson, *supra* note 1, at 284.

<sup>246</sup> 18 U.S.C. 1153(a) (2007).

<sup>247</sup> *James*, 980 F.3d at 1319.

<sup>248</sup> *Id.*

<sup>249</sup> See generally COHEN, *supra* note 1, at 398 (§ 5.02[1]) ("The term 'plenary' indicates the breadth of congressional power to legislate in the area of Indian affairs, and the term 'exclusive' refers to the supremacy of federal over state law in this area. The term 'plenary power' is also used as a shorthand for general federal authority to legislate on health, safety, and morals within Indian country, similar to the states' police powers over non-Indians.").

<sup>250</sup> Monson, *supra* note 1, at 285.

<sup>251</sup> *Id.* at 285-86.

<sup>252</sup> *James*, 980 F.3d at 1314.

<sup>253</sup> *Id.* at 1320.

Tribe's defense of its own criminal liability was also implicated by Rhode Island's law enforcement action. Thus, the policy for recognizing immunity is even stronger in the present case than in *James*, because both conflicting interests—immunity from process and alternatively criminal liability—are claimed by the Tribe itself.

Expanding upon its reasoning in *James*, the Ninth Circuit Court of Appeals recently held that state law enforcement could not enforce a search warrant pursuant to a welfare fraud investigation of tribal members, directly against a tribe on tribal lands.<sup>254</sup> Such a finding is consistent with the Supreme Court's language in *Bryan v. Itasca County* and *Three Affiliated Tribes*, as discussed under Public Law 280 above. In *Bishop-Paiute*, county law enforcement obtained and executed a search warrant against a tribal casino to inspect and seize certain employee records.<sup>255</sup> The Court of Appeals held that "the county . . . [had] violated the tribe's sovereign immunity when they . . . executed a search warrant against the tribe."<sup>256</sup> The Ninth Circuit "expressly reaffirmed *James* as codifying the principle that tribal sovereignty [or more so its corollary sovereign immunity] may serve as a bar to enforcement on tribal land."<sup>257</sup>

But, the First Circuit Court of Appeals has blatantly gone against the well-reasoned analysis of the Ninth Circuit Court of Appeals in *James* and *Bishop Paiute*, citing the unique history surrounding the Narragansett Tribe and the Settlement Act.<sup>258</sup> The interest in favor of tribal sovereign immunity is even stronger here than in *Bishop Paiute*, where a tribal government is the subject of a criminal investigation, search, and seizure, as opposed to a criminal welfare fraud investigation aimed against only tribal members.<sup>259</sup> The First Circuit Court of Appeal's attempt to distinguish *Bishop Paiute* because it did not involve enforcement of criminal laws against the tribe itself is beside the point. Although *Bishop Paiute* involved an investigation aimed at tribal members, the tribal government's immunity still shielded it from any involvement in the process. The Narragansett Tribe's interest and sovereign right to remain free of state criminal process is even stronger here where the Tribe is the target of the enforcement.

Because *Bishop Paiute* is no longer persuasive authority, one need look no further than the First Circuit Court of Appeals to find precedent consistent with *Bishop Paiute*. In *Aroostook v. Band of Micmacs v. Ryan*,<sup>260</sup> the Court of Appeals differentiated between

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<sup>254</sup> *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 558-59 (9th Cir. 2002) (holding that even though subject to Public Law 280 criminal jurisdiction, the tribe's sovereign immunity from suit and criminal process barred State enforcement of a search warrant to inspect tribal employee records on tribal lands, pursuant to a welfare fraud investigation), *reversed on other grounds*, 538 U.S. 701 (2003) (dismissing tribe's claims on § 1983 grounds).

<sup>255</sup> *Bishop Paiute*, 291 F.3d at 554.

<sup>256</sup> *Id.* The state police ignored the tribe's lack of consent, and broke into the casino and seized records, using bolt-cutters to seize employee records of the suspected individuals, along with seventy-eight others. *Id.* at 555; see Monson, *supra* note 1, at 287.

<sup>257</sup> Monson, *supra* note 1, at 288.

<sup>258</sup> *Narragansett Indian Tribe v. Rhode Island (Narragansett III)*, 449 F.3d 16, 29-30 (1st Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 673 (November 27, 2006) (noting that the decision was vacated on other ground by the Supreme Court and that it "neither addressed a state's power to enforce its applicable criminal laws against a noncompliant Indian tribe nor involved a statute that had the teeth that Congress implanted in the Settlement Act").

<sup>259</sup> *Bishop Paiute*, 291 F.3d at 554.

<sup>260</sup> 404 F.3d 48 (1st Cir. 2005), *remand reversed in part*, 484 F.3d 41 (1st Cir. 2007).

tribal sovereignty in general and tribal sovereign immunity.<sup>261</sup> The First Circuit stated, in *Aroostook*, that “tribal sovereign immunity means that [a Tribe] is not amenable to state judicial or quasi-judicial proceedings to enforce [state] laws, even if the tribe is bound to observe them,” but when a tribe asserts its sovereignty it is claiming, “in essence, that it is not subject to state laws . . . at all.”<sup>262</sup> Notwithstanding clear and consistent Supreme Court authority recognizing this distinction, the majority overruled *Aroostook* on that point.<sup>263</sup>

For example, the Supreme Court, in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*,<sup>264</sup> held that although the Potawatomi Indian Tribe was subject to state tax laws for sales of cigarettes to non-Indians on tribal lands, the tribe’s sovereign immunity still barred a suit by Oklahoma to collect those taxes.<sup>265</sup> Oklahoma complained that it possessed a “right without a remedy.”<sup>266</sup> The Supreme Court then reiterated the alternative remedies available to the state, first articulated in its decision in *Colville*.<sup>267</sup> These less-intrusive remedies are discussed in further detail below under Section VI. In any event, the Supreme Court held that although the tribe lacked the sovereign authority to sell tax-free cigarettes, its sovereign immunity remained intact and barred state tax collection proceedings.<sup>268</sup>

Most recently, the Supreme Court, in *Kiowa Tribe v. Manufacturing Technologies, Inc.*,<sup>269</sup> highlighted and affirmed the same distinction between a tribe’s inherent sovereign authority to repel application of state law, and the corollary sovereign immunity from suit or process to enforce those laws.<sup>270</sup> The Supreme Court again noted “[t]here is a difference between the right to demand compliance with states laws and the means available to enforce them.”<sup>271</sup> In *Kiowa*, a tribe signed, executed, and delivered a promissory note to a non-Indian corporation off the reservation.<sup>272</sup> The tribe eventually defaulted, and the corporation sued on the note in state court.<sup>273</sup> The state trial court held that a tribe’s sovereign immunity failed to protect it against a suit in state court involving off-reservation commercial conduct.<sup>274</sup> But, the Supreme Court refused to make such a

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<sup>261</sup> *Id.* at 68.

<sup>262</sup> *Id.* at 68; see *Narragansett III*, 449 F.3d at 32 (Lipez, J., dissenting).

<sup>263</sup> *Narragansett III*, 449 F.3d at 24-25.

<sup>264</sup> 498 U.S. 505 (1991).

<sup>265</sup> *Id.* at 512-13.

<sup>266</sup> *Id.* at 514 (“There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State.”)

<sup>267</sup> *Id.* at 514 (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 161-62 (1980)).

<sup>268</sup> *Narragansett III*, 449 F.3d at 32 (Lipez, J., dissenting).

<sup>269</sup> 523 U.S. 751 (1998); see *Narragansett III*, 449 F.3d at 32 (Lipez, J., dissenting); for a comprehensive discussion analyzing *Kiowa*, see Eric Governo, Comment, *Tribal Sovereign Immunity: History, Competing Policies, and Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 34 NEW ENG. L. REV. 175 (1999) (discussing the *Kiowa* case that held tribes enjoy sovereign immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off the reservation).

<sup>270</sup> *Kiowa Tribe*, 523 U.S. at 754-55.

<sup>271</sup> *Id.* at 755.

<sup>272</sup> *Id.* at 753-54.

<sup>273</sup> *Id.* at 754.

<sup>274</sup> *Id.*

distinction between either commercial or governmental, or on or off-reservation activity.<sup>275</sup> Both *Potawatomi* and *Kiowa Tribe* support *Aroostook*'s distinction between tribal sovereignty as maintaining a substantive exemption from state law, and tribal sovereign immunity from state process to enforce those laws. However, the First Circuit Court of Appeals incorrectly overruled and failed to apply the subtle distinction considered in *Aroostook*.

If applied, the *Aroostook* distinction would potentially dissuade lower courts, courts of appeal, and even the Supreme Court from invoking *Hicks* to allow state law enforcement to unilaterally enforce its laws on tribal lands through the criminal process.<sup>276</sup> Similarly, it might also prevent courts from reading *Hicks* to authorize on-reservation seizures of contraband cigarettes under *Colville*. The distinction supports the view that even when state laws apply to individual members of the tribe, as under the Settlement Act and Public Law 280, the application of laws to the land on which the members reside does not per se abrogate the tribe's sovereign immunity. Generally, a state lacks the power to enforce its own laws on tribal lands.<sup>277</sup> A sale of cigarettes to a non-Indian is quite different from a case where state law enforcement goes onto tribal lands to execute a warrant or seizure against a tribal member for conduct arising off the reservation. Thus, when discussing *Hicks*, it is important to remember the distinction articulated in *Aroostook*, because state criminal jurisdiction to execute its process to enforce properly-applied laws cannot simply be assumed as it was by Justice Scalia in *Hicks*.

In *Nevada v. Hicks*, the state suspected a member of the Fallon-Paiute-Shoshone tribe of killing a bighorn sheep off the reservation, a misdemeanor under Nevada law.<sup>278</sup> One year later a Nevada game warden obtained a search warrant for Hicks' home, and although a second warrant did not require tribal approval, law enforcement nonetheless sought and obtained a tribal-court search warrant.<sup>279</sup> Hicks sued the state game warden in tribal court for violations of his rights stemming from the search.<sup>280</sup> The central holding of *Hicks* was that tribal courts lack jurisdiction over suits against state officials enforcing criminal process concerning a tribal member's off-reservation activity.<sup>281</sup> However, what is more threatening to the doctrine of tribal sovereign immunity, specifically as applied to the Narragansett Tribe, is Justice Scalia's sweeping language in *Hicks*—"State sovereignty does not end at the reservation's borders."<sup>282</sup> Citing *Washington v. Confederated Tribes of Colville Reservation*,<sup>283</sup> Justice Scalia suggested that "when state interests outside the reservation are implicated, states may regulate the activities even of tribal members on tribal land."<sup>284</sup> Similarly, Justice Scalia noted that states may have

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<sup>275</sup> *Id.* at 760 ("Tribes enjoy sovereign immunity from suits on contracts, whether those contract involve government or commercial activities and whether they were made on or off the reservation.").

<sup>276</sup> See Wildenthal, *supra* note 237, at 139, 142-43.

<sup>277</sup> See generally COHEN, *supra* note 1, at 499-500 (§ 6.01[1]), 501 (§ 6.01[2]).

<sup>278</sup> *Nevada v. Hicks*, 533 U.S. 353, 355 (2001).

<sup>279</sup> *Id.* at 356.

<sup>280</sup> *Id.* at 356-57.

<sup>281</sup> *Id.* at 362.

<sup>282</sup> *Id.* at 369.

<sup>283</sup> 447 U.S. 134 (1979).

<sup>284</sup> *Hicks*, 533 U.S. at 362.

criminal jurisdiction over Indians for crimes committed off the reservation.<sup>285</sup> Equally alarming, is that Justice Scalia suggested that, even though Nevada law enforcement responsibly sought the cooperation of tribal officials, such a course was wholly unnecessary,<sup>286</sup> hinting that state law enforcement could unilaterally execute its process on tribal lands.

The full import of *Hicks* becomes clear when you examine how and why state jurisdiction was triggered in that case. According to Justice Scalia, law enforcement may enter tribal land and pursue an investigation when state law has been violated by an individual tribal member off the reservation, or even when state interests outside the reservation are implicated.<sup>287</sup> The district court read *Hicks* broadly enough to apply to tribal government activity that contravenes state law within the reservation.<sup>288</sup> Under such a broad reading of *Hicks*, state jurisdiction is proper when state law is violated by a tribe or tribal member, whether on or off the reservation. Under such an analysis, one could potentially set aside *Kiowa Tribe*'s comprehensive affirmation of sovereign immunity. It would be unpersuasive to distinguish *Kiowa Tribe*, based upon the fact it involved civil and not criminal process, because neither the Supreme Court nor commentators have ever made a civil-criminal distinction when addressing tribal sovereign immunity.<sup>289</sup> Instead of deferring to Congress to address tribal sovereign immunity, as suggested by Justice Kennedy in *Kiowa Tribe*, courts may decide to cut to the chase and read *Hicks* to abrogate the doctrine. Just as Justice Scalia balanced the tribal interest in self-government against the state's interest to investigate crimes committed off the reservation,<sup>290</sup> courts may similarly find in favor of a state's interest to collect withheld taxes, to categorically rule in favor of unilateral criminal enforcement on tribal lands.

The district court and Panel decision also read *Hicks*' grant of unilateral state police power to authorize seizure of contraband cigarettes on tribal lands, a question left unanswered by *Colville*. Thus, under *Hicks*, a court could extend *Colville*'s approval of off-reservation seizures of contraband, to include seizures on tribal lands. Both of these consequences of *Hicks* are contemplated in the lower court decisions in *Narragansett III*, and are only tempered, not expressly disapproved of, by the First Circuit Court of Appeals majority en banc. It is therefore important to limit *Hicks* to its facts, and the primary issue of tribal court jurisdiction over state officials investigating off-reservation crime on tribal lands.

Professor Alex Tallchief Skibine has argued that the Supreme Court's decision in *Hicks* should be "distinguished and limited to the factual circumstances of the case."<sup>291</sup>

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<sup>285</sup> *Id.* at 362.

<sup>286</sup> *Id.* at 363.

<sup>287</sup> *Id.* at 362.

<sup>288</sup> *See generally* Narragansett Indian Tribe of Rhode Island v. Rhode Island (*Narragansett I*), 296 F. Supp. 2d 153 (D.R.I. 2003).

<sup>289</sup> *See generally* Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc., 523 U.S. 751 (1998).

<sup>290</sup> Alex Tallchief Skibine, *Making Sense Out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 348, 359 (2001) (arguing that under federalist canons of construction the Court's *Hicks* decision is inapplicable to reservations established by treaties, and that the decision is limited to the "denial of tribal jurisdiction over the conduct of state officers conducting official state business on Indian land").

<sup>291</sup> *Id.* at 348.

The majority en banc in *Narragansett III*, apparently recognized the impropriety of directly applying *Hicks* to thwart a tribe's immunity under the facts of the case, and possibly foresaw the far-reaching implications of its effect on the doctrine as a whole. For example, the facts in *Hicks* are wholly distinguishable from the circumstances attending the Narragansett Indian Tribe raid. First, the activity in *Narragansett III* occurred on the reservation and was conducted by the tribal government itself. Second, in *Hicks*, Nevada law enforcement worked cooperatively with tribal law enforcement, and even though Justice Scalia suggests such a course was unnecessary,<sup>292</sup> it sufficiently distinguishes *Hicks* from the present case where tribal law enforcement could not practically cooperate in a search and seizure of its own government. Thus, the Supreme Court's decision in *Hicks* is inapplicable to the present case, and should be left to cases possessing analogous facts and circumstances.

Again, even the broad language in *Hicks* taken to its logical conclusion, fails to defeat the distinction, stated in *Potawatomi* and *Kiowa Tribe*, between tribal sovereign authority to repel state "law" from its borders, and the non-interchangeable concept of tribal sovereign immunity from "enforcement" of those laws against the tribal government. The attempt to read *Hicks* and *Colville* to mean state law enforcement can rain down within tribal lands, simply because the lands are subject to state law, goes directly against *Kiowa Tribe*, *Potawatomi*, and *Colville* itself. As even Justice Scalia recognized, the Supreme Court, in *Colville*, reserved the question of whether the right to tax the tribe and seize cigarettes en route to the reservation included the authority to enter the tribal lands and seize the cigarettes directly from the tribe.<sup>293</sup> Notwithstanding the fact Justice Scalia explicitly declared that *Colville* did not address the state's ability to seize cigarettes from the tribe, he stated that "several of our opinions point in that direction."<sup>294</sup> However, the Supreme Court, in *Colville*, refused to address the question of state seizure on tribal lands,<sup>295</sup> and based its decision to uphold the state's action on the off-reservation location of the seizure.<sup>296</sup> Justice Scalia's statement is further puzzling in light of the Supreme Court's later discussion of off-reservation seizures. In *Potawatomi*, the Supreme Court characterized off-reservation seizures of contraband cigarettes, as a measure aimed at cigarette wholesalers, not tribes.<sup>297</sup> Thus, *Colville* and *Potawatomi* indicate a limitation on state law enforcement to confiscations of contraband cigarettes outside of tribal lands, primarily because core tribal interests are not implicated by such seizures.

As discussed above, *Hicks* should be limited to its facts and have no effect upon a tribe's immunity from state criminal process. But, at the same time, a state's interest in collecting improperly-withheld taxes must also be given weight. Accordingly, Congress

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<sup>292</sup> *Hicks*, 533 U.S. at 363.

<sup>293</sup> *Id.* at 362-63.

<sup>294</sup> *Id.* at 363.

<sup>295</sup> *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162 (1980).

<sup>296</sup> *Id.* ("It is significant that these seizures [took] place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries.") (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)).

<sup>297</sup> *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, (citations omitted) or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores.") (citing *Colville*, 447 U.S. at 161-62).

should step in, as advised in *Kiowa Tribe*, and enact legislation aimed at resolving this specific tax enforcement dispute at issue in the present case. While the statutory scheme proposed in this paper is most readily applicable to the facts of Narragansett Indian Tribe and Rhode Island, it might be used as a model for addressing tribal immunity and state enforcement under other circumstances—e.g., civil regulatory investigations.

#### IV. PROPOSED CONGRESSIONAL STATUTORY SCHEME

Although tribal sovereign immunity protects the Tribe from enforcement of the state’s criminal process on settlement lands, Rhode Island has a significant interest in enforcing its criminal cigarette tax laws against the Tribe.<sup>298</sup> Thus, there is a need to deal with this situation in a manner that provides a positive result for both state and tribe. In the present case, Rhode Island refused to explore alternative avenues of enforcement.<sup>299</sup> Some of these alternatives include: seizing the contraband en route to the reservation, as in *Colville*;<sup>300</sup> filing an Ex parte *Young*<sup>301</sup> action against one of the tribal officials for violating the Settlement Act; negotiating a “mutually satisfactory regime for the collection of [the cigarette] excise tax,”<sup>302</sup> or collection of cigarette excise taxes from the non-Indian cigarette wholesalers by a state tax assessment.

The facts of *Narragansett III* demonstrate there are instances where states and tribes refuse to or cannot diplomatically resolve these disputes. Accordingly, Congress should enact a statute authorizing a limited waiver of tribal sovereign immunity. Under the Proposed Act, tribes would first have an incentive to voluntarily waive immunity from state action to enforce cigarette tax laws. If such a course fails, the Act would limit aspects of the tribes’ sovereign immunity, in cases where states have a valid interest and authority to tax tribal lands. While tribes may at first be adverse to any sort of abrogation of sovereign immunity, the underlying purpose of the Act would act to promote tribal-state cooperative agreements, or in the alternative, federally-supervised state action to enforce criminal cigarette tax laws.

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<sup>298</sup> See generally Jonathan I. Sirois, *Remote Vendor Cigarette Sales, Tribal Sovereignty, and the Jenkins Act: Can I Get a Remedy?*, 42 DUQ. L. REV. 27, 34-40 (2003) (discussing the increasing sales of tax-free cigarettes over the Internet by traders based on federally-recognized tribal lands, but providing analysis of the public policy behind state cigarette excise taxes and the cost to the states of when they are improperly withheld).

<sup>299</sup> *Narragansett Indian Tribe v. Rhode Island (Narragansett III)*, 449 F.3d 16, 38 (Lipez, J., dissenting), 44-45 (Torruella, J., dissenting) (1st Cir. 2006) (en banc), cert. denied, 127 S. Ct. 673 (November 27, 2006).

<sup>300</sup> See generally *Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881 (6th Cir. 2007) (holding that Michigan’s search and seizure of contraband cigarettes sent to a tribe by mail did not violate its sovereign immunity); cf. *Thunderbird Trading Post, Inc. v. U.S. Bureau of Alcohol, Tobacco & Firearms*, 2007 WL 1128810 (W.D. Wash. April 16, 2007) (holding that the federal Contraband Cigarette Trafficking Act applied to tribal organization because it violated Washington state’s cigarette tax laws and the quantity exceeded 60,000).

<sup>301</sup> 209 U.S. 123, 159 (1908) (validating a suit against a state official acting pursuant to an allegedly unconstitutional statute, and holding that such a suit does not violate the state’s sovereign immunity). This doctrine has been extended to tribal officials acting in violation of federal law. See *Narragansett III*, 449 F.3d at 39.

<sup>302</sup> *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991); see *Narragansett III*, 449 F.3d at 45 (Torruella, J., dissenting).

a. *Plenary Power of Congress Over Indian Affairs*

The relationship between Indian tribes and the United States government “[i]n its narrowest and most concrete sense, . . . approximates that of trustee and beneficiary, with the trustee (the United States) subject to legally enforceable responsibilities.”<sup>303</sup> Conceptually, the Trust Relationship Doctrine was founded upon Chief Justice John Marshall’s characterization of Indian tribes as “domestic dependent nations,” in a “state of pupillage,” whose relationship “to the United States resemble[d] that of a ward to his guardian.”<sup>304</sup> Later, the Supreme Court in *United States v. Kagama*,<sup>305</sup> recognized a fiduciary duty to protect Indian tribes from state encroachment, along with the duty’s corollary power.<sup>306</sup> Finally, the Supreme Court, in *Lone Wolf v. Hitchcock*,<sup>307</sup> definitively held that the trust relationship gave Congress the plenary authority to regulate and control Indian affairs.<sup>308</sup> As Canby notes, “where Congress was concerned, the trust responsibility had become far more of a sword for the government, than a shield for the tribes.”<sup>309</sup>

Using its plenary power, Congress has consistently passed legislation to facilitate tribal self-determination and economic development.<sup>310</sup> Furthermore, the Executive has strongly encouraged forging government-to-government relations between Indian tribes and other political entities.<sup>311</sup> In *Nevada v. Hicks*, state and tribal law enforcement worked collectively to enforce a search warrant on the reservation of a member’s home.<sup>312</sup> However, in the present situation, it is highly unlikely the tribal government would authorize or collude in the search and seizure of its own property. Accordingly, Congress needs to step in and facilitate the Executive’s government-to-government

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<sup>303</sup> CANBY, *supra* note 2, at 34.

<sup>304</sup> *Id.* at 36 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)).

<sup>305</sup> 118 U.S. 375 (1886).

<sup>306</sup> *Id.* at 384-85. In *United States v. Kagama*, the Supreme Court upheld the Major Crimes Act, which subjected specific crimes committed within Indian country, by either Indian or non-Indian, to federal prosecution. This power, the Court suggested, stemmed from the federal government’s unique relationship with the tribes, which necessitated the government’s protection of tribes from State encroachment. See CANBY, *supra* note 2, at 37.

<sup>307</sup> 187 U.S. 553 (1903).

<sup>308</sup> *Id.* at 564-65 (“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 CANBY, *supra* note 2, at 38; see also COHEN, *supra* note 1, at 398 (§ 5.02[1]).

<sup>309</sup> CANBY, *supra* note 2, at 38.

<sup>310</sup> The era of tribal self-determination began in 1968, with the passage of the Indian Civil Rights Act of 1968 (ICRA). 82 Stat. 77, codified in 25 U.S.C. § 1301; see CANBY, *supra* note 2, at 29. The ICRA imposed upon the tribes most of the protections provided by the constitutional Bill of Rights, such as free speech, the free exercise of religion, due process, and the equal protection of laws. CANBY, *supra* note 2, at 29. In 1970, President Richard M. Nixon pronounced that the termination policy had been a failure, appealed to Congress to repeal the policy, and to adopt legislation permitting self-management of tribal affairs. See generally CANBY, *supra* note 2, at 30-31, 32 (discussing various legislation geared toward tribal self-determination and economic development).

<sup>311</sup> See 59 Fed. Reg. 22951 (1994); 65 Fed. Reg. 67249 (2000); 67 Fed. Reg. 67773 (2002); see generally CANBY, *supra* note 2, at 32 (discussing recent Executive policies within the last quarter-century favoring tribal self-determination and government-to-government discourse).

<sup>312</sup> *Nevada v. Hicks*, 533 U.S. 353, 356 (2001).

policy by adopting legislation honoring the Narragansett Tribe's sovereignty and Rhode Island's interest in enforcement of its tax laws.<sup>313</sup>

*b. Proposed Statutory Framework*

i. Section One: Limited Tribal Waiver – Good Faith Negotiations for a Tribal-State Cooperative Cigarette Tax and Law Enforcement Agreement

Any statute addressing tribal sovereign immunity should contain, as a threshold matter, a provision enabling and encouraging tribes to clearly waive immunity to state criminal process.<sup>314</sup> Doing so should promote efficient law enforcement, respect tribal sovereign immunity, and forge stronger ties between tribe and state.<sup>315</sup>

Section One of the Proposed Act should contain a clause allowing for a tribe's express, consensual waiver of immunity from state criminal process, narrowly related to enforcement of properly-applied cigarette tax laws.<sup>316</sup> To ensure consistency and fairness,<sup>317</sup> the clause should require the tribe's express waiver to be embodied in a federally-approved tribal-state cooperative agreement.<sup>318</sup> Specifically, the first clause should provide both the state and tribe an opportunity to negotiate and set terms respective of each other's interests.<sup>319</sup> The cooperative agreements should be required to contain both a tax scheme agreement and law enforcement provisions, and these sections should be consistent with one another. States and tribes alike may then adopt enabling legislation to honor the agreement.<sup>320</sup> Neither the tribe's ability to waive its immunity,

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<sup>313</sup> For a discussion of the federal trust obligation's relation to tribal sovereign immunity, see Seielstad, *supra* note 110, at 737-38.

<sup>314</sup> See generally Monson, *supra* note 1, at 292-93 (discussing a tribe's ability to waive its sovereign immunity to criminal process) (quoting *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992) (“[A tribe] waive[s] its immunity as to relevant [evidence] . . . by voluntarily providing the Government with [evidence] relevant to the case.”)).

<sup>315</sup> Monson, *supra* note 1, at 292 (noting that the “availability of tribal consent will serve as a strong incentive for law enforcement to increase cooperation with tribal authorities, improving the strained relationship between Indian tribes and state and federal agencies”).

<sup>316</sup> See *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (“Suits against Indian tribe are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“[A] waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’”) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

<sup>317</sup> See *Potawatomi*, 498 U.S. at 514 (noting the viability of state and tribe entering into agreements to adopt “mutually satisfactory regime[s] for the collection of [taxes]”); see also Monson, *supra* note 1, at 292 (noting that tribal consent will increase cooperation between state and tribal law authorities).

<sup>318</sup> Multiple states have also adopted legislation addressing cooperative law enforcement with tribes on tribal lands. See, e.g., CAL. PENAL CODE §§ 830.1, 830.6, 832.6 (West 2007); FLA. STAT. ch. 285.18 (2007); MINN. STAT. § 626.93 (2007); MONT. CODE ANN. § 18-11-04 (2007); N.M. STAT. ANN. § 29-1-11 (West 2007); S.C. CODE ANN. § 27-16-70 (2007); see also Alan D. Cohn, *Mutual Aid: Intergovernmental Agreements for Emergency Preparedness and Response*, 37 URB. LAW. 1, 37 n. 161 (2005).

<sup>319</sup> For a discussion of the impact of tribal sovereign immunity on a state's ability to collect taxes, see Seielstad, *supra* note 110, at 734-35.

<sup>320</sup> For a discussion of state-tribal cooperative law enforcement and specific enabling legislation, see Oliver Kim, *When Things Fall Apart: Liabilities and Limitations of Compacts Between State and Tribal*

nor the state's option to initiate negotiations, would be conclusive or binding against either sovereign.<sup>321</sup> Both mechanisms would exist first and foremost to promote negotiations of tribal-state agreements concerning tax enforcement protocol on tribal lands.

As alluded to above, in many instances, state and tribal cooperation concerning law enforcement has been utilized—such as in *Hicks*<sup>322</sup> but more rigorous negotiation and diplomacy would certainly be needed to forge an agreement aimed at circumstances similar to the Narragansett Indian Tribe context. Hopefully, this first provision would provide both sovereigns an attempt to trigger talks leading to a state-tribal law enforcement cooperative agreement.

Section One of the Proposed Act would also adhere to the requirement that tribal waivers be express and unequivocal, because any waiver or consent to process would be embodied both in a cooperative agreement and quite probably enabling state and federal legislation.<sup>323</sup> Thus, a tribe's sovereign immunity would be protected; but should it be politically wise or feasible to waive immunity from criminal process *quid pro quo*, or at least specify instances where cooperation is warranted, a tribe would have a federal statutory measure to do so. Tribes' interests would be further protected by the likelihood these agreements would often be ratified by consistent federal legislation. Thus, a forum would exist for any disgruntled tribes to address grievances in a congressional hearing preceding enactment.

Congress would in effect be refuting Justice Scalia's advice that states need not obtain tribal consent or enter an agreement to enforce its process on tribal lands.<sup>324</sup> This makes sense, because it conforms to the federal policy of interacting with tribes on a government-to-government basis,<sup>325</sup> and substantially limits *Hick*'s rather broad and disingenuous grant of state authority to unilaterally execute its criminal process on tribal lands.<sup>326</sup> To clarify, under the Proposed Act, enforcement of a state's criminal process on tribal lands against individual Indians, for conduct arising off-reservation, would still be governed by the Supreme Court's decision in *Hicks*. But, hopefully, Section One of the Proposed Act would hedge the potential reach of Justice Scalia's language in *Hicks*.

ii. Section Two: Exhaustion of Alternative Enforcement Remedies: Good Faith Requirement of States

When either seeking to sue to collect taxes, or seize unstamped contraband cigarettes on tribal lands, states have often complained that paying lip service to both tribal sovereign immunity and a state's ability to tax reservation sales of cigarettes to

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*Governments*, 26 HAMLINE L. REV. 48, 50-51 (2002) (discussing state-tribal law enforcement compacts between tribes and Minnesota, a Public Law 280 state).

<sup>321</sup> See generally *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that states must initially consent to suit by tribes under the IGRA).

<sup>322</sup> *Nevada v. Hicks*, 533 U.S. 353, 356 (2001).

<sup>323</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

<sup>324</sup> See *Hicks*, 533 U.S. at 360-66.

<sup>325</sup> See generally CANBY, *supra* note 2, at 32 (discussing recent Executive policies within the last quarter-century favoring tribal self-determination and government-to-government discourse).

<sup>326</sup> *Hicks*, 533 U.S. at 366.

non-Indians, gives states a “right without a remedy.”<sup>327</sup> However, Rhode Island and all other states have alternatives available to enforce their cigarette tax scheme.<sup>328</sup> Instead of choosing the “confrontational alternative of a Rambo-like raid, totally invasive of . . . core tribal interests,”<sup>329</sup> states may elect to: (a) hold individual tribal officers or agents liable in actions by the state;<sup>330</sup> (b) collect cigarette sales taxes directly from wholesalers by seizing cigarettes en route to the reservation;<sup>331</sup> (c) assess wholesalers providing unstamped cigarettes to tribal smoke shops; (d) enter an agreement with the tribe to “adopt a mutually satisfactory regime” for collection of the tax;<sup>332</sup> or (e) petition Congress for “specific abrogation of tribal sovereignty.”<sup>333</sup>

Section Two codifies the Supreme Court’s recognition of alternative remedies available to states in *Potawatomi*,<sup>334</sup> by requiring a good faith attempt to implement such measures without intruding on core tribal interests. The measures contemplated by the Proposed Act would not be exhaustive, and Section Two would be subordinated by Section One’s threshold requirement to facilitate a good faith negotiation of tribal-state cooperative agreements.

For instance, Rhode Island could have sought an injunction against a tribal official, such as the Chief Sachem, for violating Section 1708(a)’s grant of taxing authority over cigarette sales to non-Indians on the settlement lands.<sup>335</sup> The Supreme Court, in *Potawatomi*, suggested an injunction against tribal officials for damages in an action brought by the state would be appropriate.<sup>336</sup> Additionally, the Supreme Court and multiple Circuit Courts of Appeal have consistently authorized similar suits against tribal officials for violating federal law.<sup>337</sup> This mechanism should be fashioned as an equitable relief clause, authorizing an injunctive remedy against any relevant tribal officials, when violating an express congressional grant of jurisdiction to the State over tribal lands. Such a proceeding will prospectively address a state’s interest in collecting taxes on items

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<sup>327</sup> *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991); *see* *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (suggesting that seizure of untaxed cigarettes en route to reservation was appropriate because it did not “unnecessarily intrud[e] on core tribal interests,” and refusing to address whether state law enforcement could likewise enter the reservation and seize the cigarettes directly from the tribe).

<sup>328</sup> *Narragansett Indian Tribe of Rhode Island v. Rhode Island (Narragansett III)*, 449 F.3d 16, 38 (Lipez, J., dissenting), 45 (Torruella, J., dissenting) (1st Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 673 (November 27, 2006).

<sup>329</sup> *Id.* at 45 (Torruella, J., dissenting).

<sup>330</sup> *See Ex parte Young*, 209 U.S. 123, 159 (1908); *see* *Jennings v. Jones*, 479 F.3d 110 (1st Cir. 2007) (involving § 1983 claim by one of the arrestees of the Narragansett Tribal smoke shop raid, seeking damages for excessive use of force and battery), *rehearing granted and opinion withdrawn*, 499 F.3d 2 (1st Cir. 2007).

<sup>331</sup> *Colville*, 447 U.S. at 161-62.

<sup>332</sup> *Narragansett III*, 449 F.3d at 45 (citing *Potawatomi*, 498 U.S. at 514).

<sup>333</sup> *Id.*

<sup>334</sup> *Potawatomi*, 498 U.S. at 514.

<sup>335</sup> *Narragansett III*, 449 F.3d at 38 (Lipez, J., dissenting).

<sup>336</sup> *Potawatomi*, 498 U.S. at 514 (“We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State.”).

<sup>337</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (noting that suit against a tribal official could proceed, even though the tribe itself enjoyed immunity from suit); *see* *Dawavendewa v. Salt River Project Agric. Improv. & Power Dist.*, 276 F.3d 1150, 1159-60 (9th Cir. 2002); *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 256-57 (8th Cir. 1995); *Tamiami Partners v. Miccosukee Tribe of Florida*, 63 F.3d 1030, 1050-51 (11th Cir. 1995).

sold to non-Indians on tribal lands, and will inject the matter into the federal courts in the initial phases of any potential dispute.<sup>338</sup>

In the present case, were the Proposed Act in place, Rhode Island would have been under an obligation to take the *Ex parte Young* route, before initiating any sort of raid against the Narragansett Indian Tribe.<sup>339</sup> For example, the state search warrant was procured on the smoke shop's first day of business.<sup>340</sup> While the actual raid occurred two days later, the state police officer who swore out the warrant stated he knew about the Tribe's plan to sell "tax-free" cigarettes for weeks.<sup>341</sup> Thus, promoting an *Ex parte Young* action through a statutory scheme would have realized Rhode Island's interest in collecting unpaid taxes, and placed the matter in the federal courts where "it could have been decided in peaceful fashion, according to the federal legal principles that govern Indian law."<sup>342</sup> Implementing *Ex parte Young* relief to states would thus keep these actions out of state courts, and place them in federal courts, necessarily experienced in matters of federal Indian law.

As in the present case, if the state simply refuses to seek enjoining tribal officials pursuant to *Ex parte Young*—even though feasible— it will be prohibited from advancing onto Section Three relief. However, if injunctive relief cannot reasonably be pursued— i.e., where the contraband cigarettes are already present on tribal lands— a state's interest to collect unpaid taxes might be advanced through a federally-supervised proceeding designed to order a state search and seizure of contraband cigarettes on tribal lands. A neutral, federal magistrate judge would issue the Section Three order, only after notice and an opportunity to appear has been provided to the tribe, and the state has satisfied its burden of proof.

### iii. Section Three: Federally Supervised Proceeding to Warrant State Search of Tribal Lands

Section Three of the Proposed Act allows a state, under limited circumstances, to enforce its criminal process on tribal lands to seize untaxed contraband cigarettes. Section Three of the Proposed Act closely resembles the current Contraband Cigarette Trafficking Act (CCTA).<sup>343</sup> Under the CCTA, Bureau of Alcohol, Tobacco, and Firearms (ATF) agents can obtain a Federal search warrant, enter a reservation, and seize contraband cigarettes.<sup>344</sup> In order to trigger the CCTA, a state cigarette tax law needs to have been violated,<sup>345</sup> and the quantity of cigarettes must exceed 10,000.<sup>346</sup> In the present case, Rhode Island's cigarette tax laws applied to the Tribe, and the Tribe violated those laws by not affixing tax stamps to its cigarette packages.<sup>347</sup> Accordingly,

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<sup>338</sup> *Narragansett III*, 449 F.3d at 38 (Lipez, J., dissenting).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 38-39 (Lipez, J., dissenting).

<sup>343</sup> 18 U.S.C. §§ 2341-2346 (2007).

<sup>344</sup> *Id.* The CCTA applies to Indian traders. *See* *United States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995).

<sup>345</sup> *United States v. Gord*, 77 F.3d 1192, 1193 (9th Cir. 1996) ("A violation of the state cigarette tax law is a predicate to a CCTA violation.").

<sup>346</sup> 18 U.S.C. § 2341(2) (2007).

<sup>347</sup> *See generally* *Narragansett III*, 449 F. 3d at 18-31.

if the contraband cigarettes—in excess of 10,000— were shipped interstate, and the ATF had investigated the activity, the CCTA might have been used to prosecute the Tribe.

Alternatively, the Proposed Act would authorize states to investigate and prosecute lesser violations of its tax laws, similar to the CCTA. In addition, if ATF refuses to act under the CCTA, the state should be able to step in under the Proposed Act. As an initial matter, the state must demonstrate a violation of its cigarette tax law—which means the criminal tax law would have to apply to the tribe in the first instance. Instead of a magistrate judge issuing a search warrant to the ATF, he or she would authorize a similarly narrow order to state authorities permitting a state search of tribal lands and seizure of contraband cigarettes.<sup>348</sup> The search order must be limited to a search reasonably related to the contraband cigarettes—i.e., the tribal smoke shop. Because of the tribe’s interest against state encroachment, the burden of proof should be higher than the probable cause standard required for a search warrant application. Additionally, instead of the usual *ex parte* request for a search warrant, Section Three should require a proceeding whereby the tribe and any related federal agency would be given notice of the proposed order, and an opportunity to be heard. Such dual notice will comport with constitutional due process, and will also provide additional notice to interested federal agencies—i.e., BIA— in case the tribe fails or refuses to protect its own interests.

Pursuant to the CCTA, issuance of a federal warrant necessarily requires a determination by the magistrate that a state cigarette tax law has been violated.<sup>349</sup> Furthermore, the warrant’s application must contain substantial evidence that the quantity requirement has been met.<sup>350</sup> Similarly, Section Three of the Proposed Act should require the same criteria to be met during the federal magistrate proceeding. First, the state law enforcement agency must demonstrate that (a) a state’s criminal cigarette tax laws actually apply to the tribe; and (b) the tribe’s activity violates those laws.<sup>351</sup> Because of the federal government’s duty to protect against state encroachment,<sup>352</sup> the evidentiary standard of the Proposed Act should exceed that required for an ordinary search warrant. Thus, instead of a probable cause standard, state authorities must demonstrate jurisdiction and violation of its cigarette tax laws by a preponderance of the evidence. Such a standard should protect against unwarranted enforcement of state criminal tax laws on tribal lands. Second, as under the CCTA, state authorities must produce substantial evidence that the minimum quantity of “contraband” cigarettes has

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<sup>348</sup> The federal order should describe the evidence addressed in the magistrate proceeding with particularity, and also refer to proof provided by any tribe or representative federal agency. The order should further relate such evidence to the order’s scope of search and seizure. Exceeding the scope of the federal search and seizure order should result in the State being held in contempt, and Congress may even consider including a tribe’s right to sue the State for such a violation.

<sup>349</sup> 18 U.S.C. § 2341(2) (2007).

<sup>350</sup> *Id.*

<sup>351</sup> In the present case, Rhode Island would have to prove by a preponderance of the evidence that (a) Rhode Island cigarette tax laws applied specifically to the Narragansett Indian Tribe; (b) that the Tribe was violating those laws; and (c) that the amount of cigarettes possessed by the Tribe for sale to non-Indians exceeded the minimum stated in the Section Three of the Proposed Act.

<sup>352</sup> *See generally* COHEN, *supra* note 1, at 499-510 (§ 6.01[1]-[3]) (discussing subordination of state authority over Indian country and tribes under Congress’ plenary power over Indian affairs).

been exceeded.<sup>353</sup> Finally, Section Three would address the tribe's inherent sovereignty and sovereign immunity, by providing the additional safeguards of providing notice to a federal agency like the Bureau of Indian Affairs, and the tribe's opportunity to challenge the magistrate's order before the search and seizure occurs. Notice and opportunity will likely prevent any unneeded invasion of core tribal interests, while at the same time honoring valid claims by state authorities.

## CONCLUSION

When Rhode Island was deciding which course to take concerning the Narragansett Indian Tribe's refusal to affix tax stamps on its inventory of cigarettes for sale, it might have seemed the State had a "right without a remedy." The State chose a physical path, over the non-violent, diplomatic enforcement remedies available to it. The facts of the present case are similar to a host of other Eastern tribes and states, whose history involves the passage of varying Indian Claims Settlement Act. To follow the First Circuit Court of Appeals' holding places all of those tribes at risk of having their reservation borders infiltrated by state law enforcement. Furthermore, the decision casts a shadow over the entire doctrine of tribal sovereign immunity under *Kiowa Tribe*. The First Circuit demonstrates the possible trend toward abrogation of tribal immunity, with Justice Scalia's opinion in *Hicks* being the means to do so. To avoid this result, courts should look instead to the leading cases addressing tribal sovereign immunity, and limit *Hicks* to its narrow set of facts. Furthermore, to avoid the kind of encounter that took place between the Narragansett Indian Tribe and Rhode Island, Congress should adopt the Proposed Act outlined in this paper. In doing so, Congress can protect the sovereign interests of both state and Tribe, and also provide an effective mechanism for states to collect improperly withheld cigarette taxes.

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<sup>353</sup> It is not necessary for purposes of this paper to determine the minimum quantity of contraband cigarettes that will trigger the magistrate proceeding. Congress should compile a record and findings relative to the amount of cigarettes, which substantially invokes the interest of States to collect unpaid cigarette taxes.