

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES  
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Supplementary Material

Chapter 11: The Contemporary Era – Equality/Native Americans

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**State v. Madsen, 760 N.W.2d 370 (S.D. 2009)**

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*Harry Madsen was a guest at the Royal River Casino Hotel, which is operated by the Flandreau Santee Sioux Tribe on Native American lands. On January 13, 2007, Robert Long Crow, a security guard employed by the hotel, discovered marijuana while he conducted a warrantless search of Madsen's room. Long Crow handcuffed Madsen and called the local police. The local police obtained a warrant for a more extensive search of Madsen's room. During that search they discovered more marijuana, other drugs, and drug paraphernalia. Madsen's pretrial motion to suppress all this evidence was rejected. He was subsequently convicted and sentenced to three years in prison. Madsen appealed that decision to the Supreme Court of South Dakota, claiming that the search violated his rights under the Fourth Amendment and the Indian Civil Rights Act.*

*The South Dakota Supreme Court unanimously ruled that Long Crow violated Madsen's rights. Chief Justice Gilbertson's unanimous opinion asserted that the Indian Civil Rights Act should be interpreted consistently with the Fourth Amendment and that Long Crow was a state actor. Other state courts have similarly interpreted the right against unreasonable searches in the Indian Bill of Rights as protecting the same rights as the analogous clause in the Fourth Amendment. What reasons does Gilbertson give for reaching those conclusions? Are those reasons sound? Might some provisions in the Indian Civil Rights Act receive a different interpretation than the analogous constitutional provision in the Bill of Rights?*

CHIEF JUSTICE GILBERTSON, delivered the opinion of the Court.

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The Indian Civil Rights Act provides in relevant part:

No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized[.]

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The Fourth Amendment typically does not directly govern the conduct of tribal officials in Indian country. However, tribal power to investigate violations in Indian country is constrained by the limits contained in the Indian Civil Rights Act, which was enacted to secure the right to be free of arbitrary and unjust actions by tribal governments. Additionally, the Indian Civil Rights Act has been extended to protect the rights of non-Indians while on tribal lands from unreasonable searches and seizures by tribal government.

Several courts have addressed the issue of whether a search and seizure conducted by tribal government is subject to the same reasonableness standard embodied in the Fourth Amendment by virtue of the Indian Civil Rights Act. Any such . . . detention is subject to the reasonableness standard embodied in the Fourth Amendment by virtue of the Indian Civil Rights Act and Fourth Amendment case law is applied to the particular alleged violation. These courts generally assumed that the Fourth

Amendment's exclusionary rule applied when tribal government violated the reasonableness limitation in the Indian Civil Rights Act . . . , but did not provide any analysis for their supposition.

[T]he language of the Indian Civil Right Act, enacted in 1968, is almost identical to the language of the Fourth Amendment, and "thus evidences a congressional intent to extend, as against the Indian tribes, 'the security of one's privacy against arbitrary intrusions by the police – which is at the core of the Fourth Amendment.'" The legislative history of the Indian Civil Rights Act lends support to this proposition. "A central purpose of the Indian Civil Rights Act was to 'secure for the American Indian . . . the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" . . .

[A]t the time of the enactment of the Indian Civil Rights Act in 1968, the United States Supreme Court had previously held in 1961 in *Mapp v. Ohio* (1961) that "the exclusionary rule was 'part and parcel of the Fourth Amendment's limitation upon governmental encroachment of individual privacy' and 'an essential part of both the Fourth and Fourteenth Amendments.'" The enactment of the Indian Civil Rights Act against the backdrop of *Mapp* evidences congressional intent to graft the Fourth Amendment exclusionary rule onto [that measure]. Thus, we are required to review a trial court's ruling on a motion to suppress evidence seized in violation of the Indian Civil Rights Act under Fourth Amendment case law, including application of the exclusionary rule.

Given that the exclusionary rule applies to the Indian Civil Rights Act, we next must determine whether the Tribe was engaged in "exercising powers of self government" as it pertains to Long Crow and the security guards when they conducted the search of Madsen's hotel suite. . . .

[T]he Flandreau Santee Sioux Tribe operates its casino under the provisions of the Indian Gaming Regulation on trust land. . . . As such, it is the Tribe's responsibility to conduct its gaming operations in compliance with Indian Gaming Regulation, which requires, among other things, adequate security measures and personnel. . . .

The Casino has implemented policies and procedures to assist security guards with maintaining compliance with the Flandreau Santee Sioux Tribal Gaming Commission's internal regulations, and ensuring casino operations are conducted fairly, cash accounted for accurately, and removing any "agent" from the property who presents a security risk. In addition to duties pertaining to casino operations, security guards also provides safety and security services at the Tribe's adjacent hotel property. The Casino's policies and procedures state that security guards are not permitted to search a casino guest or a guest's hotel room, or to conduct an arrest. Instead, security guards may detain guests suspected of criminal conduct and contact local law enforcement officers who will determine and conduct any arrest or search that may be necessary. Based on these facts, regulations, policies and procedures, we conclude that the security guards were employed by the Tribe in its exercise of powers of self government as it relates to its lawful operation of its gaming operation under Indian Gaming Regulation.

. . . Long Crow and the security guards were Tribal government actors by virtue of their status as employees of the Tribal casino operation, a distinctly Tribal governmental operation by virtue of Indian Gaming Regulation Act. While it is undisputed that Long Crow and the security guards were not employed by the Tribe as law enforcement officers, they were employed in a civil capacity to provide safety and security services for the gaming operation on Tribal land. As such, their actions when conducting searches and seizures were subject to the constraints of the Fourth Amendment, including the exclusionary rule, as embodied in the Indian Civil Rights Act.