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## CIVIL RIGHTS NOTES: AMERICAN INDIANS AND BANISHMENT, JURY TRIALS, AND THE DOCTRINE OF LENITY

Grant Christensen \*

If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who never were Indians and never expect to be Indians fight for the cause of Indian self-government, we are fighting for something that is not limited by the accidents of race and creed and birth; we are fighting for . . . the integrity or salvation of our own souls.

—Felix S. Cohen<sup>1</sup>

### INTRODUCTION

Felix Cohen is widely accepted as the father of modern Indian law.<sup>2</sup> In perhaps his most oft-quoted observation, he compared the country's treatment of American Indians to the miner's canary, noting that how our society treats Indians is an ultimate reflection on our own values, and a warning of the potential decay in civil society: "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."<sup>3</sup>

Consider the core democratic ideals embodied by citizenship and voting rights. While the U.S. Constitution initially treated "all other persons" (i.e., slaves) as three-fifths of a person for purposes of the appropriation of seats in Congress, Indians

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<sup>1</sup> Felix S. Cohen, *Indian Self Government*, in RED POWER: THE AMERICAN INDIANS' FIGHT FOR FREEDOM 74 (Alvin M. Josephy, Jr., Joane Nagel & Troy Johnson 2d eds., 1999).

<sup>2</sup> Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 357 (2008); see Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 649–50 (2006) (discussing the seminal importance of Felix Cohen and his *Handbook of Federal Indian Law*).

<sup>3</sup> Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

were not treated as people at all.<sup>4</sup> After the Civil War, when Congress amended the Constitution to eliminate the three-fifths provision, it explicitly chose to keep the language “excluding Indians not taxed,”<sup>5</sup> and thereby reaffirmed Indians’ constitutionally inferior status.<sup>6</sup> While the Fourteenth Amendment purported to extend citizenship to “[a]ll persons born or naturalized in the United States,”<sup>7</sup> and the Fifteenth Amendment granted all “citizens of the United States” the right to vote,<sup>8</sup> both provisions excluded Indians from their respective definitions of “person” and “citizen.” In *Elk v. Wilkins*,<sup>9</sup> the United States Supreme Court affirmed these exclusions, reasoning that Indians born in the United States are loyal first to their tribe and not the federal government, and therefore are not “subject to the jurisdiction thereof” as required by the Fourteenth Amendment’s birthright-citizenship clause.<sup>10</sup> Because

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<sup>4</sup> U.S. CONST. art. I, § 2 cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and *excluding Indians not taxed*, three fifths of all other Persons.”) (emphasis added).

<sup>5</sup> *Id.* amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed*.”) (emphasis added).

<sup>6</sup> The floor debates on the adoption of the Fourteenth Amendment made clear that, although Congress was willing to reverse the three-fifths compromise, it felt that Indians should still expressly be excluded from legal personhood. Consider Wisconsin Senator Doolittle’s statement: “[T]here is a large mass of the Indian population who are clearly subject to the jurisdiction of the United States who ought not to be included as citizens of the United States . . . [T]he word ‘citizen,’ if applied to them, would bring in all the Digger Indians of California.” CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866). Also consider Michigan Senator Howard’s statement: I am not yet prepared to pass a sweeping act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation, are to become my fellow-citizens and go to the polls and vote with me and hold lands and deal in every other way that a citizen of the United States has a right to do. *Id.* at 2895. Finally, note Oregon Senator Williams’s statement: “I would not agree to this proposed constitutional amendment if I supposed it made Indians not taxed citizens of the United States.” *Id.* at 2897.

<sup>7</sup> U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

<sup>8</sup> *Id.* amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

<sup>9</sup> 112 U.S. 94 (1884).

<sup>10</sup> *Id.* at 99–102 (“Under the Constitution of the United States, as originally established, ‘Indians not taxed’ were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several States . . . . The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States . . . . Indians . . . although in a geographical sense born in the United States, are no more ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government . . . .”).

Indians are not born citizens, the Court continued, the Fifteenth Amendment does not extend to them the right of the ballot.<sup>11</sup> Essentially, despite being the original inhabitants of the land with ancestry dating back thousands of years, American Indians uniquely were not entitled to birthright citizenship.<sup>12</sup> It was not until 1924 that all Indians finally became citizens, and even then the change was reflected by an Act of Congress instead of a reinterpretation of the Constitution's definition of personhood.<sup>13</sup>

Fortunately, the civil rights movement promoted advances in the protection and enforcement of rights of American Indians along with other disenfranchised groups at all levels of government.<sup>14</sup> For example, Lawrence Baca, long-time chair of the Federal Bar Association's Indian Law Section, has commented powerfully on the effect of the Civil Rights Act of 1964:

When I was a child growing up in Southern California, I remember seeing signs in the outlying parts of San Diego County saying "No Indians Allowed" or "No Indians Served." Title II, forbidding discrimination in places of public accommodation, struck down the efficacy of those signs. Under the anti-discrimination provisions of the Civil Rights Act, Indians are a race, and the signs could no longer stand.<sup>15</sup>

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<sup>11</sup> *Id.* at 109 ("The plaintiff, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment, and cannot maintain this action.").

<sup>12</sup> *Id.* at 103 ("[T]he language used, about the same time, by the very Congress which framed the Fourteenth Amendment, in the first section of the Civil Rights Act of April 9, 1866, declaring who shall be citizens of the United States, is 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed.' Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being 'naturalized in the United States,' by or under some treaty or statute." (citation omitted)).

<sup>13</sup> Indian Citizenship Act, 8 U.S.C. § 1401(b), 43 Stat. 253 (1924) (repealed 1972) ("That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."). For a critical discussion of the process by which Indians became citizens, see Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999); Stacy L. Leeds & Erin S. Shirl, *Whose Sovereignty? Tribal Citizenship, Federal Indian Law, and Globalization*, 46 ARIZ. ST. L.J. 89 (2014); Mark Shawhan, "By Virtue of Being Born Here": *Birthright Citizenship and the Civil Rights Act of 1866*, 15 HARV. LATINO L. REV. 1 (2012).

<sup>14</sup> In an early case on Indian rights at the beginning of the civil rights era, the Supreme Court established the now foundational principle of Indian law that, "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

<sup>15</sup> Lawrence R. Baca, *American Indians, the Racial Surprise in the 1964 Civil Rights Act*:

However, Chairman Baca also observed that the Civil Rights Act in other provisions explicitly excludes its application to Indian tribes and businesses, permitting them to discriminate in favor of Indians.<sup>16</sup> The Supreme Court has upheld similar provisions related to hiring and promotion preferences for Indians by divisions of the federal government that work primarily with tribes.<sup>17</sup>

Not only does federal law contain such exemptions, but the Constitution and its attendant Bill of Rights also do not apply to tribal governments when acting on persons on tribal lands.<sup>18</sup> Chief Justice Roberts, in his first Indian-law opinion, remarked, “Tribal sovereignty, it should be remembered, is ‘a sovereignty outside the basic structure of the Constitution.’ The Bill of Rights does not apply to Indian tribes.”<sup>19</sup> Fifty years ago, to ensure that the civil rights of Indian persons were upheld by their respective tribal governments,<sup>20</sup> Congress enacted the Indian Civil Rights Act (ICRA).<sup>21</sup>

This Article examines the application of ICRA on the fiftieth anniversary of its adoption. In preparation for this piece, and to try to evaluate the successes of the Act

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*They May, More Correctly, Perhaps, Be Denominated a Political Group*, 48 *How. L.J.* 971, 974 (2005).

<sup>16</sup> *Id.* at 972–73 (“In the middle of the Civil Rights Act of 1964, in Title VII, which forbids discrimination in employment, states: . . . ‘Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.’ Are you surprised by this provision? Most readers are.”).

<sup>17</sup> *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974) (upholding the Indian Reorganization Act’s hiring and promotion practices for Indians over non-Indians at the Bureau of Indian Affairs on the basis that “this preference does not constitute ‘racial discrimination.’ Indeed, it is not even a ‘racial’ preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups”).

<sup>18</sup> *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008).

<sup>19</sup> *Id.* (quoting *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring)).

<sup>20</sup> For a discussion of the origins and motivations behind ICRA, see Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 *CALIF. L. REV.* 799, 809 (2007) (“The American civil rights movement of the 1960s inspired reformers to transform tribal governments. Senator Sam Ervin of North Carolina led this endeavor, introducing bills in Congress designed to extend constitutional protections to individual Indians via an Indian Bill of Rights. Ervin’s aide, a Lumbee Indian, was partially responsible for inspiring Ervin’s work on the bill. . . . When Ervin learned that the U.S. Bill of Rights did not apply to individual Indians subject to the control of tribal governments, he commented that such a notion was ‘alien to popular concepts of American jurisprudence.’ Ervin thus sought to ensure that tribal governments offered protections to individual Indians similar to those enjoyed by citizens living under federal, state, and local governments.” (citations omitted)).

<sup>21</sup> Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303, 82 Stat. 73 (1968). For a discussion of the limits of ICRA, see Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 *U. COLO. L. REV.* 59, 94 (2013) (“ICRA, merely a federal statute, does not carry the same weight as the United States Constitution and, therefore, provides insufficient protection for nonmembers in tribal court.”).

fifty years later, I have read every ICRA case decided by federal courts in 2017. The final verdict is mixed. Despite fifty years of jurisprudence, new federal circuit splits have emerged on the application of ICRA and the availability of its only remedy, habeas corpus. The intent of this piece is to provide a snapshot of ICRA fifty years on, and to continue to tell the stories of those persons at the center of its controversies.

Part I of this Article provides a short overview of ICRA and its evolution over the last fifty years. Included in this section is a discussion of the seminal Supreme Court case on ICRA, *Santa Clara Pueblo v. Martinez*,<sup>22</sup> in which the Court held that although the tribe's membership provision discriminated against women on the basis of gender, there was no federal remedy available to enforce ICRA's guarantee of equal protection.<sup>23</sup>

Part II discusses the use of ICRA by courts in 2017. It breaks down its observations into three categories to better tell the stories of the persons and rights at the center of ICRA litigation: the right to a jury trial, the availability of a writ of habeas corpus, and the effect of uncounseled convictions in tribal courts. This section gives specific attention to the tension between different courts and the development of a new circuit split that will eventually require redress. Each of the three themes is explored through an observation of relevant case material from 2017 followed by a short commentary on how the cases inform the availability of civil rights for Indian defendants in front of tribal courts.

The last section provides some concluding observations which attempt to suggest a way forward, both to resolve some of the conflicting circuit authority and to continue to protect the rights of individuals from the exigencies of tribal governments. In this final section, ICRA is both praised and criticized. Even fifty years on there is substantial work to do to secure even the basic rights of Indian defendants in some tribal courts.

## I. BASICS OF THE INDIAN CIVIL RIGHTS ACT

It has long been established that, as Chief Justice Roberts wrote so explicitly in *Plains Commerce*, the Constitution does not apply to Indian tribes.<sup>24</sup> As early as

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<sup>22</sup> 436 U.S. 49 (1978).

<sup>23</sup> *Id.* at 56, 59 (“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. . . . Even in matters involving commercial and domestic relations, we have recognized that ‘subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves,’ may ‘undermine the authority of the tribal cour[t] . . . and hence . . . infringe on the right of the Indians to govern themselves.’” (quoting first *Fisher v. Dist. Court*, 424 U.S. 382, 387–88 (1976), and then quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959))).

<sup>24</sup> *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). Chief Justice Roberts relies on Supreme Court precedent that dates back to the nineteenth century. *See, e.g., Talton v. Mayes*, 163 U.S. 376 (1896).

1896, the Court held that the Cherokee Nation's tribal court was not required to empanel a grand jury when bringing murder charges against a tribal member in tribal court, because the Constitution's reach does not extend to Indian tribes when they exercise their inherent local powers of self-government.<sup>25</sup> Although tribes are subject to the plenary power of Congress, they are not bound by the Constitution when exercising these local powers.<sup>26</sup>

In 1968, the Indian Civil Rights Act was passed by Congress to ensure that individuals appearing before tribal tribunals had the protection of most, but not all, of the Constitution's individual rights.<sup>27</sup> Accordingly, ICRA expressly acts upon the inherent local powers of tribes ("No Indian tribe in exercising powers of self-government shall . . .")<sup>28</sup> and extends protections to individuals by placing limits on tribal tribunals.<sup>29</sup> Notably absent from these protections is any right to counsel, at least when the accused cannot be imprisoned for more than one year.<sup>30</sup> Other rights are exercised differently. For example, the right to a jury trial involving at least six members must be requested by the defendant.<sup>31</sup>

Since ICRA's enactment in 1968 there has been no shortage of excellent commentary about the differences between the rights protected by the Constitution and

<sup>25</sup> *Talton*, 163 U.S. at 384 ("It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government. The fact that the Indian tribes are subject to the dominant authority of Congress, and that their powers of local self government are also operated upon and restrained by the general provisions of the Constitution of the United States, completely answers the argument of inconvenience which was pressed in the discussion at bar.").

<sup>26</sup> *Id.* See also *United States v. Wheeler*, 435 U.S. 313, 313–14 (1978) (finding that the double jeopardy clause of the Constitution does not prevent an individual from being tried by both the United States and an Indian tribe for the same offense).

<sup>27</sup> See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 899 (2003). Important exceptions include:

the guarantee of a republican form of government, the prohibition against an established religion, the requirement of free counsel for an indigent accused, the right to a jury trial in civil cases, the provisions broadening the right to vote, and the prohibitions against denial of the privileges and immunities of citizens.

*Id.* at 899 n.60.

<sup>28</sup> Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, 82 Stat. 73.

<sup>29</sup> *Id.* § 1302(c).

<sup>30</sup> *Id.* See also *United States v. Bryant*, 136 S. Ct. 1954, 1958–59 (2016) (holding that defendant's tribal court convictions complied with ICRA and thus, defendant's lack of counsel was not unconstitutional).

<sup>31</sup> Compare U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."), with Indian Civil Rights Act § 1302(a) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.").

those protected by ICRA.<sup>32</sup> Much of this scholarship points to the seminal importance of the first Supreme Court case which squarely addressed the rights and remedies provided by ICRA: *Santa Clara Pueblo v. Martinez*.<sup>33</sup>

In *Santa Clara*, the Supreme Court concluded that the rights conferred by ICRA are enforceable only through a writ of habeas corpus, and therefore that it is possible that ICRA may grant rights that, even when violated, are unprotectable by federal courts.<sup>34</sup> The facts of *Santa Clara* read like a textbook example of discrimination on the basis of gender. Julia Martinez was a full-blooded member of the Santa Clara Pueblo who had married and had children with a Navajo man.<sup>35</sup> The Pueblo had an ordinance that granted membership to the offspring of male members with female non-members, but denied membership to the offspring of female members whose partners were non-members.<sup>36</sup> Ms. Martinez and her children brought suit against the tribe alleging that the membership ordinance violated ICRA's equal-protection guarantee because it discriminated on the basis of sex and ancestry.<sup>37</sup> The Supreme Court recognized the violation of equal protection, but affirmed the district court's determination that the balance between enforcing the equal protection of the laws and deferring to tribal cultural practices should ordinarily be made by the tribe itself and not by the federal court.<sup>38</sup> The Supreme Court reasoned that, because the

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<sup>32</sup> See, e.g., Barbara L. Creel, *The Right to Counsel for Indians Accused of a Crime: A Trial and Congressional Imperative*, 18 MICH. J. RACE & L. 317 (2013); Fletcher, *supra* note 21; Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. CIV. RTS. & CIV. LIB. 45 (2012); Robert Laurence, *Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 68 N.D. L. REV. 657 (1992); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Katherine Robillard, *Uncounseled Tribal Court Convictions: The Sixth Amendment, Tribal Sovereignty, and the Indian Civil Rights Act*, 2013 U. ILL. L. REV. 2047; Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 (2000).

<sup>33</sup> 436 U.S. 49 (1978).

<sup>34</sup> *Id.* at 61 (“Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress’[s] failure to provide remedies other than habeas corpus was a deliberate one.”).

<sup>35</sup> *Id.* at 52.

<sup>36</sup> *Id.* at 51 (“Respondents, a female member of the tribe and her daughter, brought suit in federal court against the tribe and its Governor, petitioner Lucario Padilla, seeking declaratory and injunctive relief against enforcement of a tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe.”).

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

<sup>38</sup> *Id.* at 54 (“[T]he District Court concluded that the balance to be struck between these competing interests was better left to the judgment of the Pueblo: ‘[T]he equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved . . . . Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but

Constitution does not apply to tribal courts when they exercise their inherent authority, only the tribe itself or Congress could provide injured parties with a remedy.<sup>39</sup> When it enacted ICRA, the only enforcement provision Congress chose to include was a petition for habeas corpus.<sup>40</sup> The Court held that, unless Congress expressly provides an additional remedy, tribes and their institutions, including tribal courts, have the exclusive right to resolve intra-tribal disputes.<sup>41</sup> Because neither Ms. Martinez nor her daughter was physically detained, federal courts were without subject-matter jurisdiction to issue an order to enforce their statutory right to equal protection.<sup>42</sup>

In addition to the limited habeas remedy, ICRA also limited the criminal punishments that tribes could levy.<sup>43</sup> Originally ICRA limited tribal penalties to no more than six months' imprisonment and a fine of no more than \$500 per offense.<sup>44</sup> In 1986, these limits were raised to one year in prison and no more than \$5,000 per offense.<sup>45</sup> In 2010, the Tribal Law and Order Act (TLOA) amended ICRA again, permitting tribes to impose a fine of up to \$15,000, and raising the prison term to up to three years per offense and nine years per total criminal proceeding.<sup>46</sup> However, TLOA required the tribe to provide counsel for a defendant at least equal to one which would be guaranteed by the Constitution, and to comply with several notice and reporting requirements before it could impose the heightened penalties.<sup>47</sup>

The criminal procedures followed by Indian tribunals are accordingly different from the procedures followed in other courts in the United States. On the one hand,

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also because they must live with the decision every day. . . . To abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it." (quoting *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 18–19 (D.N.M. 1975)).

<sup>39</sup> *Id.* at 58 ("In 25 U.S.C. § 1303, the only remedial provision expressly supplied by Congress, the 'privilege of the writ of habeas corpus' is made 'available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.'").

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 65–66 ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. . . . Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.").

<sup>42</sup> *Id.* at 72 ("[U]nless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.").

<sup>43</sup> See Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(b)–(d), 82 Stat. 73.

<sup>44</sup> Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 822 (2006).

<sup>45</sup> *Id.* at 822 n.243.

<sup>46</sup> Tribal Law and Order Act of 2010, 25 U.S.C. § 1302(b), 124 Stat. 2258 (2010).

<sup>47</sup> *Id.* § 1302(c)(1)–(5). Recall that unlike the right to counsel provided by the Sixth Amendment, tribes are not ordinarily required to provide a defendant with counsel unless the defendant will be incarcerated for more than one year.

they are less constrained. The constitutional aspects of criminal procedure do not apply to tribal forums as a matter of law.<sup>48</sup> Even when a right has been extended by Congress, as a practical matter, tribes are only required to provide defendants with those rights if the defendant faces incarceration; otherwise, even if an individual is denied a right explicitly articulated by ICRA, federal courts are without subject-matter jurisdiction to afford the individual claiming the violation with any relief.<sup>49</sup> However, on the other hand, Congress has constrained the power of Indian tribunals well beyond the limits placed on state or federal courts.<sup>50</sup> The penalty that may be imposed is so limited that even the most egregious crimes, like rape or murder, carry a penalty of no more than three years per offense and nine years per proceeding.<sup>51</sup>

This combination of limited punishment and lax procedure was designed to give deference to tribes to create their own justice systems that could be responsive to the limited resources of tribal governments and accommodative of tribal custom and tradition.<sup>52</sup> In this vein, there is a gap between the procedures followed by tribal courts and those that would otherwise be available in other American forums. This gap has precipitated problems that, even fifty years after ICRA's enactment, are still regularly heard by federal courts through petitions for habeas corpus under ICRA.

## II. EVENTS IN 2017

Although the Indian Civil Rights Act has had binding effect on tribal courts for fifty years, the sheer amount of ongoing litigation surrounding ICRA, and the notable success of many petitioners, suggest that tribal-court processes are in need of continued improvement to ensure that all defendants' rights are protected. In preparation for evaluating the merits of ICRA's implementation in its fiftieth year,<sup>53</sup> I have read every case that cited to it and that was issued by a federal court in 2017.<sup>54</sup> Not all of these cases deserve mention, and several of them are obscure.<sup>55</sup> After reading through

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* § 1302(b).

<sup>51</sup> *See id.* § 1302(a)(7)(C)–(D).

<sup>52</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66–67 (1978) (“Congress’[s] provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of ‘preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people.’”).

<sup>53</sup> It might seem that since ICRA was enacted in 1968 that 2018 is its fiftieth year. However, its 2018 anniversary will mark the end of its fiftieth year and the beginning of its fifty-first. Accordingly, 2017 is the closest approximation to the fiftieth year of ICRA's enactment.

<sup>54</sup> For a comprehensive survey of Indian law in 2017, see generally Grant Christensen, *A View from American Courts: The Year in Indian Law 2017*, 41 SEATTLE U. L. REV. 805 (2018).

<sup>55</sup> Consider for example *Morales-Alfonso v. Francisco Enters.*, CV 15-0200-TUC-JAS (LAB), 2017 U.S. Dist. LEXIS 69058 (D. Ariz. May 4, 2017). In *Morales-Alfonso*, the plaintiff brought an ICRA claim in federal court alleging the Tohono O'odham Nation had violated his rights when it forced him to leave a swap meet held on the tribe's reservation. *Id.* at \*1–2.

the breadth of ICRA cases, three groupings suggested themselves as proper ways to categorize the most important cases from 2017. These categories capture a snapshot of ICRA fifty years after its enactment, providing an opportunity for fair critique and evaluation.

This section is dedicated to telling the stories of persons seeking relief under ICRA in 2017 as a method of qualitative evaluation. Notably, all of these cases involve Indians who have been convicted in tribal court and are now seeking release on the basis that the tribal court denied them their rights under ICRA.<sup>56</sup>

The first section discusses the only remedy that is available under ICRA—the writ of habeas corpus.<sup>57</sup> Literally translated as “you have the body,”<sup>58</sup> it is well established that habeas traditionally is only available when a petitioner has been detained.<sup>59</sup> However, the question of what constitutes detention continues to attract the attention of courts reviewing ICRA claims. The second section will tell the story of defendants who have been incarcerated without the ability to assert their right to a jury trial. Finally, the third section discusses the effects of tribal-court convictions, even when uncounseled, on subsequent federal prosecutions. When the procedures used by a tribal court comply with ICRA, but do not comply with the United States Constitution, should convictions so obtained be recognized by federal courts for purposes of meeting predicate-offense requirements in other federal criminal statutes?

### *A. Habeas Corpus*

The Supreme Court clarified in *Santa Clara Pueblo v. Martinez* that the only remedy available for a violation of the Indian Civil Rights Act is the writ of habeas corpus.<sup>60</sup> The writ developed at common law to bring a confined individual before

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The federal court dismissed the claim, reasoning that ICRA concerned rights to which criminal defendants are entitled in tribal court and had no application in a civil claim brought by a non-member of the tribe in federal court. *Id.* at \*10–11.

<sup>56</sup> In one interesting case the defendant attempted to claim release under ICRA after he had served his sentence issued by the tribal court, but was currently serving a sentence in a federal detention facility for a violation of federal law issued by a federal court. *Adams v. Elwell*, No. CV 17-00285 RB/SCY, 2017 U.S. Dist. LEXIS 99806, at \*1, \*2, \*4 (D.N.M. June 26, 2017). The federal district court denied his claim for relief, reasoning that the defendant was no longer detained by the tribe and therefore ICRA didn’t apply. *Id.* (“Petitioner Adams is not, and was not at the time he filed this Petition, in detention by order of an Indian tribe. . . . His current detention is by federal order, not tribal order. Therefore, the Court lacks jurisdiction over his claim under § 1303 and will dismiss the Petition.”).

<sup>57</sup> See *Santa Clara Pueblo*, 436 U.S. at 88.

<sup>58</sup> Alan C. Smith, *More Than a Question of Forum: The Use of Unconstitutional Convictions to Enhance Sentences Following Custis v. United States*, 47 STAN. L. REV. 1323, 1338 (1995).

<sup>59</sup> See *Ex parte Watkins*, 28 U.S. 193, 195 (1830).

<sup>60</sup> *Santa Clara Pueblo*, 436 U.S. at 58 (“In 25 U.S.C. § 1303, the only remedial provision expressly supplied by Congress, the ‘privilege of the writ of habeas corpus’ is made ‘available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.’”).

the court in order to determine whether his detention was lawful.<sup>61</sup> Although the habeas writ has traditionally been used in the criminal context to allow individuals who claim to be unlawfully imprisoned to demand that they be set free, courts have read the habeas remedy more expansively under ICRA.<sup>62</sup>

Prior to 2017, perhaps the most notable lower-court opinion concerning the extent of the habeas remedy available in ICRA was decided by the Second Circuit. In *Poodry v. Tonawanda Band of Seneca Indians*,<sup>63</sup> Judge Cabranes held that an accusation of treason and permanent banishment from a reservation constrained the petitioners' liberty enough to grant the federal court subject-matter jurisdiction to issue a habeas writ under ICRA.<sup>64</sup> That decision has been followed broadly by other courts, with other federal judges using physical banishment to guide them in their ICRA jurisprudence.<sup>65</sup>

### 1. Observations From 2017

In 2017, federal courts further contemplated at what point a tribe had so restrained the liberty of a defendant as to warrant the habeas remedy. Does a monetary fine issued by a tribal court related to behavior surrounding a tribal election trigger sufficient confinement to confer subject-matter jurisdiction under the Indian Civil

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<sup>61</sup> See *Ex parte Watkins*, 28 U.S. at 195 (“The petitioner prays the benefit of the writ of habeas corpus, to be directed to the marshal of the district of Columbia, in whose custody, as keeper of the gaol of the district, the petitioner is, commanding him to bring the body of the petitioner before the court, with the cause of his commitment; and especially commanding him to return with the writ the record of the proceedings upon the indictments, with the judgments thereupon; and to certify whether the petitioner be not actually imprisoned by the supposed authority, and in virtue of the said judgment.”). See also *id.* at 201–03 (discussing the application and purpose of the writ of habeas corpus).

<sup>62</sup> See, e.g., *Quair v. Sisco*, 359 F. Supp. 2d 948 (E.D. Cal. 2004) (holding that disenrollment and subsequent banishment from the reservation constitute an attempt by the tribe to assert sufficient control of the petitioner's freedom to warrant habeas relief).

<sup>63</sup> 85 F.3d 874 (2d Cir. 1996).

<sup>64</sup> *Id.* at 896–97 (“The fact that permanent banishment has in the past been imposed as a punitive sanction, in our culture and in others, does not mean that under the laws of the United States it is a sanction not involving a severe restraint on liberty. Where, as here, petitioners seek to test the legality of orders of permanent banishment, a federal district court has subject matter jurisdiction to entertain applications for writs of habeas corpus.”).

<sup>65</sup> See, e.g., *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010) (holding that tribal disenrollment without subsequent banishment does not result in the petitioner being in custody for the purposes of the habeas remedy under ICRA); *Sweet v. Hinzman*, 634 F. Supp. 2d 1196 (W.D. Wash. 2008) (holding that habeas relief is appropriate when petitioners were banished from the reservation and at least some petitioners were forcibly removed); *Quair*, 359 F. Supp. 2d 948; *Moore v. Nelson*, No. C 98-3736 MJJ, 1999 U.S. Dist. LEXIS 19609 (N.D. Cal. Dec. 16, 1999) (holding that habeas is not appropriate when the defendant has only been fined by the tribe and has not been incarcerated, banished, or arrested).

Rights Act?<sup>66</sup> What about the loss of real property?<sup>67</sup> While courts answered both questions in the negative,<sup>68</sup> courts have been more uncertain about when a restriction on personal freedom is sufficient to justify the use of the habeas writ. The Ninth Circuit issued an opinion that the banishment of a tribal elder for eight years did not trigger ICRA's habeas remedy.<sup>69</sup> In doing so, the Ninth Circuit arguably split with the Second Circuit in *Poodry*, creating even more uncertainty in ICRA jurisprudence.

*a. Does a Monetary Fine Trigger the Indian Civil Rights Act?*

In *Scudero v. Moran*,<sup>70</sup> Jim Scudero filed a petition for a writ of habeas corpus alleging that his tribe, the Metlakatla Indian Community, had effectively banished him through the imposition of fines levied in relation to a tribal election.<sup>71</sup> A twelve-member Community Council and a mayor govern the Metlakatla Indian Community.<sup>72</sup> Scudero had run for mayor in 2015.<sup>73</sup> After losing the election, he requested that the Community Council certify a new election based on alleged irregularities surrounding the counting of ballots.<sup>74</sup> After the Council denied his request, Scudero challenged the election in tribal court.<sup>75</sup> The tribal judge dismissed the case, and the Council sought reimbursement of its legal costs in the amount of \$2,355.<sup>76</sup> Before the tribal judge could decide the issue, Scudero filed his habeas petition in federal court asking for relief from the imposition of costs.<sup>77</sup> Essentially, Scudero argued that he had been “effectively ‘banished’ from the Community through improper and vindictive imposition of fines given to him by the Community Council stemming from an illegal election.”<sup>78</sup>

Judge Sedwick of the U.S. District Court for the District of Alaska recognized that the habeas remedy in the Indian Civil Rights Act “does address more than actual

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<sup>66</sup> See *Scudero v. Moran*, 230 F. Supp. 3d 980 (D. Alaska 2017) (holding that Petitioner did not suffer a severe restriction on liberty, which is required in order to give the district court jurisdiction).

<sup>67</sup> *Napoles v. Rogers (Napoles II)*, No. 1:16-CV-01933-DAD-JLT, 2017 U.S. Dist. LEXIS 106382, at \*16–17 (E.D. Cal. July 7, 2017) (holding that denial from entering one's own lands does not constitute banishment).

<sup>68</sup> See *Scudero*, 230 F. Supp. 3d 980; *Napoles II*, 2017 U.S. Dist. LEXIS 106382 (finding the facts insufficient to grant habeas jurisdiction to the federal district court).

<sup>69</sup> See *Tavares v. Whitehouse*, 851 F.3d 863 (9th Cir. 2017) (holding temporary banishment not enough to trigger the habeas provision of ICRA).

<sup>70</sup> 230 F. Supp. 3d 980 (D. Alaska 2017).

<sup>71</sup> *Id.* at 980.

<sup>72</sup> *Id.* at 982.

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

<sup>74</sup> *Id.* at 982–83.

<sup>75</sup> *Id.* at 983.

<sup>76</sup> *Id.* The Council also reserved the right to increase the fee should its costs continue to rise with additional litigation. *Id.*

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

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

physical custody,” including parole, probation, and release pending trial.<sup>79</sup> However, the court noted that the Ninth Circuit had previously held that the loss of tribal citizenship or tribal services were not, without more, enough to trigger ICRA’s remedy.<sup>80</sup>

Judge Sedwick determined that Scudero’s claim that he was banished due to the imposition of a monetary fine was insufficient to trigger ICRA’s habeas protections.<sup>81</sup> The court compared the imposition of a fine, lawfully levied under tribal ordinance, with other Ninth Circuit cases in which habeas relief was denied.<sup>82</sup> The court determined that the fine was a less severe restriction on Scudero’s liberty than the loss of tribal membership or health services, which had previously been held insufficient.<sup>83</sup> While Scudero argued that he could lose his right to participate in tribal elections if the fine was levied against him and not paid, the court reiterated that the loss of one’s “voice” in the community is not enough to warrant habeas relief.<sup>84</sup> The court therefore denied the petition for the writ, but also refused to award the Metlakatla Indian Community sanctions post-dismissal, reasoning that doing so would only prolong the litigation and its associated costs for all parties.<sup>85</sup>

*b. Does Interference with Real Property Trigger the Indian Civil Rights Act?*

The second situation requiring courts to interpret the Indian Civil Rights Act’s habeas remedy in 2017 was actually decided in two separate proceedings: the first,

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<sup>79</sup> *Id.* at 984 (citing *Shenandoah v. U.S. Dep’t of Interior*, 159 F.3d 708, 714 (2d Cir. 1998)).

<sup>80</sup> *Id.* (“[T]he Ninth Circuit acknowledged that actual physical custody is not necessarily a jurisdictional requirement for habeas review under § 1303. However, it concluded that loss of tribal citizenship and access to certain tribal facilities and services was not sufficiently severe to constitute detention. The court stated that unlike the petitioners in *Poodry*, the petitioners in *Jeffredo* had not been convicted of a crime and permanently banished, thereby losing all rights afforded to tribal members.” (citing *Jeffredo v. Macarro*, 599 F.3d 913, 919 (9th Cir. 2010))). *See also id.* at 984–85 (“[D]eprivations such as the ‘loss of one’s ‘voice’ in the community, loss of health insurance, loss of access to tribal health and recreation facilities, loss of quarterly distributions to tribal members, and loss of one’s place on the membership rolls of the tribe’ are insufficient to provide the federal court jurisdiction under ICRA’s habeas provision.”).

<sup>81</sup> *Id.* at 985.

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

<sup>83</sup> *Id.* (“[Scudero] has not been evicted from his home or had his movements restricted in some significant way. The council’s decision to seek imposition of costs after a favorable judgment pursuant to tribal ordinances is far less severe than what the Ninth Circuit deemed insufficiently severe in *Jeffredo*—denial of access to certain tribal facilities and services and disenrollment in the tribe. Moreover, if the loss of one’s ‘voice’ in the community, health insurance, and quarterly distributions is insufficient to invoke the court’s jurisdiction as the Ninth Circuit indicated it would be, surely court-imposed costs for bringing an unsuccessful case in tribal court is insufficient.”).

<sup>84</sup> *Id.* (“[T]he potential threat of the loss of the right to vote is not sufficient to satisfy the detention requirement of § 1303. Petitioner has not yet been denied the right to vote. Indeed, at the time of the completion of the parties’ briefing, the tribal judge had not yet ruled on the council’s request to impose the costs of the underlying litigation on Petitioner.” (citation omitted)).

<sup>85</sup> *Id.* at 986.

an emergency appeal to the Eastern District of California in January (*Napoles I*)<sup>86</sup> and the second, following ordinary motion practice, decided in July (*Napoles II*).<sup>87</sup> In both cases, the petitioners sought assistance from federal courts to prevent the Bishop Paiute Tribe from interfering with their interest in real property.<sup>88</sup>

In *Napoles I*, a group of petitioners claimed that they were all descendants of Ida Warlie and heirs to her assignment of land on the Bishop Paiute Tribe's reservation.<sup>89</sup> They had, at various times, successfully applied for assignments of this land from Ida Warlie's original parcel.<sup>90</sup> In 2006, the Bishop Paiute Tribe began to cancel these assignments and seize the lands for the purpose of expanding the Tribe's casino.<sup>91</sup> In 2013, the Tribal Council took steps to prepare the land for the casino's expansion, including regularly dispatching tribal officers to the land occupied by the petitioners and issuing trespass citations.<sup>92</sup> At the Tribe's request, the tribal court ultimately issued a temporary restraining order preventing the petitioners from accessing the property.<sup>93</sup> The petitioners sought emergency relief from the federal court under ICRA.<sup>94</sup>

The federal court dismissed the petitioners' motion.<sup>95</sup> The court reasoned that the motion did not qualify for emergency action because the petitioners could not show that the potential harm they alleged was so immediate as to justify emergency action by the court.<sup>96</sup> The court further justified its denial of the petitioners' request for relief by noting that the petitioners did not serve the Tribe with proper notice of their emergency petition.<sup>97</sup>

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<sup>86</sup> *Napoles v. Rogers (Napoles I)*, No. 1:16-CV-01933-DAD-JLT, 2017 U.S. Dist. LEXIS 452 (E.D. Cal. Jan. 3, 2017).

<sup>87</sup> *Napoles v. Rogers (Napoles II)*, No. 1:16-CV-01933-DAD-JLT, 2017 U.S. Dist. LEXIS 106382 (E.D. Cal. July 7, 2017).

<sup>88</sup> See *Napoles II*, 2017 U.S. Dist. LEXIS 106382; *Napoles I*, 2017 U.S. Dist. LEXIS 452.

<sup>89</sup> *Napoles I*, 2017 U.S. Dist. LEXIS 452, at \*1.

<sup>90</sup> *Id.* at \*1–2.

<sup>91</sup> *Id.* at \*2.

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

<sup>93</sup> *Id.* at \*3.

<sup>94</sup> *Id.* at \*4–5.

<sup>95</sup> *Id.* at \*9.

<sup>96</sup> *Id.* at \*7–8 (“[P]etitioners have neither alleged nor stated in a sworn affidavit any facts to suggest that they face a risk of immediate and irreparable injury in the time that it would take for the opposition parties to be given notice and an opportunity to be heard. Moreover, petitioners have made no showing that potential construction of the proposed casino expansion, its commencement still months away, justifies action by this court without a hearing.”).

<sup>97</sup> *Id.* at \*8–9 (“In his declaration, petitioners' counsel explains he ‘do[es] not believe that the Tribal Council, the Court or Tribal Judge Kockenmeister, as shown by their actions to date will agree to a temporary restraining order prior to the March 21, 2017 hearing date when construction is underway.’ Counsel's explanation for his failure to notify the respondents is insufficient: the unlikelihood of respondents to agree to a stipulated temporary restraining order is no justification for a refusal [to] provide notice of petitioner's application completely.” (citation omitted)).

Because the emergency petition was denied, the parties proceeded with traditional motion practice, and the issue of ICRA's applicability returned to the court six months later.<sup>98</sup> In *Napoles II*, the plaintiffs petitioned the court for relief with a writ of habeas corpus.<sup>99</sup> They sought redress for the Bishop Paiute Tribe's denial of access to land which the petitioners claimed was theirs under the assignments from Ida Warlie's estate.<sup>100</sup> The petitioners alleged that the Tribe had threatened to take away their buildings and livestock; to continue to cite them for trespass; and to suspend certain petitioners from their jobs without pay, or fire them in retaliation if they continued to object to the Tribe's seizure of their lands.<sup>101</sup>

The Tribe moved to dismiss the habeas petition, arguing that the only rights-violating activity the petitioners alleged was the imposition of civil fines which would not result in incarceration.<sup>102</sup> Because the only penalty stemming from the tribal-court proceedings was money damages, the Tribe argued that, because the proceedings did not qualify for the limited remedy of habeas,<sup>103</sup> the federal court lacked subject-matter jurisdiction over the petition.<sup>104</sup> Petitioners rejoined that the Tribe's behavior had resulted in their ultimate detention because the ongoing citations for trespass amounted to a restraint on their liberty.<sup>105</sup> Specifically, the petitioners argued that "[a] restraint tantamount to custody exist[ed] in the instant case" because the respondents removed them and their belongings "from their lands forever," without the legal authority to do so.<sup>106</sup> Petitioners claimed this amounted to the kind of banishment from which ICRA was designed to permit federal courts to grant relief.<sup>107</sup>

The district court refused to extend the definition of detention to the kind of civil-citation practice in which the Tribe was allegedly engaging: "[T]he only punishment short of physical confinement that could potentially rise to the level of

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<sup>98</sup> See *Napoles v. Rogers (Napoles II)*, No. 1:16-CV-01933-DAD-JLT, 2017 U.S. Dist. LEXIS 106382 (E.D. Cal. July 7, 2017).

<sup>99</sup> *Id.* at \*1.

<sup>100</sup> *Id.* at \*2.

<sup>101</sup> *Id.* at \*5–6.

<sup>102</sup> *Id.* at \*7.

<sup>103</sup> *Id.*

<sup>104</sup> See *id.*

<sup>105</sup> See *id.* at \*9–10 (“[P]etitioners argue that physical custody is not required for a person to be detained and they need only be subject to a ‘severe actual or potential restraint on liberty.’ According to petitioners, they are subject to such a restraint on their liberty because the tribal court may continue to fine them for trespassing on the disputed land which they claim is rightfully theirs. Petitioners contend that this is tantamount to their partial permanent banishment, in the sense that they are permanently banished from the land they claim belongs to them.” (citation omitted)).

<sup>106</sup> *Id.* at \*10.

<sup>107</sup> See *id.* at \*15 (“Here, petitioners argue they have been ‘permanently banished’ from their land because they risk being issued additional citations if they reenter the property under dispute, and that this is sufficient to constitute ‘detention’ under § 1303 . . .”).

detention as required by § 1303 is permanent banishment.”<sup>108</sup> The court therefore denied the habeas petition.<sup>109</sup> It noted that, even assuming the petitioners’ allegations to be true and the Tribe’s behavior to be a violation of their civil rights, “their allegations [were] nonetheless simply insufficient to support a finding that a ‘detention’ ha[d] occurred within the meaning of § 1303.”<sup>110</sup>

*c. Does Banishment for a Period of Years Trigger the Indian Civil Rights Act?*

Unlike in *Napoles* or *Scudero*, the final habeas case decided in 2017 involved the clear banishment of a tribal elder.<sup>111</sup> In *Tavares v. Whitehouse*,<sup>112</sup> the United Auburn Indian Community disciplined a group of its members who, it claimed, slandered and defamed the Tribe by withholding their per capita distributions and member privileges and temporarily banned them from tribal lands.<sup>113</sup>

The United Auburn Indian Community’s governing five-member council had passed an ordinance making it unlawful to defame the reputation of the Tribe or its officials outside of a tribal forum.<sup>114</sup> In 2011, a group of tribal members submitted a recall petition to the Tribe’s Election Committee alleging financial mismanagement, retaliation, electoral irregularity, and other challenges to the competence and legitimacy of the tribal council.<sup>115</sup> The petitioners also issued two press releases detailing their complaints to local media outlets.<sup>116</sup> In response, the Tribal Council sent the petitioners formal notice that their media releases contained false and defamatory statements that were published outside of a tribal forum and, as a result of the petitioners’ actions, the Council banned Ms. Tavares from the reservation for ten years and the other petitioners for eight years.<sup>117</sup> The excluded members filed a

<sup>108</sup> *Id.* at \*14 (citing *Tavares v. Whitehouse*, 851 F.3d 863, 875–76 (9th Cir. 2017)).

<sup>109</sup> *Id.* at \*15 (“[P]laintiffs are not currently detained, have never been in physical custody, and cannot face such confinement as a result of the issuance of these citations.”).

<sup>110</sup> *Id.* (citing *Tavares*, 851 F.3d at 875–76).

<sup>111</sup> *See Tavares*, 851 F.3d at 863.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 867–68.

<sup>114</sup> *See id.* at 867 (“Ordinance 2004-001 III(i) requires members to ‘refrain from defaming the reputation of the Tribe, its officials, its employees or agents outside a tribal forum[.]’ And the Enrollment Ordinance provides that a Tribe member can be punished—up to and including disenrollment—for making misrepresentations against the Tribe.” (alteration in original)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 868. Petitioners also had their per-capita benefits from the tribal casino’s revenue suspended for a limited period. *Id.* (“The petitioners were barred from tribal events, properties, offices, schools, health and wellness facilities, a park, and the casino. During their terms of exclusions, the petitioners could not run for tribal office, but they could vote in tribal elections through absentee ballots. They were not excluded from the twenty-one privately owned parcels of land, including their own homes and land owned by other members of the Tribe, and they retained their tribal health care benefits.”).

petition for habeas corpus under 25 U.S.C. § 1303 of the Indian Civil Rights Act.<sup>118</sup> The district court held that, because the petitioners' punishment was not a "detention[,]," it lacked jurisdiction.<sup>119</sup>

On appeal, a divided panel of the Ninth Circuit affirmed.<sup>120</sup> The majority held that the loss of financial benefits did not constitute a detention.<sup>121</sup> It further held that temporary banishment was not a detention: "[W]e think Congress's use of 'detention' instead of 'custody' when it created habeas jurisdiction over tribal actions is significant . . . . At the time Congress enacted the ICRA . . . . 'detention' was commonly defined to require physical confinement."<sup>122</sup> The majority recognized that "petitioners raise[d] free speech and due process claims that implicate[d] the substantive protections Congress saw fit to grant Indians with respect to their tribes through the ICRA," but concluded that a temporary exclusion was not a detention and so the petitioners' only redress was an appeal to the Tribe itself.<sup>123</sup>

The majority distinguished the Second Circuit's *Poodry* decision, reasoning that the habeas remedy should be limited to cases of permanent banishment coupled with tribal disenrollment, because only those conditions were sufficiently severe as to constitute a deprivation of liberty equivalent to incarceration.<sup>124</sup> It emphasized the disenrollment piece was important to the *Poodry* decision given its focus on the loss of tribal citizenship.<sup>125</sup> Because the petitioners here had not permanently been banished or disenrolled, the court concluded that ICRA did not permit the federal court to interfere.<sup>126</sup> While the petitioners were denied a right protected by ICRA, the federal court was without jurisdiction to afford them a remedy.<sup>127</sup>

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<sup>118</sup> *Id.* at 869.

<sup>119</sup> *Tavares v. Whitehouse*, No. 2:13-CV-02101-TLN-CKD, 2014 U.S. Dist. LEXIS 37799 (E.D. Cal. Mar. 20, 2014).

<sup>120</sup> *Tavares*, 851 F.3d at 864.

<sup>121</sup> *See id.* at 870.

<sup>122</sup> *Id.* at 871.

<sup>123</sup> *Id.* at 878.

<sup>124</sup> *See id.* at 874–75 ("Notably, the Second Circuit again conflated disenrollment and banishment in its analysis. The court characterized the punishment in *Poodry* as considerably more severe than the punishment in *Shenandoah* because in *Poodry*, 'the petitioners were convicted [ ] of treason, sentenced to permanent banishment, and stripped of . . . Indian citizenship; their names were removed from the Tribal rolls; and they permanently [lost] any and all rights afforded [tribal] members.' By contrast, the petitioners in *Shenandoah* '[did] not allege[ ] that they were banished from the Nation, deprived of tribal membership, convicted of any crime, or that defendants attempted in anyway [sic] to remove them from [tribal land].'" (citations omitted)).

<sup>125</sup> *See id.*

<sup>126</sup> *Id.* at 875.

<sup>127</sup> *Id.* at 878 ("The petitioners raise free speech and due process claims that implicate the substantive protections Congress saw fit to grant Indians with respect to their tribes through the ICRA. ('Section 1302 [of the ICRA] provides that no Indian tribe in exercising powers of self-government shall do or fail to do the things set forth in Section 1302.'). But the petitioners' remedy is with the Tribe, not in the federal courts." (citations omitted)).

Judge Wardlaw, in dissent, would not have distinguished as clearly between “detention” and “custody,” and would have held that banishment from tribal lands for ten years would constitute a sufficiently severe restraint on the petitioners’ liberty to permit the court to exercise habeas jurisdiction.<sup>128</sup> Her dissent further explained that banishment is a unique punishment which threatens the petitioners’ very cultural affiliation.<sup>129</sup> Specifically, Ms. Tavares’ exclusion from all tribal properties and surrounding facilities meant that she could not “walk her grandchildren to school, attend tribal meetings, ceremonies, and events, or join her family and friends for any purpose on tribal land.”<sup>130</sup> She would have applied the Second Circuit’s logic in *Poodry* to hold that the district court had jurisdiction to grant the habeas petition.<sup>131</sup>

## 2. Comments on the Habeas Remedy

There is nothing inherently problematic about the resolution of the first two cases. It is perfectly fair for the petitioners in those cases to ask the federal courts to interpret the habeas remedy to accommodate the risk that the petitioners might be denied a voice in community decisions, or should not regularly be fined for trespassing on land they believe is legally theirs. It is similarly in keeping with the limited nature of the habeas remedy under the Indian Civil Rights Act for courts to look at the facts of each case and determine that Congress did not intend for federal courts to interfere with the internal affairs of the tribe in either instance. Although that logic controls monetary fines or civil citations, banishment raises different concerns.

The dissent in *Tavares* rightly points out the now-contradictory treatment of banishment by the Second and Ninth Circuits.<sup>132</sup> A pending petition for a writ of certiorari to the U.S. Supreme Court to resolve this circuit split is indicative of the tensions inherent in the two circuits’ disparate treatment of banishment in relation to the habeas remedy.<sup>133</sup> In *Poodry*, the Second Circuit emphasized the petitioner’s removal from the community as being the salient component of its reasoning.<sup>134</sup>

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<sup>128</sup> *Id.* at 880–84 (Wardlaw, J., dissenting).

<sup>129</sup> *Id.* at 884 (“Banishment is a uniquely severe punishment. It does ‘more than merely restrict one’s freedom to go or remain where others have the right to be: it often works a destruction of one’s social, cultural, and political existence.’ Tavares’s ten-year banishment is not ‘a modest fine or a short suspension of a privilege . . . but [rather] the coerced and peremptory deprivation of [her] membership in the tribe and [her] social and cultural affiliation.’” (internal citations omitted)).

<sup>130</sup> *Id.* at 887.

<sup>131</sup> *See id.* at 885 (“[W]here a tribal member has been banished rather than imprisoned, ‘[T]he ICRA’s habeas provision [nevertheless] affords the petitioners access to a federal court to test the legality of their ‘convict[ion]’ and subsequent ‘banishment’ from the reservation[.]’” (citation omitted)).

<sup>132</sup> *Id.* at 879–80, 882.

<sup>133</sup> *See Tavares*, 851 F.3d 863, *petition for cert. filed*, 86 U.S.L.W. 3484 (U.S. Sept. 21, 2017) (No. 17-429).

<sup>134</sup> *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895 (2d Cir. 1996) (“Indeed,

Although the banishment in *Poodry* was permanent,<sup>135</sup> there was nothing inherent in the court's reasoning to suggest that only a permanent banishment could sufficiently injure the petitioner's liberty interests as to trigger the habeas remedy.<sup>136</sup>

The majority opinion in *Tavares* claimed to have applied *Poodry* consistently, distinguishing the facts in that case from the permanent banishment and disenrollment experienced by the Seneca petitioners in *Poodry*.<sup>137</sup> However, distinguishing these cases based upon the facts creates a false equivalency. Habeas is supposed to apply to anyone whose liberty is sufficiently constrained.<sup>138</sup> Under ICRA, many tribes retain only the equivalent of misdemeanor authority, imposing criminal sentences that do not exceed one year.<sup>139</sup> When ICRA was first enacted, all tribal courts were limited to criminal penalties of no more than six months.<sup>140</sup> Yet despite these restrictions, which are notably less confining than life in prison, Congress has always permitted habeas review of an incarceration ordered by a tribal court.<sup>141</sup>

This appears to be an area of law where the unique facts of the specific cases encourage courts to draw fine articulations that blur the legally relevant distinctions regarding the treatment of defendants. I propose that courts should look at banishment

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we think the existence of the orders of permanent banishment alone—even absent attempts to enforce them—would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus. We deal here not with a modest fine or a short suspension of a privilege—found not to satisfy the custody requirement for habeas relief—but with the coerced and peremptory deprivation of the petitioners' membership in the tribe and their social and cultural affiliation.”).

<sup>135</sup> *Id.*

<sup>136</sup> *See id.* (“‘Restraint’ does not require ‘on-going supervision’ or ‘prior approval.’ As long as the banishment orders stand, the petitioners may be removed from the Tonawanda Reservation at any time. That they have not been removed thus far does not render them ‘free’ or ‘unrestrained.’ While ‘supervision’ (or harassment) by tribal officials or others acting on their behalf may be sporadic, that only makes it all the more pernicious. . . . [T]he petitioners have no ability to predict if, when, or how their sentences will be executed. The petitioners may currently be able to ‘come and go’ as they please, but the banishment orders make clear that at some point they may be compelled to ‘go,’ and no longer welcome to ‘come.’ That is a severe restraint to which the members of the Tonawanda Band are not generally subject.” (citations omitted)).

<sup>137</sup> *Tavares*, 851 F.3d at 875.

<sup>138</sup> *See Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

<sup>139</sup> Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1567–68 (2016) (“Until 2010, the Indian Civil Rights Act of 1968 limited tribal sentencing authority to a maximum of one year in jail or a fine of \$1000 per count, regardless of the crime. This limitation remains in effect for the vast majority of American Indian tribes.” (citations omitted)).

<sup>140</sup> *Id.* at 1581.

<sup>141</sup> *See Poodry*, 85 F.3d at 895 (“To determine the severity of the sanction, we need only look to the orders of banishment themselves, which suggest that banishment is imposed (without notice) only for the most severe of crimes: murder, rape, and treason. Had the petitioners been charged with *lesser* offenses and been subjected to the *lesser* punishment of imprisonment, there is no question that a federal court would have the power to inquire into the legality of the tribe's action.”).

as actual incarceration. Banishment creates a prison cell; however, unlike incarceration in a physical jailhouse, the prison cell is the entire world outside tribal lands, and the reservation is the free world outside the prison walls.

Traditional habeas jurisprudence has never had occasion to consider whether the size of the cell would affect the availability of the remedy.<sup>142</sup> It should not. As Justice Black wrote in 1963:

Of course, [the] writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.<sup>143</sup>

It is undeniable that, for a tribal member, the exclusion from tribal lands is a meaningful and measurable restriction on liberty because it closes off sacred sites to which the member may have a cultural and perhaps even religious connection.<sup>144</sup>

Nor should the absence of disenrollment or loss of voting rights act to remove the jurisdiction of the federal court. Even when the individual is correspondingly not disenrolled and expressly is permitted to continue to vote in tribal elections, the use of an absentee ballot is meaningfully different than direct participation.<sup>145</sup> The tribal member may lose access to interpreter services or be denied the right to cast their ballot on the day of the election, and thus forgo important information needed for him to be politically informed.<sup>146</sup>

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<sup>142</sup> Smith, *supra* note 58, at 1338 (“The Latin phrase ‘habeas corpus’ literally means ‘you have the body,’ and thus the original writ demanded that the prisoner’s custodian bring the prisoner before the court. In accord with this history, all federal habeas statutes have required that the petitioner be ‘in custody’ to utilize the writ. . . . Despite the jurisdictional importance of the custody requirement, Congress has never defined its meaning. The term ‘custody’ clearly encompasses physical confinements, but the Supreme Court has construed it more broadly, finding that even less severe restrictions on liberty constitute ‘custody’ for habeas corpus purposes.” (citations omitted)).

<sup>143</sup> *Id.* (quoting *Jones*, 371 U.S. at 243).

<sup>144</sup> *Poodry*, 85 F.3d at 895 (“We deal here not with a modest fine or a short suspension of a privilege—found not to satisfy the custody requirement for habeas relief—but with the coerced and peremptory deprivation of the petitioners’ membership in the tribe and their social and cultural affiliation.”).

<sup>145</sup> Courts have recently found the use of absentee voting instead of in-person voting, especially when targeting Indian people, to be a violation of their rights. *See Navajo Nation Human Rights Comm’n v. San Juan Cty.*, No. 2:16-CV-00154-JNP-BCW, 2017 U.S. Dist. LEXIS 145159 (D. Utah, Sept. 7, 2017); *Poor Bear v. Cty. of Jackson*, No. 5:14-CV-5059-KES, 2015 U.S. Dist. LEXIS 57762 (D.S.D. May 1, 2015).

<sup>146</sup> *See Navajo Nation Human Rights Comm’n*, 2017 U.S. Dist. LEXIS 145159, at \*64–72; *Poor Bear*, 2015 U.S. Dist. LEXIS 57762, at \*20–24.

The apparent split between the Second and Ninth Circuits could be easy to resolve by returning to first principles. The habeas remedy is available when an individual alleges that he has had his liberty restricted for an improper purpose.<sup>147</sup> Tribes should not be able to escape a review of their decisions by banishing a tribal member for a period of years instead of incarcerating her. A banishment from tribal lands is a physical restriction on the liberty of the banished tribal member, and therefore a federal court should have jurisdiction to review the protections afforded that banished individual in his tribal-court proceedings.

This is not to say that ultimately Ms. Tavares should have her banishment lifted. Importantly, the habeas remedy in ICRA affords federal courts subject-matter jurisdiction over challenges to a tribal member's detention on the basis that his rights have been violated, but it does not automatically require a reversal.<sup>148</sup> If the tribal sanction was warranted based upon a violation of tribal law, and the tribal charges as well as procedures were not prohibited by ICRA, a federal court should still uphold the banishment in the same way that it would dismiss a petition for a writ by an incarcerated tribal member.<sup>149</sup>

### *B. The Right to a Jury Trial*

In most state and federal proceedings, the defendant has a right to a jury trial because that right is guaranteed by the Sixth Amendment of the Constitution.<sup>150</sup>

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<sup>147</sup> See Smith, *supra* note 58, at 1338.

<sup>148</sup> See Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 90 (2007). The habeas remedy in 25 U.S.C. § 1303 only confers jurisdiction upon the federal court; it does not mandate the outcome of that review. *Id.* at 90–91 (“[R]espect for tribal sovereignty requires restraint in extra-tribal judicial review and oversight of tribal banishment and exclusion decisions.”). Deputy Solicitor Kunesh’s article is an exceptional study of the history of the practice of banishment and a compelling argument in favor of tribes being able to impose the sanction subject to their own laws and customs.

<sup>149</sup> For example, consider another 2017 ICRA case, *Darnell v. Merchant*, No. 17-03063-EFM-TJJ, 2017 U.S. Dist. LEXIS 195793 (D. Kan., Nov. 29, 2017). In *Merchant*, Petitioner argued that her conviction was motivated by a desire to harass. *Id.* at \*14. Petitioner provided several reasons, each of which was rejected by the court. See *id.* at \*14–26. For example, during jury selection, one juror claimed she had trouble hearing, and two others responded they were fearful they could lose their jobs. *Id.* at \*3–4. Petitioner claimed that the errors in jury selection showed bad faith, but the district court disagreed. *Id.* at \*14. The court recognized that the tribal judge responded to the concerns; he asked the juror who was hard of hearing if she could hear the judge from the bench, and reassured the other potential jurors that they could not be fired for serving on a jury. *Id.* at \*18. Such a practice did not show bad faith or a desire to harass on the part of the tribal court. *Id.*

<sup>150</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

While the Sixth Amendment does not apply to tribal-court proceedings, the Indian Civil Rights Act provides the same guarantee to tribal defendants, although it requires that they request the jury trial: “In general . . . [n]o Indian tribe in exercising powers of self-government shall . . . deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.”<sup>151</sup> The right is not illusory but clearly stated on the face of the Act.<sup>152</sup> It is incumbent upon tribes to ensure their laws permit tribal members to take advantage of the right to request a trial by jury.<sup>153</sup>

ICRA’s right to a jury trial has regularly been litigated before tribal courts, giving tribal appellate bodies the ability to develop tribal precedent on the right to request a jury trial. These courts have held that the right does not apply to civil proceedings, because the plain language of ICRA extends the right to a jury only when the defendant is accused of an offense punishable by imprisonment.<sup>154</sup> Likewise, the right does not attach when the defendant could not face imprisonment for the criminal charges levied against him.<sup>155</sup> ICRA’s jury-trial provision has also been challenged in federal courts.<sup>156</sup> The Ninth Circuit has recently held that when a defendant is not advised of his right to request a jury trial, the tribe violates the defendant’s rights under ICRA.<sup>157</sup>

### 1. Recent Observations on the Indian Civil Rights Act’s Right to a Jury Trial

Although the issue of requesting a jury trial has been comparatively rarely litigated in the context of the Indian Civil Rights Act, in 2017 the issue of the right to a jury trial was at the forefront of a series of cases arising out of the Pueblos of

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against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).

<sup>151</sup> 25 U.S.C. § 1302(a)(10) (2012). For a more detailed academic discussion of the right to a jury trial conferred by ICRA, see Rosen, *supra* note 32, at 555–57.

<sup>152</sup> § 1302(a)(10).

<sup>153</sup> *See id.*

<sup>154</sup> *See* Shippentower v. Confederated Tribes of Umatilla Indian Reservation of Oregon, 20 Indian L. Rep. 6026 (Umatilla Tribal Ct. 1993); Rosen, *supra* note 32, at 555.

<sup>155</sup> *See* Pueblo of Pojoaque v. Jagles, 24 Indian L. Rep. 6137 (Pojoaque Pueblo Tribal Ct. 1997); Rosen, *supra* note 32, at 555.

<sup>156</sup> *See, e.g.,* Fragua v. Casamento, No. CV 16-1404 RB/WPL, 2017 U.S. Dist. LEXIS 69534 (D.N.M. May 8, 2017) (addressing if ICRA was violated by the Jemez Tribal Court because it did not provide for right to trial by jury).

<sup>157</sup> *Alvarez v. Lopez*, 835 F.3d 1024, 1029 (9th Cir. 2016) (“Alvarez’s right to ‘fair treatment’ includes the right to know that he would forfeit his right to a jury unless he affirmatively requested one. The Community concedes that Alvarez ‘was not advised that he had to ask for’ a jury. . . . Tribal defendants are accorded those rights without having to take affirmative steps to invoke them. To make the same unqualified statement as to a right that must be affirmatively invoked is misleading.”). Retrial was denied, however, on the basis of failure to exhaust. *See id.* at 1027–28.

New Mexico. The federal district court broadly reaffirmed the right to a jury trial under ICRA, repeatedly holding that the Pueblos needed both to inform the accused of their right to a jury trial and to have a formal, tribally led process in place for empaneling a jury.<sup>158</sup> Consider the following cases from 2017.

In *Fragua v. Casamento*,<sup>159</sup> the petitioner Fragua requested that the New Mexico district court grant him habeas relief from his Pueblo of Jemez Tribal Court conviction of aggravated battery.<sup>160</sup> His appeal was based upon his contention that the Tribe neither informed him of his right to counsel, even at his own expense, nor did it tell him that he had a right to a jury trial.<sup>161</sup> Moreover, Fragua argued that the Pueblo of Jemez had no formal legal process to empanel a jury, making any right to a jury trial illusory.<sup>162</sup>

The federal court first determined that the tribal code did not provide an avenue to request post-conviction relief, and so Fragua did not need to launch any further appeals to exhaust his tribal remedies before the federal court could consider granting a habeas petition.<sup>163</sup> The court then proceeded to the merits and determined it needed only to consider the denial of right to a trial by jury in order to grant the requested relief.<sup>164</sup> It reasoned that “the jury issue should be dispositive. Because Fragua was never informed of his right to trial by jury, he could not be expected to request one.”<sup>165</sup> The court found the lack of a tribal process to offer jury trials particularly problematic: “Indeed, even if Fragua had requested a trial by jury, the Jemez Tribal Code has no mechanism for providing a jury trial. Because denial of the right to a jury trial is a structural defect, it requires automatic reversal.”<sup>166</sup> The magistrate recommended that the habeas petition be granted, and the district court agreed.<sup>167</sup> A second order was issued by the district court for Fragua’s brother on substantially identical facts.<sup>168</sup>

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<sup>158</sup> See, e.g., *Fragua*, 2017 U.S. Dist. LEXIS 69534.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at \*2.

<sup>161</sup> *Id.* at \*3 (“Fragua contends that he was constructively denied the right to counsel because he was not informed of that option until the morning of trial, and that he was constructively denied the right to a jury trial because the Pueblo of Jemez has no mechanism for providing a jury trial and because he was never informed of that right.”).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at \*4 (“When no remedies are available, it is not incumbent upon an unrepresented criminal defendant to navigate or, in this case, create avenues of appeal in order to meet the exhaustion requirement.”).

<sup>164</sup> *Id.* at \*6.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Fragua v. Elwell*, No. 1:16-CV-01404-RB-WPL, 2017 U.S. Dist. LEXIS 76842 (D.N.M. May 19, 2017).

<sup>168</sup> *Fragua v. Elwell*, No. 1:16-CV-01405-RB-LF, 2017 U.S. Dist. LEXIS 77701 (D.N.M. May 22, 2017).

In *Toya v. Casamento*,<sup>169</sup> the petitioner Toya, a member of the Pueblo of Jemez, sought habeas relief under ICRA from his conviction by the Pueblo of Jemez Tribal Court for aggravated DUI.<sup>170</sup> He argued that the relief was appropriate because he was denied his right to counsel and his right to a jury trial.<sup>171</sup> The respondent, in both this and the previously discussed *Fragua* proceedings,<sup>172</sup> was Al Casamento—the director of the Sandoval County Detention Center—who had physical control of the petitioner.<sup>173</sup> However, unlike in the *Fragua* cases, this time the respondent argued that the petitioner had failed to name a member of the Tribe as a respondent,<sup>174</sup> thus the court would be unable to offer complete relief.<sup>175</sup> The court found this argument by Casamento persuasive.<sup>176</sup> It cited the Second Circuit’s decision in *Poodry* for the proposition that “full relief [could not] be granted because an order to the custodian directing release of the prisoner [did] not modify or vacate the underlying tribal conviction in the absence of a tribal official.”<sup>177</sup> The court granted dismissal to Casamento and gave Toya thirty days to substitute an appropriate tribal party who could give relief from the tribal judgment.<sup>178</sup>

Toya ultimately joined the tribal judge, Judge Toledo, and proceeded with his ICRA claim in federal court.<sup>179</sup> The federal court provided additional facts about his conviction for aggravated DUI<sup>180</sup>: he was charged and convicted of four crimes in the Pueblo of Jemez Tribal Court after being found “passed out” in his vehicle with

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<sup>169</sup> No. CV 17-00258 JCH/KBM, 2017 U.S. Dist. LEXIS 80091 (D.N.M. May 25, 2017).

<sup>170</sup> *Id.* at \*1–2.

<sup>171</sup> *Id.*

<sup>172</sup> *Fragua v. Casamento*, No. 1:16-CV-01405-RB-LF, 2017 U.S. Dist. LEXIS 73953, at \*1 (D.N.M. May 12, 2017); *Fragua v. Casamento*, No. CV 16-1404 RB/WPL, 2017 U.S. Dist. LEXIS 69534, at \*1 (D.N.M. May 8, 2017).

<sup>173</sup> *Toya*, 2017 U.S. Dist. LEXIS 80091, at \*2.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at \*3–4 (“In a habeas corpus proceeding, the custodian or official having immediate physical custody of the petitioner is a proper party to the proceeding. However, where the petition collaterally attacks the petitioner’s tribal conviction and sentence, rather than the manner in which the detention is being carried out, the immediate physical custodian may lack the authority to afford the relief requested by the petitioner. In these circumstances, the proper respondent is not necessarily the person with immediate physical custody but, instead, the official with authority to modify the tribal conviction or sentence.” (citation omitted)).

<sup>176</sup> *See id.* at \*7 (“Unlike prior cases, Respondent Casamento has raised the necessary party issue in his Answer . . . [T]he Court cannot afford complete relief in the absence of joinder of an appropriate tribal official.”).

<sup>177</sup> *Id.* at \*5–6 (citing *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 899–900 (2d Cir. 1996)).

<sup>178</sup> *Id.* at \*7–8. It is insufficient to join the Tribe itself, as the Tribe has sovereign immunity and would be immune from suit. *See id.* at \*7 (“Petitioner Toya originally named the Pueblo of Jemez as a respondent, but the Pueblo was dismissed based on sovereign immunity.”).

<sup>179</sup> *Toya v. Toledo*, No. CIV 17-0258 JCH/KBM, 2017 U.S. Dist. LEXIS 160173, at \*1, \*5 (D.N.M. Sept. 9, 2017).

<sup>180</sup> *See id.* at \*2.

the engine still running.<sup>181</sup> Toya pled guilty and signed a form indicating his acknowledgment that he was advised of the rights stated under Rule 3 of the Pueblo's Rules of Criminal Procedure.<sup>182</sup> The court noted that, "[a]s written, there [was] no mention of the right to a jury trial or an attorney in Rule 3."<sup>183</sup> When he appeared before the tribal judge for sentencing, he sought to withdraw his guilty plea, requested a jury trial, and asked for a lawyer.<sup>184</sup> The tribal judge denied his requests, telling him that he "should have asked for an attorney and a [jury] trial before he pled guilty."<sup>185</sup> Ultimately, Toya was sentenced to 270 days in jail.<sup>186</sup>

After adding Judge Toledo as a respondent, Toya filed a motion for habeas relief under § 1303 of ICRA.<sup>187</sup> Toledo first argued that Toya had not exhausted his tribal remedies because, among other reasons, he did not appeal his conviction to the Governor of the Pueblo.<sup>188</sup> The federal magistrate disagreed that exhaustion was required and proceeded to consider the habeas petition.<sup>189</sup> On the merits of the request, the federal magistrate concluded that Toya had been denied his right to a jury trial, affirming that "a tribal defendant's 'right to "fair treatment" includes the right to know that he would forfeit his right to a jury unless he affirmatively requested one,' and that a Tribe 'must inform defendants of the nature of their rights, including what must be done to invoke them.'"<sup>190</sup> The federal court concluded that the tribal court never informed Toya of his right to request a jury trial and then, after he affirmatively requested one, denied him that right.<sup>191</sup> Moreover, the federal court concluded that while the tribal criminal code referenced the idea of a jury trial, there were no procedures in place to empanel one or otherwise allow a defendant before

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<sup>181</sup> *Id.* at \*1–2 ("Based on these events Petitioner was charged with four crimes: aggravated driving under the influence, liquor violation, driving on a revoked or suspended license, and open container.").

<sup>182</sup> *Id.* at \*2–3.

<sup>183</sup> *Id.* at \*3.

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

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at \*4 ("Judge Toledo sentenced Petitioner to 180 days incarceration for the DUI and 90 days incarceration for the liquor violation, for a total of 270 days confinement.").

<sup>187</sup> *Id.* at \*1, \*5.

<sup>188</sup> *Id.* at \*5–6, \*8.

<sup>189</sup> *Id.* at \*6, \*8–9, \*11 ("The problem for Respondents is that the remedies they speak of 'are available in theory, but not in fact.' Respondents point to 'custom and tradition' and contend that Petitioner's avenue for direct appeal was clear, as 'it is the Governor and Tribal Council that make the final decisions.' . . . [But] I recommend that the presiding judge determine that '[b]ecause the Jemez Tribal Code does not provide any avenue for seeking post-conviction relief, any attempt at pursuing post-conviction relief would have been futile.'" (citations omitted)).

<sup>190</sup> *Id.* at \*13, \*15 (citing *Alvarez v. Lopez*, 835 F.3d 1024, 1029 (9th Cir. 2016)).

<sup>191</sup> *Id.* at \*14 ("Here, the Tribe failed to inform Petitioner of his right to a trial by jury at his request at his arraignment. And, when he requested one, the same was denied by Judge Toledo . . .").

the tribal court to exercise the right to a jury.<sup>192</sup> The federal magistrate recommended to the federal district court that it should find a clear violation of ICRA's guarantee of a right to request a jury trial, reverse Toya's conviction, and order his release.<sup>193</sup> The federal district judge adopted the magistrate's recommendation two weeks later.<sup>194</sup>

The denial of a right to a jury trial by Pueblos in New Mexico was an issue in 2017 that was not unique to the Jemez Pueblo. However, like the original *Toya* ruling,<sup>195</sup> the other cases out of the U.S. District Court for the District of New Mexico struggled to determine the appropriate respondent. In *Garcia v. Elwell*,<sup>196</sup> the petitioner, an enrolled member of the Kewa Pueblo, was convicted of intoxication and criminal mischief and sentenced to an eighteen month incarceration.<sup>197</sup> The petitioner sought a writ of habeas corpus alleging that he was denied the right to a jury trial.<sup>198</sup> The federal court allowed the petition to proceed against the current warden of the petitioner's detention facility and the tribal judge, but dismissed the other parties who were no longer responsible for the petitioner's current incarceration.<sup>199</sup> It ordered the remaining respondents to answer the petition within thirty days.<sup>200</sup>

A similar difficulty emerged from the Pueblo of Santa Ana. In *Talk v. Southern UTE Detention Center*,<sup>201</sup> the petitioner sought habeas relief under § 1303 from a Santa Ana Tribal Court conviction for a DUI which resulted in a sentence of 364 days of incarceration.<sup>202</sup> The petitioner alleged that he was a hitchhiker and was never behind the wheel of any vehicle.<sup>203</sup> Before the court could reach the merits of his argument, it needed to determine that all of the proper parties were before the court.<sup>204</sup> It reasoned that the petitioner needed to do more than merely serve the detention center because an order releasing him did not reverse the underlying conviction and could result in his eventual rearrest.<sup>205</sup> It therefore delayed proceedings

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at \*14–15.

<sup>194</sup> *Toya v. Toledo*, No. CIV 17-0258 JCH/KBM, 2017 U.S. Dist. LEXIS 159059, at \*1 (D.N.M. Sept. 26, 2017).

<sup>195</sup> *See Toya v. Casamento*, No. CV 17-00258 JCH/KBM, 2017 U.S. Dist. LEXIS 80091, at \*2, \*5–7 (D.N.M. May 25, 2017).

<sup>196</sup> No. CV 17-00333 WJ/GJF, 2017 U.S. Dist. LEXIS 80303 (D.N.M. May 25, 2017).

<sup>197</sup> *Id.* at \*2.

<sup>198</sup> *Id.*

<sup>199</sup> *See id.* at \*5–9. The district court determined that the proper party to a habeas action is the party with the power to free the defendant. *Id.* at \*5–7. The court applied this principle to dismiss those parties related to a detention facility where Petitioner was no longer incarcerated. *See id.* at \*5, \*7–9. It also dismissed the tribe because sovereign immunity is a defense even to a habeas action filed under ICRA. *See id.* at \*7.

<sup>200</sup> *Id.* at \*9.

<sup>201</sup> No. 1:17-CV-00669 WJ/KK, 2017 U.S. Dist. LEXIS 129915 (D.N.M. Aug. 15, 2017).

<sup>202</sup> *Id.* at \*1.

<sup>203</sup> *See id.*

<sup>204</sup> *See id.* at \*2–6.

<sup>205</sup> *See id.* at \*5 (“If *Talk* only proceeds against the detention center, full relief cannot be

until the petitioner could also name a tribal official with the power to reverse his conviction.<sup>206</sup>

## 2. Comments on the Right to a Jury Trial

Ten years after the Indian Civil Rights Act was enacted, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe*<sup>207</sup> that tribal courts were divested of their inherent criminal jurisdiction over non-Indian persons unless Congress had expressly conferred it on them.<sup>208</sup> In 1978, many tribes had already established robust tribal criminal justice systems that had made express decisions about the composition of tribal juries.<sup>209</sup> It is therefore remarkable that in 2017 Indian tribes with fully functioning criminal courts had not established procedures whereby a jury could be empaneled.<sup>210</sup>

Should any tribe wish to operate a criminal court, it must, at a minimum, have developed and tested a process for jury selection. This admittedly would require a tribe to expend resources.<sup>211</sup> ICRA requires that only six persons sit on a jury,<sup>212</sup> but each tribe should decide what the proper number of jurors should be and make accommodations for them in the courtroom. Each tribe must determine what the prerequisite qualifications are to serve on a jury and whether it would limit the jury pool to only members who live on the reservation or expand the eligible jury pool to non-members.<sup>213</sup> Regardless of the scope of the jury pool, tribes should establish a robust and vetted process of maintaining and updating the jury pool and develop

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granted because an order directing the custodian to release him does not modify or vacate the underlying Tribal conviction in the absence of a Tribal official. This means he could be rearrested and incarcerated for the same crime if he returned to Santa Ana Pueblo Indian Reservation following his release. Talk must therefore name as a respondent a tribal official who has an interest in opposing the petition or affording relief as necessary.”).

<sup>206</sup> *See id.* at \*5–6.

<sup>207</sup> 435 U.S. 191 (1978).

<sup>208</sup> *See id.* at 209–12 (“We . . . acknowledge that with the passage of [ICRA], many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. . . . But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.”) (emphasis removed).

<sup>209</sup> *See id.* at 196.

<sup>210</sup> *See supra* Section II.B.1.

<sup>211</sup> *See* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 511 (1998) (“Although federal courts appear not to have been presented with the issue, the U.S. Commission on Civil Rights heard complaints from tribal officials that jury trials present insurmountable practical and financial problems for tribal courts.”).

<sup>212</sup> 25 U.S.C. § 1302(a)(10).

<sup>213</sup> *See generally* McCarthy, *supra* note 211, at 512–13 (discussing the different ways in which tribes select juries, such as the Hopi limiting juries to tribal members and the Navajo limiting juries to persons eligible to vote on the tribe’s voter rolls).

a set of model jury instructions. Those involved with the tribal justice system, including tribal judges, attorneys appearing before a tribal court, bailiffs, and court reporters, need to develop procedures and be trained on how to conduct a jury trial. A secure place for jury deliberation must be found. Without incorporating a process to hold a jury trial, tribes cannot meaningfully give defendants an opportunity to exercise their right under ICRA.

Moreover, the District Court of New Mexico was right when it suggested that, although ICRA only requires that the defendant be able to request a jury trial, the defendant must be informed of that right.<sup>214</sup> Because of the Constitution's limited application in Indian country, many tribal defendants may not formally be *Mirandized*.<sup>215</sup> In fact, full *Miranda* warnings would be misleading because ICRA does not always require that the tribe appoint counsel, but rather that the defendant have the right to hire counsel at his own expense.<sup>216</sup> However, at a minimum, a criminal defendant appearing in tribal court should be informed of his right to request a jury trial by the tribal court before entering any plea.

Failure to inform the defendant of this right is a violation of the due-process protections extended by Congress to individuals in tribal forums, and it is appropriate for federal courts meaningfully to enforce that right by granting habeas petitions and releasing defendants whose right to a jury has been violated.<sup>217</sup>

### C. *Uncounseled Convictions*

The Supreme Court has interpreted the Sixth Amendment to prohibit the imposition of a jail sentence upon any defendant without the assistance of counsel.<sup>218</sup> That right exists regardless of the seriousness or type of offense charged.<sup>219</sup> However, because

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<sup>214</sup> See *Fragua v. Casamento*, No. CV 16-1404 RB/WPL, 2017 U.S. Dist. LEXIS 69534, at \*6 (D.N.M. May 8, 2017) (“Here, the jury issue should be dispositive. Because Fragua was never informed of his right to trial by jury, he could not be expected to request one.”).

<sup>215</sup> See, e.g., Samuel D. Newton, Note, *Reliability, That Should Be the Question: The Constitutionality of Using Uncounseled Tribal Court Convictions in Subsequent Federal Trials After Ant, Cavanaugh, and Shavanaux*, 36 AM. INDIAN L. REV. 489, 503–04 (2012) (discussing *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) where a tribal member was arrested by a tribal police officer and arraigned in tribal court without being given any *Miranda* warning). See also *United States v. Peters*, No. 3:16-CR-30150-RAL, 2017 U.S. Dist. LEXIS 56754, at \*8–10 (D.S.D. Mar. 15, 2017) (finding statements made by a non-Indian to a tribal police officer admissible even though no *Miranda* warnings were given).

<sup>216</sup> § 1302(a)(6).

<sup>217</sup> See *supra* Section II.B.

<sup>218</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the Assistance of Counsel for his defence.”). See *Gideon v. Wainwright*, 372 U.S. 335, 339–45 (1963) (incorporating the Court’s holding of a fundamental right to a jury in federal court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), against the states).

<sup>219</sup> See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (“We hold, therefore, that absent

Indian tribes are not bound by the Constitution, there is no inherent Sixth Amendment right to counsel in tribal court.<sup>220</sup> As Justice Ginsburg wrote in *United States v. Bryant*, “[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.’ The Bill of Rights, including the Sixth Amendment right to counsel, therefore, does not apply in tribal-court proceedings.”<sup>221</sup>

*United States v. Bryant*, decided just two years ago, has provided some important context to the intersection between prosecution in federal and tribal courts and the respective rights enjoyed by defendants in each respective forum.<sup>222</sup> In *Bryant*, the defendant had multiple convictions for domestic assault in the Northern Cheyenne Tribal Court.<sup>223</sup> Although many of those convictions had resulted in terms of imprisonment, the defendant was never given counsel, because, under ICRA, counsel is only required if the defendant is to be sentenced to more than one year in jail.<sup>224</sup> Due to the repeated pattern of the defendant’s domestic violence, he ultimately was prosecuted and convicted in federal court under 18 U.S.C. § 117(a), which makes it unlawful to commit a domestic assault in Indian country if the defendant had at least two prior convictions of domestic violence in federal, state, or Indian tribal court.<sup>225</sup> The defendant argued that his federal conviction should be reversed because the tribal-court convictions, which qualified as his predicate offenses under § 117(a), were uncounseled.<sup>226</sup>

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a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”). The Supreme Court has not, however, extended the right to counsel to those cases involving only the threat of jail time if no jail time is imposed. *See Scott v. Illinois*, 440 U.S. 367, 369 (1979) (“The Supreme Court of Illinois went on to state that it was ‘not inclined to extend *Argersinger*’ to the case where a defendant is charged with a statutory offense for which imprisonment upon conviction is authorized but not actually imposed upon the defendant. We agree with the Supreme Court of Illinois that the Federal Constitution does not require a state trial court to appoint counsel for a criminal defendant such as petitioner, and we therefore affirm its judgment.” (citation omitted)).

<sup>220</sup> *United States v. Bryant*, 136 S. Ct. 1954, 1961–62 (2016).

<sup>221</sup> *Id.* at 1962 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 1963.

<sup>224</sup> *Id.* at 1958–59.

<sup>225</sup> *See id.*; *see also* 18 U.S.C. § 117(a) (2012), *amended by* 18 U.S.C. § 117(a) (Supp.II 2015) (“Any person who commits a domestic assault within . . . Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—[an] assault, sexual abuse, or [a] serious violent felony against a spouse or intimate partner[,] . . . shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.”).

<sup>226</sup> *Bryant*, 136 S. Ct. at 1958–59 (“*Bryant*’s tribal-court convictions, it is undisputed, were valid when entered. This case presents the question whether those convictions, though uncounseled, rank as predicate offenses within the compass of § 117(a).”).

Justice Ginsburg, writing for the majority, reasoned that the tribal-court convictions did qualify as predicate offenses because they were valid when they were issued.<sup>227</sup> While the Constitution and its attendant Sixth Amendment rights do not apply in Indian country, ICRA affords “a range of procedural safeguards to tribal-court defendants ‘similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.’”<sup>228</sup> Justice Ginsburg recognized that, unlike the Sixth Amendment, ICRA does not provide a defendant a right to counsel when faced with charges that carry a criminal penalty of less than one year in jail, but instead only permits the defendant to be represented by counsel procured at his own expense.<sup>229</sup> The Court ultimately held that the use of the tribal-court convictions as the required predicate offenses for the purpose of 18 U.S.C. § 117(a) was proper because there was no violation of the defendant’s rights when the convictions were issued<sup>230</sup>: “It would be ‘odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it’s used in a subsequent case where the defendant’s right to appointed counsel is fully respected.’”<sup>231</sup>

### 1. The Recent Evolution of Tribal Court Convictions as Predicate Offenses

*Bryant* provided a definitive resolution to the question of what effect a tribal-court conviction has on federal proceedings and related questions regarding the interplay between the right to counsel contemplated by the Indian Civil Rights Act and that guaranteed by the Sixth Amendment. *Bryant*’s holding, however, continues to have reverberations across Indian country. In 2017, lower courts worked to unpack the meaning of *Bryant* and apply it to other situations where defendants have raised potential violations of their rights under ICRA.

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<sup>227</sup> *See id.*

<sup>228</sup> *Id.* at 1962 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).

<sup>229</sup> *Id.* (“The right to counsel under ICRA is not coextensive with the Sixth Amendment right. If a tribal court imposes a sentence in excess of one year, ICRA requires the court to accord the defendant ‘the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution,’ including appointment of counsel for an indigent defendant at the tribe’s expense. § 1302(c)(1)–(2). If the sentence imposed is no greater than one year, however, the tribal court must allow a defendant only the opportunity to obtain counsel ‘at his own expense.’ § 1302(a)(6). In tribal court, therefore, unlike in federal or state court, a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel.”).

<sup>230</sup> *Id.* at 1965 (“*Bryant*’s 46-month sentence for violating § 117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court. *Bryant* was denied no right to counsel in tribal court, and his Sixth Amendment right was honored in federal court, when he was ‘adjudicated guilty of the felony offense for which he was imprisoned.’” (quoting *Alabama v. Shelton*, 535 U.S. 654, 664 (2002))).

<sup>231</sup> *Id.* (quoting *United States v. Bryant*, 769 F.3d 671, 679 (2014) (Watford, J., concurring)).

The most notable opinion in the last year on the effect of a tribal-court judgment and the interplay with ICRA emerged from Arizona.<sup>232</sup> In *State v. Lopez*, the defendant was convicted of ‘child molesting’ in Tohono O’odham tribal court and sentenced to 360 days in tribal jail after a judicial proceeding in which he was uncounseled.<sup>233</sup> He subsequently pled guilty in state court for failure to register as a sex offender, and in that proceeding did not challenge his tribal conviction.<sup>234</sup> Three years later, the defendant was again charged with failure to register as a sex offender.<sup>235</sup> In this second state proceeding he did contest the state’s use of his uncounseled tribal conviction, arguing that because he was not given an attorney, the conviction was unconstitutional, and thus he had no duty to register.<sup>236</sup>

The Arizona trial court held that the uncounseled tribal-court conviction deprived the defendant of the Sixth Amendment’s guarantee of a right to counsel.<sup>237</sup> It reasoned that because the state had an obligation to ensure that the predicate conviction was constitutionally obtained, the state had failed to satisfy a required element of the offense.<sup>238</sup> The state appealed, and during the pendency of the appeal the U.S. Supreme Court decided *United States v. Bryant*.<sup>239</sup>

The Arizona appellate court revisited the trial court’s decision in light of the Supreme Court’s new direction that other courts are to recognize tribal-court judgments, even if obtained using processes or procedures which would otherwise be unconstitutional, as long as the tribal-court proceedings were valid when they were issued.<sup>240</sup> The appellate court determined that the tribal-court conviction was valid when it was issued.<sup>241</sup> It recognized that the “due process considerations under ICRA are not necessarily coextensive with those under the United States Constitution[,]”<sup>242</sup> and accordingly reversed the determination of the trial court that the defendant’s conviction was “facially unconstitutional.”<sup>243</sup>

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<sup>232</sup> *State v. Lopez*, Nos. 2 CA-CR 2016-0076 and 2 CA-CR 2016-0122 (consolidated), 2017 WL 3187583 (Ariz. App. July 27, 2017).

<sup>233</sup> *Id.* at \*1.

<sup>234</sup> *Id.*

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

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* (“[T]he trial court concluded Lopez’s tribal court conviction was facially unconstitutional, and thus the state ‘ha[d] failed to satisfy an element of the pending charges against [him].’” (quoting *State v. McCann*, 21 P.3d 845, 849 (2001))).

<sup>238</sup> *Id.* at 1 n.2 (citing *McCann*, 21 P.3d at 849).

<sup>239</sup> *Id.* at \*1.

<sup>240</sup> *Id.* at \*2.

<sup>241</sup> *Id.* at \*3 (“Lopez concedes ‘*Bryant* is dispositive of . . . the trial court’s ruling’ with regard to the constitutionality of his uncounseled conviction. That case makes clear that an otherwise valid but uncounseled tribal court conviction, where a defendant is sentenced to a term of less than one year, comports with both the Constitution and ICRA.”).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* (“Because Lopez was sentenced to a 360-day term of incarceration, the trial court’s

But what if the predicate offense explicitly required the prior conviction to be counseled? In *United States v. Long*,<sup>244</sup> the defendant was charged with several criminal violations including being a prohibited person in possession of a firearm.<sup>245</sup> Under 18 U.S.C. § 922(g)(9), “it is unlawful for any person ‘who has been convicted in any court of a misdemeanor crime of domestic violence’ to possess a firearm in or affecting interstate commerce . . . .”<sup>246</sup> Section 921(a)(33)(B)(i), however, provides that “[a] person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless . . . the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case . . . .”<sup>247</sup> In *Long*, the predicate domestic-violence offense, which the government argued made the defendant ineligible to own a firearm, was a conviction in the Rosebud Sioux Tribe’s tribal court.<sup>248</sup>

The Eighth Circuit cited *Bryant* when it recognized that ICRA, unlike the Constitution, did not require the defendant to be provided with counsel in his tribal court proceeding.<sup>249</sup> The court concluded that there was therefore nothing constitutionally wrong with the defendant’s tribal-court conviction.<sup>250</sup>

However, unlike in *Bryant* or *Lopez*, the defendant was not entirely uncounseled.<sup>251</sup> Instead, the defendant had been represented by a tribal lay advocate—an individual who was not law trained, and was not a member of the South Dakota Bar nor a licensed attorney—who was approved to practice in front of the Rosebud Sioux Tribal Court.<sup>252</sup> A divided panel of the Eighth Circuit ruled that the tribal court conviction was sufficient to trigger the federal statute making Mr. Long a person prohibited from owning firearms.<sup>253</sup> The Eighth Circuit reasoned that the statute’s requirement that the defendant be represented by counsel “in the case” meant that he only needed to be represented by someone recognized to appear before the court prosecuting the criminal case.<sup>254</sup> The lay

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conclusion that *Lopez*’s tribal court conviction was ‘facially unconstitutional’ because it was uncounseled is incorrect and the court’s ruling must be vacated.”).

<sup>244</sup> 870 F.3d 741 (8th Cir. 2017).

<sup>245</sup> *Id.* at 743.

<sup>246</sup> *Id.* at 745.

<sup>247</sup> *Id.* at 745–46.

<sup>248</sup> *Id.* at 745.

<sup>249</sup> *Id.* at 747 (“Under [ICRA], a criminal defendant in tribal-court proceedings is entitled to appointed counsel when a sentence of more than one year’s imprisonment is imposed.”).

<sup>250</sup> *Id.* (“Because Long was sentenced to 365 days’ imprisonment, with 305 days suspended, in the underlying tribal-court proceeding, any right that Long had to appointed counsel could have come only from Rosebud tribal law.”).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

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

<sup>254</sup> *Id.* (“Because lay counsel are admitted to practice before the tribal court, we conclude that Long was represented by counsel in the tribal-court proceeding within the meaning of 18 U.S.C. § 921(a)(33)(B), and that his conviction there thus constituted a valid predicate offense under 18 U.S.C. § 922(g)(9).”).

advocate was entitled to practice in tribal court, therefore the defendant was represented by counsel.<sup>255</sup>

Judge Colloton dissented.<sup>256</sup> He argued that a lay advocate should not qualify as counsel for purposes of the federal statute because that is not the common understanding or expectation of defendants in the criminal justice system.<sup>257</sup> Applying that principle to the federal statute restricting the purchase of firearms for persons convicted of domestic-violence offenses when represented by counsel, Judge Colloton would have concluded that Long's tribal conviction did not qualify.<sup>258</sup> Because his dissent read the statute as requiring a predicate domestic-violence offense where the defendant was represented by counsel, he would have reversed the conviction.<sup>259</sup>

## 2. Comment on the Effect of a Tribal Conviction

*Lopez* and *Long* illustrate the ongoing tension between the Constitution and the Indian Civil Rights Act that still exists even now, fifty years after ICRA's original enactment. Because ICRA does not guarantee that tribal courts will acknowledge the same set of procedural rights in a criminal proceeding as those afforded by the Constitution, there are Indians receiving convictions in tribal courts that would otherwise be unconstitutional in state or federal courts.<sup>260</sup> The fact that American Indians are also United States citizens raises the issue of potential discrimination against a group of Americans on the basis of an immutable characteristic.<sup>261</sup>

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 748.

<sup>257</sup> *Id.* at 749 (“The ordinary meaning of ‘counsel’ in the legal context conveyed by the phrase ‘represented by counsel’ is a lawyer.”).

<sup>258</sup> *Id.* at 750 (“When Long was convicted of a misdemeanor in the tribal court, he was not represented by a lawyer in the case. Therefore, he was not ‘represented by counsel in the case’ within the meaning of § 921(a)(33)(B)(i)(i).”).

<sup>259</sup> *Id.*

<sup>260</sup> Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 646 (2000) (discussing the differences between the due process clause of ICRA and the Constitution); Newton, *supra* note 215, at 508–09 (discussing the pre-*Bryant* circuit split on whether a tribal-court judgment that was procedurally sound if issued by a tribal court, but unconstitutional if issued by a state or federal court, should be used as predicate offenses).

<sup>261</sup> Courts traditionally have fudged this question. It has long been established that federal courts may treat Indians differently on the basis of their status as Indians. The Supreme Court has justified this as being different treatment on the basis of a political rather than racial attribute. *See supra* note 17 and accompanying text. The Court specifically has upheld separate treatment for purposes of federal criminal law. In addition to *Bryant*, see *United States v. Antelope*, 430 U.S. 641, 649 n.11 (1977) (“It should be noted, however, that this Court has consistently upheld federal regulations aimed *solely* at tribal Indians, as opposed to *all* persons subject to federal jurisdiction. Indeed, the Constitution itself provides support for legislation directed specifically at the Indian tribes. As the Court noted in *Morton v. Mancari*, the Constitution therefore ‘singles Indians out as a proper subject for separate legislation.’”).

The Supreme Court in *Bryant* did nothing to resolve this tension. Instead, the Court appeared to have extended the inequalities by allowing Indian defendants to be guaranteed fewer due-process rights than their fellow citizens, and then, when they are convicted without the benefit of trained legal counsel, have those uncounseled convictions held against them as predicate offenses permitting enhanced federal criminal penalties.<sup>262</sup> Exacerbating the inequality, Congress's recent extension of the Violence Against Women Act permits tribal courts to assert criminal jurisdiction over non-Indians for certain domestic-violence offenses, but requires the tribal court to ensure a licensed attorney for those prosecutions.<sup>263</sup>

It is difficult to suggest that the better answer is to require tribal courts to comply with all constitutional guarantees. After all, ICRA was enacted specifically because the Constitution does not apply to tribes in the same way that it applies to protect the rights of defendants in non-tribal criminal proceedings.<sup>264</sup> In fact, Justice Ginsburg's decision in *Bryant* extended to tribal courts a degree of respect and trust. It recognized that, although tribal-court proceedings may apply different procedures, the fact that the procedures are different does not mean the defendant has been denied due process.<sup>265</sup> Justice Ginsburg's unanimous opinion placed a lot of trust in the emerging professionalism of tribal courts.<sup>266</sup>

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<sup>262</sup> *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016) (“Because Bryant’s tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution.”).

<sup>263</sup> Shefali Singh, *Closing the Gap of Justice: Providing Protection for Native American Women Through the Special Domestic Violence Criminal Jurisdiction Provision of VAWA*, 28 COLUM. J. GENDER & L. 197, 219–20 (2004) (“The VAWA Amendment states that all the rights listed in the Indian Civil Rights Act must be upheld, but [ICRA] only requires Indian tribes to give free counsel to indigent defendants who are charged with crimes with a sentence of more than one year. . . . [However,] [t]he Act also states, ‘if a term of imprisonment of *any length* may be imposed,’ a tribe must provide ‘all rights described in section 202(c)’ of the Indian Civil Rights Act, which includes ‘providing an indigent defendant the assistance of a defense attorney licensed to practice law[.]’” (alterations in original) (quoting 25 U.S.C. § 1302(c)(2) (2006))).

<sup>264</sup> *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). ICRA provides similar but not identical rights to those guaranteed by the Constitution. *Id.* at 60–61 (“We note at the outset that a central purpose of the ICRA and in particular of Title I was to ‘secur[e] 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.’” (alteration in original) (citing S. Rep. No. 841, 90th Cong., 1st Sess., 5–6 (1967))).

<sup>265</sup> *Bryant*, 136 S. Ct. at 1966 (“ICRA itself requires tribes to ensure ‘due process of law,’ and it accords defendants specific procedural safeguards resembling those contained in the Bill of Rights and the Fourteenth Amendment. . . . Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions. Therefore, the use of those convictions in a federal prosecution does not violate a defendant’s right to due process.” (citation omitted)).

<sup>266</sup> *Id.* The opinion was 9–0, but Justice Thomas did write a concurrence expressing concern about the plenary power of Congress in the area of Indian affairs.

The Kansas state courts have developed a better approach: the application of lenity.<sup>267</sup> *Bryant* is clear that a tribal-court criminal conviction that complies with all of the rights established by ICRA can serve as a predicate offense for purposes of federal criminal jurisdiction.<sup>268</sup> However, when there is any doubt as to what the tribal court decided, the rule of lenity should be invoked to protect tribal criminal defendants. Lenity suggests that when there is ambiguity, that ambiguity should be resolved in favor of the accused.<sup>269</sup> Such an approach properly balances the recognized interest of the government to have enhanced criminal penalties and restrictions apply to repeat offenders, while also protecting the tribal defendants whose tribal-court proceedings are ultimately subject to a different set of procedural safeguards.

Applying this principle of lenity to the two cases described above yields a consistent result that both safeguards the interests of the state and protects the rights of the defendant. In *Lopez*, the defendant was convicted of child molestation—an offense which requires the convicted individual to register as a sex offender.<sup>270</sup> The defendant’s failure to do so has consequences under state law,<sup>271</sup> and the defendant should be subject to those consequences. As the Arizona appellate court ultimately held, *Bryant* is directly controlling.<sup>272</sup> There was nothing inherently improper in the state court requiring the defendant to register as a sex offender based upon his tribal court conviction for molestation of a minor.<sup>273</sup>

Applying the principle of lenity to *Long*, however, changes the result. In *Long*, the federal statute required that the tribal-court conviction occur in a proceeding at which the criminal defendant was provided with counsel.<sup>274</sup> *Long* was represented in the tribal criminal proceeding by a lay advocate who, while having experience in the tribal court, was not trained as an attorney.<sup>275</sup> The federal firearm statute did not specify if counsel in the underlying proceeding was required to be trained in the law.<sup>276</sup> Faced with that ambiguity, the majority of the Eighth Circuit held that,

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<sup>267</sup> *State v. Horselooking*, 400 P.3d 189, 196 (Kan. App. 2017) (“[I]n a situation like this one where the [tribal court] does not designate a prior conviction as a felony or a misdemeanor, we believe that our Supreme Court would apply the rule of lenity to determine Horselooking’s criminal history. Under the rule of lenity, when a criminal statute is silent or ambiguous on a matter, the statute must be construed in favor of the accused.”).

<sup>268</sup> *Bryant*, 136 S. Ct. at 1966.

<sup>269</sup> *See Horselooking*, 400 P.3d at 196.

<sup>270</sup> Ariz. Rev. Stat. § 13-3821.

<sup>271</sup> *See id.*

<sup>272</sup> *State v. Lopez*, Nos. 2 CA-CR 2016-0076 and 2 CA-CR 2016-0122 (consolidated) 2017 WL 3187583, at \*3 (Ariz. App. July 27, 2017) (“*Lopez* concedes ‘*Bryant* is dispositive of . . . the trial court’s ruling’ with regard to the constitutionality of his uncounseled conviction.” (citation omitted)).

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

<sup>274</sup> *United States v. Long*, 870 F.3d 741, 745–46 (8th Cir. 2017).

<sup>275</sup> *Id.* at 747.

<sup>276</sup> For different interpretations of the statute demonstrating the ambiguity, compare the majority (“*Long* was represented by counsel in the tribal-court proceeding within the meaning

because the lay advocate was permitted to practice in front of the tribal court, the defendant's eventual conviction occurred with the assistance of counsel.<sup>277</sup> Lenity would suggest a different result.

Here, there is ambiguity in the meaning of the statute. As Judge Colloton noted in his dissent in *Long*, the ordinary meaning of *counsel* is an attorney who has been trained in the law.<sup>278</sup> Because the application of the federal firearm statute to the defendant's tribal-court conviction is ambiguous, lenity proscribes that the ambiguity be resolved in favor of the accused. Notably such an application would not result in criminals senselessly being released. The federal criminal code is sufficiently broad to charge the defendant with other criminal offenses stemming from the same unlawful activity—the exact situation which presented itself in that case.<sup>279</sup> Applying the principle of lenity to federal-court offenses that use tribal-court convictions as predicate offenses would afford a proper balance between the interests of the state in prosecuting criminals and the protection of the accused.

#### CONCLUSION

Fifty years later, the Indian Civil Rights Act continues to generate controversies regarding its specific application to defendants. This piece has examined cases decided in the semicentennial year following ICRA's enactment, and told just a few of the stories of the accused and the courts' resolution of their claims. This Article suggests that some of the doctrines involving ICRA have become needlessly complicated and could be resolved better by returning to basic principles.

*Banishment:* Courts have spent too much energy trying to parse out factual differences in cases concerning whether banishment is a sufficient constraint on liberty to trigger ICRA's habeas remedy. Courts should instead view banishment for what it really is—the confinement of the excluded individual in a cell. Admittedly that cell is nearly all-encompassing, but habeas has never required that a prison cell be of any limited size to trigger the appropriateness of the habeas remedy. Tribal courts should not be encouraged to pursue banishment instead of imprisonment in order to avoid federal plenary review.

*Right to a Jury:* ICRA extends to each criminal defendant in a tribal proceeding the right to a jury trial if requested. Defendants in tribal proceedings must be informed of that right before the court accepts any plea, so that the accused can make a conscious decision about whether to invoke her right to a jury. Moreover, tribes must

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of 18 U.S.C. § 921(a)(33)(B).”), *id.* at 747, with the dissent's contrary conclusion (“The ordinary meaning of ‘counsel’ in the legal context conveyed by the phrase ‘represented by counsel’ is a lawyer.”), *id.* at 749 (Colloton, J., concurring in part and dissenting in part).

<sup>277</sup> *Id.* at 747 (majority opinion).

<sup>278</sup> *Id.* at 749 (Colloton, J., concurring in part and dissenting in part).

<sup>279</sup> *Id.* at 743 (majority opinion) (noting that the defendant was also convicted of simple assault and assault with a deadly weapon).

develop their tribal codes and their courthouses to accommodate juries of at least six individuals as required by ICRA. Failure to have a robust and impartial process in place to empanel a jury is a denial of ICRA's right to request a jury trial.

*Effect of a Judgment.* State and federal courts understandably struggle to articulate a consistent rule for when a tribal-court conviction can serve as a predicate offense. The situation is further complicated because the rights the Constitution affords to defendants in a state or federal forum are different from the minimal procedures that tribal courts are required to follow. Given this ambiguity, state and federal courts should turn to the doctrine of lenity and hold that, when there is a question of whether a tribal-court conviction should serve as a predicate offense, all ambiguity should be resolved in favor of the accused. Treating tribal-court convictions in this way gives respect to the unambiguous decisions of the tribal court, ensures that states generally can enforce their criminal laws, and protects the rights of the Indian defendant.

Felix Cohen's "canary in a coal mine" analogy is particularly apt when applied to ICRA. By protecting the rights of Indian defendants in tribal courts, ICRA helps ensure the rise of our democratic faith.