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The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative

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THE RIGHT TO COUNSEL FOR INDIANS ACCUSED OF CRIME: A TRIBAL AND CONGRESSIONAL IMPERATIVE

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Native American Indians[1] *charged in tribal court criminal proceedings are not entitled to court appointed defense counsel. Under well-settled principles of tribal sovereignty, Indian tribes are not bound by Fifth Amendment due process guarantees or Sixth Amendment right to counsel. Instead, they are bound by the procedural protections established by Congress in the Indian Civil Rights Act of 1968. Under the Indian Civil Rights Act (ICRA), Indian defendants have the right to counsel at their own expense. This Article excavates the historical background of the lack of counsel in the tribal court arena and exposes the myriad problems that it presents for Indians and tribal sovereignty.*

While an Indian has the right to defense counsel in federal criminal court proceedings, he does not in tribal court. This distinction makes a grave difference for access to justice for Americans Indians not only in tribal court, but also in state and federal courts. The Article provides in-depth analysis, background, and context necessary to understand the right to counsel under the ICRA and the U.S. Constitution. Addressing serious civil rights violations that negatively impact individual Indians and a tribe's right to formulate due process, this Article ultimately supports an unqualified right to defense counsel in tribal courts.

Defense counsel is an indispensable element of the adversary system without which justice would not "still be done." Tribes, however, were forced to embrace a splintered system of justice that required the adversary system but prohibited an adequate defense. The legacy of colonialism and the imposition of this fractured adversary system has had a devastating impact on the formation of tribal courts. This legacy requires tribal and congressional leaders to rethink the issue of defense counsel to ensure justice and fairness in tribal courts today. The Article concludes that tribes should endeavor to provide counsel to all indigent defendants appearing

1. This Article uses the terms "Native American Indian" and "Indian" interchangeably to refer to indigenous tribal people who inhabit the present-day United States. While it is true the term "Indian" was never accurate, it has become a term of art from historical use in Federal Indian law, history, and statutes.

in tribal courts and calls upon Congress to fund the provision of counsel to reverse the legacy of colonialism and avoid serious human rights abuses.

"[L]awyers in criminal courts are necessities, not luxuries."
– Justice Hugo Black, 1963[2]

INTRODUCTION

The full panoply of rights and due process protections afforded to criminal defendants in this country do not apply to Native American Indian defendants prosecuted in tribal court.[3] Indians routinely face criminal prosecution, incarceration, and receive prison terms—sometimes lengthy—all without the benefit of defense counsel.[4]

Tribal governments and, by extension, tribal courts are not bound by the Fifth Amendment due process guarantees, the Sixth Amendment right to counsel, or any of the Bill of Rights requirements.[5] Instead, tribes are required to follow the Indian Civil Rights Act of 1968 (ICRA).[6] The statutory protections established by Congress in ICRA apply only to Indian tribal governments.[7]

Under ICRA, an Indian has the right to counsel in a criminal proceeding in tribal court, but only "at his own expense."[8] The reality is that most American Indians cannot afford or find competent retained counsel

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2. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.")

3. U.S. CONST. amends. IV–VI, VIII, and XIV. As explained below in Parts II–III, inherent tribal sovereignty predates the Constitution and the existence of the United States itself. Thus, the Constitution and Bill of Rights do not apply to federally recognized tribes. *See* Talton v. Mayes, 163 U.S. 376, 383–84 (1896) (holding that the Fifth Amendment grand jury requirement did not apply to tribes, as the U.S. Constitution had no application to Indian tribes).

4. *See, e.g.*, Romero v. Goodrich, 480 F.App'x 489 (10th Cir. 2012) (challenging a tribal court order of imprisonment for eight years without counsel); *see also* Bustamante v. Valenzuela, 715 F. Supp. 2d 960 (D. Ariz. 2010) (upholding an eighteen-month prison term based upon a guilty plea without counsel).

5. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns preexisting the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *Talton*, 163 U.S. at 384.

6. Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303 (1970).

7. The ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall" abridge a number of enumerated rights aimed at protecting individuals facing criminal prosecution in tribal court. *Id.* § 1302.

8. Prior to the Tribal Law and Order Act amendments, the statute read: "No Indian tribe exercising powers of self-government shall— . . . (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense." *Id.* As shown below, this provision was enacted prior to *Gideon* and *Argersinger*.

to appear in tribal court.[9] This fact is often met with surprise by non-Indian lawyers and the general public.[10]

Few federal Indian law scholars have recognized the important differences of federal power over crime and punishment of Indians. Instead, they have collapsed the analysis of purported federal plenary power of Indian affairs in civil and criminal matters, without regard to the individual Indian.[11] They have failed to adequately decipher criminal law and the distinct impact that federal power has over the defenseless Indian.[12] Indian scholars and practitioners have also overlooked the fact that, whether abso-

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9. *See infra* Part III.

10. *See, e.g.*, Gary Fields, *Defense Reservations: Native Americans on Trial Often Go Without Counsel; Quirk of Federal Law Leaves a Justice Gap in Trial Court System*, WALL ST. J., Feb. 1, 2007, at A1. Quoting a former federal public defender, Fields described what he saw as an absence of fundamental constitutional safeguards: "The Constitution acts as a floor beneath you that no state can go below. . . For Native Americans, that floor doesn't exist." *Id.* (quoting Popko). Understanding the reasoning and basic tenants of Indian law that surround this issue, proved to be more difficult for the reporter. Fields wrote, "[T]he right of defendants to legal counsel is guaranteed by the Constitution. But due to a little-known quirk in federal law, Native Americans aren't assured this protection. That's because under U.S. law, Indian Tribes are considered sovereign nations and are not subject to all privileges afforded by the Bill of Rights." *Id.*

11. Some Indian law scholars object to the discussion of Indian civil rights as misplaced and separate the positions into two groups: tribal rights and individual rights. *See, e.g.*, FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 73 (1995) (noting that tribal leaders must balance respect for individual rights with the possibility of civil rights suits "grind[ing] tribal activity to a halt"); Carole Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 937 (2003) (viewing "the injection of Anglo-American [individual] rights as a threat to tribal revitalization"). A number of Indian law scholars addressed civil rights issues after the passage of the Indian Civil Rights Act, including one article on the right to counsel. *See* Robert T. Coulter, *Federal Law and Indian Tribal Law: The Right to Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. SURV. HUM. RTS. L. 49 (1970–71). There is, however, little else written on the subject of the right to counsel. *See, e.g.*, Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998). Some scholars fear that discussing individual rights with outsiders allows opponents of tribal sovereignty to attack tribal justice systems. *See, e.g.*, Mathew Fletcher, *Indian Courts and Fundamental Fairness*, 84 U. COLO. L. REV. 59 (2003) (citing to attacks on tribal ability to administer justice in the Violence Against Women Act reauthorization hearings); *Violence Against Women Reauthorization Act of 2011: Hearing on S. 1925 Before the S. Comm. on the Judiciary*, 112th Cong. 40–41, 51–55 (2012) (reporting minority views of senators arguing against expansion of tribal court jurisdiction); *Violence Against Women Reauthorization Act of 2012: Hearing on H.R. 4970 Before the H. Comm. On the Judiciary*, 112th Cong. 58–59 (2012) (reporting House majority views that tribal courts will not provide adequate due process to nonmembers).

12. This Article is the second in a series of articles that explores the heretofore nonexistent defense perspective in criminal law in Indian country. *See* Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37 (2011) (rejecting a proposal to count tribal court convictions in federal sentencing as a way to promote or respect tribal sovereignty). This Article provides the history, context, and analysis necessary to question the role of and right to defense counsel in tribal court. A forthcoming article will explore the right to counsel as a due process requirement and an examination of the writ of habeas corpus review as the mechanism of justice to protect Indian civil rights.

lute or qualified, a "right to counsel" arises from a foreign adversarial model based upon the retributive justice system.[13] The United States imposed this adversary system on tribes to displace tribal traditional justice based upon restorative principles.[14] The displacement occurred without concern for rights of the accused.[15]

This Article explores the role of and right to counsel for Native American defendants under the Indian Civil Rights Act and the U.S. Constitution. In doing so, the Article exposes the potential for serious human rights violations. The tensions present in this issue negatively implicate not only the individual Indian defendant, but the tribe's right to define the nature and extent of internal tribal due process.[16]

An indigent Indian defendant's right to counsel in a tribal criminal case (whether appointed or retained) has become inextricably intertwined with tribal sovereignty.[17] In this context, tribal sovereignty means the right of tribes to determine their own internal court practices and procedures.[18] The idea of self-governance has become the right to *not* have required counsel as a matter of right. Tribes and tribal governing bodies viewed this issue as a sovereign prerogative that may or may not be funded, depending on fiscal and administrative responsibilities and resources.[19] Therefore, it is simply not acceptable to address the problem by announcing that Indian people deserve the same rights as a person coming before state or federal court. While such a stance might be a viable rallying point to ultimately fight for the right to indigent defense counsel in tribal courts, a sovereign tribe's right to define due process under the tribal internal system must also be acknowledged.

The role of defense counsel in tribal court and in tribal sovereignty must be examined, not only in response to the encroachment of tribal sovereignty by requirements of a "right" to counsel made by renewed congressional efforts, but also through the lens of tribal values and deeply held beliefs of what constitutes justice and fairness. Declining to provide counsel for defendants may be an act of tribal sovereignty, but it may come at the expense of the same sovereign power.

To understand the role of and right to counsel in tribal courts, it is important to examine the development of the doctrine in state and federal

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13. As described in Part II. B *infra*, the Bureau of Indian Affairs ("BIA") created Courts of Indian Offenses ("CIO courts") to impose the adversary system on reservations in an effort to bring law and order where federal officials thought none existed.

14. The displacement included the imposition of CIO courts and the Major Crimes Act as explained in Part II. B *infra*.

15. The evolution of the right to counsel in American courts described in Part I, *infra*, did not include Indian country. Part II describes the background and history of the prohibition of counsel in tribal courts.

16. *See infra* Parts III and IV.

17. *Id.*

18. *Id.*

19. *Id.*

court as a matter of constitutional interpretation as well as the Indian Civil Rights Act. Only in understanding the differences can one understand the potential for serious civil rights violations that negatively impact an individual Indian defendant, tribal due process, and the public's view of tribal sovereignty.

The role of defense counsel and the concept of an accused's right to assistance of counsel developed from English common law and are now encompassed under the Fifth and Sixth Amendments to the U.S. Constitution.[20] Tribal courts, on the other hand, have a different relationship and history under the Constitution, but they are expected to have the same jurisprudence to be legitimate.[21] Despite this requirement, defense counsel in tribal courts (or the lack thereof) evolved from an elaborate struggle between tribal sovereignty and federal encroachment.[22] To understand the nature of the right to counsel, an examination of the right to counsel as it was presented to Indians and tribal courts from the American colonists is imperative.

Part I of this Article reviews the historic development of the right to counsel under the U.S. Constitution. This Part provides a comparative backdrop and illuminates the nature and impact of the disparities that exist between prosecutions of those facing charges in state or federal court and individual tribal members who face charges in tribal court. Part II excavates the historical antecedents to the prohibition against counsel in tribal court, which is rooted in the federal government's imposition of the adversary system and the creation of Courts of Indian Offenses. The history follows the tribes' subsequent acquiescence and adoption of the prohibition against counsel as a sovereign act intended to reject federal control and reassert control over their own legal systems. Part III shows the development of the right to counsel at the Indian's own expense under the Indian Civil Rights Act as compared to the Sixth Amendment right guaranteed for all accused under the Constitution. Part IV illuminates the serious problems for the United States, tribal governments, and the individual Indian based upon the separate and disparate treatment of tribal people when they are charged with crimes within their own legal systems. Failing to provide defense counsel in tribal court effectively bars access to justice for Indians in tribal, state, and federal courts. Finally, Part V calls upon tribal and congressional leaders to analyze the right to counsel as it currently exists and reconsider their respective positions. The Article proposes solutions that encompass and uphold tribal sovereignty while also protecting the Native American Indian in the right to counsel debate. Access to justice is achieved through the establishment and funding of indigent defense systems in adversarial tribal courts and support of the sovereign right to

20. *See* U.S. CONST. amends. V–VI.

21. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978) (suggesting that tribal courts that look like state and federal courts are legitimate).

22. *See infra* Parts II and III.

implement tribal justice systems that represents an alternative to prosecution and incarceration.

I. THE EVOLUTION OF THE CONSTITUTIONAL RIGHT TO COUNSEL AS A FUNDAMENTAL RIGHT AFFORDED CRIMINAL DEFENDANTS IN AMERICAN COURTS

"Originally, in England a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest."

— Justice George Sutherland, 1932[23]

The role of defense counsel in tribal court cannot be evaluated without an overview of the evolution of the right to counsel under the U.S. Constitution and American jurisprudence more generally. The right to assistance of counsel in criminal proceedings in American courts has gradually evolved, and it has eventually expanded to encompass the fundamental role that defense counsel plays in the adversarial system. Such an idea was grafted from the English justice system, but it took root and grew based upon the ideals of the American colonists. Under the U.S. Constitution, the nature of the right to counsel developed to embody a fundamental character in American law, despite the fact that the English common law did not support such a lofty ideal.

A. *The Right to Counsel Under English Common Law and in the American Colonies*

English common law severely limited an accused's right to consult with counsel at trial.[24] Only parties in civil actions and persons charged with misdemeanors or petty offenses were provided assistance of legal counsel.[25] Defendants charged with a felony or other serious offense, including those punishable by death, had no legal right to appear with counsel.[26] Those accused of felonies could seek to have counsel speak to legal questions only.[27] This legal system reflected the common law precept that

23. Powell v. Alabama, 287 U.S. 45, 60 (1932) (describing the practice in English law of denying counsel to those accused of the most serious crimes).

24. WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8–9 (1955); *Powell*, 287 U.S. at 61.

25. BEANEY, *supra* note 24, at 8–9; *Powell*, 287 U.S. at 61.

26. Bruce R. Jacob, *Memories of and Reflections about* Gideon v. Wainwright, 33 STETSON L. REV. 181, 186 n.8 (2004) (citing 5 WILLIAM BLACKSTONE *355 ("It is a settled rule at common law, that no counsel shall be allowed to a prisoner, upon his trial upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated.") and 3 SIR EDWARD COKE, INSTITUTES *137 ("Where any person is indicted of Treason or Felony, and pleadeth to the Treason or Felony, not guilty . . . it is holden that the party in that case shall have no councell")); *Powell*, 287 U.S. at 63 n.1.

27. Jacob, *supra* note 26, at 186.

in serious criminal matters, the defendant should not get away with something or avoid punishment just because he had the professional service of a skilled lawyer.[28]

Eventually, in 1695, Parliament carved out an exception to allow counsel for those accused of political crimes.[29] But it was not until 1836 that the practice of prohibiting access to counsel was abandoned and access to counsel was expanded to permit defense counsel for a defendant charged with a felony.[30]

Rejecting the English common law, the American colonies considered the right to counsel in criminal cases anew.[31] At least twelve of the thirteen colonies recognized a right to counsel, at minimum, in criminal prosecutions involving capital offenses or other serious crimes.[32] Within this formative milieu, the states adopted the federal constitutional right to counsel embodied in the Sixth Amendment.[33] James Madison proposed the current Sixth Amendment in 1789, and it passed both houses with little or no debate in 1791.[34] However, at this point, the Sixth Amendment only applied against the federal government and not the states.[35] In 1868, Congress passed the Fourteenth Amendment, to declare, *inter alia*,

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28. *Id.*

29. Treason Act, 1695, 7 & 8 Will 3, c.3, § 1 (Eng.). The Treason Act permitted not only the right to retain counsel but required the court to appoint counsel, not exceeding two, upon the request of the accused. *Id.* For more on the background of English law in this area, see FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT (1951).

30. *Powell*, 287 U.S. at 61 (citing 1 THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 698 (8th ed. 1927)).

31. *See* BEANEY, *supra* note 24, at 25 (noting that "[t]he right to counsel in the American colonies deviated from the English right in certain respects"). In the colonies, a statutory provision was generally the rule, as opposed to judicial discretion under the English rules. In the colonies that only permitted the privilege of retaining counsel, however, the colonial courts seemed to provide no greater protection than the English courts. *Id.*

32. *Powell*, 287 U.S. at 61 (citing 1 THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 698 (8th ed. 1927)).

33. Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L. J. 1000, 1031 (1964) [hereinafter *An Historical Argument*] ("Madison proposed the present sixth amendment in the House on July 2, 1789, and it passed both Houses almost without debate. It was ratified in late 1791.").

34. *Id. See also* BEANEY, *supra* note 24, at 27 (examining that "the data available indicate that no comment or controversy accompanied Congressional proposal of the Sixth Amendment to the Constitution, and the proceedings at the three state ratifying conventions in which counsel provisions were demanded reveal nothing concerning the contemporary meanings of the right to counsel").

35. In *Barron v. Baltimore*, 32 U.S. 243 (1833), the Court held that the Bill of Rights constrained only the power of the federal government. ("[The first ten] amendments contain no expression indicating an intention to apply them to State governments. This court cannot so apply them."). Interestingly, it has been noted that "[f]rom 1791 until 1932 state and federal courts saw practically no cases on the right to counsel." *An Historical Argument*, *supra* note 33, at 1031.

that "[no] state shall make or enforce any law which shall abridge the privileges or immunities" of U.S. citizens, and shall not "deny to any person . . . the equal protection of the laws."[36] The Fourteenth Amendment, thus, opened the door to judicial interpretation of the right to counsel as a fundamental human right, and extension of the Sixth Amendment right to counsel protections to state criminal defendants.[37]

B. *The Nature of the Right to Counsel in State and Federal Courts*

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

— Justice Hugo Black, 1963[38]

In a commanding line of cases that include *Powell v. Alabama*,[39] *Johnson v. Zerbst*,[40] and *Gideon v. Wainwright*,[41] the U.S. Supreme Court defined the Sixth Amendment right to counsel as the fundamental right to a fair trial.[42] While the Constitution guarantees a fair trial through the Due Process Clauses,[43] the basic elements of a fair trial in a criminal proceeding are defined in the Sixth Amendment, which includes the Counsel Clause:

> 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 against him; to have compulsory

36. U.S. CONST. amend. XIV, § 1.

37. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (extending the right to a court-appointed attorney to those defendants facing felony charges in state court who cannot afford to retain counsel); Johnson v. Zerbst, 304 U.S. 458 (1938) (establishing the Sixth Amendment right to counsel); *Powell*, 287 U.S. 45 (upholding the right to counsel under the Due Process Clause of the Fourteenth Amendment when the state provides a statutory right to counsel); *see also* Scott v. Illinois, 440 U.S. 367, 374 (1977) (holding that the Sixth and Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to the assistance of appointed counsel in his defense); Argersinger v. Hamlin, 407 U.S. 25 (1972) (establishing the right to counsel for misdemeanors).

38. *Gideon*, 372 U.S. at 344. For an interesting review of *Gideon*, *see* Jacob, *supra* note 26.

39. 287 U.S. at 64–65.

40. 304 U.S. at 458.

41. 372 U.S. at 344.

42. Strickland v. Washington, 466 U.S. 668, 686 (1984).

43. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1.

> process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[44]

Thus, the Constitution dictates that a fair trial is one in which evidence, subject to adversarial testing, is presented to an impartial tribunal for resolution of elements or issues defined in advance of the proceeding.[45] Certain safeguards are essential to criminal justice,[46] and the right to counsel is one of those safeguards.

The Supreme Court has construed the Counsel Clause to mean that in federal courts, counsel must be provided for defendants unable to employ counsel, unless the right is competently and intelligently waived.[47] Counsel's presence is essential because attorneys are the means through which all other rights of a person on trial are secured.[48] As the Supreme Court has repeatedly recognized, without counsel, the right to be heard would be meaningless:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[49]

In *Powell v. Alabama*, the Court dealt with a defendant's right to counsel. This was the infamous case of the "Scottsboro boys"—nine Black youths charged with capital rape charges in Alabama.[50] Specifically, the case in-

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44. U.S. CONST. amend. VI.

45. *Strickland*, 466 U.S. at 685.

46. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942).

47. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

48. United States v. Cronic, 466 U.S. 648, 653 (1984).

49. Powell v. Alabama, 287 U.S. 68–69 (1932).

50. *See generally* HOLLACE RANSDELL, REPORT ON THE SCOTTBORO, ALA. CASE (1931), *available at* http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/Scottsbororeport.pdf.

volved an alleged gang rape of two White girls by nine Black teenagers. A trial of the boys, which began twelve days after their arrest and without adequate representation or preparation, resulted in capital convictions for all on trial. In that case, the Supreme Court unequivocally declared that "the right to the aid of consideration of counsel is of this fundamental character."[51] *Powell* was the first major case to address the meaning and extent of the Sixth Amendment right in criminal cases under the U.S. Constitution.[52] The Supreme Court's examination reveals an American tragedy, reversed only by the Court's affirmance of a due process the right to counsel.

While limited to the facts and circumstances of the case,[53] the *Powell* holding took on enormous meaning, prompting the Court to later comment that "its conclusions about the fundamental nature of the right to counsel are unmistakable."[54] *Powell* did not establish a rule, but as a practical matter, it began to be cited "as an automatic rule requiring counsel in every capital case"[55] at the state level.

In 1936, the Court again reaffirmed the fundamental nature of the right to counsel in another case. Relying on *Powell*, the Court stated:

> We concluded [in *Powell*] that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.[56]

Then, just two years later, the Supreme Court in *Johnson v. Zerbst* held that not only was there a right to retain counsel under the Sixth Amendment, but that in federal courts, an attorney must be appointed if the defendant could not afford one. In that case, the Court remarked:

> (The assistance of counsel) is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'[57]

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51. *Gideon*, 372 U.S. at 342–43 (internal quotation marks omitted) (citing *Powell*, 287 U.S. at 68).

52. 287 U.S. at 65.

53. *Id.*

54. *Gideon*, 372 U.S. at 343 (citing *Powell*, 287 U.S. at 68).

55. Jacob, *supra* note 26, at 191.

56. Grosjean v. Am. Press Co., 297 U.S. 233, 243–44 (1936).

57. Johnson v. Zerbst, 304 U.S. 458, 462 (1938); *see also* Smith v. O'Grady, 312 U.S. 329 (1941); Avery v. Alabama, 308 U.S. 444 (1940).

In a remarkable departure from this solid reasoning, the Supreme Court, in *Betts v. Brady*,[58] refused to extend the Sixth Amendment's guarantee of indigent defense counsel to those in the state courts. The Court decided that the federal right was not "made obligatory upon the states by the Fourteenth Amendment."[59]

However, in *Gideon v. Wainwright*,[60] the watershed case announcing a new constitutional rule, the right to counsel was extended to require court appointed counsel in state criminal prosecutions for felony charges. There, the high court proclaimed that counsel was a fundamental right, necessary for a fair trial.[61]

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[62]

The Court held that the appointment of counsel for an indigent criminal defendant was a "fundamental right, essential to a fair trial"[63] and that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires it in federal court.[64] The *Gideon* Court recognized that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[65]

In 1972, nine years after *Gideon v. Wainwright* and four years after the enactment of ICRA, the Supreme Court extended the right to court appointed counsel to all persons, including Native Americans, facing the possibility of imprisonment in state or federal court.[66] The right to counsel plays an important role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to

58. 316 U.S. 455 (1942).

59. *Id.* at 465.

60. 372 U.S. 335 (1963).

61. *Id.* at 344.

62. *Id.*

63. *Id.* at 335.

64. *Id.* (overruling *Betts*, 316 U.S. 455).

65. *Id.* at 344.

66. Argersinger v. Hamlin, 407 U.S. 25 (1972).

accord defendants ample opportunity to meet the prosecution's case.[67] Thus, a just system cannot exist without the right to counsel. Because of the vital importance of assistance of counsel, the Supreme Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to counsel appointed if retained counsel cannot be obtained.[68]

C. *Effective Assistance of Counsel*

The presence of a warm body who happens to be a lawyer is not enough to meet the demands of the Sixth Amendment, according to the Supreme Court in *Strickland*.[69] The Court in *Strickland* held, "the [C]onstitution's guarantee of appointment of counsel cannot be satisfied by mere formal appointment."[70] The Sixth Amendment's recognition of the right to assistance of defense counsel, including indigent defense counsel appointed by a court, envisions counsel playing a role that is critical to the adversarial system and its ability to produce just results.[71] An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that a trial is fair.[72] For this reason, the Court has long recognized that the right to counsel is the right to effective assistance of counsel.[73] In *Strickland v. Washington*, the Supreme Court settled the debate regarding the proper standard to be utilized in evaluating

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67. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

68. *Argersinger*, 407 U.S. at 37; *Gideon*, 372 U.S. at 344; Johnson v. Zerbst, 304 U.S. 458, 462 (1938). In *Scott v. Illinois*, 440 U.S. 367, 374 (1979) the Supreme Court limited the right to counsel in trial misdemeanor to those cases where actual imprisonment was imposed (finding "that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense"). For example, another exception is that the Sixth Amendment right to counsel does not apply to prison disciplinary hearings. Wolff v. McDonnell, 418 U.S. 539 (1974).

69. 466 U.S. 668 (1984).

70. Avery v. Alabama, 308 U.S. 444, 446 (1940).

71. *Strickland*, 466 U.S. at 685.

72. *Id.*

73. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955) ("The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard."); Glasser v. United States, 315 U.S. 60, 69–70 (1942); *Avery*, 308 U.S. at 446 ("The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."); Powell v. Alabama, 287 U.S. 45, 58 (1932) (citing state court cases on effective assistance and time to investigate and prepare for trial) (repeating the language of the district court to ultimately uphold a denial of the right to counsel in a capital case the Supreme Court opined, "The record indicates that the appearance [of counsel] was rather *pro forma* than zealous and active . . . Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense.").

effective assistance of counsel and formally recognized the critical role of defense counsel in criminal cases.[74]

Effective assistance of counsel is not simply a trial right. It also applies at the pretrial phase and especially during plea bargaining, when most cases are resolved.[75] In 2012, the Supreme Court decided two cases, which emphasized the importance of competent legal counsel in the plea bargaining process by informing defendants of plea offers and accurately advising a defendant of the risks and benefits of going to trial or admitting guilt. In *Missouri v. Frye*, the Court held that defense counsel has an affirmative duty to communicate formal offers from the prosecution and that defense counsel's failure to communicate a written plea offer to his client before it expires constitutes deficient performance.[76] The Court took this principle a step further in *Lafler v. Cooper*, finding ineffective assistance of counsel where a defendant was prejudiced by his counsel's defective advice that led him to reject a plea offer and go to trial.[77]

Thus, under the Sixth Amendment jurisprudence made applicable to all state and federal prosecutions, the constitutional guarantee of effective assistance of counsel applies to all critical stages of representation where the defendant cannot be presumed to make critical decisions without the sound advice of competent counsel.[78] This advice includes the counseling phase prior to trial, the trial itself, sentencing, and appeal.[79] Additionally, the nature of effective assistance of counsel and the critical role of defense counsel is still evolving. These recent cases clarify the scope of the Sixth Amendment and underscore the importance of defining "the duty and responsibilities of defense counsel" throughout the criminal proceeding.

II. THE RIGHT TO COUNSEL IN TRIBAL COURT AND THE MYTH OF THE SOVEREIGN PREROGATIVE

"It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."

—Justice George Sutherland, 1932[80]

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74. 466 U.S. at 668.

75. Lafler v. Cooper, No. 10-209, slip op. at 11 (U.S. 2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); *see also* Missouri v. Frye, No. 10-444, slip op. at 7 (U.S. 2012) ("[O]urs 'is for the most part, a system of pleas, not trials,' . . . it is insufficient to simply point to fair trials as a backdrop that inoculates any errors in the pre-trial process.").

76. *Frye*, No. 10-444, slip op. at 9.

77. *Lafler*, No. 10-209, slip op. at 4–11.

78. *Id.* at 6.

79. *Id.*

80. Powell v. Alabama, 287 U.S. 45, 53 (1932).

A. *Background: The Right To Counsel in Tribal Court Does Not Begin with the Indian Civil Rights Act, or Does It?*

As citizens of the United States, Native American Indians are entitled to constitutional protections, including the right to defense counsel when facing criminal prosecution in state or federal courts. However, the Indian defendant is without the benefit of those constitutional protections in tribal court where the U.S. Constitution has no application.[81] Thus, the landmark Supreme Court holdings of *Powell*, *Gideon*, *Argersinger*, and their progeny, guaranteeing the right to court appointed counsel for indigent defendants and protecting assistance of counsel at all critical stages in a criminal proceeding, simply do not apply to Indians in tribal court.[82]

But that is not the manifest injustice in this scenario. The real injustice lies in the fact that the federal government prohibited the presence of defense counsel in tribal courts from the beginning, when it first imposed the adversarial system on tribes, and this prohibition has persisted through time because it is misinterpreted as a sovereign right. To understand the full nature of this injustice and its development, it is necessary to review the sovereign relationship between tribes and the United States and to examine the history and formation of tribal courts under the influence and coercion of the federal government.

1. Tribal Inherent Power Pre-Dates Contact and the Constitution

Indian nations pre-existed the formation of the United States and the drafting of the U.S. Constitution.[83] It is axiomatic, then, that inherent tribal sovereignty predates the Constitution and the existence of the United States itself.[84] Indian law scholars have long recognized this principle.[85] Even the Supreme Court, which has never included an Indian law

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81. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978); Talton v. Mayes, 163 U.S. 376, 383 (1896).

82. *Id.*

83. *See, e.g.*, *Talton*, 163 U.S. at 383 ("It cannot be doubted . . . that prior to the formation of the Constitution treaties were made with the Cherokee tribes by which their autonomous existence was recognized.").

84. *Id.*

85. *See, e.g.*, Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect Of American Indian Sovereignty*, 37 TULSA L. REV. 661, 683 (2002) ("A fundamental attribute of the sovereignty of American Indian nations, including many of its theoretical premises under federal law, is that the concept of tribal sovereignty predates the ratification of the Constitution and formation of the United States."); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy and the United States v. Lara: Notes Toward A Blueprint For the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 654 (2009) ("It was European contact and the eventual establishment of the United States, at least under the Supreme Court's understanding of tribal sovereignty, that disrupted and fundamentally changed the numerous ancient systems of tribal governance.").

scholar among the distinguished jurists on the bench, has consistently acknowledged the existence of a separate tribal sovereignty.[86]

The Court's formal recognition of the extraconstitutionality status of tribal governments dates back to 1896, when the Supreme Court in *Talton v. Mayes* declared that tribal powers of self-government do not spring forth from the U.S. Constitution but from the inherent powers tribes enjoyed prior to colonization.[87] In *Santa Clara Pueblo v. Martinez*,[88] the seminal case announcing the limits of federal review of Indian civil rights, the Court propounded, "As separate sovereigns preexisting the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[89] Thus, the U.S. Constitution and Bill of Rights do not apply to federally recognized Indian Tribes.[90] As sovereign political bodies, tribes possess inherent power to determine their own makeup and membership and to enact and enforce laws within their own boundaries of jurisdiction.[91] Thus, Indian tribes have "retained the right to try and punish individuals who transgress their laws." [92] The right originates not from the federal government, but from the tribes' inherent sovereignty.

After the formation of the Constitution, treaty making became the primary means of handling Indian affairs.[93] Treaties between the sovereigns were nation-to-nation agreements and included recognition of tribal power and authority to govern the community through local tribal values, norms, and justice on the lands.[94] Treaties negotiated between the tribes

86. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 55 ("Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government.") (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559–60 (1832)); *Talton*, 163 U.S. at 383 (holding that the U.S. Constitution had no application to Indian tribes); *Worcester*, 31 U.S. (6 Pet.) at 519 ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial"); *see also* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997) ("Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes.").

87. 163 U.S. at 385.

88. 436 U.S. at 56.

89. *Id.*

90. *See Talton*, 163 U.S. at 384 (holding that the Fifth Amendment did not operate upon the powers of local self-government enjoyed by tribes). The holding in *Talton* has been extended to other provisions of the Bill of Rights as well as to the Fourteenth Amendment. *See Santa Clara Pueblo*, 436 U.S. at 56 n.7.

91. *See Talton*, 163 U.S. at 384 (citing Kagama v. United States, 118 U.S. 375, 381 (1886)).

92. United States v. Bird, 287 F.3d 709, 713 n.5 (8th Cir. 2002) (citing United States v. Wheeler, 435 U.S. 313, 323 (1978)).

93. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 33–67 (1942). The United States negotiated a treaty with nearly every tribe in the nation.

94. For a detailed account of the complexities of criminal jurisdiction over Indians, including the historical development of jurisdiction and examination of early treaty arrangements, see Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Per-*

and the United States specified the jurisdictional boundaries and parameters for addressing unwanted behavior and peoples within the borders of reservation lands, in terms consistent with international diplomacy.[95] Such criminal justice provisions delineated the parties' power to punish wrongdoers based upon considerations of territory and citizenship or membership of the accused and the victim.[96]

A treaty with the Delaware Nation was the first agreement negotiated between the U.S. government and the Indians. It included the proviso that "neither party shall proceed to the infliction of punishments on the citizens of the other."[97] Thus, the United States and the Delaware Nation agreed to refrain from unilateral action to punish citizens of the other's nation "till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice. . . ."[98]

Treaty making became the basis for the primacy of the federal government in dealing with Indian affairs.[99] This practice followed that of the Dutch, English, and Spanish governments in their relationships with indigenous tribes in present day North America and continued until 1871.[100] In that year, the House of Representatives successfully included a provision in the Indian Appropriations Act to end formal acknowledgement or recog-

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spective, 17 ARIZ. L. REV. 951, 952–60 (1975) [hereinafter Clinton, *Development*]; this article, along with his second article, Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976), remains the most comprehensive guide on the history of the subject.

95. *See* Clinton, *Development*, *supra* note 94, at 953–60 (1975) (citing treaties).

96. *Id.* at 953.

97. Treaty with the Delawares, Sept. 17, 1778, art. IV, 7 Stat. 14.

98. The entire article provides:

> For the better security of the peace and friendship now entered into by the contracting parties, against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice: The mode of such trials to be hereafter fixed by the wise men of the United States in Congress assembled, with the assistance of such deputies of the Delaware nation, as may be appointed to act in concert with them in adjusting this matter to their mutual liking. And it is further agreed between the parties aforesaid, that neither shall entertain or give countenance to the enemies of the other, or protect in their respective states, criminal fugitives, servants or slaves, but the same to apprehend, and secure and deliver to the State or States, to which such enemies, criminals, servants or slaves respectively belong.

Id.

99. Clinton, *Development*, *supra* note 94, at 953, 957–58.

100. *Id.*

nition of Indian nations by the United States.[101] The end of treaty making did not, however, end congressional efforts to secure agreements with tribes, which were then ratified by statute.[102]

2. The Indian Trade and Intercourse Acts and General Crimes Act Dealt with Punishment and Process

Overlapping with its treaty-making powers, Congress dealt with Indian crime and punishment through a series of Trade and Intercourse Acts from 1790 to the late 1800s.[103] Passed to effectuate movement of non-Indian traders throughout the territories by establishing licensing regulations and to protect tribal lands secured by treaty,[104] the Acts were revised to define criminal offenses and applicable sentences. They also defined the jurisdiction over Indians and non-Indians for such crime and punishment.[105] The temporary Trade and Intercourse Acts became permanent with the passage of the Trade and Intercourse Act of 1834, which provided the basis of the General Crimes Act or the Indian Country Crimes Act.[106]

The General Crimes Act expressly granted federal jurisdiction over interracial crimes (crimes involving Indian and non-Indian victims or perpetrators) committed in Indian Country. However, it included two important exceptions.[107] First, the Act did not apply to "any offence committed

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101. Act of Mar. 3, 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2006)). "[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." *Id.*

102. Clinton, *Development*, *supra* note 94, at 958; *see, e.g.*, *Ex parte* Kan-gi-shun-ca (*Ex parte* Crow Dog), 109 U.S. 556, 564–70 (1883) (describing the February 28, 1877, agreement with the Sioux Indians that was enacted after treaty-making ended). In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Supreme Court found that the 1877 Act effected an unconstitutional taking of tribal property set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868, requiring payment of just compensation for the Black Hills.

103. Clinton, *Development*, *supra* note 94, at 958–60.

104. The first of these acts, the Act to Regulate Trade and Intercourse with the Indians, prohibited any U.S. citizen or inhabitant from entering Indian lands and provided for federal prosecution of any who committed crime or trespass against "the person or property of any peaceable and friendly Indian or Indians." Act of July 22, 1790, ch. 33, §§ 5–6, 1 Stat. 137, 138.

105. *See, e.g.*, Act of May 19, 1796, ch. 30, §§ 4–6, 1 Stat. 469, 470–73 (rendering it a crime to settle on or survey any lands secured by treaty for the Indians, and requiring the death for murder of Indians in Indian Country by non-Indians.); Act of Mar. 3, 1817, ch. 92, §§ 1–2, 3 Stat. 383 (providing for a federal forum for crimes committed by an Indian in Indian country for the first time, with exceptions).

106. Clinton, *Development*, *supra* note 94, at 959–60; *see* Act of June 30, 1834, ch. 161, 4 Stat. 729. The General Crimes Act is also known as the Indian Country Crimes Act. *See* Creel, *supra* note 12, at 59 n.124.

107. The General Crimes Act provides in its entirety:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and

by one Indian against another, within any Indian boundary."[108] It thus respected inherent tribal authority over internal affairs. Second, the Act specifically exempted from federal prosecution any "Indian committing any offense in Indian country, who has been punished by the local law of the tribe," or any case where exclusive jurisdiction had already been secured by an Indian tribe.[109] These provisions implicitly supported inherent sovereignty and upheld tribal control and authority over crime and punishment on reservations or within defined Indian territory, especially in dealing with tribal members and internal affairs.[110] Those coming before the traditional tribal system would be afforded the protections and procedures provided for by tribal custom, which constituted the "local law of the tribe."[111]

3. Major Crimes Act Displaced Tribal Authority over Crime and Punishment on Indian Lands

The idea of respect for tribal sovereign authority over criminal matters persisted until Congress seized control over serious crimes on reservations with the passage of the Major Crimes Act in 1885.[112] Prior to 1885, the federal government had the power to prosecute only those cases permitted under the Trade and Intercourse Acts or rightfully pursuant to the specific terms of applicable treaties.[113] Tribes handled offenses on the reservation under their own internal law and custom, exercising inherent authority to resolve disputes and to sanction those transgressing community norms.[114]

> exclusive jurisdiction of the United States, except in the District of Columbia, shall extend to the Indian Country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian Country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152 (2006).

108. *Id.*; *see also* Act of Mar. 3, 1817, Ch. 92 § 1, 3 Stat. 383, 383.

109. 18 U.S.C. § 1152. The deferential reference to tribal law in the federal statutes implicitly supports a respect for tribal court power over members and even over non-members within the tribal territory.

110. *See e.g.*, *Ex parte* Kan-gi-shun-ca (*Ex parte* Crow Dog), 109 U.S. 556, 571–72 (1883) (acknowledging the federal law and policy that supported tribal authority over its own internal affairs).

111. *See* 18 U.S.C. § 1152.

112. Major Crimes Act, Pub. L. No. 80-772, 62 Stat. 683 (codified at 18 U.S.C. § 1153 (2006)).

113. *See Ex parte* Kan-gi-shun-ca, 109 U.S. at 571–72.

114. Though historically underappreciated by the non-Indian observer, Indian societies developed their own methods and internal societal structures to deter unwanted behavior, to restore a member after a wrong, and to otherwise maintain law and order. These systems incor-

Prior to the Major Crimes Act, statute and treaty provisions interacted to uphold internal tribal sovereign authority, as exemplified in *Ex parte Kan-gi-shun-ca.*[115] In that case, the United States arrested and prosecuted a member of the Great Sioux Nation, Kan-gi-shun-ca, in federal territorial court for the murder of another Sioux Indian, Sin-ta-ga-le-Scka, on the Great Sioux reservation in the Dakota Territory.[116] The federal court found Kan-gi-shun-ca guilty and sentenced him to death. [117] Kan-gi-shun-ca, though, had already been brought to justice for the same crime under Sioux tradition.[118] Later, the congressional enactment imposed the adversary system in Indian Country and supplanted this tribal traditional restorative justice.[119]

Upon a petition for the writ of habeas corpus, the Supreme Court reversed the federal conviction in 1883, holding that the federal government lacked jurisdictional authority over the crime because it was committed against another Indian within Indian country. Thus, the prosecution was exempt under the treaties and the applicable federal law regarding criminal jurisdiction in Indian territory.[120] In *Ex parte Kan-gi-shun-ca*, the Supreme Court upheld the limits of federal jurisdiction and protected tribal sovereign authority to punish offenses within tribal boundaries in light of the absence of an explicit congressional measure to the contrary.[121]

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porated tribal values and acknowledged the role of the individual within the whole community. For descriptions of differing world views, laws, customs and traditions, see, for example, Christine Zuni Cruz, *Strengthening What Remains*, 7 KAN. J. L. & PUB. POL'Y 17 (describing the operation of native and non-native societies from different world views and in the context of law and order). *See also* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 10 n.22 (1994) (citing ten full-length monographs or dissertations on the traditional law of Indian people); Philmer Bluehouse & James W. Zion, *Hózhqqjí Naat' áanii: The Navajo Justice and Harmony Ceremony*, 10 MEDITATION Q. 327 (1993) (describing the Navajo peacemaking process of applying internal law and principles); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995) (describing how indigenous law and justice is incorporated into everyday life and is based upon restorative principles of healing).

115. 109 U.S. at 571–72.

116. *Id.* at 557–58.

117. *Id.* at 557.

118. Under the Brule tradition, the tribal council met to resolve the murder, ordered an end to the disturbance, and arranged a peaceful reconciliation of the families involved through offered or accepted gifts. HARRING, *supra* note 114, at 104–05 (explaining that the restorative process applied by the tribe in the case was just "one of a number of conflict resolution mechanisms available to the Sioux," and was "used only after the most serious of tribal disturbances"). For the murder, Kan-gi-shun-ca's family was ordered under tribal law to compensate Spotted Tail's family for the loss by offering "$600 in cash, eight horses, and one blanket"). *Id.* at 1.

119. *See* Major Crimes Act, 18 U.S.C. § 1153 (2006).

120. *Ex parte* Kan-gi-shun-ca, 109 U.S. at 571–72.

121. *Id.*

In direct reaction to the Supreme Court's decision, Congress quickly passed the Major Crimes Act.[122] This Act requires prosecution of Indians accused of certain crimes on reservations in federal court, and fundamentally changed the criminal justice regime for Indians from that point on.[123] The Major Crimes Act intruded into the otherwise exclusive criminal jurisdiction of Indian tribes, previously circumscribed by geography, tradition, and culture.[124] Thus, Congress extended federal jurisdiction to crimes committed by Indians on Indian land with the explicit purpose that many an Indian would "be civilized a great deal sooner by being put under [federal criminal] laws and taught to regard life and the personal property of others."[125] Under the Major Crimes Act, tribal people accused of committing serious crimes on the reservation defined by the statute are bound to the federal courts for prosecution and punishment, according to the laws and U.S. Constitution, including laws governing the right to counsel.[126] Once in federal court, the rights of an Indian defendant track those of all non-Indian defendants facing federal criminal prosecution.[127]

However, tribal justice systems on reservations suffered. With the Major Crimes Act, the United States began a wholesale displacement of tribal governments, governing internal affairs regarding crime and punishment in a tribe's own community. This displacement continues with the Indian Civil Rights Act of 1968 and the more recent Tribal Law and Or-

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122. FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 166 (1975).

123. The Major Crimes Act provides in its main part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153.

124. Over time, the Major Crimes Act has been expanded to encompass more than twenty enumerated felony offenses. Specific offenses under the Major Crimes Act include murder, manslaughter, kidnapping, maiming, felony child sex abuse, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a person under sixteen, arson, burglary, robbery, and felony theft. *Id.*

125. Keeble v. United States, 412 U.S. 205, 211–12 (1978) (quoting 16 Cong. Rec. 936 (1886) (remarks of Rep. Cutcheon)).

126. *See* 18 U.S.C. § 1153.

127. *Id.* § 3242 ("All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.").

der Act of 2010.[128] The Major Crimes Act, thus, began the imposition of the U.S. Constitution over the Indian in federal court, and the concomitant history of right to counsel included the Indian defendant.

The development of assistance of counsel as a right, however, did not follow in the tribal courts. Tribal courts, as formal systems distinct from internal tribal ways of addressing unwanted behavior, represent Indian subjugation in the nineteenth century and the imposition of the adversary criminal justice system on Indians. First, this happened by the creation of an Indian police force and the Courts of Indian Offenses.[129] Tribal police and tribal courts have never been "tribal."[130] Rather the courts and police force were sponsored first by the U.S. Army and later came under the Indian Affairs Department sponsorship and control.[131] After the Courts of Indian Offenses, tribes formed their own tribal courts as judicial entities under the Indian Reorganization Act. Under the control of the United States policy, tribal courts began with the presupposition that attorneys were not necessary.

B. *Imposition of Courts of Indian Offenses and Prohibition Against Attorneys*

Congress exercised authority over Indian jurisdiction through the Trade and Intercourse Acts as well as through treaty making. The War Department, Department of the Interior, and the Bureau of Indian Affairs also had a hand in dealing with the "Indian Problem."[132]

In the later part of the 1800s, in addition to congressional encroachment on criminal jurisdiction by the Major Crimes Act, tribes suffered the imposition of the adversarial court system to displace or supplant indigenous justice systems by the Department of Interior. The first court system,

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128. *See* 25 U.S.C.A. §§ 1301–1341 (West 2012) (imposing a version of the Bill of Rights on Indian tribal governments); *id.* § 1302 (expanding tribal court sentencing authority contingent upon specific requirements of the tribal court, including the right to appointed counsel, in the Tribal Law and Order Act of 2010); *see also* 18 U.S.C. § 1162 (2006) (granting unilateral authority to states to assume criminal and civil jurisdiction over reservations within their boundaries).

129. WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 107–08 (1966). The Indian police force and tribal courts were both components of the assimilation plan. *Id.*

130. *See* Sydney Harring, *Native American Crime in the United States*, *in* INDIANS AND CRIMINAL JUSTICE 98–102 (Laurence French ed. 1982).

131. *Id.* at 101.

132. The term "Indian problem," found throughout the discussion of Indian law and policy, is used without specific definition to identify a variety of issues (usually from the colonizer's point of view) in dealing with the indigenous peoples inhabiting the lands that would later become the United States. *See, e.g.*, Northwest Band of Shoshone Indians v. United States, 324 U.S. 335, 355 (1945) (Jackson, J., concurring) (opining that "[t]he Indian problem is essentially a sociological problem, not a legal one"); THE INDIAN PROBLEM, H. R. MISC. DOC. NO. 149 (1924); *see also* ROBERT HAYS, EDITORIALIZING "THE INDIAN PROBLEM": THE NEW YORK TIMES ON NATIVE AMERICANS, 1860–1900 1 (describing the forty years of news stories in the paper addressing what was commonly referred to as the "Indian problem").

Courts of Indian Offenses, began administratively by the Commissioner of Indian Affairs under a broad but tenuous line of authority.

In 1824, the Secretary of War established the Bureau of Indian Affairs (BIA) and housed it in the War Department, the agency responsible for the operation of the United States Army.[133] Congress established the Office of the Commissioner of Indian Affairs in 1832.[134] Indian affairs remained under the War Department for twenty-five years, until 1849, when the federal government transferred the BIA to the newly created Department of the Interior (DOI).[135] The statute entrusted the management of all Indian affairs and all matters arising out of the Indian relations to the Commissioner and the BIA.[136] Presumably then, Congress and the executive delegated federal power over Indian affairs to the Interior and the BIA. The Department and the Bureau, without any express power or authority, created the Courts of Indian Offenses.

Courts of Indian Offenses operated to establish and impose an adversarial justice system. The courts were the brainchild of Secretary of the Interior Henry Moore Teller, a former Colorado Senator, appointed to the post on April 17, 1882.[137] Shortly after his appointment, Teller alerted his Commissioner of Indian Affairs, Hiram Price, of "a great hindrance to the civilization of the Indians," involving Indian tribal ceremony and custom.[138] Teller's December 3, 1882, letter to Price called for active measures to put an end to "the old heathenish dances, such as the sun-dance, scalp-dance," and other feasts and dances of the same character on reservations.[139] Describing what he viewed as "wicked conduct" he also despaired of the state of Indian marriage relations, the influence of medicine men, and lamented on the need to instill private property ownership as a societal value.[140] Teller opined, "It will be extremely difficult to accomplish much towards the civilization of the Indians while these adverse influences are allowed to exist,"[141] and he set out to abolish Native practice, custom, and rites through a new court system:

> I therefore suggest whether it is not practicable to formulate certain rules for the government of the Indians on the reservations that shall restrict and ultimately abolish the practices I

133. *See* SUPERINTENDENCY OF INDIAN AFFAIRS, H.R. DOC. NO. 146, at 6 (1824).

134. 25 U.S.C. §§ 1–2 (2006).

135. Act of Mar. 3, 1849, ch. 108, § 5, 9 Stat. 395, 395.

136. 25 U.S.C. § 1a (2006).

137. Appointed by President Chester Arthur, Teller served from 1882 to 85. The dates of Teller's nomination and confirmation are unknown. Past Secretaries of the Department of Interior, U.S. DEPARTMENT OF INTERIOR, http://www.doi.gov/whoweare/past_secretaries.cfm#teller (last visited Apr. 1, 2013).

138. PRUCHA, *supra* note 122, at 160; *see also* HAGAN, *supra* note 129, at 107–08.

139. PRUCHA, *supra* note 122, at 159.

140. PRUCHA, *supra* note 122, at 160; HAGAN, *supra* note 129, at 108–09.

141. PRUCHA, *supra* note 122, at 160.

> have mentioned. I am not ignorant of the difficulties that will be encountered in this effort; yet I believe in all tribes there will be found many Indians who will aid the Government in its efforts to abolish rites and customs so injurious to the Indians and so contrary to the civilization that they earnestly desire.[142]

In response to this request, Commissioner Price obligingly proposed the Court of Indian Offenses to "well accomplish the ultimate abolishment of the evil practices," and promulgated a set of rules for the courts.[143] Expediently approved by Secretary Teller on April 10, 1883, the rules organized courts and procedure and established a criminal and civil code.[144] The Courts of Indian Offenses sprung forth within the span of four months, as imagined by the Indian Commissioner, with the mission to keep Indians from being Indian. At the same time, the Courts of Indian Offenses introduced and mandated the adversary system on the reservation for criminal matters.

As blatant federal instrumentalities, one would assume that the Courts of Indian Offenses provided a right to counsel at least consistent with the federal Constitution and provide for Sixth Amendment jurisprudence.[145] In fact, the opposite was true. Courts of Indian Offenses prohibited the appearance of attorneys.[146] The Indian agent selected or recruited judges from among the reservation Indians.[147] When none could be recruited, the Indian police force served as the judge.[148] Under rules and list of crimes defined by the Office of the Indian Affairs, the courts operated simply to achieve their mission as "[n]o lawyers perplex the judges."[149] Unencumbered by defense attorneys, "[n]o guilty party ever escape[d] punishment on account of a technicality of the law."[150]

The Indian agent or the selected judge imposed standard punishments, including imprisonment, withholding of rations, forced labor, and fines.[151] In 1892, the rules authorized imprisonment of "up to five days imprisonment for failure to do road work and up to six months for medicine men convicted a second time of interfering with the civilization programs."[152] Thus, the reservation Indian was placed in jeopardy without

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142. *Id.*

143. HAGAN, supra note 129, at 109.

144. *Id.*

145. *See supra* Part I.B.

146. 25 C.F.R. § 11.9 (1958) (repealed by 26 Fed. Reg. 4360–61 (May 19, 1961)).

147. HAGAN, supra note 129, at 109.

148. *Id.* at 111.

149. *Id.* at 120.

150. *Id.*

151. *Id.* at 120–21.

152. *Id.*

a defense, which was consistent with the purpose of the reservation and the court system to educate and civilize the Indian.[153]

The "civilization" of the Indian occurred for almost eighty years without any regard for the rights of the accused. The *Code of Federal Regulations* prohibited attorneys in tribal court until 1961.[154] Moreover, Congress never authorized the Courts of Indian Offenses and did not authorize payment for the Indian judges until 1888.[155] These early Federal Indian Courts enjoyed, "at best a shaky legal foundation" based upon this oppressive beginning.[156] Nonetheless, the Commissioner and local Indian agents established Courts of Indian Offenses in every Indian agency that they themselves saw fit, with the exception of the Five Civilized Tribes, the Indians of New York, the Osage, the Pueblos, and the Eastern Cherokees.[157] By the 1900s, Courts of Indian Offenses operated in two-thirds of the Indian agencies,[158] and they persist to operate as the law and order court on more than twenty reservations or Indian trust lands to this day.[159]

The adversary system was a foreign system imposed on tribes. Further, it was designed by the federal government to bring about the "civilization" of the Indian.[160] The laws designed to stop "heathenish practices" were met with as little opposition as possible because attorneys were prohibited in the Courts of Indian Offenses.[161] Although judges and police were recruited from among the tribal people, there was incentive to follow the system put in place by the BIA and the Indian agent.[162] The Indian

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153. *See* United States v. Clapox, 35 F. 575 (D. Or. 1888). In *Clapox*, Judge Deady described and defended the courts as a necessary tool to educate and civilize the Indian:

> These "courts of Indian offenses" are not the constitutional courts provided for in section 1, art 3, Const., which congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to who it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gather there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.

Id. at 577.

154. *See* 25 C.F.R. § 11.9 (1958) (repealed by 26 Fed. Reg. 4360–61 (May 19, 1961)).

155. HAGAN, *supra* note 129, at 110–11.

156. *Id.* at 120.

157. *Id.* at 109.

158. *Id.* at 109.

159. *See* 25 C.F.R. § 11.100 (2012) (listing twenty-one such courts currently in existence).

160. *See* United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

161. *See* HAGAN *supra* note 129, at 120–21; PRUCHA, *supra* note 122, at 159; *supra* notes 146–152.

162. *Clapox*, 35 F. 575; HAGAN, *supra* note 129, at 108–09; PRUCHA, *supra* note 122, at 160. Since the goal was to educate and civilize the Indian, the incentives were to comply by foregoing involvement in "crimes" of being a practicing Indian, among other things, or submit to prosecution and punishment in Courts of Indian Offenses. *See also* Creel, *supra* note 12, at 63.

who resisted was met with more punishment.[163] There was no need for a right to assistance of counsel in one's defense The prohibition against counsel began with the Courts of Indian Offenses and took hold as an important part of the tribal system. Thus, there existed no preexisting "right to counsel" in the new tribal courts created by the U.S. government. Tribes extended and continued this precedent of "no right to counsel" in the courts formed by their own tribal governments.

C. *Indian Reorganization Act Courts Continued the Prohibition of Attorneys*

During the advent of tribal self-determination as a federal policy, Congress initiated the Indian Reorganization Act of 1934 (IRA). The IRA represented the new federal Indian policy designed to reverse the damaging effects of the termination of Indian reservations and devastating divestiture of lands under the Indian General Allotment Act of 1887, also known as the Dawes Act.[164] The IRA sought to repair poverty, but it shattered Indian governments, and lowered morale caused by allotment by reaffirming inherent tribal sovereignty and supporting tribal self-government.[165] Returning to the principles of tribal self-determination and self-governance, which had characterized the pre-Dawes Act era, Congress halted further allotments and authorized Indian tribes to incorporate and adopt tribal constitutions as a way to reestablish formal tribal internal self-government.[166] Pursuant to this recognition, tribes formed constitutional governments and organized tribal courts as models or replicas of state and

163. *See, e.g.*, *Clapox*, 35 F. 575. In that case, an Indian woman was arrested, without written warrant by the Indian police on the Umatilla reservation on a charge of adultery, and committed to the Indian jail for trial before the Court of Indian Offenses; she was rescued by other Indians. Those involved in her rescue were prosecuted for a crime against the United States. *Id.* Upholding the prosecution Judge Deady found:

> But, pleasantry aside, and in conclusion, the act with which these defendants are charged is in flagrant opposition to the authority of the United States on this reservation, and directly subversive of this laudable effort to accustom and educate these Indians in the habit and knowledge of self-government. It is therefore appropriate and needful that the power and name of the government of the United States should be invoked to restrain and punish them.

Id. at 579.

164. Dawes Act, 25 U.S.C. § 331 (1928). The Act had the same coercive intent to civilize and assimilate Indians as the Courts of Indian Offenses of the same time period. Divesture of Indian reservation lands was promised and protected by treaty. The Act allotted tribal landholdings and opened lands reserved for Indians by treaty or other documents to non-Indian settlement, cutting tribal lands from approximately 138 million to 48 million acres. COHEN, *supra* note 93, at 216.

165. COHEN, *supra* note 93, at 395–98. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10–18, 63–67 (1995).

166. 25 U.S.C. §§ 476–77 (2006).

federal courts.[167] Any tribe adopting or enacting a tribal constitution had to seek and acquire BIA approval to do so.[168] Tribes enacting a model constitution commonly adopted a "Law and Order Code" promulgated by the BIA, as BIA approval was also required of tribal codes, ordinances, and resolutions passed under the constitution.[169] Each constitution adopted under the IRA contained a provision allowing the Secretary of Interior to "rescind [any] ordinance or resolution for any cause. . . ."[170]

Pervasive federal control over tribal governance was achieved through this statutorily required review and approval. The BIA's practice of formulating model constitutions, codes, and resolutions for passage by tribes created a BIA stranglehold over tribal actions.[171] Tribes, formulating and adopting formal governments under the Indian Reorganization Act, adopted standard constitutions prepared by the BIA "patterned after the United States Constitution rather than tribal custom."[172] Emerging tribal courts followed the preexisting pattern for Courts of Indian Offenses. The pattern was derived from the *Code of Federal Regulations* that tribunals shall enforce the pertinent U.S. statutes, the rulings of the DOI, and any ordinance or custom of a tribe not prohibited by federal legislation.[173] Tribal constitutions adopted under the Indian Reorganization Act of 1934 included the prohibition against attorneys, which began in the Interior Department's Courts of Indian Offenses and was codified in the *Code of Federal Regulations*.[174]

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167. Some tribes had written constitutions, which were adopted prior to the Reorganization Act. COHEN, *supra* note 93, at 128.

168. 25 U.S.C. § 476. Section 16 of the Act provides:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

169. Coulter, *supra* note 11, at 55.

170. WILLIAM A. BROPHY & SOPHIE D. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 70–71 (1966).

171. Coulter, *supra* note 11, at 54–56.

172. KENNETH R. PHILP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM 1920–1954 164 (1977) (describing how the Bureau "tried to impose rigid white political and economic concepts in a situation that called for flexibility") Most constitutions contained boilerplate language consisting of a preamble, followed by articles which set forth powers to employ legal counsel, negotiate with federal state and local governments, and regulate tribal lands. *Id.*

173. BROPHY & ABERLE, *supra* note 170, at 58.

174. *Id.* ("[P]rofessional lawyers are excluded from most of the tribunals.").

Secretary of Interior Stewart Udall finally amended the regulations in 1961 to allow the presence of professional lawyers in the courts of Indian offenses, based upon the concern that the prohibition might be unconstitutional. The reversal did not affect the more than fifty independent tribal governments which prohibited professional attorneys in their own tribal courts.[175] Each of those tribes was free to amend tribal constitutions to allow or regulate attorneys in tribal courts.[176] Again, tribes did so only with the approval of the Secretary of the Interior.[177]

III. THE INDIAN CIVIL RIGHTS ACT OF 1968 AND THE RIGHT TO COUNSEL DEBATE

During the civil rights era, Congress embarked upon an investigation into the civil rights of Native American Indians on and off reservation lands.[178] In 1961, the Senate Subcommittee on Constitutional Rights, headed by Senator Sam Ervin of North Carolina initiated a series of hearings and field investigations following an independent report[179] and a DOI report[180] examining civil rights problems of individual Indians. Congress struggled with the question of how Indian tribal governments relate to the U.S. Constitution and the protections it afforded all citizens.[181] The Congressional investigation reflected the widespread concern that "the preservation of tribal rights and cultures has seemed in some areas to come in conflict with the constitutional rights of individual Indians as American citizens."[182] At issue was the fact that "Indian Tribes are not subject to the federal constitutional limitations of the Bill of Rights."[183] Senator Ervin's ostensible objectives were to investigate the civil rights gap for tribal people due to the inapplicability of the Bill of Rights to tribal governments.[184]

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175. *Id.*

176. *See* 48 Stat. 984, 987 (1934) (codified with some differences in language at 25 U.S.C. § 476 (2006)).

177. *Id.*

178. *The Constitutional Rights of the Am. Indian: Hearing Before the Subcomm. on the Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. 1–2 (1961) [hereinafter *1961 Hearings, Part 1*].

179. FUND FOR THE REPUBLIC, REPORT OF THE COMMISSION ON THE RIGHTS, LIBERTIES AND RESPONSIBILITIES OF THE AMERICAN INDIAN (William A. Brophy & Sophie D. Aberle eds., 1961).

180. TASK FORCE ON INDIAN AFFAIRS, BUREAU OF INDIAN AFFAIRS, A PROGRAM FOR INDIAN CITIZENS (1961).

181. *1961 Hearings, Part 1*, *supra* note 178, at 1–2.

182. *1961 Hearings, Part 1*, *supra* note 178, at 5 (Remarks of Sen. Kenneth B. Keating).

183. *1961 Hearings, Part 1*, *supra* note 178, at 8 (Remarks of Sen. Frank Church) (commenting that the U.S. Constitution does not apply to tribal governments). *See generally* Talton v. Mayes, 163 U.S. 376 (1896).

184. For a comprehensive analysis of the ICRA and Senator Ervin's interests, see Donald L. Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 HARV. J. ON LEGIS. 557 (1972).

Congressional leaders sought to correct what it viewed as a double standard of justice.[185] As a result Congress enacted the Indian Civil Rights Act of 1968 (ICRA)[186]to afford the "individual Indian protection of his rights as a citizen in the face of tribal practices."[187] The Act established ten enumerated rights "constitutional Rights," mimicking the Bill of Rights with some important exceptions.[188]

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185. U.S. COMM'N ON CIVIL RIGHTS, AMERICAN INDIAN CIVIL RIGHTS HANDBOOK 9 (1972).

186. Indian Civil Rights Act, Pub. L. 90–284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301–1303 (1970)). The ICRA was also referred to as the "Indian Bill of Rights." *See* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

187. *1961 Hearings, Part 1*, *supra* note 178, at 6 (Remarks of Sen. Roman Hruska).

188. ICRA did not prohibit the establishment of religion, provide for an automatic right to a jury trial, or require the appointment of counsel for indigents in criminal cases. Specifically, the Act provided:

> § 1302 Constitutional Rights
>
> No Indian tribe in exercising powers of self-government shall—
>
> 1. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> 2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
>
> 3. subject any person for the same offense to be twice put in jeopardy;
>
> 4. compel any person in any criminal case to be a witness against himself;
>
> 5. take any private property for a public use without just compensation;
>
> 6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
>
> 7. require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of 6 months or a fine of $5,00, or both;
>
> 8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> 9. pass any bill of attainder or ex post facto law; or
>
> 10. 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.
>
> § 1303. Habeas corpus
>
> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

ICRA did not prohibit the establishment of religion, provide for an automatic right to a jury trial, or require the appointment of counsel for indigents in criminal cases.[189] The restraint in these areas reflected the need to recognize tribal sovereign authority in due process and government.[190] The final version of the Act reflected a compromise between the original intention to bring tribes fully under the umbrella of the U.S. Constitution and the recognition of independent tribal sovereignty. Thus, the ICRA may have "secured for the American Indian the broad constitutional rights afforded to other Americans" to "protect individual Indians from arbitrary and unjust actions of tribal governments,"[191] but it did so in word only. Without counsel to understand the protections afforded and object to transgressions, any such arbitrary and unjust actions of the government remain unchecked. While Congress explicitly granted habeas corpus in federal court to remedy violations under ICRA,[192] it is available only in criminal proceedings and rendered virtually meaningless without the benefit of counsel.[193]

A. *The Indian Right to Counsel "At His Own Expense"*

Ultimately concerned with the individual rights of Indians in their own tribal court systems, Congress enacted the ICRA, but failed to require the right to court appointed counsel. The right to defense counsel provided by tribal expense was opposed by the BIA for several reasons, including that such a provision would be costly to the BIA and that defense counsel would create an imbalance as tribes are not usually represented and judges are not always legally trained.[194]

In addition, the Courts of Indian Offenses operated to prohibit attorneys under the *Code of Federal Regulations*, which set the standard for the

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25 U.S.C. §§ 1302–1303.

189. *Id.*

190. *See also* AMERICAN INDIAN CIVIL RIGHTS HANDBOOK, *supra* note 185, at 11. ("In passing the Act, Congress attempted to guarantee individual rights to reservation Indians without severely disrupting traditional tribal culture.")

191. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 90-841, 5–6).

192. 25 U.S.C. § 1303.

193. *Santa Clara Pueblo*, 436 U.S. at 62; *see also Tribal Law and Order Act of 2009: Hearing on H.R. 1924 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111 Cong. 162–68 (2010) (written response of Barbara Creel to post-hearing questions posed from the subcommittee regarding federal habeas as an adequate remedy to protect Indians from unjust actions in tribal courts and attributing the lack of civil rights cases under ICRA to the fact that Indian defendants have no counsel to protect their rights); United States v. Swifthawk, 125 F. Supp. 2d 384, 387 (D.S.D. 2000) (finding that there is virtually no case law on ICRA). This lack of case law is disturbing given that Judge Charles B. Kornman, author of the *Swifthawk* opinion, presides over the U.S. District Court for the District of South Dakota and has only reviewed two ICRA cases (using the Westlaw case database).

194. *1961 Hearings, Part 1*, *supra* note 178, at 13.

BIA and tribal governments to follow.[195] The DOI and BIA officials argued that the presence of attorneys in tribal court would unnecessarily complicate an otherwise simple process and because of attorneys' superior knowledge, would likely control proceedings in tribal court.[196] As a compromise, the DOI introduced a substitute bill which provided Indians the right to counsel, but only at their own expense.[197]

Importantly, ICRA included for the first time a limit on tribal sentencing authority. In no event could tribes impose any penalty or punishment greater than imprisonment for term of 6 months or a fine of $500, or both.[198] Thus, the anemic view of a right to counsel partially reflected the norm in state court for misdemeanor charges in 1968.

While the debate regarding tribal members' right to counsel under the ICRA ensued, the indigent defendant's right to counsel in state and federal court was still unfolding. Senator Ervin began his investigative hearings in 1961, before *Gideon* had been decided.[199] During the seven years of Senate hearings from 1961 and continuing after the passage of ICRA in 1968, the Supreme Court had not yet extended the right to counsel to defendants facing jail time for misdemeanor offenses. At that time, the Sixth Amendment guaranteed a criminal defendant the right to counsel in federal court,[200] but that right was not made applicable to state court trials until 1963; even then, it was only for felonies, not misdemeanors.[201] Thus, with regard to the right to counsel debate of the time, ICRA's provision of a right to counsel at the Indian's own expense was equivalent to the right to counsel in the states. Tribes were in synchronicity with the state and federal judicial interpretation of the late 1960s and early 1970s.

Tribal sentencing authority was limited to a maximum of six months imprisonment, the equivalent of a misdemeanor in state court.[202] The states were not required to provide counsel for misdemeanor offenses at

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195. Secretary of the Interior Stewart L. Udall amended the code in 1961 to remove the prohibition, which served no reasonable purpose. *See* 25 C.F.R. § 11.9 (1958) (repealed by 26 Fed. Reg. 4360-61 (May 19, 1961)).

196. Secretary of the Interior Stewart Udall amended the Code to lift the prohibition against professional attorneys appearing in tribal courts in May 1961. Fed. Reg., Vol. 26, No. 96 (May 19, 1961); *1961 Hearings, Part 1*, *supra* note 178, at 54.

197. Burnett, *supra* note 184, at 591.

198. Indian Civil Rights Act, 25 U.S.C. § 1302(7) (1970).

199. Gideon v. Wainwright, 372 U.S. 335 (1963).

200. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

201. *Gideon*, 372 U.S. at 345.

202. Indian Civil Rights Act, 25 U.S. § 1302(7) (1970). As originally enacted, ICRA provided the following restraint on tribal authority to punish: "[A]nd in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both." *Id.*

ICRA's passage in 1968, so why should tribes be so required?[203] Not until nine years after *Gideon* and four years after the passage of the ICRA, did the Supreme Court extended the right to counsel to all defendants, including indigent persons, facing jail time for offenses in state and federal courts.[204]

Unfortunately, after the expansion of the right to counsel in state and federal courts, Congress undertook no subsequent review of an Indian tribal defendant's access to an adequate defense in tribal court. Instead, in 1986, Congress expanded sentencing authority of the ICRA from six months to one year without reviewing, assessing or altering the right to counsel or the resources for tribal defense.[205] Congress acted to increase tribal sentencing power in reaction to the Supreme Court's denigration of tribal criminal justice and failed to apply the civil rights lens of the original law.[206] It was not until 2010, that Congress reconsidered the right to counsel for tribal court defendants, and then only to increase tribal court sentencing authority to a total of nine years.[207]

B. *The Tribal Law and Order Act of 2010 Requires Appointed Counsel to Impose a Sentence Greater Than One Year*

Congress enacted the Tribal Law and Order Act to allow, *inter alia*, an increase in tribal sentencing jurisdiction under ICRA in certain cases, provided that tribes ensure certain individual rights to an Indian criminal defendant, including the right to counsel as guaranteed by the U.S. Constitution.[208] The 2010 amendments to tribal sentencing authority demon-

203. Indians were subject to imprisonment under the Courts of Indian Offenses. 25 C.F.R. § 11.114 (2012); HAGAN, *supra* note 129, at 120. In addition, the legislative history shows that the discussion on the right to counsel did not include a concern for lengthy incarceration. BIA reports revealed that tribes were not routinely imposing jail sentences. Of the 435 tribal governments supervised by the BIA, only twenty-three had contracts with BIA administered jails and nineteen other tribes administered their own tribal jail facility. *1961 Hearings, Part I, supra* note 178, at 247–50.

204. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

205. Indian Civil Rights Act, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 25 U.S.C. § 1302(7) (1988)).

206. Duro v. Reina, 495 U.S. 676 (1990) (finding that tribal courts had no jurisdiction over non-member Indians who committed offenses within the reservation boundaries); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (finding that tribes had no jurisdiction to prosecute non-Indians who committed crimes within the reservation boundaries). These two decisions were, at least in part, an outgrowth of the fact that tribal courts did not have to guarantee rights commensurate with the United States Constitution. *See* Oliphant, 435 U.S. at 211–12; Duro, 492 U.S. 693–96. In response to *Duro*, Congress amended ICRA to recognize inherent tribal criminal jurisdiction over *all* Indians. Indian Civil Rights Act, 25 U.S.C. § 1301(2) (2006). This amendment was also made without the civil rights lens of protection for the Indian defendant subject to tribal court.

207. The Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258 (codified at 25 U.S.C § 1302).

208. *Id.*

strate Congress's intent to provide enumerated rights and standards to defendants facing a term of imprisonment of more than one year.[209]

The Act expanded tribal sentencing authority and installed procedural safeguards to address lengthy tribal incarceration without the aid of legally trained defense counsel. No tribe may "impose . . . any penalty or punishment greater than imprisonment for a term of one year or a fine of $5000, or both."[210] However, the new law increases sentencing authority for those certain cases, provided that the tribe seeking to enhance sentencing authority secures certain rights of defendants.[211] A tribal court may impose a "term of imprisonment greater than 1 year but not to exceed 3 years," if the defendant has been previously convicted of the same or comparable offense in any jurisdiction in the United States and would be subject to imprisonment of greater than one year if prosecuted in state or federal courts. Specifically, the Act increases the maximum sentence under the ICRA from one year to three years and increases the maximum fine to fifteen thousand dollars. The expanded sentencing authority applies only when a defendant has been provided "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitu-

209. *Id.*

210. *Id.*

211. The Tribal Law and Order Act of 2010 changed the maximum sentence a tribe may impose from one year to three years and increased the maximum fine from $5000 to $15,000, but only with the permission and approval to ensure that the tribe or tribal court process meets the extensive requirements. The Act provides in pertinent part:

> (c) RIGHTS OF DEFENDANTS.—In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—
>
> (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
>
> (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
>
> (3) require that the judge presiding over the criminal proceeding—
>
> (A) has sufficient legal training to preside over criminal proceedings; and
>
> (B) is licensed to practice law by any jurisdiction in the United States;
>
> (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
>
> (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

Even where all these requirements are met, the "total penalty or punishment" cannot exceed nine years. If these requirements are not met, even under the 2010 amendments to ICRA, the tribe is limited to one year and $5,000 fine. *Id.*

tion."[212] In addition to affording indigent defense counsel the right to *effective assistance*, tribes seeking to implement the greater sentencing scheme under the TLOA must afford a whole host of additional rights and safeguards not enumerated in ICRA, including a legally trained judge to preside over the criminal proceeding;[213] public access to tribal laws, rules of evidence, rules of criminal procedure, including rules governing recusal of judges;[214] and a record of tribal criminal proceedings.[215]

However, as explained above, the Fifth Amendment due process guarantees and the Sixth Amendment right to counsel have no application to tribal court proceedings. The statutory provisions of ICRA provide the sole protections available for Indian defendants in tribal courts. Though the 2010 Act tried to increase protections for Indians, it failed to do so because it did not address the underlying issue that there is no right to counsel. At present, for the vast majority of prosecutions in tribal court, Indians have only the right to counsel at their own expense, the equivalent of the English statutory rule after 1836 and the pre-*Gideon* case law in the United States.

When passed in 1968, ICRA continued in the vein of federal attempts to mold tribal systems to conform to the adversary system found in the Western-Anglo criminal justice model. Consistent with the Bill of Rights, the ICRA afforded Indians guarantees of free exercise of religion, freedom of speech, freedom of press, peaceable assembly,[216] and other protections. It also gave Indians the criminal procedural protections known to defendants in state and federal courts through due process,[217] including a prohibition on double jeopardy and self-incrimination[218] and the right to a jury trial for offenses punishable by jail.[219]

While the Indian version of guaranteed civil rights mirrored the Bill of Rights, the notable exception, the right to counsel, is an especially egregious oversight, especially in light of the purpose of ICRA.[220] The

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212. *Id.*

213. The Act provides that the Indian tribe shall,

> "require that the judge presiding over the criminal proceeding—
>
> (A) has sufficient legal training to preside over criminal proceedings; and
>
> (B) is licensed to practice law by any jurisdiction in the United States."

Id.

214. *Id.*

215. *Id.*

216. Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. § 1302(1) (1970)).

217. *Id.* § 1302(6).

218. *Id.* § 1302(3)–(4).

219. *Id.* § 1302(10).

220. In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court determined that the Act does not permit members of a tribe to pursue legal action against the tribe

irony is that Congress investigated civil rights abuses in tribal courts because the courts did not include the constitutional guarantees afforded by the Fifth and Sixth Amendments, imposed a set of rights, and then failed to include the one factor that could protect those rights: the fundamental human right of access to defense counsel.[221]

IV. FAILURE IN ACCESS TO JUSTICE IN UNITED STATES COURTS BASED ON THE LACK OF COUNSEL FOR CRIMINAL DEFENDANTS IN TRIBAL COURTS

The absence of a right to free defense counsel in tribal court harms the Indian in state and federal court. The Indian defendant suffers dual investigation and double jeopardy punishment, uncounseled guilty pleas, and waiver of his ICRA rights in tribal court only to face extensive collateral consequences and direct use of his prior uncounseled convictions by the state and federal court systems that allegedly uphold the right to counsel as fundamental.

The dual sovereignty doctrine provides for prosecution in both federal and tribal courts for the same offense. Because Indian tribes are separate sovereigns with inherent powers of self-government predating the existence of the United States, the Supreme Court has upheld dual prosecution for the same offense. Under these principles, the Double Jeopardy Clause is not violated, and the Indian may legally be punished twice: once in tribal court and in federal court for the same offense.[222] Additionally, Indians face harsher punishment in federal court because of their status as Indians under the Major Crimes Act, and the courts have consistently held that this treatment does not violate the Equal Protection Clause.[223] Federal prosecutions can follow tribal prosecution for the same offense, and the

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for violating any provisions of the act. In other words, it is a law without teeth, without any enforcement mechanism. The exception to the rule is federal habeas corpus review for criminal proceedings.

221. *See* 25 U.S.C. § 1302.

222. United States v. Wheeler, 435 U.S. 313 (1978) (holding that federal prosecution in addition to tribal prosecution for the same offense under the dual sovereignty doctrine did not violate the prohibition against double jeopardy).

223. United States v. Antelope, 430 U.S. 641 (1977) (holding that federal prosecution presented no equal protection problem even where the federal jurisdiction applied only to Indians, and non-Indians prosecution in state court resulted in lighter sentence); *see* U.S. SENTENCING COMM'N NATIVE AM. ADVISORY GRP., REPORT OF THE AD HOC ADVISORY GROUP ON NATIVE AMERICAN SENTENCING ISSUES 9, 17–27, *available at* http://www.ussc.gov/Research/Research_Projects/Miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf; Troy Eid, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067 (2010); *see, e.g.*, United States v. Swifthawk, 125 F. Supp. 2d. 384, 384–85 (D.S.D. 2000) ("Congress has seen fit to impose altogether different penalties on Native Americans . . . . Thus, Swift Hawk faces up to five years more time in prison and a much higher fine than a similarly situated Norwegian or for that matter another Native American driving in Sioux Falls [off the reservation]. This is without taking into account the harshness of the Federal Sentencing Guidelines in their treatment of Native Americans.").

federal investigation may overlap with that of a tribe's.[224] The fact that prosecution in tribal court may proceed without defense counsel also impacts an Indian defendant's Fifth and Sixth Amendment guarantees under the U.S. Constitution in a subsequent prosecution in federal court. Under differing tribal laws, the right to counsel as defined by internal tribal law may trigger whether the Sixth or Fifth Amendment right to counsel attaches in a federal prosecution.[225] This allows for overreaching in federal criminal investigations.[226] When tribal prosecution is initiated under ICRA, a defendant is not entitled to counsel under the Fifth or Sixth Amendments.[227] Under subsequent federal investigation and prosecution, an Indian enjoys those constitutionally protected rights. However, federal prosecutions ignore federal constitutional protections by initiating investigation in tribal court and using that information and evidence in the subsequent federal proceeding.[228]

Additionally, prior tribal court convictions are routinely used against Indian defendants in the federal sentencing scheme. The federal sentencing guidelines provide for a favored upward departure based upon prior tribal court convictions.[229] For example, in *United States v. Romero*,[230] the U.S. District Court for the District of Colorado relied on an allegedly unlawful prior tribal court conviction as the basis for lengthening a tribal member's subsequent federal sentence by almost three years. The court cited to the prior uncounseled conviction to grant the U.S. Attorney's motion for an upward departure. The court upwardly departed from the applicable Criminal History Category II to Category VI to increase the sentence by thirty months.[231] The federal consequences of a prior tribal uncounseled conviction are irrefragable and include impeachment in future proceedings.[232]

More disturbing, however, is the federal court's use of a prior uncounseled tribal court conviction as an element of a federal offense.[233] Under 18 U.S.C. § 117, a federal habitual offender statute, it is a felony offense for a person who has had two or more prior domestic assault con-

224. *See* United States v. Doherty, 126 F.3d 769 (6th Cir. 1997).

225. United States v. Red Bird, 146 F. Supp. 2d 993 (2001). For further explanation of the dual sovereignty doctrine and how it works to the detriment of the Indian see, Alex M. Hagen, *From Formal Separation to Functional Equivalence: Tribal-Federal Dual Sovereignty and the Sixth Amendment Right to Counsel*, 54 S.D. L. REV. 129 (2009).

226. *Swifthawk*, 125 F. Supp. 2d. at 386–90.

227. *Id.*

228. *Id.*

229. U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.2(i), 4A1.3 (2003).

230. 442 F.App'x. 399 (10th Cir. 2011).

231. *Id.* at 401.

232. *See, e.g.*, United States v. Denetclaw, 96 F.3d 454, 457 (10th Cir. 1996) (noting that a trial court is permitted to use a guilty plea in tribal court to impeach a criminal defendant).

233. The (mis)use of prior uncounseled tribal court convictions in federal court and the proper constitutional analysis is the subject of a forthcoming article.

victions to commit a domestic assault within Indian country. The law provides that state tribal or federal prior convictions are eligible. Two Federal Courts of Appeals have held that uncounseled tribal convictions, resulting in incarceration, can be used as a predicate offense under the habitual offender statute.[234]

The issues presented on appeal before the Eighth Circuit in *United States v. Cavanaugh* consisted of whether the Fifth or Sixth Amendments to the U.S. Constitution precluded the use of these prior tribal-court misdemeanor convictions as predicate convictions to establish the habitual-offender elements of § 117. Cavanaugh's prior convictions resulted in actual incarceration that, pursuant to *Gideon,*[235] would have been a constitutional violation of his Sixth Amendment right to appointed counsel had the convictions originated in a state or federal court.

The district court, recognizing that the Sixth Amendment imposes no duty on Indian tribes to provide counsel for indigent defendants, noted that prior convictions were valid at their inception and that the prior terms of incarceration were not in violation of the U.S. Constitution, tribal law, or the Indian Civil Rights Act.[236] The lower court, nevertheless, held that the uncounseled convictions were infirm for the purpose of proving the habitual-offender, predicate conviction elements of the § 117 offense in these subsequent federal court proceedings.[237]

On appeal, the Eighth Circuit reversed, finding the Sixth Amendment inapplicable to the analysis.[238] In doing so, the court recognized an inconsistency in several cases dealing with the use of arguably infirm prior judgments to establish guilt, trigger a sentencing enhancement, or to determine a sentence for a subsequent offense.[239] Ultimately, the Eighth Circuit dispensed with any Indian law analysis and held that use of such convictions did not violate the federal defendant's right to counsel because the federal constitutional right to appointed counsel did not apply against a tribe. Thus, absent any "allegations of irregularities or claims of actual innocence" concerning the tribal convictions, the court failed to preclude the use of the convictions to establish the predicates for the § 117 charge.[240] In a subsequent case, the Tenth Circuit held the same.[241]

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234. United States v. Shavanaux, 647 F.3d 993, 1000 (10th Cir. 2011); United States v. Cavanaugh, 643 F.3d 592, 594 (8th Cir. 2011).

235. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* Scott v. Illinois, 440 U.S. 367 (1979).

236. United States v. Cavanaugh, 680 F. Supp. 1062, 1075–76 (D.N.D. 2009), *rev'd* 643 F.3d 592, *cert. denied*, 132 S. Ct. 1542 (2012).

237. *Id.* at 1075.

238. *Cavanaugh*, 643 F.3d 592.

239. *Id.* at 601–02.

240. *Id.* at 605.

241. United States v. Shavanaux, 647 F.3d 993 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012).

The spurious reasoning of the circuit courts failed to take into account two undeniable aspects of Indian law: (1) the rights Indians enjoy as U.S. citizens under the United States Constitution differ from their civil right under ICRA, and (2) tribal sovereign power in crime and punishment in Indian country by federal law and policy. These two aspects taken together require federal judges to uphold the U.S. Constitution. While the judicial reasoning turned on the fact that the Sixth Amendment to the U.S. Constitution did not apply in tribal court, the decision should have recognized something more obvious: namely, that ICRA does not apply in federal court.[242]

In the American criminal justice system, judges sit as an impartial observer and are sworn to uphold the Constitution and the law. Thus, federal judges reviewing criminal convictions, either to enhance sentencing or as an essential element of a crime under 18 U.S.C. § 117, are required to uphold the over two hundred years of Anglo-American jurisprudence interpreted and developed by the Supreme Court and applied by lower federal courts. The Supreme Court has held that the right to counsel is guaranteed to all persons accused of crimes in state and federal courts.[243] While it is true that those decisions do not apply in tribal court, they most certainly do apply in federal courts. The Tenth and Eighth Circuit Courts of Appeal shirked their responsibilities to uphold the Constitution when applied to Native Americans in federal court. The failure to do so produced the wrong result.

The Major Crimes Act subjects an Indian defendant to federal prosecution for serious crimes, but an Indian is also subject to harsher treatment in state court as a result of a conviction in tribal court. An Indian defendant's uncounseled conviction in tribal court also induces further penalties or disabilities under state laws.[244] Currently, both Kansas[245] and Oregon[246] allow for prior tribal convictions, without regard to the appointment of counsel, to be included in an offender's criminal history during a subse-

242. *See* Indian Civil Rights Act, 25 U.S.C. §§ 1301–1302 (2006).

243. The Sixth Amendment right to counsel mandates the provision of counsel to indigent defendants sentenced to any amount of prison time for criminal felonies or misdemeanors absent a knowing and intelligent waiver. Scott v. Illinois, 440 U.S. 367, 373–74 (1979); *see also* Farretta v. California, 422 U.S. 806, 835 (1975).

244. *See, e.g.*, State v. Spotted Eagle, 71 P.3d 1239, 1245 (Mont. 2003) (holding that prior uncounseled tribal court convictions may be used in the sentencing proceedings in Montana courts); State v. Stensgar, No. 14627-8-III, 1996 WL 460262 (Wash. Ct. App. Aug. 13, 1996) (upholding a state court's imposition of an exceptional sentence under state law based on prior convictions, including a guilty plea to indecent liberties in Colville Tribal Court). For a chart detailing state civil and criminal uses of tribal court convictions against Indians, see Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263, 290–96 (2004).

245. KAN. STAT. ANN. § 21-4711(e) (West 2007).

246. *See* State v. Graves, 947 P.2d 209, 210–11 (Or. Ct. App. 1997) (concluding prior convictions assessed for sentencing purposes "include federal, tribal court, military and foreign convictions.") (quoting OREGON SENTENCING GUIDELINES IMPLEMENTATION MANUAL 57 (1989)).

quent state court sentencing. Thus, Indians face an increased possibility of harsher punishment based on uncounseled tribal convictions.

While it is true that lack of counsel in tribal court is not an infirmity of tribal courts so as much it is the direct result of ICRA, it cannot be consistent with U.S. jurisprudence regarding the fundamental right to counsel to use these convictions in federal court against an Indian. The result is that Indians are left defenseless in tribal country, and then their federal rights are violated in the federal court system, when it imports the foreign judgment where the U.S. Constitution has no application.

It is ridiculous and contrary to notions of access to justice that such uncounseled tribal court convictions are relied upon in federal court in the name of tribal sovereignty. It is equally repugnant that the Assistant U.S. Attorneys seek to distort their own bedrock principle of the right to counsel, guaranteed by the Constitution, in the name of protecting Indian people or communities. The line drawn in federal court between individual freedom and tribal sovereignty has evolved into a perverted view of the U.S. Constitution as applied only to Indians.

V. RECONSIDERATION OF THE RIGHT TO COUNSEL IN TRIBAL COURT: A TRIBAL AND CONGRESSIONAL IMPERATIVE

Tribes should explore the right to counsel in tribal court, looking at access to justice and the assistance of counsel as a "fundamental right" in the adversary system. Tribal traditional systems of justice included fairness; no less should be afforded under those systems that emerged as a result of pervasive federal control or adopted by a tribe. For congressional and executive leaders, the role of the government in fashioning tribal courts and the historical prohibition of a defense should be reviewed as a whole to determine the response to crime and punishment. For federal judges who sit to review underlying tribal court convictions, it is simply unacceptable to dispense with any analysis regarding the uncounseled tribal court convictions and simply point to the fact that the Indian Civil Rights Act does not require counsel. Justice and fairness in the American judicial court system requires more in each of these considerations. It is imperative that tribal and congressional leaders reconsider their positions and take up the mantel to provide true access to justice through the establishment of indigent defense systems in adversarial tribal courts or support the sovereign right to a suitable alternative. Tribes operating an adversarial court system should be required to provide defense counsel, and Congress should help provide resources to establish this element critical to a functioning justice system. Those tribes implementing non-adversarial justice systems based on custom and tradition should be allowed to develop without federal interference. In either case, the tribal actions should be respected in foreign courts.

A. *Tribal Imperative*

Though the Indian Civil Rights Act did not prescribe a tribal right to indigent defense, neither does it prohibit the right to defense counsel.[247] Tribes are free to provide counsel as a matter of practice, providing fairness and justice beyond the limited protections required by statute or the U.S. Constitution.[248] Citing lack of resources and cost, tribes have rejected defense counsel's role in the adversary model of justice. Importantly, tribes did not appreciate being expected to provide those rights determined to be fundamental by an entity outside of and not subject to tribal authority.[249] Tribal sovereign authority was undercut and truncated with the implementation of the adversarial court in the first instance.[250] Once a tribe agreed to accept the adversary system and engage in prosecutions that mimic the state and federal criminal justice system, defense counsel became fundamental to justice. Without indigent defense counsel, tribes have only a hobbled adversary system of injustice.

Viewing assistance of counsel through the lens of the foreign criminal justice system as a fundamental human right is imperative, especially when that foreign system has displaced traditional justice. Tribes have the opportunity to reconsider the impact on tribal people and the tribal community of the failure to allow or provide a necessary part of the justice system they

247. *See* Indian Civil Rights Act, 25 U.S.C. § 1302(6) (2006). Prior to the Tribal Law and Order Act of 2010, the guarantee of "the assistance of counsel for his defense" existed but only at the defendant's own expense. Due to the Tribal Law and Order Act, tribes are now required to provide defense counsel to indigent defendants at the expense of the tribal government in order to impose an authorized sentence over one year. Indian Civil Rights Act, 25 U.S.C.A. § 1302 (West 2012).

248. Indeed, tribes have always had the right to provide defense counsel in tribal court at the tribe's own expense as a sovereign prerogative. The problem is finding the resources to fund tribal public defense. For example, the Tulalip Tribe, a tribe in the mid-Puget Sound area of Washington provides for indigent defense in their tribal code. *See* Tulalip Tribal Code 2.25.070, *available at* http://www.codepublishing.com/wa/Tulalip/. The Tulalip Tribes collaborated with a law school to assist in providing public defense. Since 2002, the Tribal Court Defense Clinic at the University of Washington School of Law has partnered with the Tulalip, Squaxin Island, Port Gamble S'Klallam, and Puyallup Tribes to serve as their public defender on these reservations. *See Tribal Court Public Defense Clinic,* U. WASH. SCH. LAW, http://www.law.washington.edu/Clinics/Tribal/Default.aspx (last visited Mar. 18, 2013). The Pueblo of Laguna has employed, at times, a tribal public defender to provide legal defense services to defendants in criminal actions. For a description of the Pueblo of Laguna's judicial services, see *Judicial Services,* PUEBLO LAGUNA, http://www.lagunapueblo-nsn.gov/Judicial_Services.aspx (last visited Mar. 18, 2013). The Navajo Nation operates a public defense system. *See* NAVAJO NATION CODE ANN. tit. 2, § 1991 (2010). The White Earth Nation Rules of Criminal Procedure provide: "[T]hat a defendant has a right to counsel in all subsequent proceedings. . .and if the defendant appears without counsel and is financially unable to afford counsel, that counsel will forthwith be appointed without out cost to the defendant," if charged with a crime punishable by incarceration. WHITE EARTH NATION R. CRIM. P. 5.01, *available at* http://www.narf.org/nill/Codes/wearthcode/codecriminalrule5.pdf.

249. Burnett, *supra* note 184, at 589–90.

250. *See supra* Parts II and III.

adopted. It is important to reconsider the background and history that led to a prohibition of professional attorneys under tribal courts and a right to retained counsel under ICRA.

Tribes should reevaluate whether defense counsel is consistent with their justice plan. This means an indigent defense is essential to the adversary system of justice. If tribes have implemented the system, indigent defense counsel is a necessary and proper requirement for a fair and just system. On the other hand, tribes do not have to implement the adversary system in all matters. The sovereign prerogative allows tribes to induce justice and fairness through their own systems.[251] Should tribes have another system, like a restorative justice system based upon native tribal tradition or custom or other principles, there would be no need to provide defense counsel. Instead, tribes should review and utilize their own methods for restoring the tribe or tribal members to balance. Any arguments in favor of providing counsel must be responsive to the needs of tribes, tribal people, and take into account the expense.

Addressing the cost of an indigent defense system is important. One suggestion is to provide tribal defense counsel through a pro bono requirement.[252] Attorneys admitted to the tribal bar, such as the Navajo Nation bar, are required to accept criminal defense cases and represent clients pro bono.[253] However, in testimony before the Indian Law and Order Commission, Chairman Troy Eid asked the Navajo Nation Public Defender to comment on this pro bono requirement as a practical solution for tribes. Kathleen Bowman, the Director of the Navajo Nation Office of the Public Defender, testified as to the very real problems of effective assistance of counsel under the tribal requirement. She maintained that she often has to employ other counsel because of a conflict.[254] Unfortunately, outside counsel often do not have the requisite training or advocacy skill necessary for a competent criminal defense because the practice of criminal law and Indian law are highly specialized. No matter how competent an attorney

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251. The intent of the Indian Reorganization Act was to promote tribal self-determination.

252. For example, the State of New York recently implemented a pro bono requirement for all members of the state bar "to address the state's urgent access to justice gap." Press Release, N.Y. State Unified Court Sys., Chief Judge Names Advisory Comm. on Pro Bono Bar Admission Requirements (May 22, 2012), *available at* http://www.nycourts.gov/press/pr2012_03.shtml. Rule 520.16 of Rules of the Court of Appeals requires all applicants who successfully pass the bar examination after 2015, to perform fifty hours of qualifying pro bono service before applying for admission to practice at the appellate level. 22 NYCRR 520.16.

253. As a general rule, all members of the Navajo Nation Bar Association are required to accept pro bono assignments from the Navajo Nation courts, including representation of indigent defendants in criminal cases. NAVAJO NATION PRO BONO R. II, III, *available at* http://www.navajolaw.org/2007_PDF/Bono.pdf.

254. Kathleen Bowman, Testimony Before the Indian Law and Order Commission (Apr. 19, 2012).

may be in his or her field, there is no guarantee of transferable skills to provide competent assistance in a criminal proceeding.[255]

Furthermore, this practice is only available to tribes with an extensive tribal bar membership and would not be helpful for the vast majority of tribes. For smaller tribes, in the absence of a dedicated defense system, there simply would not be enough attorneys to meet the needs of the tribal criminal court. [256] Such a requirement reflects the 1880s view of defense counsel in American courts.[257] During that time, judges expected that lawyers would represent defendants in criminal cases as a professional obligation or duty and did not consider payment as necessary.

Instead of a blanket requirement for all members of the bar, a second option is for a tribe to create a specialized defense bar. Those attorneys with requisite expertise and experience could be kept in a pool and receive appointment by the court in criminal cases. Short of providing defense counsel for every member who comes before the court, tribes could appoint counsel for those facing charges with a risk of penalty of incarceration or simply reserve appointed counsel for the most serious offenses. Under these systems, however, the question of payment for the attorney still exists. In addition, criminal defense attorneys require payment funds for travel, adequate investigation, experts, fees for subpoenas, and other costs to the attorney incurred as part of the vigorous defense. In the absence of a fully functioning volunteer criminal defense bar, the question remains: Who pays?

To solve this problem, tribes should look to Congress. Tribes operating an Anglo-American adversary system should insist on training opportunities and funding for court personnel as essential to a just system. Practitioners, whether lawyers or lay advocates, should insist on access to justice for all. Indian community members deserve access to an attorney and appointment of free legal counsel for those who cannot afford an attorney. Training, funding, and an independent tribal defense organization are all requirements of a just system,[258] and all are perspicuously encompassed under the federal trust responsibility.

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255. *Id.*

256. *Id.*

257. Federal and state courts took the position that they had the inherent power to appoint counsel for indigent defendants in any criminal case. It was seen as the responsibility of every lawyer to accept appointment without fee. This was the privilege of being allowed to practice law. BEANEY, *supra* note 24, at 77; *see* Powell v. Alabama, 287 U.S. 45, 73 (1932).

258. Professional organizations have established clear standards for an effective criminal defense system and the ABA has adopted a number of standards and created a document listing ten fundamental principles. *See* ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

B. *Congressional Imperative*

Congress and the executive have a responsibility to review the federal role in shaping tribal justice and to navigate a solution to address the historical deficiency in tribal defense. The first responsibility of federal leadership is to engage in tribal consultation on the issue. Congress has yet to undertake serious consultation on the right to counsel; it should do so in order to assess the needs and rights of the tribe and the needs and rights of the individual Indian who can be prosecuted in any tribal court for criminal offenses within that tribe's jurisdiction.[259]

The nation-to-nation relationship requires consultation between the sovereign prerogative and the nation. This question of who pays for defense counsel arose in the 1961 hearings, and discussion led to the decision not to require defense counsel in tribal court.[260] The answer that Congress ignored at that time should be embraced today. Congress should fund indigent defense systems for tribal courts, if chosen by the tribes. Unambiguously encompassed under the federal tribal trust responsibility,[261] Congress has funded training and access to personnel for tribal courts in the form of judges, clerks, prosecutors, police, probation officers, and other positions.[262] Justice requires, at the very least, parity in any funds allocated for tribal prosecutors and defense counsel.[263]

Parity in funding between the prosecution and defense is also essential. The adversary system places the burden of proof on the prosecution to prove its case beyond a reasonable doubt. The system presupposes that the

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259. As described in Part III.B, *supra*, when enacted in 1968, ICRA imposed the first proscription on tribal court sentencing authority, limiting tribal court sentences to six months or a fine of $500, or both (the equivalent of a misdemeanor in state court). In 1986, Congress amended ICRA by the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207–137, 3207–146 (codified at 25 U.S.C. § 1302(7) (2006)) to allow harsher penalties of up to one year imprisonment and a $5,000 fine. There was no change in the right to counsel provision until 2010. *Id.* § 1302(6). From 1968 until 2010, ICRA provided for the Indian, "at his own expense to have the assistance of counsel for his defense." *Id.* In 2010, Congress expanded tribal sentencing power to include a potential to impose up to three years in prison, and fines of $15,000, or both, provided certain rights and requirements are met. Tribal Law and Order Act of 2010, Pub. L. No. 111–211, § 234, 124 Stat. 2258 (codified at 25 U.S.C § 1302). The TLOA authorized the power to stack individual three year sentences up to a maximum of nine years, again only if the rights and requirements are met. *Id.*

260. *1961 Hearings, Part 1*, *supra* note 178, at 13, 54.

261. For an overview of the federal trust responsibility in Indian law, see generally, COHEN, *supra* note 93; Reid Payton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1214 n.8 (1975).

262. 42 U.S.C. § 3796gg-1(a) (regarding funding to Indian tribal government to develop and strengthen law enforcement and prosecution in the context of combatting crimes of violence against women).

263. One of the fundamental principles of a just public defense system is parity. *See* ABA, *supra* note 258, at 1 ("There is parity between defense counsel and the prosecution with respect to resources and defense counsel is include as an equal partner in the justice system.").

two opposing sides will have access to information, including the investigation and evidence culled by the government. In addition, the defense must have access to its own independent research, investigation, and experts to refute the evidence of guilt offered by the prosecution.[264] A study to determine the resources made available to tribal court systems, including funding for tribal police, judges, personnel, and jails over the years, without the requisite funding for a defense bar, is an essential starting point. A portion of past funding should be allocated to those tribes who seek to implement indigent defense system as a necessary part of their tribal court system.

In addition to consultation, congressional, and executive leaders should endeavor to create and staff a tribal liaison to serve between the Office of the Federal Public Defender (FPD) and Indian tribes. The FPD is the office responsible for indigent defense in federal courts under 18 U.S.C. § 3006a. The court appoints the FPD to represent Indians facing federal criminal charges under the Major Crimes Act, yet there is no communication or coordination between tribal leaders and the federal courts. There is a tribal liaison in the Office of the United States Attorney designed to serve the prosecution, yet no one is provided to assist the tribe and Indian community in defense.[265]

Justice, fairness, and judicial economy in the federal system require the creation of a dual and successive prosecution policy to establish guidelines for prosecutorial discretion in determining where to bring a prosecution.[266] Through implementation of a "Petite" policy, tribes and the federal government can enter into a true partnership. This would authorize the two sovereigns to decide and determine at the outset whether a particular case will be prosecuted in federal court and allow Indians to have access to the full panoply of rights afforded them under the Constitution. The support and furtherance of tribal sovereignty is met with a proviso that tribal traditional values and practices can be considered in the federal sentencing phase. In the alternative, forgoing federal prosecution and providing the tribe the resources to investigate and prosecute an individual under the tribal adversary system can allow for creative approach to dealing

264. *Id.*

265. Section 213 of the Tribal Law and Order Act of 2010 amended the Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801–2814 (2006) to require the U.S. Attorney for each district that includes Indian country to "appoint no less than 1 assistant United States Attorney to serve as tribal liaison for the district." 25 U.S.C.A. § 2810(a) (West 2012). The law established purpose and duties of the Tribal Liaison and also authorized and encouraged the appointment of a Special U.S. Attorney to prosecute crimes in Indian Country. Tribal Law and Order Act of 2010, Pub. L. No. 111–211, § 213, 124 Stat. 2258 (codified at 25 U.S.C § 1302).

266. The U.S. Attorney's office has long had a policy that precludes the initiation or continuation of a federal prosecution after a prior state or federal prosecution based on the same or similar acts. U.S. DEP'T. OF JUSTICE UNITED STATES ATTORNEYS' MANUAL § 9-2.031. It is also known as the "Petite" policy. *See* Petite v. United States, 361 U.S. 529 (1960); Barbara Creel, *Respect for Tribal Courts*, 46 U.S.F. L. REV. 37, 90–91 (2012).

with the Indian defendant at sentencing. The tribal liaison and a tribal "Petite" policy can work in tandem toward the worthy goals of justice and fairness in both systems.

CONCLUSION

The lack of defense counsel in tribal courts arises from the historical imposition of a foreign system that displaced sovereign forms of inherent justice. As such, the issue is inextricably entangled with tribal sovereignty and the sovereign right to determine due process. These issues that tribes see as a sovereign prerogative have broad, and sometimes devastating, impacts on individual Indians and their civil rights. The magnitude of the challenges has yet to be met by the measure of our actions to solve them. Sovereignty is what sovereignty does. Acting out of sovereign right to withhold an adequate defense impacts tribal members' individual rights and a tribe's overall sovereign goals in the tribal court and beyond. Exploring this issue leads to specialized factors, the balancing of interests, and resource allocation issues of impoverished nations. Revisiting the role of counsel in tribal courts provides an opportunity to strengthen sovereign interests by protecting distinct rights.

Tribes have an obligation to review the role of counsel in tribal courts and history of the right in the adversary system. With the history at hand, tribes now have an opportunity to undertake a review of their own values regarding defense, imprisonment, and fairness in light of the federal government's prohibition of counsel and use of prior uncounseled convictions. In light of the trust responsibility and the fundamental human rights at stake, Congress should undertake to directly fund tribal defense systems.