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HABEAS CORPUS PETITIONS IN FEDERAL AND TRIBAL COURTS: A SEARCH FOR INDIVIDUALIZED JUSTICE

Carrie E. Garrow*

INTRODUCTION

Tribal courts are the most effective forum for addressing alleged civil rights violations under the Indian Civil Rights Act (ICRA); thus, the provision in ICRA that grants U.S. federal courts habeas corpus jurisdiction must be amended to allow tribal governments to opt out. This is even more imperative because the 2013 Violence Against Women Act (VAWA) amendments to ICRA provide non-Indians the option to petition for a stay of detention while their habeas petition is pending. This new provision creates an ICRA that values the rights of non-Indians more than those of Indians because Indians are not granted this option.

Although this new provision was created to avert fears that tribal courts are unable to properly address civil rights violations,[1] an unprecedented survey of habeas corpus petitions filed in federal courts under ICRA found that fifty percent of cases are dismissed for failure to exhaust tribal court remedies. This acknowledges the sovereignty of Indian Nations and the view that tribal courts are the most effective forum for addressing any alleged violations. Notably, none of these cases were refiled after exhausting their tribal remedies and, of the remaining cases that proceeded after exhausting their tribal remedies, only four habeas petitions were granted. An additional four writs were granted on jurisdictional grounds due to the defendants' status as non-Indians; however, the low number of writs granted since 1968 demonstrates that tribal governments commit few civil rights violations that result in detention. Although federal courts have exercised their supervisory duty as required by ICRA, it is no longer necessary. Tribal courts effectively remedy any civil rights violations themselves.

The question remains, however, what happens when civil rights violations are alleged in tribal courts? Although every tribal court is different, the case study of

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[1] *See, e.g.*, Jodi Gillette & Charlie Galbraith, *President Signs 2013 VAWA—Empowering Tribes to Protect Native Women*, THE WHITE HOUSE BLOG (Mar. 7, 2013, 7:07 PM), https://www.whitehouse.gov/blog/2013/03/07/president-signs-2013-VAWA-empowering-tribes-protect-native-women [http://perma.cc/5U28-VBCE].

Navajo Nation Supreme Court habeas corpus cases demonstrates that tribal courts, when using tribal law based upon their culture, not only remedy civil rights violations but provide individualized justice by remedying such violations. Tribal courts, therefore, act as a check on the power of both the executive branch and the lower courts, reforming the justice system to avoid future civil rights violations. As illustrated by Dean Haungooah's case,[2] tribal courts also work to restore a defendant to his or her community.

In 2012, a Navajo Nation District Court sentenced Mr. Haungooah to 365 days in jail and a $500 fine.[3] The jail sentence was later suspended, and he was placed on probation for a year.[4] After three months of probation, a petition was filed that alleged Haungooah violated probation by failing to be a law-abiding citizen, leaving the jurisdiction of the Navajo Nation without approval, and possessing or using intoxicating liquors or controlled substances without medical treatment.[5] The petition also stated that Haungooah failed to check in on July 9, 2012, but acknowledged that he called on July 10, 2012, to inform his probation officer that he had left his residence in Kayenta.[6] "A copy of the revocation petition was provided to Probation and Parole Services (PPS) to be mailed to [Haungooah] 'when he disclose[d] his current address,'" but the court never issued a summons to appear before it issued a bench warrant.[7] Haungooah was then arrested on November 27, 2012, pursuant to the bench warrant.[8] While he was detained, he was "served with a notice of hearing and criminal summons ordering him to appear the very next day."[9] The court also issued an order of temporary commitment without stating why Haungooah's detention was necessary.[10]

At the hearing, the court informed Haungooah that his public defender had withdrawn legal representation and that "any legal representation in th[e] proceeding would be at his own cost."[11] Initially, the judge "asked [him] how he wished to proceed, to which [he] did not respond."[12] The judge then asked Haungooah if he wanted to proceed without an attorney, and Haungooah answered, "Yes."[13] Haungooah informed the court that he was a non-member Indian whose family had moved out of Kayenta, leaving him homeless.[14] He explained that he had been "homeless for more than two

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[2] Haungooah v. Greyeyes, No. SC-CV-06-13, 2013 Navajo Sup. LEXIS 2 (Navajo June 4, 2013).

[3] *Id.* at *1–2.

[4] *Id.* at *1.

[5] *Id.* at *1–2.

[6] *Id.* at *2.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at *3.

[13] *Id.*

[14] *Id.*

weeks in Kayenta because PPS had told him he could not leave the area."[15] He stated that when he did leave, it was difficult to find shelter but that he had told his probation office why he left.[16] Haungooah also stated that he had remained in contact with his probation officer by phone after he left Kayenta.[17]

The hearing proceeded with the judge simply "read[ing] the petition out loud and, after each paragraph, . . . instruct[ing] [Haungooah] to answer 'true or false,' or that he 'understood.'"[18] Haungooah stated "true" or "understood" each time.[19] The court found that Haungooah admitted to the allegations; thus, it reinstated the original jail sentence of 365 days.[20] After the imposition of the sentence, Haungooah filed several motions with the court requesting credit for time served which were denied.[21] He then filed a writ for habeas corpus with the Navajo Nation Supreme Court.[22] In an exercise of individualized justice, the Court granted Haungooah's writ for violations of his due process rights,[23] and then emphasized to the trial court and PPS that "Diné justice 'throws no one away.'"[24]

In 2013, I conducted a survey of habeas corpus petitions filed in federal court. The survey occurred after the Violence Against Women Reauthorization Act (VAWA) was enacted, amending ICRA to recognize special criminal jurisdiction of tribal governments over non-Indian defendants who committed domestic violence crimes.[25] The amendments included a pilot project that enabled the Department of Justice to select tribal governments to begin exercising the special criminal jurisdiction prior to 2015.[26] If an Indian Nation wanted to participate in the pilot project, it needed to submit a lengthy application that described its justice system to the Department of Justice.[27] One of the questions was whether a habeas corpus petition had ever been

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at *3–4.

[22] *Id.* at *4.

[23] *Id.*

[24] *Id.* at *7 & n.3 (quoting *Accountability & Returning the Offender to the Community: Core Responsibilities of Indian Justice*, Memorandum from the Inter-Tribal Workgroup as Submitted by the Navajo Nation, the Hopi Tribe, and the Fort McDowell Yavapai Nation, and Approved by the Intergovernmental Relations Comm. of the Navajo Council, Res. No. IGRMY-109-08, to the Senate Comm. on Indian Affairs on the proposed Indian Country Crime Bill (Apr. 21, 2008), http://www.navajocourts.org/intertribalworkgroup/WorkgrpMemo1.pdf [http://perma.cc/ZU9Q-GVAP]).

[25] *See* Violence Against Women Reauthorization Act of 2013 § 204(b)(1), 25 U.S.C.A. § 1304(b)(1) (West, Westlaw through P.L. 114-25 (excluding P.L. 114-18)).

[26] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 908(b)(2)(A)–(B), 127 Stat. 125 (West 2013).

[27] *See, e.g.*, OFFICE OF THE RESERVATION ATTORNEY TULALIP TRIBES FINAL APPLICATION QUESTIONNAIRE FOR THE VAWA PILOT PROJECT ON TRIBAL CRIMINAL JURISDICTION (2013),

filed in federal court by an individual detained by its tribal justice system.[28] My colleague, Jerry Gardner, who participated in the Department of Justice's consultations regarding the implementation of the VAWA amendments, pointed out the lack of research on how federal courts treat habeas petitions filed under ICRA, and he suggested that I conduct this research. The results revealed that federal courts respect tribal sovereignty. Although this confirmed that tribal courts are the appropriate forum to remedy any civil rights violations, the next step needs to be taken. The U.S. government needs to allow Indian Nations to opt out of federal habeas corpus review granted by ICRA. This is not because tribal police, tribal prosecutors, and tribal courts do not make mistakes, rather tribal courts, when using their own written and oral tribal law,[29] provide effective civil rights remedies. In doing so, they are better able to provide individualized justice, treating each individual petitioner as unique. Through the use of tribal law, the reviewing tribal court can reform the system when needed to better reflect tribal values and protect civil rights. Federal courts, however, cannot provide individualized justice because they do not understand the individual's rights as determined by tribal law and culture.

This Article is divided into the following sections. Part I provides a brief overview of the federal government's restrictions on tribal courts and the Indian Civil Rights Act (ICRA). Part II analyzes the purpose of habeas corpus. Part III presents my unprecedented survey which examined the federal court habeas corpus petitions filed under ICRA by individuals detained by tribal governments. Part IV proceeds with a case study of habeas corpus petitions filed with the Navajo Nation Supreme Court. The case study illustrates that the Navajo Nation Supreme Court not only rectifies any civil rights violations using Navajo Common Law to interpret Navajo civil rights and provide individualized justice, but also uses habeas petitions as a judicial tool to both check the power of the executive branch and lower courts and improve the system based on tribal culture that will result in fewer civil rights violations. Wielding habeas corpus as a judicial tool, in addition to respecting it as a privilege of the petitioners, the court provides individualized justice, which for the Navajo Nation is Diné justice.[30] Finally, I conclude that more federal review is not the answer to ensure the protection of civil rights in tribal courts. The federal government

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http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-tulalip.pdf [http://perma.cc/6MKU-BENU].

[28] *See id.* at no. 9.

[29] Terms such as "tribal police," "tribal prosecutors," "tribal courts," and "tribal law" refer to the terms as used in the written and oral tribal law that is based upon the Nation's cultural values. Many Indian Nations have been saddled with laws based on western legal values due to the colonial policies of the federal government, which interfered with the tribal governments' ability to function effectively. A part of the nation-building process that many Indian Nations have gone through, and are still going through, is to rewrite their laws to restore their own cultural values. *See generally* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT (Miriam Jorgensen ed., 2007); MELISSA L. TATUM ET AL., STRUCTURING SOVEREIGNTY: CONSTITUTIONS OF NATIVE NATIONS (2014).

[30] *See supra* note 24 and accompanying text.

needs to amend ICRA to allow Indian Nations to opt out of the habeas corpus provision, allowing more focus to be placed upon strengthening tribal courts to prevent and address civil rights violations through the use of their own tribal laws, better equipping them to provide individualized justice.

I. THE INDIAN CIVIL RIGHTS ACT AND FEDERAL INDIAN LAW'S LIMITATIONS ON TRIBAL CRIMINAL JURISDICTION

Tribal governments are separate sovereigns outside of and not subject to restrictions contained within the United States Constitution.[31] In 1962, congressional hearings focused on tribal governments' administration of justice.[32] Some members of Congress expressed shock that Indian Nations were outside the reach of the Constitution.[33] Tribal members and leaders testified; some argued that tribal governments violated tribal members' rights, while others testified that if violations existed, they could be remedied at the tribal level.[34] Opponents of federal civil rights legislation also argued that tribal laws often valued community rights over individual rights and that any law enacted by the federal government would not only violate tribal sovereignty, but also clash with tribal laws and culture.[35]

Despite these concerns, Congress enacted the Indian Civil Rights Act (ICRA) in 1968, imposing limitations on tribal governments and creating a statutory basis for civil rights.[36] ICRA contained civil rights similar to those found in the U.S. Constitution, such as the rights to due process and equal protection.[37] Additionally, ICRA limited the sentencing authority of tribal courts to six months and a $500 fine.[38] Subsequent amendments, however, increased sentencing to one year and a $15,000 fine, but the 2010 Tribal Law and Order Act (TLOA) increased this limit to three years.[39] In addition to these limitations, ICRA created a federal remedy for

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[31] Talton v. Mayes, 163 U.S. 376, 384–85 (1896); Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 172–76 (2008). In 1978, the U.S. Supreme Court stated, "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal . . . authority." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.03[1], at 916 (Nell Jessup Newton et al. eds., 2005) ("Indian tribes are not states of the Union within the meaning of the Constitution, and the constitutional limitations on states thus do not apply to tribes.").

[32] *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 242 (4th ed. 2012).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Indian Civil Rights Act, 25 U.S.C. §§ 1301–1304 (2012).

[37] *See id.* § 1302(a)(1)–(10) (enumerating many rights similar to those found in the U.S. Constitution).

[38] *Id.* § 1302(a)(7).

[39] *Id.* § 1302(7)(C).

civil rights violations that result in illegal detention. In part, ICRA provides that "[t]he 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."[40]

In *Santa Clara Pueblo v. Martinez*,[41] the U.S. Supreme Court confirmed habeas corpus as the only federal remedy that ICRA created.[42] In recognizing tribal courts as the appropriate forum for civil rights actions, the Court stated:

> Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.[43]

The Court acknowledged that tribal dispute resolution forums are positioned better than federal courts to both understand and apply tribal traditions and customs.[44] The Court also noted that "the structure of the statutory scheme and the legislative history of Title I [of ICRA] suggest that Congress's failure to provide remedies other than habeas corpus was a deliberate one."[45] Thus, all other claims alleging civil rights violations under ICRA, except for a habeas corpus petition challenging illegal detention, must be brought in tribal court.

Despite the U.S. government's current stated policy of supporting Indian self-determination,[46] numerous limitations on tribal court jurisdiction have been imposed in addition to ICRA.[47] In *Oliphant v. Suquamish Indian Tribe*,[48] the U.S. Supreme Court refused to recognize tribal criminal jurisdiction over non-members. The Court later extended *Oliphant* in *Duro v. Reina*[49] and refused to recognize tribal criminal

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[40] *Id.* § 1303.

[41] 436 U.S. 49 (1978).

[42] *Id.* at 58–59. The Court recognized that tribes possess sovereign immunity, and only the tribes or Congress could waive that immunity. *Id.*

[43] *Id.* at 65 (citations omitted).

[44] *Id.* at 71.

[45] *Id.* at 61.

[46] *See* Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 219–20 (1986) (providing an overview of the origins of Indian jurisprudence in America); Robert B. Porter, *A Proposal to the* Hanodaganyas *to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 899 (1998) (summarizing the evolution of federal Indian policy).

[47] *See, e.g.*, Jackie Gardina, *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts*, 35 AM. INDIAN L. REV. 1, 11–13 (2010–2011) (noting limitations on tribal courts' jurisdiction).

[48] 435 U.S. 191, 195 (1978).

[49] 495 U.S. 676, 679 (1990).

jurisdiction over non-member Indians. In 1991, after numerous requests by Indian Nations, Congress adopted a *Duro*-fix by amending ICRA and restoring recognition of tribal criminal jurisdiction over non-member Indians.[50]

Recent events indicate a move toward further recognition of tribal court authority,[51] yet such recognition comes with limitations. Although the Tribal Law and Order Act (TLOA) increased tribal court sentencing authority up to three years, it imposed a nine year cap as total penalty or punishment in a criminal proceeding.[52] This increased sentencing authority also required tribal governments to model their courts' practices after those of American courts. Pursuant to ICRA, tribal governments must "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution."[53] When charged with a crime with a penalty of more than a year, the tribal government, at its expense, must provide an indigent defendant an attorney that is "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."[54] Prior to charging a defendant, the laws must be publicly available, and a recording must be made of the trial.[55] Finally, the judge presiding over the proceeding must have sufficient legal training and be licensed by any jurisdiction.[56]

In 2013, Congress enacted the Violence Against Women Reauthorization Act (VAWA) , amending ICRA to restore the recognition of Indian Nations's criminal jurisdiction of tribal courts over non-Indian defendants charged with domestic violence.[57] The non-Indian defendant must have a tie to the Nation by residing or working within such Nation's Indian country, or be a spouse, intimate partner or dating partner of a member of such Nation or an Indian who resides within such Nation's Indian country.[58] This recognition of special criminal jurisdiction also comes with limitations.

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[50] Indian Civil Rights Act, 25 U.S.C. § 1301(4) (2012).

[51] *See, e.g.*, *id.* § 1302(a)(7)(D).

[52] *Id.*

[53] *Id.* § 1302(c)(1).

[54] *Id.* § 1302(c)(2).

[55] *Id.* § 1302(c)(4)–(5).

[56] *Id.* § 1302(c)(3).

[57] *Id.* § 1304(b). The purpose of VAWA is to combat the high rates of domestic violence and sexual abuse that result from the lack of resources, the lack of tribal criminal jurisdiction over non-member Indians, and a confusing maze of Congressional legislation that has granted federal courts and some state courts concurrent jurisdiction. *See* AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 19 (2007), http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf [http://perma.cc/CQR9-XC6K]. The bill to reauthorize VAWA initially met strong opposition due to the jurisdictional provisions' granting Indian Nations limited criminal jurisdiction over non-Indians. *See, e.g.*, Rebecca Burns, *VAWA: A Victory for Women—But Which Women?*, IN THESE TIMES (Feb. 28, 2013), http://inthesetimes.com/article/14668/vawa_a_victory_for_womenbut_which_women [http://perma.cc/NK2C-ZRBH] (interviewing author Beth Richie).

[58] 25 U.S.C. § 1304(b)(4)(B).

Important for this discussion is that when a non-Indian defendant files a habeas corpus writ, he may also request a stay of detention.[59] The federal court may grant a stay of detention if there is a likelihood the petition will be granted and, "after giving [the] alleged victim . . . an opportunity to be heard, [the court] finds by clear and convincing evidence . . . the petitioner is not likely to flee or pose a danger to any person or the community if released."[60] Also, all of the TLOA sentencing provisions apply to non-Indian defendants, regardless of whether they are charged with a crime that has a sentence longer than one year.[61] Additionally, the panel from which a jury is selected must "reflect a fair cross section of the community,"[62] in order to allay fears that a non-Indian defendant would be tried by a jury consisting of all Indians. Finally, the Nation exercising criminal jurisdiction must provide "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant."[63]

Other limitations on tribal courts may lay in the future. In November 2013, the Indian Law and Order Commission (ILOC), created by TLOA, issued its recommendations on improving law and order in Indian country.[64] One of the many recommendations made was to allow Indian Nations to opt out of "Federal Indian country criminal jurisdiction and/or congressionally authorized State jurisdiction, except for Federal laws of general application."[65] Upon opting out, the Nation would have "inherent criminal jurisdiction over all persons within . . . the Tribe's lands as defined in the Federal Indian Country Act."[66] Although tribal governments oppressed by the current jurisdictional maze welcomed this recommendation, such recommendation came with limitations. For instance, if a Nation chose to exercise criminal jurisdiction, its "Tribal government must also immediately afford all individuals charged with a crime with civil rights protections equivalent to those guaranteed by the U.S. Constitution."[67] Additionally, the government would be subject to full Federal judicial appellate review by a newly created United States Court of Indian Appeals with the power to hear appeals of

> alleged violations of the 4th, 5th, 6th, and 8th Amendments of the U.S. Constitution by Tribal courts; to interpret Federal law

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[59] *Id.* § 1304(e)(1).

[60] *Id.* § 1304(e)(1)–(2).

[61] *Id.* § 1304(d).

[62] *Id.* § 1304(d)(3)(A).

[63] *Id.* § 1304(d)(4).

[64] *See generally* INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES (2013), http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [http://perma.cc/XF94-XMSR].

[65] *Id.* at 23.

[66] *Id.* at ix (citations omitted).

[67] *Id.* at 23.

> related to criminal cases arising in Indian country throughout the United States; to hear and resolve Federal questions involving the jurisdiction of Tribal courts; and to address Federal habeas corpus petitions.[68]

The Commission made this recommendation for a new layer of federal court review despite stating that "[t]here is little or no scholarly research or other evidence showing significant violations of ICRA by Tribal courts that go uncorrected by Tribal appellate courts; in fact, what research exists, although limited, suggests that there is no systematic problem of under-protection."[69] My research demonstrates that the current federal review granted under ICRA and any additional form of federal review suggested by the ILOC is no longer necessary.

II. HABEAS CORPUS

The U.S. Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[70] ICRA follows suit, incorporating the privilege language: "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."[71] The U.S. Supreme Court stated that this privilege serves to protect a person's liberty, and the "protection for the habeas privilege was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights . . . ."[72]

Scholars argue that habeas review is also a form of Article III power belonging to judges.[73] In English common law, habeas corpus

> originated, after all, not as a protection for the individual, but as a procedure for the judiciary to issue a command to the executive in the person of the sheriff. As habeas corpus evolved into a process to examine the basis of a person's detention, the real target of the writ was not the detainee, but the government officer called on to justify the basis of his or her authority to detain.[74]

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[68] *Id.* at 23–24.

[69] *Id.* at 19 (citing THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter et al. eds., 2012)).

[70] U.S. CONST. art. I, § 9, cl. 2.

[71] Indian Civil Rights Act, 25 U.S.C. § 1303 (2012).

[72] Boumediene v. Bush, 553 U.S. 723, 725 (2008).

[73] *See* Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 774–75 (2013); Steven Semeraro, *Two Theories of Habeas Corpus*, 71 BROOK. L. REV. 1233, 1249 (2006).

[74] *See* Brian R. Farrell, *Habeas Corpus in Times of Emergency: A Historical and Comparative View*, 1 PACE INT'L L. REV. ONLINE COMPANION 74, 92 (2010), http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1011&context=pilronline [http://perma.cc/YK5U-XVQZ].

The writ "serve[d] as a barometer for the existence of respect for the rule of law and, by extension, the legitimacy of a government's authority."[75] English judges used the writ to consolidate power and to decide what counted as lawful custody, as habeas was an "instrument of English judicial power," which "allowed *judges*—not legislators or monarchs—to determine how much custodial process rendered detention lawful."[76]

The scope of a court's review of a habeas petition varies depending on several factors, including where in the judicial process the writ is filed and the nature of the court ordering detention. The reviewing court tailors its review depending "upon the rigor of any earlier proceedings."[77] In *Boumediene*, the Court noted that "the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where [the petitioner had] little or no previous judicial review of the cause for detention."[78] A court of record, possessing general jurisdiction, receives less scrutiny than "'inferior' tribunals of limited jurisdiction," because courts of record have broad remedial powers that give "the habeas court greater confidence in the judgment's validity."[79] The U.S. Supreme Court noted:

> Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record, as was the case in *Watkins* and indeed in most federal habeas cases, considerable deference is owed to the court that ordered confinement. . . . Likewise in those cases the prisoner should exhaust adequate alternative remedies before filing for the writ in federal court. . . . Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding.[80]

Habeas review allows for a review of the factual and legal support for detention in addition to providing a chance to determine whether the proceedings provided due process: "First, judges provide habeas process when reviewing whether a detention is authorized, which includes examining whether the detention has adequate factual and legal support. Second, in doing so, the judge may examine whether earlier proceedings comported with due process."[81] As discussed above, however, when there are minimal proceedings in the originating court, "habeas takes on a greater role where due process is constrained. Judges have the strongest Suspension Clause obligation

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[75] *Id.*

[76] Kovarsky, *supra* note 73, at 759 (citations omitted).

[77] *Boumediene*, 553 U.S. at 781.

[78] *Id.* at 780.

[79] *Id.* at 782.

[80] *Id.* (citations omitted).

[81] *See* Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 55 (2012).

to review legal and factual questions where there was no prior adequate judicial review of detention."[82]

Tribal courts also use habeas corpus as an instrument of judicial power. As demonstrated below, the Navajo Supreme Court uses it to determine whether the appropriate custodial process was in place to protect the rights of defendants.[83] The Navajo Supreme Court also uses the writ as a check on whether the proceedings provided due process and whether detention is authorized.[84] Although Congress may have intended ICRA's habeas provision as a check on the power of Indian Nations, federal courts—in acknowledgment of tribal sovereignty—consistently defer to the tribal court that ordered the confinement and require exhaustion of tribal remedies in most cases.[85]

III. FEDERAL COURTS AND ICRA HABEAS CORPUS PETITIONS

My methodology is focused on habeas petitions filed under ICRA in federal court since ICRA's enactment in 1968. The survey discovered a total of only thirty cases. Habeas corpus petitions that were filed but subsequently found by the court to not include detention,[86] a criminal violation,[87] or later ruled as moot[88] were screened out.

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[82] *Id.* at 56.

[83] *See, e.g.*, Tiger v. Moore, No. CIV-11-73-FHS, 2011 U.S. Dist. LEXIS 21355 (E.D. Okla. Mar. 3, 2011).

[84] *See, e.g.*, Jeffredo v. Macarro, 590 F.3d 751 (9th Cir. 2009), *cert. denied*, 560 U.S. 925 (2010).

[85] *See infra* notes 89–90 and accompanying text.

[86] For example, in *Jeffredo*, 590 F.3d at 751, appellants filed a habeas corpus action claiming their tribe disenrollment was equal to detention. The court held the limitation on their access to tribal facilities did not rise to a detention, and thus the court did not have habeas jurisdiction. *Id.* In *Shenandoah v. Halbritter*, 366 F.3d 89, 90–92 (2d Cir. 2004), *cert. denied*, 544 U.S. 974 (2005), the petitioners sought habeas relief for an allegedly unlawful tribal housing ordinance. The court held that the housing ordinance did not constitute a sufficiently severe restraint on their liberty to invoke the court's habeas corpus jurisdiction. *Id.* In *Barnett v. Moore*, No. CIV-11-74-FHS, 2011 U.S. Dist. LEXIS 21451 (E.D. Okla. Mar. 3, 2011), once again, the petitioners sought a writ seeking relief from tribal court order holding them in indirect contempt and imposing a financial sanction. The court again held the petitioners failed to satisfy the custody requirement of habeas corpus relief. *Id.* In *Tiger*, 2011 U.S. Dist. LEXIS 21355, the petitioners sought a writ seeking relief from tribal court order holding them in indirect contempt and imposing a financial sanction. The court held the petitioners failed to satisfy the custody requirement of habeas corpus relief. *Id.* In *Payer v. Turtle Mountain Tribal Council*, No. A4-03-105, 2003 U.S. Dist. LEXIS 18173, at *2, *16 (D.N.D. Oct. 1, 2003), petitioners sought relief from a tribal council resolution removing them as school board members. The court ruled that they were not detained and their claims were more appropriately characterized as a property right and thus the court lacked habeas corpus jurisdiction. *Id.*

[87] *See, e.g.*, Alire v. Jackson, 65 F. Supp. 2d 1124, 1125, 1127 (D. Or. 1999). The petitioner sought habeas corpus relief for an order excluding her from her Indian reservation. The court held that this was a civil proceeding and not a criminal conviction, thus habeas corpus remedy under the Indian Civil Rights Act was not available. *Id.*

[88] *See, e.g.*, Romero v. Goodrich, No. 11-2159, 2012 U.S. App. LEXIS 9508, at *2–3 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 1315 (2013). After an unsuccessful tribal appeal,

Also, cases where a determination on the writ could not be found were also excluded. These cases were all screened out, because they could not provide a complete picture of federal habeas corpus review under ICRA.

The survey revealed that federal courts, when the detainee is an Indian, are respectful of tribal government sovereignty and jurisdiction and defer to tribal courts by requiring exhaustion of tribal remedies. Fourteen of the thirty cases were dismissed for failure to exhaust tribal court remedies.[89] None of these cases reappeared in the federal courts.[90] Courts generally allowed several exceptions to the exhaustion requirement, and only five of these cases were found. The most common exception was the non-Indian status of the petitioner, over which the tribal court lacked jurisdiction according to *Oliphant*.[91] Since *Oliphant*, it has been rare for a tribal government to detain a non-Indian; thus, it is not surprising that the number is low. In the remaining ten cases, the petitioners had exhausted their tribal court remedies and proceeded forward with their federal habeas petitions. Six of these writs were denied, and four were granted. The low number of cases filed over a forty-five-year span, and the granting of only four writs does not support Congress's concern that tribal governments committed numerous civil rights violations.

A. The Exhaustion Requirement

Federal courts "generally recognize[ ] that a petitioner must fully exhaust tribal-court remedies before a federal court can review challenges to his detention."[92] This

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the defendant filed a habeas petition alleging an excessive sentence. The district court magistrate recommended his petition be granted. He was subsequently indicted by a federal court for assaulting a federal officer during his stay in a tribal jail. The tribal court, after learning of the new charge and lengthy sentence he might face, *sua sponte* commuted defendant's sentence. The court then dismissed the defendant's habeas petition as moot. *Id.*

[89] *See* Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012); Selam v. Warm Springs Tribal Corr. Facility, 134 F.3d 948 (9th Cir. 1998); Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995); Youckton v. Stinson, No. C10-5780BHS, 2011 U.S. Dist. LEXIS 12122 (W.D. Wash. Feb. 8, 2011); Anderson v. Grand Traverse Band of Ottawa & Chippewa Indians Tribal Court, No. 1:10-CV-676, 2010 WL 5625054 (W.D. Mich. Dec. 21, 2010); Chipps v. Oglala Sioux Tribal Court, No. CIV. 10-5028-JLV, 2010 WL 1999458 (D.S.D. May 18, 2010); Acosta-Vigil v. Delorme-Gaines, 672 F. Supp. 2d 1194 (D.N.M. 2009); Bercier v. Turtle Mountain Tribal Court, No. 4:08-cv-094, 2009 WL 113606 (D.N.D. Jan. 15, 2009); Azure v. Turtle Mountain Tribal Court, No. 4:08-cv-095, 2009 WL 113597 (D.N.D. Jan. 15, 2009); McPhee v. Steckel, No. C07-5668RJB, 2008 WL 410650 (W.D. Wash. Feb. 12, 2008); Whitetail v. Spirit Lake Tribal Court, No. 2:07-cv-42, 2007 WL 4233490 (D.N.D. Nov. 28, 2007); LaVallie v. Turtle Mountain Tribal Court, No. 4-06-CV-9, 2006 WL 1069704 (D.N.D. Apr. 18, 2006); Donnell v. Red Lake Tribe, No. Civ. 04-5086JNEJGL, 2005 WL 2250767 (D. Minn. Sept. 13, 2005); Gillette v. Marcellais, No. A4-04-123, 2004 WL 2677268 (D.N.D. Nov. 22, 2004).

[90] *See supra* note 89 for the lack of subsequent case history.

[91] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978), *superseded by* 25 U.S.C. § 1301 (1979).

[92] *Acosta-Vigil*, 672 F. Supp. 2d at 1196 (citing Boozer v. Wilder, 381 F.3d 931, 935 (9th Cir. 2004)); *see also* Azure–Lone Fight v. Cain, 317 F. Supp. 2d 1148, 1150 (D.N.D. 2004);

exhaustion rule, however, is not required by ICRA, but it is based upon comity and is generally not a jurisdictional prerequisite to review.[93] This is in accordance with the general application of the privilege of habeas, as deference is given to courts of record which provide defendants with a fair hearing and subsequently impose a sentence.[94] Exhaustion of tribal court remedies is required as ICRA was designed "to limit tribal government and it is therefore appropriate that tribal courts interpret their application to tribal proceedings."[95]

Courts provide several reasons for the exhaustion rule. The rule reinforces Congress's policy of "promoting tribal sovereignty, including the development of tribal courts."[96] It also promotes the administration of justice "by allowing a full record to be developed in the [t]ribal [c]ourt before either the merits or any question concerning appropriate relief is addressed [in federal court]."[97] This is in accord with judicial reasoning in non-ICRA habeas cases, requiring exhaustion to create a sufficient record for the reviewing court.[98] Perhaps most importantly, the exhaustion rule gives a tribal court "full opportunity . . . to rectify any errors it may have made."[99]

The courts do not always require petitioners to exhaust tribal remedies.[100] The court will "make [an] inquiry to see what the law demands under the circumstances. The need to adjudicate alleged deprivations of individual rights must be balanced against the need to preserve the cultural identity of the tribe by strengthening the tribe's own institutions."[101] The court may not require exhaustion "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[102] Also, a court will generally not require a petitioner to exhaust tribal remedies

> if he or she proves that resort to remedies provided by the tribe would be futile. If a tribal remedy in theory is non-existent in

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Quair v. Sisco, 359 F. Supp. 2d 948, 971–72 (E.D. Cal. 2004); Lyda v. Tah-Bone, 962 F. Supp. 1434, 1436 (D. Utah 1997).

[93] *See Valenzuela*, 699 F.3d at 1206; Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006); Necklace v. Tribal Court of Three Affiliated Tribes, 554 F.2d 845 (8th Cir. 1977).

[94] *See supra* Part II.

[95] *Acosta-Vigil*, 672 F. Supp. 2d at 1196.

[96] *Valenzuela*, 699 F.3d at 1206 (citing Nat'l Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985)).

[97] *Id.* (quoting *Nat'l Farmers Union Ins.*, 471 U.S. at 856).

[98] *See supra* Part II.

[99] *Valenzuela*, 699 F.3d at 1206 (quoting *Nat'l Farmers Union Ins.*, 471 U.S. at 856).

[100] *See, e.g.*, Wounded Knee v. Andera, 416 F. Supp. 1236, 1239 (D.S.D. 1976).

[101] *Id.*

[102] LaVallie v. Turtle Mountain Tribal Court, No. 4-06-CV-9, 2006 WL 1069704, at *2 (D.N.D. Apr. 18, 2006) (quoting *Nat'l Farmers Union Ins.*, 471 U.S. at 857 n.21).

> fact or at best inadequate, it might not need to be exhausted. If a Petitioner does all that is possible but an attempted appeal is frustrated by official inaction, no more can be demanded, and the exhaustion requirement is satisfied.[103]

As noted above, exhaustion of lower court remedies is preferred by appellate courts.[104] Exhaustion of remedies is also required for habeas corpus petitioners who seek a writ in federal court while detained by state governments.[105] The exhaustion rule for state-detained petitioners is not based on comity, rather it is required by statute.[106] The application for habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State."[107] The exceptions to this statutory requirement are an absence of an available corrective process in the state or "circumstances exist that render such process ineffective to protect the rights of the applicant."[108] Fortunately, despite the lack of a statutory requirement in ICRA, federal courts recognize tribal sovereignty and that the sentencing court should be allowed to remedy any violation, as the sentencing court has broader remedial powers and a knowledge of tribal law.

B. Non-Indian Defendants—No Exhaustion Required

My survey found only five cases where the federal courts did not require exhaustion of tribal remedies. Four of these were non-Indians, illustrating that the federal courts' deferral to tribal courts is citizenship based. In *Oliphant*, the defendant was a non-Indian, and tribal court proceedings were stayed after his arraignment on a charge of assaulting a tribal police officer while he proceeded to argue lack of jurisdiction through his habeas petition in federal court.[109] In *Duro,* the defendant, a non-member Indian, was charged with illegally firing a weapon.[110] After the tribal court denied his motion to dismiss for lack of jurisdiction, he filed a writ of habeas corpus in federal court.[111] In *Oliphant* and *Duro*, the Supreme Court failed to address the

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[103] *Wounded Knee*, 416 F. Supp. at 1239 (citations omitted); *see also* Selam v. Warm Springs Tribal Corr. Facility, 134 F.3d 948, 954 (9th Cir. 1998); St. Marks v. Chippewa-Cree Tribe, 545 F.2d 1188, 1189–90 (9th Cir. 1976); Cobell v. Cobell, 503 F.2d 790, 793–94 (9th Cir. 1974).

[104] *See supra* note 92 and accompanying text.

[105] 28 U.S.C. § 2254 (b)(1)(A) (2012).

[106] *See id.* § 2254.

[107] *Id.* § 2254(b)(1)(A).

[108] *Id.* § 2254(b)(1)(B).

[109] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194–95 (1978), *superceded by* 25 U.S.C. § 1301 (1979). Oliphant, a non-Indian who was a resident of the Reservation, filed his writ after his arraignment and was released on his own recognizance. *Id.* at 194.

[110] Duro v. Reina, 495 U.S. 676, 676 (1990), *superceded by* 25 U.S.C. § 1301 (1990).

[111] *Id.* Duro allegedly shot and killed a fourteen-year-old boy on the Salt River Reservation. He was charged with murder by the federal government pursuant to the Major Crimes

exhaustion of tribal remedies rule, proceeding directly to the question of the tribal court's jurisdiction.[112] Federal courts follow this procedure and do not require exhaustion of tribal court remedies when the petitioner is a non-Indian.[113] In *Wetsit*, for instance, the Ninth Circuit stated:

> Following the precedent of *Duro* we have examined the question of jurisdiction prior to the question of exhaustion of remedies. In *Duro* the federal district court entertained a habeas petition immediately after the tribal court had denied the petitioner's motion to dismiss. No objection to the petition was made on the ground that the petitioner had not exhausted his tribal remedies. We infer that when a tribal court attempts to exercise criminal jurisdiction over a person not a member of a tribe, no requirement of exhaustion need be enforced. It is different when the petitioner is a member of the tribe. Then, by virtue of her consent to tribal membership, she is bound to follow the procedures of the tribe if they are consistent with the Indian Civil Rights Act. Having failed to do so, she is not entitled to have her petition for habeas relief considered.[114]

Other than *Oliphant* and *Duro*, only three individuals have received a waiver of the exhaustion requirement.[115] In *Greywater v. Joshua*, the Eighth Circuit granted the petitioner's writ, noting that exhaustion was not required because the petitioner was a non-member Indian.[116] *Greywater*, however, was prior to the *Duro*-fix, which restored recognition of tribal court criminal jurisdiction over non-member Indians.[117] Thus, a similar defendant today would be required to exhaust tribal remedies.

Similarly in *In re Garvais*, the court did not address the issue of exhaustion of tribal remedies but proceeded straight to Garvais's claim that he was not an Indian.[118] The court found that Garvais was not a member of a tribe or eligible for tribal enrollment.[119]

> While enrollment in a federally recognized Tribe has never been determinatively adjudicated to be an absolute requirement of

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Act, but it was later dismissed. He was then charged by the Tribe, but due to the sentencing limitations of ICRA, he was only charged with the illegal firing of a weapon. *Id.* at 679–81.

[112] *See Duro*, 495 U.S. at 684–85*; Oliphant*, 435 U.S. at 195–96.

[113] *See, e.g.*, Wetsit v. Stafne, 44 F.3d 823, 826 (9th Cir. 1995).

[114] *Id.*

[115] *See* Greywater v. Joshua, 846 F.2d 486 (8th Cir. 1988); *In re* Garvais, 402 F. Supp. 2d 1219 (E.D. Wash. 2004); Connor v. Conklin, No. A4-04-50, 2004 WL 1242513 (D.N.D. June 2, 2004).

[116] 846 F.2d at 493.

[117] *See Duro*, 495 U.S. at 684.

[118] 402 F. Supp. 2d at 1220–23.

[119] *Id.* at 1223.

> § 1153 or tribal court jurisdiction, "enrollment is the common evidentiary means of establishing Indian status." The importance of enrollment is evidenced by the fact that courts have found tribal enrollment alone sufficient proof that a person is an Indian.[120]

The court granted his writ finding that he was only regarded as a descendant of an Indian, which was insufficient to subject him to the jurisdiction of the tribal court.[121]

The final case, *Connor v. Conklin*, appears to be an anomaly with regard to the exhaustion rule.[122] Connor was a tribal member and his appeal was pending when he filed a writ of habeas corpus in the Northern Division of North Dakota;[123] thus, exhaustion of tribal remedies should have been required, unless another of the previously stated reasons were present. The respondent, the Tribe, however, did not raise the exhaustion requirement, and the court failed to address it.[124] Nonetheless, Mr. Connor's writ was dismissed.[125] This case illustrates the importance of tribal attorneys in raising the exhaustion requirement when representing an Indian Nation on a habeas corpus petition. By failing to raise the issue, the court was able to proceed and exercise its jurisdiction under ICRA, rather than allowing the tribal court to provide any needed remedy.

The federal courts' failure to require tribal remedies when the defendants are non-Indian stems from the concept of citizenship invoked by *Oliphant*.[126] As Duthu eloquently articulated:

> The *Oliphant* opinion also introduced the concept of citizenship and the accompanying language of individual rights of personal liberty as a limiting principle on tribal powers. This functioned much like the "protective cloak" of nationality that early colonizers used to insulate themselves from the laws of indigenous peoples. As the political theorist Steven Curry explains, "This move was usually justified by the claim that settlers could not be subjected to the 'arbitrary' and 'primitive' laws of 'vengeance and the blood feud' practised by the original inhabitants as this would be unjust. The nationality that clung like a protective cloak to these settlers also brought with it the jurisdiction of their sovereigns wherever they happened to settle. They denied to indigenous communities the integrative power and territorial authority that they ascribed to their own communities so as to impose the

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120 *Id.* at 1225 (citations omitted).
121 *Id.* at 1226.
122 No. A4-04-50, 2004 WL 1242513 (D.N.D. June 2, 2004).
123 *Id.* at *1.
124 *Id.* at *1–5.
125 *Id.* at *5.
126 N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 20 (Colin G. Calloway ed., 2008).

> extended power of their own states on the New Word, rather than having that authority already present there imposed on them (as they would have expected if they settled in a different European state.)"[127]

This cloak of citizenship is not a new concept in the United States.[128] The privilege of habeas corpus, if any, of enemy combatants and non-citizens has been vigorously debated.[129] When detainees in Guantanamo Bay and Bagram sought to challenge their detention through habeas corpus, the U.S. government "initially took the position that habeas corpus was not available to detainees because of their status as 'enemy combatants' and their location outside of the sovereign territory of the United States."[130] The Supreme Court ruled that non-citizen detainees at Guantanamo Bay were entitled to file habeas corpus petitions in federal court.[131] When Congress responded with legislation removing federal court jurisdiction to hear enemy combatants' habeas corpus petitions, the Supreme Court found it was unconstitutional.[132]

Although a thorough comparison of the cloak of citizenship is outside the scope of this Paper, this view of citizenship is found again in the VAWA amendments to ICRA that allow non-Indians to seek a stay of detention when filing a habeas petition. Indians do not receive this same protection. The federal government perceives their right to vote as enough protection against civil rights violations by tribal governments. Fearful of civil rights violations, the government affords non-Indians to use their U.S. citizenship as a cloak and request a stay of detention while their federal habeas petition is pending. Despite this differing treatment of non-Indians by the federal courts and Congress, it is unlikely that tribal governments will treat defendants in tribal courts differently. In my discussions with other tribal court judges about if and how they will implement TLOA and VAWA, the response has been similar: they will treat all defendants the same and will not set up separate systems with different rights. As we will see with Mr. Haungooah, tribal justice is a respecter of persons.

C. Tribal Court Remedies Exhausted and Habeas Corpus Granted

The survey found only four cases where tribal remedies had been exhausted and a federal court granted a writ of habeas corpus. Moreover, one of these cases has

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[127] *Id.* at 22–23 (citing STEVEN CURRY, INDIGENOUS SOVEREIGNTY AND THE DEMOCRATIC PROJECT 77 (2004)).

[128] *See infra* notes 129–32 and accompanying text.

[129] *See* Edward F. Sherman, *U.S. Supreme Court Rejects Bush Administration Position on Guantanamo Detainees: The Watershed of the* Boumediene v. Bush *Line of Cases* (Tulane Pub. L. & Legal Theory Research Paper Series No. 09-08, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407582; Stephen I. Vladeck, *Deconstructing* Hirota*: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497 (2007).

[130] Farrell, *supra* note 74, at 75.

[131] Rasul v. Bush, 542 U.S. 466 (2004).

[132] Boumediene v. Bush, 553 U.S. 723 (2008).

been discredited,[133] one case should have been appealed by the Tribe,[134] and a third case is being appealed.[135] The remaining case fails to support Congress's concern that tribal governments commit numerous civil rights violations or justify the need for a stay of detention for non-Indians under VAWA.

Wounded Knee v. Andera is an older case from the 1970s where the tribal court judge also acted as the prosecutor; thus, it is not surprising the federal court found this to be a violation of due process.[136] This was the most egregious due process violation found in the survey. Given the change and growth in tribal courts, this violation is unlikely to occur today.[137]

In *Spears v. Red Lake Band of Chippewa Indians*, the petitioner challenged the tribal court's imposition of consecutive sentences as a violation of ICRA's one-year sentencing limitation.[138] Spears pled guilty to six charges in tribal court: negligent homicide, driving under the influence of alcohol, failing to take an alcohol test, failing to stop at the scene of an accident, driving without a license, and a liquor violation.[139] The sentences were imposed consecutively for a total of thirty months.[140] ICRA states that a tribe many not "impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both."[141] Spears admitted that he violated several tribal code provisions, but that he committed only one offense: unlawful driving, which resulted in the death of another person.[142] The federal court held that the phrase "any one offense" in ICRA was ambiguous and looked to Congressional intent to determine its meaning.[143] The court noted that

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[133] *See* Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176 (D. Minn. 2005); *see also infra* notes 138–47 and accompanying text.

[134] *See* Johnson v. Tracy, No. CV-11-01979-PHX-DGC, 2012 WL 4478801 (D. Ariz. Sept. 28, 2012).

[135] *See* Kelsey v. Pope, No. 1:09-CV-1015, 2014 U.S. Dist. LEXIS 43037 (W.D. Mich. 2014), *appeal docketed*, No. 14-1537 (6th Cir. Apr. 30, 2014).

[136] Wounded Knee v. Andera, 416 F. Supp. 1236, 1240 (D.S.D. 1976).

[137] *See* NAT'L AM. INDIAN CT. JUDGES ASS'N, INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT (Orville N. Olney & David H. Getches eds., 1978) (discussing studies of civil rights violations in federal courts). Getches's seminal report was the first on ICRA and found that tribal courts suffered from a lack of resources, law-trained judges, and law-trained defense attorneys for defendants. *Id. See also* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59 (2013) (revisiting Getches's study and arguing that ICRA is declining in importance as Indian tribes adopt constitutional guarantees similar to ICRA into their governing structures to guarantee fundamental fairness).

[138] 363 F. Supp. 2d at 1177.

[139] *Id.*

[140] *Id.*

[141] Indian Civil Rights Act, 25 U.S.C. § 1302(a)(7)(B) (2012). ICRA has been subsequently amended pursuant to TLOA to allow for three years when certain restrictions are followed by the tribal court. *Id.* § 1302(a)(7)(C).

[142] *Spears*, 363 F. Supp. 2d at 1177.

[143] *Id.* at 1178–79.

Congress intended to "adopt the concept that separate crimes arising from a single criminal episode should normally be treated as a single offense for sentencing purposes."[144] Once the court determined that ICRA authorized a maximum twelve month sentence for a single criminal transaction, the court held that four of the offenses constituted a single criminal transaction.[145] The court granted Spears's writ and remanded the case to tribal court.[146] As discussed below, this interpretation of ICRA's phrase "any one offense" has been discredited by other federal courts.[147]

A more recent case addressed the application of the new TLOA amendments to ICRA. In *Johnson v. Tracy*, the petitioner was convicted of unlawful restraint, sexual abuse, and assault.[148] The petitioner was sentenced to 120 days of probation for unlawful restraint, 365 days in jail for the sexual abuse, and 365 days in jail for the assault, and the jail terms were ordered to run consecutively.[149] The tribal appellate court affirmed his conviction while the federal habeas corpus petition was pending.[150] Johnson's crimes occurred on June 12, 2010, and TLOA became effective on July 29, 2010.[151] TLOA amended ICRA to allow for the imposition of three year sentences for crimes when certain conditions are met by the tribal court.[152] The TLOA amendments also state that a tribal government cannot "impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years."[153] Johnson raised several TLOA claims, including that the judge did not have the qualifications required by TLOA, despite the fact that none of the individual sentences were longer than one year.[154] The court concluded that the application of TLOA's procedural protections did not present retroactivity or *ex post facto* concerns; thus, the "[p]etitioner's trial was a 'criminal proceeding' at which an Indian tribe 'imposed a total term of imprisonment of more than 1 year.' Petitioner therefore should have been accorded the procedural protections of 25 U.S.C. § 1302(c) that were then in

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[144] *Id.* at 1180.

[145] *Id.* at 1182.

[146] *Id.*

[147] *See infra* notes 148–56 and accompanying text.

[148] No. CV-11-01979-PHX-DGC, 2012 WL 4478801, at *1 (D. Ariz. Sept. 28, 2012).

[149] *Id.* at *1.

[150] *Id.* at *2.

[151] *Id.*

[152] Indian Civil Rights Act, 25 U.S.C. § 1302(c). TLOA imposed several procedural requirements on tribal courts imposing sentences greater than one year, including the right to effective assistance of counsel that is at least equal to that guaranteed by the U.S. Constitution. The government must provide counsel for indigent defendants, and the counsel must be licensed in a jurisdiction that applies appropriate professional licensing standards and ensures professional responsibility. The judge presiding over the proceeding must have sufficient legal training and be licensed by any jurisdiction in the U.S. Prior to charging the defendant, the tribe must make the criminal laws, rules of evidence, and rules of criminal procedure publicly available. A record of the proceedings must be maintained. *Id.*

[153] *Id.* § 1302(a)(7)(D).

[154] *Johnson*, 2012 WL 4478801, at *2.

effect as a result of the TLOA amendments to the ICRA."[155] The court granted Johnson's writ for habeas corpus.[156] Unfortunately, the Tribe did not appeal and did not challenge the court's application and interpretation of TLOA. The Tribe had a strong argument that the defendant's cases were not prosecuted under the TLOA amendments or that TLOA could not be applied retroactively. This again raises the issue that tribal attorneys must ardently advocate for Indian Nations while defending against habeas corpus petitions in federal court.

Currently, *Kelsey v. Pope* is under appeal, and it involves jurisdictional issues.[157] In this case, Kelsey is a tribal member of the Little River Indian Band of Ottawa Indians and was charged with assault in a tribally owned building that was located off the Band's Reservation.[158] Kelsey was tried in tribal court over his objection and was found guilty.[159] He appealed to the Tribal Court of Appeals, which confirmed his conviction and sentence of six months of incarceration and probation.[160] Kelsey then filed a writ in federal court arguing that the tribal courts did not have jurisdiction because the offense did not occur within Indian country.[161] Although the Band argued that it has jurisdiction over members, regardless of where the crime occurs,[162] the district court disagreed and granted the petition for habeas corpus.[163]

Of these cases where writs were granted after exhaustion of tribal remedies, only *Wounded Knee v. Andera* involved a true civil rights violation.[164] Numerous changes and growth in tribal courts in the forty years since that case, including tribal constitutional amendments that incorporate culture and separation of powers, training of judges and tribal attorneys, and access to better funding, make it unlikely that similar situations will occur. Also, the fact that no other cases similar to *Wounded Knee* were found in the survey suggests that these types of civil rights violations are rare. *Spears* has been discredited by other courts.[165] Were *Spears* decided again, it is most likely that the writ would not be granted. The issue in *Kelsey* is about jurisdiction, not a true violation of the defendant's civil rights.[166] Finally, *Johnson* is one of the first TLOA cases.[167] And there may be others. The fact that there might be an increase in the number of habeas petitions since the adoption of TLOA, and now VAWA,

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[155] *Id.* at *5 (citations omitted) (quoting 25 U.S.C. § 1302(c)).

[156] *Id.*

[157] No. 1:09-CV-1015, 2014 U.S. Dist. LEXIS 43037 (W.D. Mich. 2014), *appeal docketed*, No. 14-1537 (6th Cir. Apr. 30, 2014).

[158] *Id.* at *2.

[159] *Id.*

[160] *Id.*

[161] *Id.* at *2–3.

[162] *Id.* at *3.

[163] *Id.* at *9.

[164] *See* 416 F. Supp. 1236, 1240 (D.S.D. 1976).

[165] *See supra* notes 150–60 and accompanying text.

[166] *Kelsey*, 2014 U.S. Dist. LEXIS 43037, at *3.

[167] Johnson v. Tracy, No. CV-11-01979-PHX-DGC, 2012 WL 4478801 (D. Ariz. Sept. 28, 2012).

does not mean there is an increase in civil rights violations. Rather, it simply means that disputes are over the interpretation and application of TLOA and VAWA. Like *Spears*, *Johnson* may one day be discredited as an invalid interpretation of TLOA.

D. Tribal Court Remedies Exhausted and Habeas Corpus Denied

The survey of federal habeas corpus cases discovered six cases where tribal court remedies had been exhausted and the writs were denied. These cases illustrate tribal courts' ability to address alleged violations of civil rights. The petitioners raised various challenges: equal protection and due process,[168] that the trial judge was improperly in office,[169] the failure to prove Indian status,[170] right to counsel,[171] the right to confrontation,[172] right to compulsory process,[173] and right to a jury trial.[174] All of these challenges were examined by the courts and were denied. Cases of interest include *Bustamante v. Valenzuela*[175] and *Miranda v. Anchondo*.[176] Like *Spears*, they both raised challenges against the imposition of consecutive sentences as violations of ICRA's sentencing limitation of a one-year term of imprisonment for any one offense.[177] Both courts rejected the reasoning in *Spears* that "any one offense" is ambiguous.[178] In *Miranda*, the Ninth Circuit noted that the magistrate adopted the reasoning in *Spears*, but the court rejected the district court's ruling that the 910-day sentence violated ICRA.[179] The court examined whether the term "offense" had an ordinary common meaning when ICRA was enacted in 1968.[180] The court found:

> [B]y the time Congress enacted the ICRA in 1968, "offense" as used in the statute's double jeopardy provision had an established meaning—it meant a criminal violation with separate elements of proof, not a single criminal transaction. There is no reason to conclude that Congress meant something different when it used the term in § 1302(7).[181]

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[168] Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005); Alvarez v. Tracey, No. CV-08-02226-PHX-DGC, 2012 WL 1038746 (D. Ariz. Mar. 28, 2012).
[169] Anderson v. Henton, 399 F. App'x 280 (9th Cir. 2010).
[170] Eagle v. Yerington Paiute Tribe, 603 F.3d 1161 (9th Cir. 2010).
[171] *Alvarez*, 2012 WL 1038746.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] 715 F. Supp. 2d 960 (D. Ariz. 2010).
[176] 654 F.3d 911 (9th Cir. 2011).
[177] *See id.* at 913; *Bustamante*, 715 F. Supp. 2d at 962.
[178] *Bustamante*, 715 F. Supp. 2d at 965; *see Miranda* 654 F.3d at 913.
[179] *Miranda*, 654 F.3d at 914, 918.
[180] *Id.* at 916.
[181] *Id.* at 917.

The Court, rejecting *Spears*, held that "§ 1302(7)'s one-year sentencing cap for 'any one offense' means that a tribal court may impose up to a one-year sentence for each violation of a criminal law. As it is undisputed that Petitioner committed multiple criminal violations, the district court erred in concluding that her 910-day sentence violated § 1302(7)."[182]

E. Federal Habeas Petitions by State Detainees

A full comparative study of federal habeas petitions filed by tribal detainees and state detainees is beyond the scope of this Article. Moreover, it is not an adequate comparison. Federal court review of a tribal detainee's petition is granted without a tribe's consent to suit versus a review of a state detainee, where the state consented through joining the United States.[183] And, as noted above, the tribal remedy exhaustion requirement is not statutory, rather based on comity. A quick review, however, illustrates that even if the federal habeas review was needed for tribal detainees, which the survey demonstrates it is not, the actual process provides few remedies. Although Congress envisioned providing tribal detainees with a remedy in federal courts that could not be found in tribal courts,[184] studies of state detainees who filed habeas petitions in federal courts suggest that, in reality, state detainees receive few remedies.[185] The federal statute regulating habeas petitions from state court convictions requires exhaustion of remedies, rather than relying on federal courts to use comity.[186] The requirement of exhaustion of state remedies and the increase in the depth of state judicial review due to past habeas litigation improving state procedures have resulted in many petitioners' sentences expiring prior to seeking a federal habeas review.[187] "Most

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[182] *Id.*

[183] *See* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 148 (2002) [hereinafter Clinton, *No Federal Supremacy Clause*]; Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 847 (1990); Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 365, 371 (1989); Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After* Duro v. Reina, 38 FED. BAR NEWS & J. 70, 70–71 (1991); Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 109–10 (2012); Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 64 (2006); Frank Pommersheim, *Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts*, 14 T.M. COOLEY L. REV. 457, 461 (1997); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 15 (1991); David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 478–79 (1994).

[184] *See* Clinton, *No Federal Supremacy Clause*, *supra* note 183, at 198.

[185] *See infra* notes 189–92.

[186] 28 U.S.C. § 2254(b)(1)(A) (2006).

[187] NANCY J. KING & JOSEPH L. HOFFMAN, HABEAS FOR THE TWENTY-FIRST CENTURY 73 (2011).

state felons who are sentenced to incarceration after trial receive sentences of less than six and a half years and will not have the opportunity to seek federal habeas review if their state review proceedings drag on past the end of their custody."[188]

King, after conducting her survey of habeas petitions filed by state detainees in federal court, is not optimistic that habeas petitioners receive much, if any, relief in federal court.[189]

> For all but a very small proportion of the millions of those convicted of crime every year in the United States, the Great Writ is a pipe dream. It is available only to those prisoners whose prison sentences are so long that they are still in custody even after the state courts have finished reviewing, and rejecting, their constitutional claims. For everyone else, habeas provides no remedy at all.[190]

King also found that those who eventually completed the long process of obtaining federal review actually received little relief.[191]

> Of the thousands of randomly selected cases examined in the 2007 study, only seven habeas petitioners actually received any relief from a district court. . . . As a percentage of all felony cases prosecuted, the probability that a writ will be granted is truly microscopic: less than two-thousandths of 1 percent (0.002 percent) of felony cases started each year in state court will ultimately result in habeas relief.[192]

Given that the federal process does not provide adequate remedies for state detainees, it is doubtful that it will provide adequate remedies for tribal detainees. Although federal courts have exercised their supervisory authority delegated by Congress through ICRA, the survey indicates it is no longer necessary. It is more effective to support tribal courts and their efforts to remedy civil rights violations through the application of tribal law.

F. Implications from the Survey

The survey reveals several important implications. First, despite Congress's concern about civil rights violations within Indian Country, the survey reveals that

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[188] *Id.* at 74 (citing Sean Rosenmerkel et al., *Felony Sentences in State Courts, 2006—Statistical Tables* (Dec. 2009), http://www.bjs.gov/content/pub/pdf/fssc06st.pdf [http://perma.cc/ZWN5-T33Z]).

[189] *Id.* at 74–75.

[190] *Id.* at 75.

[191] *Id.* at 81.

[192] *Id.*

there are few alleged violations in cases involving detention. Second, federal courts have exhausted their supervisory review granted by ICRA, and it is not necessary, as only four writs have been granted. Third, federal courts, through the tribal exhaustion requirement, recognize tribal sovereignty and that tribal courts are the appropriate forum to address any alleged violations. Fourth, despite the lack of need for federal review, courts continue to allow non-Indian citizens to wear their cloak of citizenship within Indian Country. And now with the VAWA amendments to ICRA, the cloak is strengthened, as non-Indians may seek a stay of detention while pursuing a habeas corpus petition, which does not even require exhaustion of tribal court remedies.[193]

Morever, federal courts, as discussed below, are unable to implement individualized justice based on the tribal law of each tribal government that may come before a federal court. As illustrated by the case study below, tribal appellate courts such as the Navajo Nation Supreme Court implement individualized justice by protecting civil rights as defined by their laws and culture, implement changes into the criminal justice procedure when necessary to avoid further civil rights violations, and, as in Mr. Haungooah's case, do more than effect a release from detention. In that case, the court used the restorative justice component of its tribal law to help Haungooah.

IV. INDIVIDUALIZED JUSTICE AND A CASE STUDY OF THE NAVAJO NATION SUPREME COURT AND HABEAS CORPUS

A. Individualized Justice

The doctrine of individualized justice suggests that defendants at one or more states of the criminal process should be "treat[ed] . . . as uniquely individual human beings."[194] Most courts limit individualized justice to sentencing,[195] although Beyea notes that individualized justice is now moving forward into other parts of the criminal justice process through the use of various defenses that reduce or negate culpability.[196]

Taslitz argued that criminal law *require*s defendants to be treated as unique because a court must consider the defendant's mental state as highly relevant with regard to proving beyond a reasonable doubt that the defendant committed the crime.[197] In

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[193] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat 54 (West 2013).

[194] Woodson v. North Carolina, 428 U.S. 280, 304 (1976); *see* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996) (providing an overview of the evolution of individualized justice).

[195] *See* Coleman, *supra* note 194, at 1114 & n.115.

[196] Sam Beyea, *Cultural Pluralism in Criminal Defense: An Inner Conflict of the Liberal Paradigm*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 705, 717 (2014).

[197] Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 4 (1993).

practice, however, the American criminal justice system fails to both provide individualized justice and treat each defendant as unique.[198]

> But what the law requires and what the defendant receives are often two very different things. Overburdened criminal courts behave more like bureaucracies than centers of justice. The pressure to "move cases" leaves little time, and fewer resources, to treat each defendant as unique. Add to these pressures the stereotypes, myths, and presuppositions that we all bring to the courtroom and the result is trial by assumption, not by a fair and thorough evaluation of each defendant as a special human being.[199]

As discussed above, this is especially true with habeas petitions filed by state detainees because of the volume of cases. A critical component of treating individuals as unique is to respect and protect their civil rights. Civil rights of tribal citizens are better protected by tribal courts when tribal judges have an understanding of such citizens' civil rights, as defined by tribal law. Given that a federal court has no understanding of civil rights as defined by tribal law, a federal judge is ill-equipped to provide individualized justice.

The Honorable B. Michael Dann equates individualized justice with rehabilitation and restoration, not necessarily tailoring the charging or sentencing of crimes to the individual.[200] Although he does not elaborate on his definition, he also realizes the numerous obstacles to achieving individualized justice: too heavy caseloads combined with speedy trial requirements, the lengthy time from arrest to disposition despite the speedy trial rule, too little truth in pleas and sentences, too much ineffective imprisonment, and too much reliance on the criminal justice system.[201] Judge Dann argues that the lack of individualized justice in Maricopa County, Arizona, has a serious impact.[202]

> Lack of greater individualized justice sends the message to victims and defendants alike that they are not important enough to justify the system's resources. Many accused persons, who turn to drugs or gangs in large part due to a lack of a feeling of self esteem, end up in a criminal justice system that confirms those negative views of self and feeds destructive impulses.[203]

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198 *Id.*
199 *Id.* (citations omitted).
200 B. Michael Dann, *Arizona's Criminal Justice System*, 29 ARIZ. ATT'Y 12, 14 (Oct. 1992).
201 *Id.* at 14–15.
202 *Id.* at 14.
203 *Id.*

Fortunately, tribal courts can, and do, equate individualized justice with restoration.[204] The cases below illustrate that the Navajo Supreme Court, by employing Navajo law, which is grounded in restorative principles, treats each detainee as a unique individual. By using habeas corpus as a judicial tool, the Court interprets rights according to Navajo law and imposes any needed remedy. Even while treating the detainee as an individual, the Navajo Supreme Court uses habeas corpus to remedy the system to ensure that others do not incur the same violation of rights.

B. The Navajo Nation Courts

The Bureau of Indian Affairs created the Navajo Court of Indian Affairs in 1892 which enforced prohibitions against cultural practices.[205] Despite this new structure, Navajo judges continued to use Navajo justice, which existed prior to contact with the colonists.[206] But many disputes were handled outside of the court system to avoid the imposition of incarceration, which was contrary to Navajo traditional justice.[207] The Navajo Nation dismantled the Court of Indian Affairs in 1958 and replaced it with its own court system, which after several reforms strengthening it as a separate and independent branch, continues to function today.[208] The Navajo courts use Navajo Common Law, or their normative precepts, to guide their decision making.[209] This allows the courts to implement Navajo individualized justice, which focuses on restoring disputes and the community to right relations—*hózhq'*—or harmony.[210] Former Navajo Supreme Court Justice Austin explains *hózhq'* as "a state (in the sense of condition) where everything, tangible and intangible, is in its proper place and functioning well with everything else, such that the condition produced can be described as peace, harmony, and balance (for lack of better English terms)."[211]

Although this is a limited and simple understanding of a complex Navajo principle, it is one of the main principles of Navajo Common Law which allows us to

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[204] *Id.*

[205] *See* Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177 (1994) [hereinafter Yazzie, *Life Comes From It*].

[206] *Id.* at 177, 180.

[207] *Id.* at 181.

[208] *See* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE (2009) (providing a complete description of the Navajo court system).

[209] *See* Yazzie, *Life Comes From It, supra* note 205; Robert Yazzie, *"Hozho Nahasdlii"—We are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 120–24 (1996) [hereinafter Yazzie, *Hozho Nahasdlii*]; *see also* James W. Zion, *Civil Rights in Navajo Common Law*, 50 U. KAN. L. REV. 523, 523–24, 531 (2002) (discussing civil rights under Navajo Common Law).

[210] AUSTIN, *supra* note 208, at 54.

[211] *Id.*; *see also* Yazzie, *Life Comes From It*, *supra* note 205, at 175; Yazzie, *Hozho Nahasdlii*, *supra* note 209, at 124.

understand the application of Navajo individual justice via habeas corpus petitions. The Navajo Nation Supreme Court not only examines petitioners' claims of illegal incarceration under Navajo statutory law and Navajo Common Law, but it also provides instruction, interpretation, and clarification to the Navajo Nation, lower courts, police, and prosecutors on how to improve and reform the criminal justice process to protect the rights of future defendants. Finally, the Court ensures that each petitioner receives the assistance necessary to be restored to right relations. This case study supports not only the tribal remedies exhaustion rule by federal courts but also that the most effective forum for habeas corpus petitions lies with tribal courts which use laws based upon their cultural values to implement individualized justice.

C. The Navajo Nation Habeas Corpus Process

Navajo Nation courts have habeas corpus procedures in place that are similar to the American notion of habeas; however, the Navajo courts are not bound by American law in their interpretation and application of Navajo law.[212] The Navajo Nation Supreme Court stated clearly that "[t]hough we have adopted [habeas corpus] from Anglo-American law, we are, of course, not bound by outside practices."[213] Yet, the Court uses habeas as a judicial tool to instruct the lower courts on the interpretation and protection of civil rights according to Navajo law. The court has used it as a tool to both instruct the lower courts and executive branch on, and clarify, the habeas corpus process.

In *Thompson v. Greyeyes*,[214] the Navajo Nation Supreme Court addressed the uncertainty in the process used by habeas petitioners. The Court interpreted and clarified the rules to ensure that petitioners, the jail, and the lower courts understood the process and that the process was accessible to detainees.[215]

> We previously have stated that Rule 26 of the Navajo Rules of Civil Appellate Procedure (NRCAP) governs writs of *habeas corpus*. Rule 26 primarily concerns writs against courts or officials to restrain actions taken outside their jurisdiction (prohibition) or to compel action required by law (mandamus). The rule does not mention *habeas corpus*. Rule 26(d) states that petitions for writs other than mandamus and prohibition "shall conform so far as practicable, to the procedures [for those writs]." There are several requirements in Rule 26 concerning service, payment of filing fees, and the necessary facts to be included in a petition

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[212] H.M. v. Greyeyes, No. SC-CV-63-04, 8 Navajo Rptr. 572, 580 (Navajo 2004).
[213] *Id.*
[214] No. SC-CV-29-04, 8 Navajo Rptr. 476, 484 (Navajo 2004).
[215] *Id.*

> that are difficult, if not impossible for a petitioner to comply with when the defendant is an incarcerated criminal defendant. We therefore must decide what procedure petitioners should follow that reflects a prisoner's inability to access records, money for filing fees, and other resources due to their incarceration.
>
> Though located in rules that only apply to criminal cases, Rule 14 of the Appellate Rules provides a specific procedure for habeas writs that takes into consideration the difficulties incarcerated defendants may have in filing petitions. Based on our authority under Rule 26(d), we hereby adopt the procedures found in Rule 14 of the Appellate Rules for writs of *habeas corpus* involving incarcerated criminal defendants.
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> We now lay out the proper procedure for incarcerated criminal defendant writs. A petitioner does not have to pay a filing fee, but only needs to file the petition with the Supreme Court. The respondent to a *habeas corpus* petition is not the court who ordered the detention, but "the person having custody of the person." That person is the Director of the Department of Corrections (Director). The Chief Justice reviews the petition, and may issue the writ if "in proper form." The writ of *habeas corpus* itself does not order the release of the petitioner, but merely directs the Director "to appear in the [Supreme Court] on a certain date and bring the detained person with him [or her] and show cause why the person should not be released." In other words, the writ is the equivalent of an order to show cause, and the Director must bring the petitioner with her and respond to the petition by demonstrating that the petitioner is lawfully detained. The burden of proof in a *habeas* case therefore shifts once the Chief Justice issues the writ. The petitioner initially has the burden to establish facts showing his illegal detention. Once shown, the petition is in "proper form," and when the Chief Justice issues the writ the Director must show that the petitioner's detention is legal.[216]

After clarifying the process, the Court moved on to the alleged civil rights violations.[217] Thompson argued that he was wrongfully incarcerated because he was sentenced to 120 days in jail for two offenses that did not authorize jail time.[218] The

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[216] *Id.* at 484–85 (citations omitted).
[217] *Id.* at 485.
[218] *Id.*

Court, interpreting and applying Navajo statutory law, determined that his sentence was illegal because it was cruel and unusual under the Navajo Nation Bill of Rights.[219] The offense of interfering in judicial proceedings did not provide for a jail sentence, rather "*nályéél*, a peace or security bond, and/or a sentence of labor or community service."[220] As a result, the Court found that the lower court lacked the authority to incarcerate Thompson, and his sentence amounted "to legislating from the bench."[221]

Not satisfied with solely finding that Thompson was sentenced improperly, the Court explained Navajo due process and why he was sentenced illegally under Navajo due process.[222] "Fundamental notions of fairness in our Common Law [Navajo traditional or oral law], articulated in our opinions as Navajo due process, require that the respondent have notice of the available sentencing options before he or she pleas to an offense."[223] In this case, Thompson's reading of the criminal complaint would lead him to believe he was charged with an offense that would not lead to jail because the section he was charged with prohibits jail as punishment.[224] Thus, he had no notice as to what sentence might be imposed.[225] Thompson's petition was granted, and he was released.[226]

The Navajo Nation Supreme Court has applied its traditional law, which is termed Navajo Common Law, to ensure the habeas process was tailored or individualized for the needs of detained juveniles.[227] In *H.M. v. Greyeyes*, H.M. faced consolidated petitions for a child in need of supervision (CHINS) and delinquency cases in Crownpoint Family Court.[228] The minor was placed in a youth home by the lower court.[229] While in the youth home, the minor was moved to a youth detention facility for an alleged violation of disorderly conduct.[230] A petition for adjudication of a delinquent child was filed, and, at a detention hearing, the lower court ordered continued detention.[231] The minor filed her writ while the adjudicatory hearing was still pending.[232] At the time of her filing, she had been detained for over two months.[233] Her writ sought release from detention and dismissal of the pending CHINS and delinquency cases.[234]

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[219] *Id.*
[220] *Id.* at 485–86.
[221] *Id.* at 486.
[222] *Id.* at 487–88.
[223] *Id.* at 487 (citations omitted).
[224] *Id.*
[225] *Id.*
[226] *Id.* at 487–88.
[227] *See* H.M. v. Greyeyes, No. SC-CV-63-04, 8 Navajo Rptr. 572, 579–80 (Navajo 2004).
[228] *Id.* at 577.
[229] *Id.*
[230] *Id.*
[231] *Id.* at 577–78.
[232] *Id.* at 578.
[233] *See id.*
[234] *Id.*

The Court determined whether the procedures outlined in *Thompson* for habeas petitions applied in juvenile cases.[235] "To answer that question, as Rule 26 is not clear, we look to *Diyin Nohookáá' Dine'é Bi Beehaz'áanii*, or Navajo Common Law Principles on the status of children."[236] The Court noted that the importance of children in Navajo society required that their rights be protected like the rights of adults.[237]

> Under these principles we have held that the police, Social Services, and the courts must strictly comply with the procedures in the Children's Code to take children into custody and keep them detained pending disposition of juvenile cases. If agents of the Navajo Nation fail to follow these requirements, we recognize, at the very least, the same right of a juvenile to seek release from illegal detention under a writ of *habeas corpus*.[238]

The Court, seeking to ensure the protected status of H.M. and any other children, altered the rules established by *Thompson* for minors seeking release from illegal detention.[239]

> As we have previously recognized, the strict guidelines for detention of children reflect that a child is not yet fully emotionally mature. Children taken into custody "experience a gamut of emotions from fear to embarrassment to anger." Problems that may result are violent confrontations with other children or staff of a facility or infliction of mental or physical abuse on themselves. Indeed, suicide may result from the conditions of detention. While these reactions may also occur with adult prisoners, children are especially susceptible to them. Therefore, we recognize that this Court may release a child based on the petition itself, on the day of the filing of the petition, without the necessity of the writ and hearing required by *Thompson*. The Chief Justice, instead of issuing a writ, may, in her discretion, convene the Court immediately. The Court then may release the child without a hearing, as long as all the justices agree and the reasons are plain in the release order. However, if all three Justices do not agree that the child should be immediately released, the Chief Justice will issue a writ and set a hearing, and the regular *Thompson* procedures will apply.[240]

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[235] *Id.*
[236] *Id.* at 579.
[237] *Id.*
[238] *Id.* (citations omitted).
[239] *Id.*
[240] *Id.* at 579–80 (citations omitted).

The Court granted H.M.'s writ due to an untimely filing of the CHINS petition and then proceeded to examine H.M.'s request to dismiss her pending cases.[241] Although the Court noted again that it was not bound by the American definition of habeas, which focuses solely on release from detention,[242] it adopted a narrow interpretation of relief due to the fact that writs cause interference with the lower courts' management of cases.[243] The Court denied her request to dismiss her pending cases.[244]

Despite the above ruling about dismissals, the Court made an exception in *In re L.R. v. Greyeyes*,[245] as required by Navajo individualized justice. The Court addressed the minor's request to vacate a conviction that arose from an untimely filing of a juvenile petition for adjudication of a delinquent child.[246] The Court ruled that the juvenile was illegally detained when the petition was filed thirty-one days after the referral in violation of the thirty day requirement in the Navajo Nation Children's Code.[247] Regarding the minor's request for a dismissal for two delinquency orders, the Court stated:

> Under the circumstances of this case, the Court will vacate a conviction where the statute clearly mandates a dismissal with prejudice if the petition alleging delinquency is untimely filed. This Court will not send the matter back to the Family Court for dismissal. The burden will not be placed upon a child to petition the court for dismissal or incur additional legal costs where the statute mandates a specific remedy.[248]

By using the habeas process as a judicial tool, the Navajo Nation Supreme Court has used Navajo Common Law to provide further instructions to the lower courts on how minors should only be detained when the government is strictly complying with Navajo law. In *In re M.G. Greyeyes*,[249] the Court ruled that a family court cannot use contempt to incarcerate a CHINS child when the Code did not allow such child to be incarcerated under the original CHINS order. The Navajo Children's Code

> reflects the clear intent of the Navajo Nation Council that CHINS children are a distinct group from juvenile delinquents and require a different type of treatment. As defined by the Children's Code,

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[241] *Id.* at 578, 580.
[242] *Id.* at 580.
[243] *Id.*
[244] *Id.*
[245] No SC-CV-39-07, 2007 Navajo Sup. LEXIS 21, at *7 (Navajo Nov. 21, 2007).
[246] *Id.* at *5–6.
[247] *Id.* at *6–7.
[248] *Id.* at *7.
[249] No. SC-CV-09-07, 2007 Navajo Sup. LEXIS 1, at *2 (Navajo May 17, 2007).

> children in need of supervision have not committed a criminal offense, but are in need or care or rehabilitation. . . . The use of contempt to incarcerate a CHINS child improperly treats that child as delinquent, violates the Council's clear prohibition on incarceration of such children, and amounts to cruel and unusual punishment under the Navajo Bill of Rights.[250]

Similar to *Thompson*, the Court again used Navajo Common Law to determine whether a petitioner in a juvenile delinquency proceeding could be detained for an offense that did not provide for incarceration of adults.[251] The petitioner was adjudicated as a delinquent child for a violation of disorderly conduct and sentenced to 180 days of incarceration, which was suspended in lieu of 6 months of probation.[252] Subsequently, the minor was found to be in violation of his probation, and the lower court revoked his probation and reinstated his disposition of 180 days of detention.[253]

> The Court holds that the Family Court cannot incarcerate a juvenile if Title 17 does not authorize incarceration of an adult committing the same offense. Though incarceration of a delinquent minor is mentioned as one option, the Court interprets Section 1152(A)(2) consistent with Dine bi beenahaz'aanii [Navajo fundamental law]. Under Dine bi beenahaz' aanii [sic] children must be treated with the greatest of respect. They are fragile and the utmost care must be taken because of their continued growth. Further, incarcerated children are not fully emotionally mature and experience a "gamut of emotions" while in custody that can lead to violent acts on themselves and others. Consequently, incarceration is a severe remedy for a child, and is to be imposed only when absolutely necessary. To allow greater ability to imprison children than that allowed for adults is an outcome wholly inconsistent with the above values. The. [sic] Court therefore interprets Section 1152(A)(2) to only allow incarceration when allowed for adults. Incarceration of a minor when unauthorized for an adult is cruel and unusual punishment in violation of the Navajo Bill of Rights.[254]

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[250] *Id.* at 3–4 (citations omitted).

[251] N.B. v. Greyeyes, No. SC-CV-03-08, 2008 Navajo Sup. LEXIS 2, *4 (Navajo Apr. 16, 2008).

[252] *Id.* at *1.

[253] *Id.* at *3–4.

[254] *Id.* at *6–8 (citations omitted).

D. Individualized Justice—A Balancing of Rights

Individualized justice in the tribal court setting requires application of tribal laws based upon traditional tribal values;[255] however, tribal courts are often faced with balancing notions of western or American rights that have been imposed through ICRA with rights based upon cultural values.[256] The Navajo Supreme Court faced this issue when it determined whether a minor has a right to an attorney at a detention hearing.[257] As discussed above, the detention of a minor is a serious matter guided by Navajo Common Law.[258] In *M.C. v. Greyeyes*, the Court found that the Navajo Nation Code provided for a child's right to assistance of counsel at all proceedings alleging delinquency.[259] Navajo statutory law also required that a detention hearing be held within twenty-four hours of the filing of the delinquency petition,[260] which was not within the discretion of the courts.[261] As a result, when the minor requested an attorney at the detention hearing, it was unclear whether the lower court had the discretion to continue the hearing.[262] Navajo statutory law does afford the courts discretion to continue a preliminary hearing, but that discretionary language was missing from the detention hearing's statutory language.[263] The Court stated:

> The absence of similar language in the detention hearing section leads this Court to conclude that the 24 hour timeline is intended to be binding on the judge under all circumstances. In addition, *dine bi beenahazaanii* [sic] [Navajo Common Law] supports our holding.
>
> Navajo common law considers the detention of a child a very important matter, stating that "incarceration is a severe remedy for a child, and is to be imposed only when absolutely necessary." Children must be treated with respect because they are "fragile

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[255] *See* Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17 (1997) (discussing the use of traditional law); Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re] Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1 (Jan. 2001) http://lawschool.unm.edu/tlj/tribal-law-journal/articles/volume_1/zuni_cruz/index.php [http://perma.cc/4H2T-ESLL].

[256] *See* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 319–21 (2011) (discussing how tribal courts use traditional law); Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 57 (2007).

[257] M.C. v. Greyeyes, No. SC-CV-16-12, 2012 Navajo Sup. LEXIS 9 (Navajo July 12, 2012).

[258] *See* H.M. v. Greyeyes, No. SC-CV-63-04, 8 Navajo Rptr. 572, 579 (Navajo 2004).

[259] *M.C.*, 2012 Navajo Sup. LEXIS 9, at *10.

[260] *Id.* at *7 (citing 9 N.C.C. § 1311(A) (2014)).

[261] *Id.* at *10 (citing *In re* A.W., 6 Navajo Rptr. 38, 42 (Navajo 1999)).

[262] *Id.* at *10–12.

[263] *Id.* at *10–11.

> and the utmost care must be taken because of their continued growth." There is always a concern for a child who is subjected to detention because they are not yet fully emotionally mature and therefore they experience "a gamut of emotions" which can lead to violent acts upon themselves or others. These principles can be summed up as, *biniinaanii holoogo ei alchini nizaadgoo wota '* [sic]. Therefore, a determination of whether to release the child should be made at the earliest time possible.[264]

In holding that the right to an attorney did not attach to the detention hearing in order to ensure that the hearing was held within twenty-four hours, the Court noted that the minor does not typically appear alone, but with a parent or guardian who is allowed to speak for the child.[265] Even if the minor was facing the court alone, he did not face a determination of guilt at the detention hearing, and Navajo teachings prepared him to speak for himself.[266]

> In Navajo teachings, when a child reaches puberty, a boy becomes a young man and a girl becomes a young women [sic]. Young men and young women are able to speak to the court on the matter offurther [sic] detention. In other words, young people can express to the court whether or not there is alternate placement available. Although the ABBA [Álchini Bi Beehaz'áannii Act] did not consider puberty in drafting the law, we find that Navajo young men and women are capable of speaking for themselves at a detention hearing.[267]

E. Exhaustion of Tribal Remedies

In its application of individualized justice, the Navajo Nation Supreme Court continues to be respectful of the court process that, if allowed to work, can afford justice. Similar to the exhaustion requirement in federal courts, the Navajo Nation also requires petitioners to seek other remedies when necessary.[268] In *Begay v. Tso*,[269] the petitioner's requests contained within his writ were "more clearly considered as interlocutory appeals on the question of self-incrimination by the plaintiff in a civil action,"[270] and the Navajo Court of Appeals does "not honor interlocutory

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[264] *Id.* at *11–12 (emphasis added) (citations omitted).
[265] *Id.* at *12.
[266] *Id.* at *12–13.
[267] *Id.*
[268] *See infra* note 275 and accompanying text.
[269] No. A-CV-30-83, 1983 Navajo App. LEXIS 25 (Navajo Nov. 16, 1983).
[270] *Id.* at *1.

appeals."[271] In *Begay*, the court noted that the request before it was an appeal from a district court order which was not final.[272] Thus, the court denied the defendant's application for a writ of habeas corpus, his request for a stay of the lower proceedings, and his other applications for writs.[273] In *In re Application of Johnson*,[274] the Navajo Nation Supreme Court stated with finality that "[i]n no case should a habeas corpus proceeding be used as a substitute for appeal."[275]

F. Navajo Due Process

Similar to federal courts, the Navajo Nation Supreme Court uses habeas corpus as a judicial tool to examine whether the lower court proceedings complied with due process. The use of habeas in this manner allows the Court to dispense individualized justice by ensuring the petitioner's right to due process was respected. As the Court did in *Thompson*, the Court ensures that the lower courts, police, and prosecutors, understand and apply the Navajo definition of due process.[276] The focus on Navajo fairness of process ensures that each individual receives the appropriate justice. As the cases below demonstrate, the issue of due process often arises with regard to notice and an opportunity to be heard.

In *Johnny v. Greyeyes*,[277] the Court explained the Navajo meaning of procedural due process. The petitioner alleged that his due process rights were violated after he was detained for failure to appear before the Family Court on an order to show cause and was not informed why he was detained.[278] In addressing the petitioner's due process arguments, the Court stated:

> The primary principle that informs this Court's interpretation of procedural due process is K'e Atcitty v. The District Courtfor [sic] the Judicial District of Window Rock . . . . K'e, which fosters fairness through mutual respect, requires that an individual is fully

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[271] *Id.* at *2.
[272] *Id.* at *3.
[273] *Id.* at *4–5.
[274] No. A-CV-08-90, 1990 Navajo Sup. LEXIS 12, at *2 (Navajo June 14, 1990).
[275] *Id.* at *2.
[276] Thompson v. Greyeyes, No. SC-CV-29-04, 8 Navajo Rptr. 476 (Navajo 2004).
[277] No. SC-CV-52-08, 2009 Navajo Sup. LEXIS 1, at *6–7 (Navajo Feb. 27, 2009).
[278] *Id.* at *4. Johnny was the subject of a Domestic Abuse Protection Order (DAPO) issued on May 24, 2007. The order expired on November 4, 2007. The mother of Johnny's children filed a petition for an Order to Show Cause (OSC) alleging Johnny violated the DAPO. The Family Court set a hearing date, but Johnny was not personally served. When Johnny did not appear, the court issued a warrant for his arrest. Johnny was arrested on another matter and served with the warrant. He was served with an Order for Temporary Commitment on the DAPO and that Order stated good cause had been shown that he should be detained until a hearing twenty days later. *Id.* at *1–2.

> informed and provided an opportunity to speak. The Family Court therefore has an obligation to protect Petitioner's right to due process of law.[279]

The Court granted his writ, finding that the lower court violated his right to due process "under the Navajo Bill of Rights as informed by the Navajo principle of fundamental fairness," because he did not have notice of the order to show cause or an opportunity to be heard prior to being detained.[280]

Several habeas decisions have focused on the right to notice, a critical component of due process. In *Bitsie v. Greyeyes*,[281] the petitioner appeared for a pretrial hearing on a criminal battery charge.[282] After the pretrial hearing, the prosecutor charged him verbally with a crime of interfering with judicial proceedings.[283] The petitioner was arraigned, entered a plea of not guilty, and bail was denied despite the prosecutor not objecting to the petitioner's release.[284] The Court addressed whether the petitioner suffered a violation of his due process rights because of the denial of bail without a separate bail hearing and specific findings justifying his detention.[285] The Court noted that it was well-established that bail may be denied at arraignment and that this was consistent with the Navajo Nation Code, which provides that every person arrested for an alleged offense shall be given an opportunity to be released on bail within eighteen hours from the time of commitment.[286] Although the Court had previously held that there is a legal presumption for pretrial release unless the government objects and the court makes findings, on the record, of denial of bail in accordance with Navajo law,[287] the Court explained that when bail is denied, Navajo Nation Rule 15(d) requires the reasons be stated for the record, but they need not be written.[288] Reasons must be given so that the "defendant understands why he or she will continue to be held pending trial, and may contest those reasons," and to assist the Supreme Court with review.[289] In Bitsie's case, the "[r]espondent [Navajo Nation Department of Justice] failed to make any showing by clear and convincing evidence that clear and adequate reasons were given to defendant in denying pretrial bail."[290] The respondent failed to produce

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[279] *Id.* at *6–7 (citations omitted).
[280] *Id.* at *7.
[281] No. SC-CV-55-11, 2011 Navajo Sup. LEXIS 7 (Navajo Dec. 19, 2011).
[282] *Id.* at *1.
[283] *Id.* at *2.
[284] *Id.*
[285] *Id.* at *3.
[286] *Id.* at *4.
[287] *Id.* at *7 (citing Wood v. Window Rock Dist. Court, No. SC-CV-20-09, 2009 Navajo Sup. LEXIS 11, at *6 (Navajo July 1, 2009)).
[288] *Id.* at *4 (citing Dawes v. Eriacho, No. SC-CV-09-08, 2008 Navajo Sup. LEXIS 3, at *3 (Navajo May 5, 2008)).
[289] *Id.* at *6.
[290] *Id.* at *7–8.

either a digital recording of the hearing or a transcript, and, without such record, the Court could not determine whether the lower court adequately explained the reasons for denial of bail.[291] "An accused cannot be denied liberty for substantial periods of time without well-established due process protections being followed."[292] Bitsie had no notice of why he was detained or an opportunity to respond; thus, his right to due process was violated.

The failure to make written findings of fact when bail was denied was challenged again as a violation of due process in *Apachito v. Navajo Nation*.[293] The Court noted that the Navajo Rules of Criminal Procedure required the court to state their reasons on the record, not in writing.[294] Recognizing the importance of due process and the right to notice, yet attempting to balance this with the demands on the court system, the Court noted that requiring findings on the record was a recent change included in a revision of the Rules prompted by

> informalities violative of defendants' rights to due process of law . . . . The rule requiring findings on the record was motivated by such concerns. Practical and sound policy reasons also support our view. Every year more than 30,000 criminal cases are filed in the trial courts throughout the Navajo Nation. It would be impractical to require that in every instance where a bail denial is considered, a trial court must state the reasons for bail denial on the record and then undertake the tedious task of rushing to reduce the same to writing.[295]

In *Dawes v. Eriacho*,[296] the Court clarified the importance of stating clear reasons for denial of bail on the record in providing notice to defendants:

> [W]ritten reasons are not required, as long as the district court judge clearly and adequately explains his or her reasons for denying release to the defendant, and such reasons are available in the record of the case. The primary purpose of requiring reasons is so that the defendant understands why he or she will continue to be held pending trial, and may contest those reasons before the district court, and, if necessary, before this Court in a habeas corpus proceeding.[297]

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[291] *Id.* at *8–9.
[292] *Id.* at *9.
[293] No. SC-CV-34-02, 2003 Navajo Sup. LEXIS 15 (Navajo Aug. 13, 2003).
[294] *Id.* at *6–7.
[295] *Id.* at *5–6.
[296] No. SC-CV-09-08, 2008 Navajo Sup. LEXIS 3 (Navajo May 5, 2008).
[297] *Id.* at *7.

Although the Court denied Dawes's writ on the grounds that written findings were not necessary, the Court, employing individualized justice, granted the writ on the grounds that her later request for release on bail was not ruled upon by the lower court.[298] Dawes remained in jail for two weeks without a ruling on her request, "without knowledge of why she remained there, and [with] no opportunity to contest the district court's reasons."[299] The Court held that the lower court's failure to respond was a denial of her request without any reasons, written or verbal, in contradiction to Navajo law.[300]

The Court returned to the Navajo principles that limit incarceration and require due process prior to imposing a sentence in *Baker v. Greyeyes*.[301] Baker alleged his detention was illegal because his sentences were supposed to run concurrently, not consecutively.[302] He argued that the sentencing court had not stated, in its written order, whether the sentences were to run consecutively or concurrently, and the lower court had failed to justify its incarceration of the defendant as required by Navajo statutory law.[303] The Court noted the Navajo Nation Criminal Code, which requires that "[a]ll jail sentences must be supported by a written statement, by the Court, of reasons for imposition of a jail sentence."[304] The Code also gives the courts discretion to impose concurrent or consecutive sentences,[305] but due process requires a defendant to have notice of possible sentencing options, such as a consecutive sentence, prior to entering a plea.[306] The Court granted his writ because he did not have notice of the possibility of a consecutive sentence.[307]

Ruling that sentences are presumed to run concurrently, the Court, again using habeas as a judicial tool to improve the system, provided this instruction to the respondent, the Navajo Nation Department of Corrections:

> Diné principles of hozhóogo and k'é additionally underscore the necessity that sentences in criminal cases should reveal with fair certainty the intent of the court to ensure that those charged with executing an order of incarceration are not unduly confused. The duty of a court to be clear pursuant to these principles are expressed in the traditional law that those in authority must respectfully regulate with clarity, T'áadoo alk'ehólóní K'é bee

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[298] *Id.* at *9–10.
[299] *Id.* at *10.
[300] *Id.*
[301] No. SC-CV-34-12, 2012 Navajo Sup. LEXIS 5 (Navajo Aug. 24, 2012).
[302] *Id.* at *3.
[303] *Id.* at *3–4.
[304] *Id.* at *7 (citing 17 N.N.C. § 220(A)).
[305] *Id.* at *9 (citing 17 N.N.C. § 225).
[306] *Id.* at *9 (citing Navajo v. Morgan, No. SC-CR-02-05, 2005 Navajo Sup. LEXIS 11 (Navajo Nov. 8, 2005)).
[307] *Id.* at *15–16.

> íishjánígo. Respondent shall take heed of the presumption for concurrent sentencing that has been hereby adopted, and note its responsibility to see that defendants in similar situations are timely released and not unlawfully detained.[308]

G. Mr. Haungooah's Quest for Individualized Justice

Returning to Mr. Haungooah's quest for individualized justice, Mr. Haungooah was sentenced to 365 days in jail and a $500 fine.[309] The jail sentence was suspended and he was placed on probation for a year.[310] A probation violation was filed after three months, alleging that he had failed to be a law-abiding citizen, left the Navajo Nation without approval, and possessed or used intoxicating liquors or controlled substances without medical treatment.[311] He was not served with the petition or summons.[312] He was arrested on a bench warrant issued a day after the petition was issued, without having notice of the pending probation violation.[313] At the hearing without an attorney, he "admitted" the violations after a questionable process by the judge.[314] He informed the judge that he had left the area because he was homeless and told his probation officer of his homelessness.[315] The court imposed a 365-day sentence, and after several motions to the sentencing court, Mr. Haungooah filed a writ of habeas corpus with the Navajo Nation Supreme Court.[316]

The Court took up Mr. Haungooah's request and, after examining the Navajo Rules of Criminal Procedure, determined the summons must be served personally or by certified mail.[317] Under Navajo law, a bench warrant for arrest can only be issued if the petition for a violation of probation shows probable cause to believe the probationer will not appear.[318] The Court found there was no probable cause to issue the bench warrant.[319]

> Probable cause under Rule 53(b) requires, basically, a showing of futility in getting defendant to respond, meaning either that the defendant has disappeared with no way to contact him or her, or that defendant has shown by egregious past conduct that he

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[308] *Id.* at *15.
[309] Haungooah v. Greyeyes, No. SC-CV-06-13, 2013 Navajo Sup. LEXIS 2, at *1 (Navajo June 4, 2013).
[310] *Id.*
[311] *Id.* at *1–2.
[312] *Id.* at *2.
[313] *Id.*
[314] *Id.* at *4.
[315] *Id.* at *3–4.
[316] *Id.* at *4–6.
[317] *Id.* at *7.
[318] *Id.* at *7–8.
[319] *Id.* at *9–10.

> or she will not appear in [the] future. Neither situation is present in this case.[320]

The Court also found petitioner had not been properly served with the petition and summons and, thus, did not have proper notice of the revocation proceedings.[321]

The Court also took issue with the lower court's notification and waiver of the defendant's rights at the initial appearance and issued instruction on the proper conduct of Navajo judges.[322] The judge was "mandated to address the probationer personally and determine that the probationer understands an enumerated list including the nature of the alleged probation violations, his fundamental rights, and the government's burden of proof."[323] At a probation hearing, the probationer's fundamental rights include his right to counsel at the revocation hearing, right to cross-examination, and right to present witnesses on his behalf.[324] The Court found the lower court failed to discuss any of his rights and that the petitioner did not voluntarily waive his right to an attorney.[325] A waiver of the fundamental right to an attorney is protected under the Navajo Nation Bill of Rights, and any waiver must be a "knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences."[326] The Court instructed the lower court that the Navajo principle of "hazho'ógo" requires the Court to engage in a patient, respectful discussion advising a person of his rights before a waiver will be found effective.[327] The Court ruled that Mr. Haungooah's waiver was not knowing and intelligent because the lower court did not inform him of his rights enumerated under the Rules of Criminal Procedure, including the right to counsel.[328]

The Court granted the Petitioner's writ but did not stop with the violations noted above. The Court, using individualized justice, turned to Navajo Common Law and focused on the restorative aspect of Navajo law.[329] The Court noted that Mr. Haungooah was a homeless, non-member Indian whose family had moved away from the area.[330] It also took judicial notice that there were no alcohol abuse treatment centers in the area.[331] The Court reprimanded the failure of the tribal government in assisting Mr. Haungooah with finding solutions to his problems of homelessness and addiction.[332]

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[320] *Id.* at *9.
[321] *Id.* at *12–13.
[322] *Id.* at *15.
[323] *Id.* at *13–14.
[324] *Id.* at *14.
[325] *Id.* at *14–15.
[326] *Id.* at *15–16 (citing Eriacho v. Ramah Dist. Court, No. SC-CV-61-04, 2005 Navajo Sup. LEXIS 1 (Navajo Jan. 5, 2005)).
[327] *Id.* at *16.
[328] *Id.* at *16–17.
[329] *Id.* at *10–13.
[330] *Id.* at *10.
[331] *Id.*
[332] *Id.* at *10–12.

> Guided by *Diné bi beenahaz'áanii* which emphasized restorative justice, the prosecution and PPS here had the discretion and responsibility to find a solution for Petitioner other than seek reinstatement of his original jail sentence. *Diné bi beenahaz'áanii* imposes a duty on our government to provide avenues for restoration. Diné justice "throws no one away." *Diné bi beenahaz'áanii* gives our judicial system greater options and responsibilities than strictly applying punishments. In any system, one does not place unreasonable burdens on the defendant. In a restorative justice system, a close eye should be kept on the defendant with an obligation to help defendants obtain services, even beyond the locality if necessary. Such assistance gives a community hope by ensuring rehabilitative services so that offending members can be treated rather than merely punished or expelled. It is a fundamental right of our people to expect that their governmental agencies pursue restorative measures, especially where dire living circumstances are beyond a defendant's control, as in this case.[333]

H. Implications from the Navajo Nation Case Study

The case study demonstrates that the most effective forum to hear habeas petitions filed by individuals detained by the Navajo tribal government is the Navajo Nation Supreme Court. The Navajo Nation Supreme Court uses tribal law, written and oral, to interpret Navajo statutory law, define Navajo civil rights, and improve the Navajo justice system. Although the system began as a BIA court system, statutory amendments have created a separate and independent judicial system focused on protecting the rights of parties and dispensing individualized justice. The improvements to the Navajo Nation's habeas process, illustrated by the case study, made the process more accessible to detainees and increased the protection of minors. The Court interprets and applies Navajo law in a manner that federal courts could not. A federal judge might be supplied with a Navajo code; however, a federal judge will not have the knowledge or understanding of Navajo Common Law to interpret it or its application to petitioners. Additionally, the Navajo Nation Supreme Court uses habeas corpus in a manner similar to federal courts, respecting exhaustion of tribal remedies and ensuring due process has been met, in addition to determining the legality of the petitioner's detention. Perhaps more important for each individual petitioner, the Navajo Nation Supreme Court employs a version of individualized justice which focuses on restorative justice, ensuring that no habeas petitioner will be thrown away.

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[333] *Id.* at *10–12 (emphasis added) (citations omitted).

CONCLUSION

Tribal courts are the most effective forums to remedy civil rights violations, and ICRA needs to be amended to allow Indian Nations to opt out of federal habeas corpus review. ICRA's new amendment, affording a stay of detention for non-Indian petitioners seeks to placate tribal court critics. The criticism, however, is not backed by research. When Congress originally enacted ICRA, it recognized that tribal courts are the proper forum for ICRA challenges, authorizing the writ of habeas corpus as the only federal remedy. Federal courts have exercised that supervisory authority for over forty-five years.[334] In exercising such authority, federal courts have consistently supported tribal sovereignty by requiring exhaustion of tribal remedies. But as the survey demonstrates, the federal habeas corpus remedy, in addition to being a violation of tribal government sovereignty, is unnecessary. In the survey of the cases where tribal remedies were exhausted, only four resulted in the granting of writs, one of which has been discredited due to an incorrect interpretation of ICRA. Moreover, the other three writs that were granted were based on jurisdictional issues, not civil rights violations, because the defendants, with their cloaks of citizenship wrapped around them, were not subject to the jurisdiction of the Indian Nations.

The Navajo Nation case study demonstrates that tribal courts are appropriate forums. The use of tribal law based on tribal values results in individualized justice, not simply individualized justice through the use of discretionary sentencing or mitigating a defendant's culpability, but individualized justice through the interpretation and protection of civil rights as defined by Navajo Common Law—something federal courts cannot provide. Through the application of Navajo Common Law, alleged violations are not only corrected, but the interpretation and application of tribal law results in the use of habeas as a judicial tool to check the power of the executive branch and lower courts. The Navajo Nation Supreme Court, using Navajo Common Law, provides instruction on how to reform or change its justice system to prevent any further civil rights violations. Perhaps more importantly to the individual, such as Mr. Haungooah, the use of tribal law results in a form of individualized justice where no one is thrown away.

One may question, if individualized justice is premised on the application of tribal law based on cultural values, how a non-Indian, who may not have an in-depth understanding of these values, will perceive that justice? And isn't the application of individualized justice based on tribal law an argument that non-Indians should have a federal habeas corpus remedy and be allowed a stay of detention while the petition is pending because they have no understanding of the law? The debate regarding the cloak of citizenship provided to non-Indians in Indian country, and the lack of that cloak for enemy combatants detained by the U.S. governments will continue; however, this is a debate of colonialism. Prior to colonization, most Indian Nations

[334] *See* Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303 (1968).

treated non-indigenous people with respect, regardless of their citizenship, and many Indian Nations adopted non-citizens to afford them those benefits. Today, as illustrated by the Navajo Nation Supreme Court, the Navajo Nation is a respecter of persons. Although Mr. Haungooah was not Navajo, but a member of another Nation, the Court applied Navajo Common Law to ensure that he received the individualized justice he deserved. The Court did not care that he was not a citizen of the Navajo Nation. Additionally, given King's survey of habeas petitions by state detainees,[335] many of those petitioners would most likely welcome the opportunity to learn and receive the individualized justice that a tribal court can apply.

Rather than focusing on increasing federal court review over the exercise of criminal jurisdiction by tribal governments, focus should be on increasing the strength of tribal courts to apply individualized justice. Many tribal courts already do this through the application of tribal laws based on their tribal values, but more research is needed to highlight their success. Other tribal courts are burdened with westernized laws based on Western values and are working to reform their systems, but they struggle with a lack of resources. With an increased focus on using tribal court forums, and limiting federal review, more petitioners will receive the justice sought by Mr. Haungooah.

[335] *See* KING & HOFFMAN, *supra* note 188.