Protecting Victims of Domestic Assault: Upholding the Use of Uncounseled Tribal Court Domestic Assault Convictions to Establish Federal Habitual Domestic Assault Charges

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Protecting Victims of Domestic Assault: Upholding the Use of Uncounseled Tribal Court Domestic Assault Convictions to Establish Federal Habitual Domestic Assault Charges

Cover Page Footnote
Joanna Adu is a third-year law student at Seattle University School of Law. In addition to her scholarship in Indian law, she served as a judicial extern for the Tulalip Tribal Court in Tulalip, WA. She would like to thank Professors Catherine O'Neill, Eric Eberhard, and Erica Wolfe for sparking her interest, building her knowledge, and providing professional experience in Indian law. Joanna would also like to thank the Honorable Theresa Pouley, the Honorable Ron Whitener, and Court Director Wendy Church for the opportunity to work for and learn from them while at the Tulalip Tribal Court.
PROTECTING VICTIMS OF DOMESTIC ASSAULT: 
UPHOLDING THE USE OF UNCOUNSELED TRIBAL COURT 
DOMESTIC ASSAULT CONVICTIONS TO ESTABLISH 
FEDERAL HABITUAL DOMESTIC ASSAULT CHARGES

Joanna Adu*

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INTRODUCTION

Roman Cavanaugh, Jr., an enrolled member of the Spirit Lake Sioux Tribe, was driving one evening with his common-law wife and their children.\(^1\) Both adults were intoxicated and began to argue with each other.\(^2\) As the altercation escalated, Roman grabbed his wife’s head, jerked it back and forth, and then slammed it into the dashboard of the vehicle.\(^3\) After pulling the car into a field, Roman’s wife jumped out of the vehicle and hid in fear.\(^4\) Roman eventually drove away, with the children still in the vehicle, and was later arrested and charged with domestic assault.\(^5\) Because Roman had previous convictions of domestic assault in tribal court, after this incident, the U.S. federal government charged him with “Domestic Assault by a Habitual Offender” (18 U.S.C. § 117).\(^6\)

Roman Cavanaugh’s case was heard in an Eighth Circuit district court that held that his previous tribal convictions could not be used as the predicate offenses for charges under § 117.\(^7\) The court made ruled based on the fact that Cavanaugh’s three previous tribal convictions were the result of proceedings that occurred without legal representation.\(^8\) Subsequently, the appellate court reversed the district court’s ruling, holding that because no actual constitutional violation had occurred, use of the tribal convictions was not precluded.\(^9\)

Currently, a circuit split exists regarding whether tribal convictions in which the defendant did not have counsel can be used as the predicate offenses for charges brought under § 117. This split was recently highlighted in United States v. Bryant, where a Ninth Circuit appellate court denied the use of the defendant’s prior tribal convictions to substantiate federal criminal

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\(^1\) United States v. Cavanaugh, 643 F.3d 592, 594 (8th Cir. 2011).
\(^2\) Id.
\(^3\) Id.
\(^4\) Id.
\(^5\) Id.
\(^6\) Id.
\(^7\) Id. at 593.
\(^8\) Id. at 594.
\(^9\) Id. at 606.
charges under § 117.\textsuperscript{10} Conversely, the Eighth and Tenth circuits have held that tribal convictions can be used for charges under § 117.\textsuperscript{11}

Domestic violence is an epidemic\textsuperscript{12} that warrants considerable attention in the United States, regardless of racial classification. Furthermore, Indians are significantly more likely to be physically assaulted when compared to all other racial classifications.\textsuperscript{13} Holding Indian domestic abusers accountable cannot be done singlehandedly by tribal courts nor by U.S. federal courts because of the unique relationship between the two governing systems. Prior to 2010, tribal courts were unable to impose sentences of incarceration greater than one year.\textsuperscript{14} Additionally, tribal courts have primary jurisdiction over their members for certain criminal and civil actions.\textsuperscript{15} Contrary to its U.S. counterpart, if a tribal court conviction imposes a sentence of one year or less, that tribal proceeding does not warrant court-appointed counsel.\textsuperscript{16} As previously mentioned, this situation has occurred in at least three U.S. circuit courts, with different results.

This Article argues that the U.S. Supreme Court should uphold the ability of federal courts to use tribal domestic assault

\begin{thebibliography}{10}
  \bibitem{10} United States v. Bryant, 769 F.3d 671, 679 (9th Cir. 2014).
  \bibitem{11} See \textit{Cavanaugh}, 643 F.3d at 605; United States v. Shavanaux, 647 F.3d 993, 1000 (10th Cir. 2011).
  \bibitem{12} Melissa Jeltsen, \textit{Joe Biden: Domestic Violence is a ‘Public Health Epidemic’}, \textsc{Huffington Post} (Mar. 20, 2015, 4:45 PM), http://www.huffingtonpost.com/2015/03/20/biden-domestic-violence-epidemic_n_6911820.html.
  \bibitem{14} The Tribal Law and Order Act (TLOA) has increased the authority of tribal courts to impose sentences of incarceration up to three years, however, not all tribes have implemented TLOA. 25 U.S.C. § 1302(7)(B)–(C) (2012); NAT’L CONG. OF AM. INDIANS, \textit{Tribes Exercising Enhanced Sentencing}, TRIBAL LAW & ORDER RES. CTR, http://tloa.ncai.org//tribesexercisingTLOA.cfm (last visited Nov. 25, 2014).
  \bibitem{15} 25 U.S.C. §§ 1302, 1304(b) (2012).
\end{thebibliography}
convictions in cases that are absent of other alleged improprieties, to meet the elements of § 117. Recognition of tribal convictions should be extended on principles of comity because: 1) tribal sovereignty preceded the formation of the United States Constitution, and as such, the Constitution does not govern tribes; 2) the Sixth Amendment does not apply to tribal proceedings so convictions without defense counsel can never be Sixth Amendment violations; and 3) although upholding the use of uncounseled tribal convictions would result in unique circumstances that are applicable only to Indians, precluding courts from subsequently recognizing such convictions would also result in circumstances applicable only to Indians; Indian domestic assault victims would be left uniquely endangered and vulnerable.

Following this Introduction, Part I provides a brief history of U.S. courts’ treatment of Indian tribes as both dependent wards of the federal government and sovereign nations operating within the U.S. system. Part II examines the avenues by which Indian tribal sovereignty can be upheld in the U.S. federal system. Part III discusses the unique relationship between federal and tribal courts and the rights afforded within each venue. Part IV examines the arguments that have been raised by Indian defendants, advocating for preclusion of federal recognition of their tribal convictions. Finally, this Article concludes by emphasizing the need and importance for U.S. Supreme Court review on this issue.

I. BACKGROUND

To understand the complexity that underlies the relationship between Indian tribal courts and U.S. federal courts, this Article begins with a brief history of Indian tribal sovereignty. This section examines the way U.S. federal courts have historically treated tribal adjudicatory jurisdiction and provides the context for analyzing the three cases that have led to the current circuit split.

A. History of United States Courts’ Treatment of Tribal Sovereignty

Historically, tribal sovereignty has experienced intermittent definitional changes dating back to the Marshall trilogy of cases beginning in 1823. In Johnson v. M’Intosh, the Supreme Court held that Indian rights to complete sovereignty “were necessarily
diminished” upon the “discovery” of the North American land that eventually became the United States (also referred to as the “Discovery Doctrine”).\textsuperscript{17} Then, in \textit{Cherokee Nation v. Georgia}, the majority opinion conceded that Indian tribes held similar status to that of states, but restricted that sovereignty by labeling tribes as “domestic dependent nations.”\textsuperscript{18} Subsequently, the opinion in \textit{Worcester v. Georgia} stated that, “The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights.”\textsuperscript{19} U.S. courts have continued to struggle to find a balance between the tribal right to sovereignty that preceded U.S. formation, and the need for the U.S. government to have ultimate control over Indian lands and tribal members.\textsuperscript{20}

Indian tribes, at minimum, retain the sovereign powers that are not limited by Congress.\textsuperscript{21} As such, Congress retains plenary power to affirm, restrict, or eliminate Indian tribal power.\textsuperscript{22} Furthermore, Congress has affirmed the inherent tribal rights of self-government over Indian criminal matters.\textsuperscript{23} However, tribal authority to prosecute criminal matters is limited in the types of crimes that may be prosecuted as well as the punishments that tribes can impose.\textsuperscript{24} In instances of domestic violence, Congress has explicitly afforded Indian tribes the ability to exercise “special domestic violence jurisdiction” over tribal members and their significant others.\textsuperscript{25} The deviation resulting in the current circuit split results from tribal exercises of self-governance over domestic assault offenders on tribal reservations.

\textsuperscript{17} Johnson v. M’Intosh, 21 U.S. 543, 574 (1823).
\textsuperscript{18} Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (emphasis added).
\textsuperscript{19} Worcester v. Georgia, 31 U.S. 515, 559 (1832).
\textsuperscript{21} Id.
\textsuperscript{22} WILLIAM C. CANBY, JR., \textit{AMERICAN INDIAN LAW IN A NUTSHELL} 79 (5th ed. 2009).
\textsuperscript{23} 18 U.S.C. §§ 1152, 1153 (2012); CANBY, supra note 22, at 92.
\textsuperscript{24} CANBY, supra note 22, at 152.
\textsuperscript{25} 25 U.S.C. § 1304(b) (2012). However, not all cases of domestic violence involving tribal members will fall under tribal jurisdiction. § 1304(b)(4).
The U.S. Constitution does not govern Indian tribes.\textsuperscript{26} This difference in criminal procedure results in the two sovereign systems overlapping each other, which requires some sort of accord between the two systems. Limiting the ability of tribes to adequately punish habitual domestic assault offenders, and preventing federal courts from subsequently using tribal convictions to punish habitual domestic assault offenders, would leave Indian domestic assault victims in a uniquely dangerous and vulnerable state.

\textbf{B. The Cases Giving Rise to the Circuit Split}

Tribal courts, at a minimum, have the ability to impose up to one year of incarceration on uncounseled convictions as authorized by the Indian Civil Rights Act (ICRA).\textsuperscript{27} Conversely, U.S. federal and state courts cannot constitutionally impose any term of incarceration unless a defendant has knowingly waived or received the right to counsel, as mandated by the Federal Constitution.\textsuperscript{28}

Under 18 U.S.C. § 117, “Any person who commits a domestic assault within . . . Indian country and who has a final conviction on at least [two] separate prior occasions in . . . Indian tribal court proceeding” will be charged and could receive a prison sentence for up to ten years.\textsuperscript{29} The act expressly encompasses Indian country and its tribal court proceedings, however, Congress did not expressly address whether such convictions may be used by federal courts in cases where the tribal proceedings did not include protections similar to those afforded by the U.S. Constitution.

1. United States v. Bryant

In a decision issued on September 30, 2014, the Ninth Circuit U.S. Court of Appeals held that the federal charges brought under § 117, for domestic assault by a habitual offender, against Michael Bryant, Jr. must be dismissed because one of the defendant’s prior tribal convictions was uncounseled and thus could not be used by

\textsuperscript{26} CANBY, \textit{supra} note 22, at 79–80.
\textsuperscript{28} United States v. Cavanaugh, 643 F.3d 592, 596 (8th Cir. 2011).
\textsuperscript{29} 18 U.S.C. § 117(a) (2012).
the federal government. In the opinion written by Judge Paez, the court stated that, “tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the sixth amendment right.”

Michael Bryant, Jr., an Indian and resident of the Northern Cheyenne Tribe reservation, was charged and convicted of domestic assault in two separate incidents against two separate women. Both convictions were obtained in the Northern Cheyenne Tribal Court. A month after the second domestic assault conviction, in June 2011, Michael was federally indicted under § 117.

Under the Law and Order Code of the Northern Cheyenne Tribe, a defendant has the right to defend himself by acquiring an attorney at the defendant’s own expense. Michael did not have legal counsel in either of his prior tribal court proceedings. Furthermore, in at least one of the prior tribal court convictions, he was sentenced to a term of incarceration. The government argued that because the Sixth Amendment does not govern tribal courts, the use of the previous convictions should be allowable.

In issuing its decision in favor of the defendant, the appellate court based its holding on a prior decision, United States v. Ant. In Ant, the court held that because the defendant’s prior tribal conviction would not have been admissible if it had occurred anywhere else besides a tribal court; the only way such a conviction could be admissible in federal proceedings was if the

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30 United States v. Bryant, 769 F.3d 671, 679 (9th Cir. 2014).
31 Id. at 677.
32 Id. at 673 n.2.
33 Id. at 673.
34 Id. at 673.
35 Id. at 674 n.4. This comports with ICRA, which mandates the right for defendants to obtain counsel at their own expense. Id at 675 n.5.
36 Id. at 673 n.4.
37 Id. at 674 n.3.
38 The court only addressed the Sixth Amendment issue in its opinion, most likely because in finding the use of the tribal convictions invalid under the Sixth Amendment, there was no need to do a Fifth Amendment Due Process analysis. See id. at 679 n.7.
39 Id. at 677.
defendant had made a “knowing and intelligent waiver of his right to counsel” as required in U.S. court systems.40 Interestingly, after the Ant ruling, the same Ninth Circuit appellate court held that the federal firearms statute (18 U.S.C. § 922(g)(9)) was an exception to the Ant rule and prior uncounseled tribal convictions that resulted in incarceration could be used as the predicate offense.41

The Bryant decision scarcely references tribal sovereignty in issuing its decision. In fact, tribal sovereignty is only mentioned in a footnote to provide explanation of the inapplicability of the Constitution to tribal courts.42 The lack of discussion about the unique status of tribal courts in relation to U.S. courts leaves the question of whether the Ninth Circuit adequately understood the reasons tribal convictions should be upheld and respected, despite being different from U.S. courts. Additionally, the opinion makes no reference to principles of comity or respecting tribal adjudicatory procedure in its sovereign capacity, which arguably weakens the Ninth Circuit’s argument due to a lack of complete discussion.

In Judge Watford’s concurring opinion, he argues that the Ant ruling should be reexamined.43 He supports this conclusion by discussing the inconsistency of the Ant ruling with the Supreme Court’s ruling in Nichols v. United States.44 In Nichols, the Court held that an uncounseled U.S. misdemeanor conviction, with no term of imprisonment, could be used to enhance sentencing for a subsequent offense that would result in incarceration.45 Understandably, Judge Watford was concerned that the holding in Ant reached beyond the boundaries of the Supreme Court holding in Nichols—which does not completely agree with the Ninth Circuit that uncounseled convictions are presumptively unusable.46

40 Id. at 676–77 (internal quotation marks omitted) (quoting United States v. Ant, 882 F.2d 1389, 1394 (9th Cir. 1989)).
41 Id. at 677; see also United States v. First, 731 F.3d 998, 1001, 1003 (9th Cir. 2013).
42 Bryant, 769 F.3d 671, 675 n.5 (9th Cir. 2014).
43 Id. at 679.
44 Id. at 679–80.
45 Id at 679.
46 Id.
Hypothesizing about the constitutionality of the tribal proceedings, had they occurred in a U.S. court, is inconsequential because the Constitution does not apply to tribes. As Judge Watford frankly articulated:

[T]he fact remains that [Bryant’s] prior convictions were not obtained in violation of the sixth amendment [sic] because they occurred in tribal court, where the sixth amendment [sic] doesn’t apply . . . . So aren’t we really saying that the right to appointed counsel is necessary to ensure the reliability of all tribal court convictions? If that’s true, we seem to be denigrating the integrity of tribal course . . . . [R]espect for the integrity of an independent sovereign’s courts should preclude such quick judgment [against tribal conviction validity].

Judge Watford went on to stress the need for the U.S. Supreme Court to issue a clear and definitive answer for federal use of uncounseled tribal court convictions because of the stark differences in opinion between the Ninth Circuit and the rulings from the Eighth and Tenth circuits.

On July 6, 2015, the Ninth Circuit Court of Appeals denied a petition to rehear Bryant en banc. Although the court order merely states that there were not enough votes in favor of rehearing the case, the concurring opinion by Judge Paez (joined by Judge Pregerson) provides a look at the misplaced legal reasoning held by some of the judiciary regarding tribal adjudication. In his opinion, Judge Paez recognizes that: 1) the Sixth Amendment is not applicable to Indian tribes, 2) ICRA does not require a right to counsel that is in line with the U.S. Constitution, and 3) Congress has made clear its intention to “aggressively” address domestic assault in Indian Country. However, despite all of his express recognition, Judge Paez

47 Id. at 679–80.
48 Id. at 1042. An “en banc” hearing is when all judges are “present and participating.” BLACK’S LAW DICTIONARY (10th ed. 2014).
49 Id. at 1043–44.
ultimately falls back upon *United States v. Ant’s* ruling (that uncounseled tribal convictions cannot be used) because its “approach adheres to the Sixth Amendment’s core interest in *reliability*.” As Judge Watford highlighted in his concurring opinion in Bryant’s first appellate court ruling, isn’t Judge Paez really questioning the validity of all tribal court convictions?\(^5\)

In this opinion, the appellate court again fails to explain why tribal sovereignty and principles of comity do not warrant recognition of Bryant’s prior tribal convictions. Interestingly, Judge Paez does make it a point to state that “no part of the decision in Bryant is intended to express contempt for tribal courts. Nor does [the] decision frustrate the purpose of [§ 117] simply because it conditions the use of prior trial court misdemeanor convictions that result in imprisonment on the provision of counsel.” Judge Paez’s position does exactly what he says it does not, it frustrates the purpose of § 117, as applied to Indian *domestic assault victims*. Congress has explicitly recognized the severity of domestic violence and the need to hold offenders accountable.\(^6\) Yet, if courts are unwilling to provide tribal courts the deference otherwise afforded to foreign courts, Indian domestic assault offenders are able to escape the punishment that is commensurate with the habitual nature of their behavior.

Alternatively, in the dissent opinion to the reconsideration denial, Judge Owens gets straight to the heart of what is at stake in these types of cases:

Michael Bryant likes to beat women. Sometimes he kicks them. Sometimes he punches them. Sometimes he drags them by their hair. He punched and kicked one girlfriend repeatedly, threw her to the floor, and even hit her. When he could not find his keys, he choked another woman to the verge of passing out. *Although his violence varies, his* 

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50 *Id.* at 1043 (emphasis added).
51 See *supra* note 47 and accompanying text.
52 *Bryant*, 792 F.3d at 1044.
punishment never does. Despite Bryant’s brutality – resulting in seven convictions for domestic violence – his worst sentence was a slap on the wrist: one-year imprisonment, or what someone who “borrows” a neighbor’s . . . magazine from the mailbox . . . would face.54

In addition to highlighting the staggering rates of domestic assault suffered by Indian (including Alaskan Native) women, the dissent opinion emphasizes the inconsistency of punishment that results from this circuit split.55 Depending on where an offender is located geographically, he may or may not be held accountable for his habitually assaultive behavior.56 Ultimately, both opinions expressly agree that the resolution of this issue lies at the feet of the Supreme Court.57

2. Contradictory Rulings out of the Eighth and Tenth Circuits

In United States v. Cavanaugh out of the Eighth Circuit and United States v. Shavanaux out of the Tenth Circuit, the U.S. appellate courts came to a completely different ruling than the Ninth Circuit. Although each court used different reasoning to reach the same conclusion, both courts ultimately determined that because Indian tribes are not subject to the Constitution, no constitutional violation existed that would preclude subsequent use of uncounseled tribal convictions for charges under § 117.

a. United States v. Cavanaugh

Roman Cavanaugh, Jr. was charged with “Domestic Assault by a Habitual Offender” after the domestic assault incident described at the beginning of this Article.58 The incident resulting in Roman’s federal charges was subsequent to three previous tribal domestic abuse convictions in March 2005, April 2005, and

54 Bryant, 792 F.3d at 1044–45 (emphasis added).
55 Id. at 1045.
56 Id. at 1044–46.
57 United States v. Cavanaugh, 643 F.3d 592, 594–95 (8th Cir. 2011).
58 Id. at 593.
January 2008.\textsuperscript{59} The previous convictions came out of the Spirit Lake Tribal Court.\textsuperscript{60} Roman never made any allegations of impropriety or appealed any of his convictions, notwithstanding the existence of a tribal court appeal procedure.\textsuperscript{61}

In reaching its decision, the appellate court discussed in detail prior cases that involved Sixth Amendment violations in U.S. court proceedings that resulted in incarceration.\textsuperscript{62} In what appears to be an underlying persuasive element of its ruling, the opinion discusses the exceptional nature of using prior convictions that do not comport with U.S. constitutional procedure for repeat-offender or enhancement statutes.\textsuperscript{63} The Court cites Nichols v. United States, which states that “recidivist statutes . . . do not change the penalty imposed for the earlier conviction . . . this Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the offender.”\textsuperscript{64}

The court acknowledged the unique nature of tribal courts in order to differentiate tribal convictions from the previous cases that expressed great concern about the reliability of uncounseled convictions. The opinion then addresses the Ninth Circuit Ant holding by differentiating the circumstances of that case from Cavanaugh. It explains that Ant is not applicable in this case because Ant sought to use a tribal conviction to prove subsequent federal charges that arose out of the same incident.\textsuperscript{65}

\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 596–600; see Baldasar v. Illinois, 446 U.S. 222, 222–24 (1980) (holding that an uncounseled misdemeanor conviction, that did not include incarceration, could not be used to enhance subsequent charges); see also Scott v. Illinois, 440 U.S. 367, 368–74 (1979) (holding that the Sixth Amendment right to counsel is violated when any term of incarceration is imposed); see also Burgett v. Texas, 389 U.S. 109, 110–16 (1967) (holding that an uncounseled felony conviction could not be used to enhance punishment from a subsequent recidivist charge); see also United States v. White, 529 F.2d 1390, 1391–94 (8th Cir. 1976) (holding that where the defendant was convicted without properly waiving a right to counsel, the term of incarceration was vacated but the conviction was affirmed).
\textsuperscript{63} Cavanaugh, 643 F.3d at 598–600.
\textsuperscript{64} Id. at 598–600; see also Nichols v. United States, 511 U.S. 738, 746–47 (1994) (quoting Baldasar, 446 U.S. at 232 (Powell, J., dissenting)).
\textsuperscript{65} Cavanaugh, 643 F.3d at 604.
In line with the Tenth Circuit decision in *United States v. Shavanaux*, the Eighth Circuit based its decision on principles of comity and ultimately concluded that in the absence of a constitutional violation, use of uncounseled tribal convictions cannot be precluded.\(^66\) While the Eighth Circuit did its best to tackle the complicated relationship between sovereign Indian tribes and the U.S. federal courts, the Tenth Circuit ruling in *Shavanaux* proved more eloquent in articulating the substantial importance of tribal sovereignty and principles of comity, in ultimately upholding the use of tribal convictions.

b. United States v. Shavanaux

In *United States v. Shavanaux*, the Tenth Circuit U.S. Court of Appeals upheld the use of Adam Shavanaux’s prior uncounseled tribal convictions in bringing charges under § 117.\(^67\) The appellate court based its decision on principles of comity, its determination that Shavanaux’s tribal convictions were absent of any Due Process violations (as required under ICRA), and its determination that the prior uncounseled tribal convictions did not violate the Sixth Amendment because the Constitution is not applicable to Indian tribes.\(^68\)

In the opinion written by Judge Lucero, the analysis of a potential Sixth Amendment violation begins with an examination of the unique relationship between Indian tribes and the United States.\(^69\) Judge Lucero contends that a sovereign proceeding ungoverned by the Constitution and thus different from constitutional procedure does not make the conviction “constitutionally infirm.”\(^70\) This determination directly conflicts with the Ninth Circuit opinion in *Bryant*. In reaching this conclusion, the court reasoned that *at the time* of the tribal proceedings that resulted in the previous convictions, there was no Sixth Amendment violation and furthermore, subsequent use of

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\(^{66}\) *Id.* at 594.
\(^{67}\) *United States v. Shavanaux*, 647 F.3d 993, 1002 (10th Cir. 2011).
\(^{68}\) *Id.* at 997–98.
\(^{69}\) *Id.*
\(^{70}\) *Id.* at 997.
those tribal convictions would not create a brand new Sixth Amendment violation.\textsuperscript{71}

Additionally, the court determined that the tribal convictions did not violate Due Process rights because the proceedings fully complied with ICRA.\textsuperscript{72} Furthermore, the tribal proceedings were otherwise absent of improprieties that would preclude subsequent use of these “foreign court” convictions.\textsuperscript{73}

The unique status of Indian tribes as sovereign nations (and thus warranting treatment of its convictions as those of a foreign court), stems from the fact that tribes and tribal governance existed prior to the creation of the U.S. Constitution.\textsuperscript{74} The next section will examine tribal sovereignty and why the Federal Constitution does not govern tribes, then briefly discuss principles of comity and the Full Faith and Credit Clause.

II. TRIBAL SOVEREIGNTY PRECEEDED THE UNITED STATES CONSTITUTION

The determination of whether to allow the use of an uncounseled conviction obtained in tribal courts is uniquely applicable to Indian tribal members. This unique situation stems from our country’s history: the “discovery” of land that became the United States; land that Indian tribes were already long residing. Although the English conquered the land that encompasses the United States, Indian tribes have remained distinct entities.\textsuperscript{75} Indian tribal nations are geographically within the boundaries of the U.S., yet maintain tribal sovereignty to the extent it has not been limited by the U.S. legislature or a treaty.\textsuperscript{76}

Tribal sovereignty existed prior to the formation of the U.S. and thus derives from the tribes themselves and is not reliant on the U.S. Constitution for its creation. As Charles Wilkinson articulated in \textit{American Indians, Time, and the Law}, “tribal authority was not

\textsuperscript{71} Id.
\textsuperscript{72} Id. at 999–1000.
\textsuperscript{73} Id. at 999.
\textsuperscript{74} See Prygoski, supra note 20.
created by the Constitution – tribal sovereignty predated the formation of the United States and continued after it.” Therefore, to hold sovereign nations that are not governed by the Constitution to its requirements and presume that any deviation lends to a presumption of invalidity appears to be somewhat autocratic.

A. Principles of Comity and the Full Faith and Credit Clause

Recognition of foreign court judgments generally falls under one of two categories: 1) the Full Faith and Credit Clause; or 2) principles of comity. First, Full Faith and Credit requires recognition of other jurisdictional judgments within the U.S., and otherwise, as delegated by Congress. Congress has required Full Faith and Credit in certain Indian tribal matters, including judgments under the Indian Child Welfare Act (ICWA), among others. While Congress may choose to extend Full Faith and Credit to tribal domestic assault convictions at some point in the future; at a minimum, courts have the flexibility to extend recognition of tribal convictions via principles of comity.

Second, under principles of comity, courts have the ability to recognize foreign judgments deemed appropriate. In instances in which recognition of foreign judgments is not required, principles of comity allow courts to respect the sovereignty of another nation’s proceedings, albeit different than our own. The primary treatise in Indian law, Cohen’s Federal Indian Law Handbook, describes the comity doctrine generally.

[T]he comity doctrine allows the receiving court greater discretion to determine whether to enforce

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77 CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 103 (Yale Univ. Press 1987).
78 U.S. CONST. art. IV, § 1.
79 See Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997); COHEN, supra note 76.
80 See COHEN, supra note 76.
81 “Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance.” United States v. Shavanaux, 647 F.3d 993, 999 (10th Cir. 2011). See also Marchington, 127 F.3d at 810 (citing Hilton v. Guyot, 159 U.S. 113, 205 (1895)); COHEN, supra note 76.
the foreign judgment . . . a court using the principles of comity may refuse to enforce a foreign judgment either because it was reached through procedures the receiving court views as fundamentally unfair, because the rendering court lacked jurisdiction, or because the judgment violates a strongly held public policy of the form.\textsuperscript{82}

The cases that have given rise to the circuit split are absent of any other circumstances that would lend towards presumptive exclusion in federal courts.

Realistically, not all tribal court convictions will be absent of other allegations of impropriety, or will be otherwise invalid for subsequent use. Extending recognition under principles of comity allows courts the flexibility to recognize those convictions as applicable and exclude convictions that were obtained under suspect circumstances. Within the limited scope and analysis provided in this Article, arguing for full faith and credit may prove too rigid and limiting on courts to enforce tribal convictions that do not warrant extensions. As each Indian tribe is its own sovereign nation, each tribe maintains different adjudicatory proceedings (if any exist at all). A full analysis of the inconsistency presented by these unique circumstances in cases of additional alleged improprieties is beyond the scope of this Article and one that is required before an argument for full faith and credit extension can be made.

III. THE UNIQUE RELATIONSHIP BETWEEN TRIBAL AND U.S. COURT SYSTEMS

The Sixth Amendment of the U.S. Constitution provides criminal defendants with court-appointed legal representation to assist in their defense if the defendant is indigent.\textsuperscript{83} This right is accorded to all U.S. criminal defendants unless the right has been waived. Alternatively, ICRA, which governs Indian Tribal

\textsuperscript{82} COHEN, supra note 76.
\textsuperscript{83} “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. CONG. amend. VI.
Proceedings, does not require court appointed defense in cases that seek to impose terms of incarceration that are less than one year.\textsuperscript{84}

In \textit{Cavanaugh}, the court noted that preclusion of uncounseled tribal convictions would result if there was any existence of a constitutional violation.\textsuperscript{85} However, as Indian tribal proceedings are not governed by the Constitution, a constitutional violation does not exist. Furthermore, a constitutional violation would not be created anew if the conviction were later used as a predicate offense for habitual domestic assault charges because the protections accorded by the Sixth Amendment \textit{apply at the time of adjudication}.\textsuperscript{86}

Within the U.S. court system, convictions in which the defendant did not have counsel have generally been precluded from subsequent use for enhancement and recidivist statutes.\textsuperscript{87} However, preclusion from subsequent use does not always mean completely vacating the original uncounseled conviction.\textsuperscript{88} For example in \textit{Scott}, an eighth circuit appellate court held that because the defendant had not clearly waived his right to counsel (but was then not provided counsel) in a proceeding that resulted in a suspended sentence, the imposition of a jail sentence was improper.\textsuperscript{89} However, the court in \textit{Scott} also affirmed the uncounseled conviction itself because it found sufficient evidence of the defendant’s guilt.\textsuperscript{90} As such, arguments regarding the reliability-concerns of uncounseled convictions do not appear to be universal.

As sovereign nations with inherent rights of authority over tribal members, Indian tribal proceedings are treated as convictions of foreign courts. Historically, U.S. courts have used various foreign court convictions in U.S. court proceedings, so the use of tribal convictions is not as unusual as protestors seek to suggest.

\textsuperscript{84} \textit{See} 25 U.S.C. § 1302(c) (2010).
\textsuperscript{85} United States v. Cavanaugh, 643 F.3d 592, 601 (8th Cir. 2011).
\textsuperscript{86} \textit{Id.} at 600; \textit{see also} Alabama v. Shelton, 535 U.S. 654, 662 (2002).
\textsuperscript{88} \textit{See} United States v. White, 529 F.2d 1390, 1391–94 (8th Cir. 1976).
\textsuperscript{89} \textit{Id.} at 1393.
\textsuperscript{90} \textit{Id.} at 1393–94.
As the Shavanaux opinion noted, “federal courts have repeatedly recognized foreign convictions and accepted evidence obtained overseas by foreign law enforcement through means that deviate from our constitutional protections.”91 There are no obvious and overarching circumstances present in tribal proceedings that would warrant a presumption of preclusion other than the presence of Constitutional deviation.

The Restatement of Foreign Relations provides a framework by which foreign court proceedings should warrant exclusion. Only in cases where a judgment was obtained in an impartial judicial system or the court rendering the judgment did not have jurisdiction over the defendant should there be a presumption of invalidity.92 None of the three courts discussed in this paper determined that either situation presented itself in any of the tribal convictions. Furthermore, none of the tribal defendants alleged non-compliance with ICRA which governed the tribal proceedings.

A. The Indian Civil Rights Act

Indian Tribes are governed by ICRA (and as of 2010 the Tribal Law and Order Act).93 Although the Constitution does not govern tribes, Congress selectively applied certain protections from the Bill of Rights to tribal members, via ICRA.94 Of particular importance in U.S. criminal proceedings are the protections afforded under the Due Process Clause. The Fifth Amendment of the Constitution requires that “no person shall … be deprived of life, liberty, or property, without due process of law…”95 Accordingly, ICRA states that “No Indian tribe in exercising powers of self-government shall … deny to any person within its

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91 United States v. Shavanaux, 647 F.3d 993, 999 (10th Cir. 2011).
95 U.S. CONST. amend. V.
jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.”

Furthermore, ICRA affords criminal defendants the right of counsel in cases that seek to impose a term of incarceration beyond one year. Thus, as articulated in the Cavanaugh opinion, “if a tribe elects not to provide for the right to appointed counsel through its own laws, Indian defendants in tribal court have no Constitutional or statutory right to appointed counsel unless sentenced to a term of incarceration greater than one year.”

In the tribal convictions of Bryant, Cavanaugh, and Shavanaux, the proceedings fully complied with ICRA and were absent of any allegations of impropriety. The inclusion of tribal convictions in § 177 and the Congressional exclusion of any requirements to provide defense counsel in tribal proceedings less than one year in ICRA, should logically result in a presumption of validity.

IV. ARGUMENTS AGAINST USE OF TRIBAL CONVICTIONS FOR FEDERAL CHARGES

Indian defendants have raised a number of defenses to support the preclusion of federal use of tribal domestic assault convictions for subsequent federal criminal charges under § 117. This section explains why the arguments raised in Bryant, Cavanaugh, and Shavanaux are unpersuasive.

A. Allowing Use of Uncounseled Tribal Convictions Effectively Results in Racial Bias

In Shavanaux, the defendant argued that allowing for use of uncounseled tribal convictions in federal charges would result in

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97 25 U.S.C. § 1302(c)(A)–(B) (2010) (emphasis added). “In a criminal proceeding in which an Indian tribe . . . imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall . . . provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution . . . at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney.” § 1302(c)(A)–(B) (emphasis added).
98 United States v. Cavanaugh, 643 F.3d 592, 596 (8th Cir. 2011).
an exception that would apply only to American Indians. The court responded by drawing a distinction between a purely racial classification and a “political” classification, with Indians falling under the second group, due to the unique relationship between Indians and U.S. federal law.

It would be hard to deny that allowing for use of uncounseled tribal convictions in federal prosecutions would not result in a situation that is applicable only to Indians. However, the Shavanaux court’s attempt to differentiate between racial and political classifications is unnecessary. This differentiation is unnecessary because the unique relationship between the sovereign nations creates a compelling interest that warrants recognition of tribal proceedings. Albeit, in other circumstances, classifications that fall along racial lines may necessitate avoidance when possible. The result should not be viewed in terms of bias and instead should be viewed as recognition of the inherent right of tribes to govern Indians in criminal matters. Additionally, such a result is necessary to fill the gap that is created by the limitation of tribes to impose punishment beyond a certain threshold.

B. Because Tribal Courts Can Be Dysfunctional, the Presumption of Validity is Inaccurate

Each Indian tribe is considered to be a sovereign entity. As such, tribal proceedings can vary greatly. Some tribes, such as the Navajo Nation, have a well-established adjudicatory system, other tribes maintain no adjudicatory system at all, and many tribes fall somewhere in between. Cavanaugh noted the district court’s concern about the deficiency of tribal court systems as a whole, “caused by a lack of resources [and] the ongoing lack of resources to overcome these shortcomings.”

The concern regarding the lack of resources available in many tribes to properly establish an acceptable court system does have merit. However, the tribal proceedings in Bryant, Cavanaugh, and

99 United States v. Shavanaux, 647 F.3d 993, 1001 (10th Cir. 2011).
100 Id.
102 Cavanaugh, 643 F.3d at 595.
Shavanaux were absent of any allegations of non-compliance with ICRA, which provides the requisite standards to warrant presumption of validity. Recognition of tribal convictions based on principles of comity allows courts to filter out those improper and otherwise suspect tribal proceedings as necessary. Arguably, if the concern were such that any uncounseled conviction are suspect, then affirmation of uncounseled U.S. convictions or other foreign convictions that deviate from U.S. constitutional procedure while denying Indian tribal convictions would result in an inconsistency that appears to fall along racial (and political) classifications.

The arguments raised by the defendants to preclude use of their prior tribal convictions do not warrant much examination. Even in the Ninth Circuit, which determined that use of tribal uncounseled convictions was precluded, the basis was comparable unconstitutionality and not on either of the arguments discussed. Once the determination is made that a constitutional violation is not created anew, it becomes hard to argue for preclusion of otherwise valid tribal convictions without relying on an underlying assumption of tribal invalidity or dismissal of tribal sovereignty.

CONCLUSION

Reasonable minds have differed regarding the ability of the U.S. federal government to use uncounseled tribal convictions as the predicate offenses to charge an individual under § 117. The deviation in opinion centers around the constitutionality of using convictions obtained in proceedings that, had they occurred in U.S. courts, would have been unconstitutional. However, the convictions were not obtained in the U.S. court system and as such were not governed by the Constitution. By all accounts, the tribal convictions were obtained in compliance with ICRA, which governs these proceedings.

Although three different cases give rise to the circuit split, at their cores all three cases involve the same situation: habitual domestic offenders, otherwise valid tribal justice proceedings and convictions, and additional domestic assaults warranting a higher

\[^{103}\text{25 U.S.C. § 1302 (c)(3) (2010).}\]
level of punishment than most tribes are able to impose. Absent any allegations of impropriety and in the circumstances presented in these three cases, use of uncounseled tribal convictions should not be precluded on grounds on unconstitutionality and recognition of those convictions should be extended on principles of comity.

While none of the opinions express any overt biases towards Indian tribal proceedings, preclusion from use of tribal convictions could result in a step backwards in the judicial treatment of tribal sovereignty. Supreme Court review is crucial in affirming the inherent rights of Indian tribes to govern Indians in criminal matters and the decision will likely turn on the majority views of tribal sovereignty and the validity of tribal courts. If the Supreme Court rules otherwise, Indian domestic assault victims will be left vulnerable to their assailants in a way that no other U.S. citizen is subject to.\textsuperscript{104}

\textsuperscript{104} Prior to publication of this Article, the United States Supreme Court granted \textit{certiorari} in United States v. Bryant, 769 F.3d 671 (9th Cir. 2014). The Court is scheduled to hear oral arguments for the case January 2016.