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# ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the post-Oliphant World?

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## INTRODUCTION

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) allows tribes to enforce criminal laws on their lands against non-Indians by relaxing federal restrictions on tribal jurisdiction through special domestic violence criminal jurisdiction (SDVCJ).[1] This SDVCJ reflects congressional reaffirmation of the inherent tribal criminal jurisdiction over non-Indians, and is an important step towards ensuring the safety of Native American women within their own communities. This inherent sovereign power of tribes to provide safety and security in their communities through their own criminal laws was first questions by the Supreme Court in 1978 after centuries of tribes carrying on relations with non-Indians. In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that tribes did not have criminal jurisdiction over non-Indians on their own reservations because "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'" [2] The Court concluded that, "by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their

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[1] Violence Against Women Act (VAWA), Pub. L. 103-322, 108 Stat. 1796 (1994) (codified at 25 U.S.C. §1304 (2013)).

[2] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[3]

VAWA 2013 establishes Congress's explicit answer to *Oliphant*, legislating its clear support of tribes' inherent sovereign power to prosecute non-Indians, and creating the first specific exceptions to the Court's rule against tribal prosecution of non-Indians. Although VAWA 2013 does not overturn *Oliphant*, it narrows *Oliphant*'s applicability and has ushered in the post-*Oliphant* world where tribes may prosecute non-Indians as sovereign entities.

Although VAWA represents an important development for tribes and law and order on Indian reservations, tribal convictions may be challenged by writ of habeas corpus in federal court; therefore, the law will be as effective as the federal courts allow it to be. Ultimately, the federal courts' treatment of tribal convictions on habeas review, as well as the tribal courts that produce them, will determine the law's success in stemming the violence against women occurring throughout Indian country.

This article discusses several issues that arise from the confluence of the tribal sovereignty doctrine, federal habeas corpus, and the exhaustion doctrine under VAWA 2013. Because the Constitution does not apply to tribes as it does to the states,[4] the legal structure of VAWA 2013 raises novel constitutional concerns within Indian law jurisprudence. As more tribes implement VAWA 2013, these new questions will likely be raised via habeas corpus challenges under the Indian Civil Rights Act (ICRA). How the Constitution will apply to criminal defendants in tribal courts, or alternatively, how tribal courts will apply pseudo-constitutional individual rights in criminal cases, is beyond the scope of this article. However, this article addresses how federal courts will interpret and decide the federal habeas corpus rules and the processes that courts will use to ultimately decide those substantive questions of constitutional rights and the tribal sovereignty doctrine.

Part I describes the background and legislative history of VAWA 2013, highlighting the debate in Congress between permitting tribes to exercise their inherent sovereign jurisdiction

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[3] *Oliphant*, 435 U.S. at 210.
[4] Talton v. Mayes, 163 U.S. 376 (1898).

and delegating federal jurisdiction to the tribes.[5] Congress's decision to maintain inherent sovereignty reaffirms the Doctrine of Tribal Sovereignty and ultimately will lead to more effective and fair tribal laws. Part II describes the writ of habeas corpus in more detail and discusses the complex legal questions arising from Congress's decision to reaffirm inherent tribal authority in VAWA 2013. Both habeas corpus and tribal sovereignty jurisprudence have strong exhaustion doctrines based in the orderly management of justice and respect for other sovereigns in the federalist system. VAWA 2013's immediate habeas review for SDVCJ convictions and stay of detention remedies run contrary to these principles. Part III analyzes the clear language of ICRA, as amended by VAWA 2013, which establishes unique habeas corpus remedies but does not clearly establish the procedural rules and standards for granting habeas relief. In applying the "substantial likelihood" standard, which is the standard that an SDVCJ habeas petitioner must satisfy to be granted immediate relief under VAWA 2013, the federal courts must rely on the current binding tribal exhaustion doctrine established in *National Farmers* and its progeny. Thus, this article concludes that Congress has created new federal habeas remedies in VAWA 2013 that must be interpreted through the Supreme Court's long-standing precedents on tribal exhaustion requirements.

Ultimately, as tribal governments continue developing and as more tribal legislatures pass criminal codes under SDVCJ, questions about the delicate coexistence of, and interaction between, tribal and American sovereignty will arise in ICRA habeas corpus litigation. In resolving these complex questions, federal courts should refrain from judicial activist tendencies as seen under the Burger and Rehnquist Courts. Interpretations of VAWA 2013's unprecedented, immediate federal habeas corpus relief and the application of habeas corpus precedent in the ICRA context more generally should be based upon federal Indian law, the doctrine of tribal sovereignty, and the very real policy impacts

[5] This distinction has important appellate ramifications. Delegated authority would simply federalize any tribal SDVCJ convictions, with tribal prosecutors essentially acting as deputized federal prosecutors. The resulting convictions would be reviewable in federal courts on direct appeal. Inherent authority maintains the three distinct sovereigns in the federalist system, with tribes prosecuting crimes under their own authority and purview similar to state prosecutions, but with federal government review on habeas.

of tribal sovereign prosecutions of domestic violence in securing safe communities for Native Americans. Indian country should share in the overall safety benefits that the rest of the country has enjoyed since the initial passage of VAWA in 1993.

## I.Brief Introduction to Habeas Corpus and VAWA 2013

Originally only available for federal convictions, the Habeas Corpus Act of 1867 expanded federal habeas corpus review in order to protect civil rights in the South in the wake of the Civil War.[6] Congress and the federal courts have significantly limited access to habeas corpus review in recent years. Habeas corpus has become a pipe dream for state and federal prisoners given that only 0.35% of habeas petitions filed are granted habeas relief.[7] Yet for federal collateral attacks on tribal convictions, Congress has greatly expanded federal habeas review powers in VAWA 2013, but only for tribal prosecutions of non-Indians under inherent tribal authority.[8] The Supreme Court held in *Oliphant v. Suquamish Indian Tribe* that tribes are prohibited from exercising their inherent criminal jurisdiction over non-Indians.[9] VAWA 2013 establishes three exceptions to the *Oliphant* rule, for domestic violence, dating violence, and restraining order violations.[10]

In contrast to what has been called the "incredible shrinking writ" for federal review of state convictions,[11] VAWA 2013 significantly expanded federal habeas corpus review of tribal convictions.[12] The VAWA 2013 amendments did not extend the

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[6] Judiciary Act of February 5, 1867, ch. 28, 14 Stat. 385-86, reprinted in Fay v. Noia, 372 U.S. 391, 441-45 (1963) (codified as amended 28 U.S.C. § 2241(c)(3) (1996)). Federal habeas corpus act codified at 28 U.S.C. §§2241-2254.

[7] Lynn Adelman, *The Great Writ Diminished*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5 (2009).

[8] *See* Violence Against Women Act (VAWA), Pub. L. 103-322, 108 Stat. 1796 (1994) (current version at 25 U.S.C. § 1304 (2013)). VAWA 2013 amends the Indian Civil Rights Act (ICRA), which provides "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." Indian Civil Rights Act (ICRA), 25 U.S.C. § 1303.

[9] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribes do not have criminal jurisdiction over non-Indian offenders).

[10] 25 U.S.C. §1304(c) (2013).

[11] Jeanne-Marie Raymond, *The Incredible Shrinking Writ: Habeas Corpus Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 9 CAP. DEF J. 52, 52 (1996).

[12] 25 U.S.C. §1304(c) (2013).

habeas procedural barriers to federal review of state convictions to Section 1304(e) SDVCJ habeas review. Instead, Congress created completely unique tribal habeas corpus remedies for immediate federal habeas review and the completely unprecedented remedy of a federal stay of detention of convicted offenders.[13] Under VAWA 2013, the federal habeas court is not even required to decide the habeas petition on the merits before ordering a stay of detention, but merely must find a "substantial likelihood" the petitioner would be granted habeas relief.[14]

These SDVCJ habeas remedies far exceed the federal authority on habeas review of state convictions as amended in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[15] AEDPA codifies recent Supreme Court precedent limiting state petitioner access to federal habeas review by increasing procedural requirements. VAWA 2013's unprecedented federal invasion of tribal court jurisdiction demeans tribal sovereignty, creates uncertainty about the ICRA habeas jurisprudence, and chills the effective implementation of tribal SDVCJ. Although Congress reaffirmed inherent tribal sovereignty over non-Indians for SDVCJ,[16] permitting federal habeas review without requiring petitioners to exhaust tribal remedies undermines both tribal sovereignty and habeas exhaustion jurisprudence. No such deference is given to tribes under VAWA 2013. VAWA 2013's unprecedented habeas remedies of contradict those principles.

VAWA 2013 marks the first time that tribes may prosecute non-Indian criminals in their own communities since the Court's 1978 *Oliphant* decision to limit tribal jurisdiction.[17] In writing the opinion of the Court, Justice Rehnquist applied "racist nineteenth-century beliefs and stereotypes … [of] Indian tribes, as lawless and uncivilized savage peoples."[18] The Court supported its abrogation of tribal criminal jurisdiction with "unsupported conclusions tainted by judicial activism," and cited dubious precedential

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[13] 25 U.S.C. §1304(e)(2) (2013).
[14] 25 U.S.C. §1304(e) (2013).
[15] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §2254 et seq.).
[16] 25 U.S.C. §1304(b)(1) (2013).
[17] *Oliphant*, 435 U.S. at 191.
[18] ROBERT A. WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA, 98 (2005).

authority for its holding.[19] The Court found that "[c]ongress never expressly forbade Indian tribes [from] impos[ing] criminal penalties on non-Indians," thus "impl[ying] … that Congress consistently believed" Indian tribes did not have jurisdiction over non-Indians.[20] This holding overlooked the fact that Congress never legislated the matter and completely contradicted the longstanding Indian cannons of construction, which dictate that ambiguities are to be held in favor of the tribes.[21] The *Oliphant* decision was based more on the biases, stereotypes, and incorrect "historical perspective"[22] of the Justices rather than equitable legal and historical analysis.[23] The Supreme Court reinforced the weak reasoning of the *Oliphant* decision two weeks later in *U.S. v Wheeler* by inventing the idea that Congress may "implicitly divest[]" tribes of their inherent powers in addition to explicit abrogation by statute or treaty.[24]

Although not the full legislative reversal of *Oliphant* that tribes have long advocated for,[25] VAWA 2013 is a significant step towards federal acknowledgment of full tribal criminal jurisdiction over Indian lands. As of March of 2015 at the close of the SDVCJ pilot project,[26] five SDVCJ pilot programs in Pascua Yaqui, Umatilla, Sisseton-Wahpeton Oyate, Fort Peck and the Tulalip Tribe of Washington have successfully resulted in 28

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[19] Geoffrey C. Heisey, *Oliphant and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 Indian L. J. 1051, 1062, 1051 n.3 (1998). (There is a long literature of Indian law scholars criticizing the *Oliphant* decision).

[20] *Oliphant*, 435 U.S. at 201.

[21] Worcester v. Georgia, 31 U.S. 515, 582 (1832) (McLean J., concurring).

[22] *Oliphant*, 435 U.S. at 206.

[23] *See generally* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973 (2010); R. BERKHOFER, THE WHITE MAN'S INDIAN (Vintage ed. 1979); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN MODERN CONSTITUTIONAL DEMOCRACY, 43 (1987) (describing the Court's rationale in *Oliphant* as a "visceral reaction" to tribes rather than legal reasoning of legal precedent and Congress's policy of Indian self-determination).

[24] United States v. Wheeler, 435 U.S. 313, 326 (1978) ("The areas in which such implicit divestiture of sovereignty have been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe").

[25] National Congress of American Indians ("NCAI"), *Combating Domestic Violence and Sexual Assault: A Call for a Full Oliphant Fix*, Resolution #SPO-16-037 (July 30, 2016) (available at http://www.ncai.org/resources/resolutions/combatting-non-indian-domestic-violence-and-sexual-assault-a-call-for-a-full-oliphant-fixf).

[26] VAWA Sec. 908(a).

convictions.[27] Currently, any tribe may implement SDVCJ jurisdiction over non-Indians for a limited scope of domestic violence and related crimes committed in Indian country.[28]

Congressional debate over VAWA 2013 highlighted the concern that tribal courts will not provide due process and other protections afforded by the U.S. Constitution to non-Indian defendants.[29] Noting that tribes are not subject to the U.S. Constitution,[30] VAWA 2013 opponents argued that American citizens will be tried in tribal courts without the benefit of fundamental criminal procedure rights guaranteed in the U.S. Constitution.[31] For example, Senator Chuck Grassley told an audience "on an Indian reservation, [the jury is] going to be made up of Indians, right? So the non-Indian doesn't get a fair trial,"[32] implying that Native Americans are unable to act as impartial jurors. Senator Grassley and other opponents of VAWA 2013 have not raised the same concerns for Indian defendants in state and federal courts tried by completely non-Indian juries.

### *A. Tribal Criminal Jurisdiction*

However, as sovereign "domestic dependent nations,"[33] tribes have their own inherent authority to create and enforce their own

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[27] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §904(b)(2), 127 Stat. 121 (2013) (codified at 25 U.S.C. 1304); NAT'L CONG. OF AMERICAN INDIANS, SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT, 8-13 (October 29, 2015).

[28] VAWA Sec. 908(a).

[29] Whether congressional representatives may have similar concerns about tribal court treatment of Indians is irrelevant given that tribes already have criminal jurisdiction over them.

[30] *Talton*, 163 U.S. 376.

[31] Although tribes are not constrained by the U.S. Constitution, all Native Americans have been citizens since 1924, when Congress passed the *Indian Citizenship Act of 1924*, Pub. L. 68-175, 43 Stat. 253, and are no less understanding of its protections than American citizens who are not Indians.

[32] Jennifer Benderly, *Chuck Grassley On VAWA: Tribal Provision Means 'The Non-Indian Doesn't Get A Fair Trial*,' HUFFINGTON POST (Feb. 21, 2013), http://www.huffingtonpost.com/2013/02/21/chuck-grassley-vawa_n_2735080.html; *See also* Kate Pickert, *What's Wrong With The Violence Against Women Act?*, TIME (Feb. 27, 2013), http://nation.time.com/2013/02/27/whats-wrong-with-the-violence-against-women-act/ (noting Republican opposition to tribal jurisdiction over non-Indians because of Constitutional concerns); Ryan Devreskracht, *House Republicans Add Insult To Native Women's Injury*, 3 U. MIAMI RACE & SOC. JUST. L. REV. 1, 1-4 (2014).

[33] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

laws independent of the U.S. Constitution and Congress.[34] Although the Supreme Court judicially restrained tribal jurisdiction over non-Indian criminal defendants in *Oliphant* under *U.S. v. Wheeler*'s theory of "implicit divestiture,"[35] Congress can act explicitly to correct the court's errors. For example, Congress passed the "*Duro-Fix*"[36] to "change 'judicially made' federal Indian law through … legislation"[37] after the Supreme Court further constrained tribal criminal jurisdiction to only tribal members in *Duro v. Reina*.[38] Ultimately, Congress has "plenary power" in Indian affairs,[39] such that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance."[40] Thus, Congress may also "enact[] a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes."[41]

Congress has recently increased efforts to improve safety in Indian country through passing VAWA 2013 and the *Tribal Law and Order Act of 2010* (TLOA), which expanded tribal sentencing authority.[42] VAWA 2013 SDVCJ will improve the safety of Native American women by permitting tribal prosecution of domestic violence crimes.[43] Specifically, this partial *Oliphant*-fix "affirm[s]… the powers of self-government of a participating tribe [to] include the inherent power of that tribe … to exercise special domestic violence criminal jurisdiction over all persons."[44] This includes non-Indian defendants that reside or are employed in

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[34] Williams v. Lee, 358 U.S. 217, 223 (1959).
[35] *Wheeler*, 435 U.S. at 326.
[36] Act of Nov. 5, 1990, Pub. L. No. 101-511, §8077(d), 104 Stat. 1893 (temporary legislation until September 30, 1991); Act of Oct. 28, 1991, 105 Stat. 646 (permanent legislation) (codified as amended in scattered sections of 25 U.S.C.); *See generally* Geoffrey C. Heisey, *Oliphant and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 INDIAN L. J. 1051, 1071-75 (1998).
[37] U.S. v. Lara, 541 U.S. 193, 207 (2004).
[38] Duro v. Reina, 495 U.S. 676 (1990).
[39] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[40] *Wheeler*, 435 U.S. at 323.
[41] *Lara*, 541 U.S. at 207.
[42] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.).
[43] Violence Against Women Act (VAWA), Pub. L. 103-322, 108 Stat. 1796 (1994) (current version at 25 U.S.C. §1304 (2013)).
[44] 25 U.S.C. §1304(b)(1) (2013).

Indian country of the participating tribe,[45] or are a spouse, intimate partner, or dating partner of a tribal member or nonmember Indian residing in the Indian country of the participating tribe.[46] VAWA 2013 gives subject matter jurisdiction to the participating tribe over domestic violence, dating violence, and violations of tribe-issued protection orders.[47]

Congress pass TLOA in 2010 to increase tribal law enforcement presence in Indian country by providing grants, increased cross-deputization opportunities with state and federal agencies, and increasing tribal sentencing authority. Under TLOA, tribes imposing an "enhanced sentence" of at least one year must provide the defendant with "effective assistance of counsel at least equal to that guaranteed by the United States Constitution," including indigent defense.[48] Additionally, TLOA establishes judicial standards and prior notice by publication of the laws as requirements to impose enhanced sentences.[49] Various tribal enhanced jurisdiction and sentencing authorities have been recently recognized in several different acts passed by Congress. The TLOA recognizes tribal sentences greater than one year if the defendant is guaranteed effective assistance of counsel equal to the Sixth Amendment,[50] indigent assistance by a licensed defense attorney,[51] public notice of all laws prior to charging the defendant,[52] and creation of a trial record.[53] Additionally, the judge presiding over the criminal proceeding must have "sufficient legal training to preside over criminal proceedings," and be licensed to practice law in any U.S. jurisdiction.[54] Tribes exercising SDVCJ and fulfilling TLOA requirements may sentence defendants up to three years per separate offense that would be "punishable by more

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[45] 25 U.S.C. §1304(b)(4)(B)(i, ii) (2013).
[46] 25 U.S.C. §1304(b)(4)(B)(iii) (2013).
[47] 25 U.S.C. §1304(c)(2013).
[48] 25 U.S.C. § 1302(c)(1-2) (2013) (It is unclear why TLOA mandates tribal provision of counsel for indigent defendants in § 1302(c)(2), when such a right is already ensured through the constitutionally-equivalent requirement in § 1302(c)(1); this language makes it unclear whether TLOA's effective assistance of counsel right is coextensive with Fifth and Sixth Amendment rights to counsel).
[49] 25 U.S.C. §1302(c)(3-4) (2012).
[50] 25 U.S.C. §1302(c)(1) (2012).
[51] *Id.* at §1302(c)(2).
[52] *Id.* at §1302(c)(4).
[53] *Id.* at §1302(c)(5).
[54] *Id.* at §1302(c)(3).

than one year of imprisonment if prosecuted by the United States or any of the States."[55] The total sentence a tribe can impose with consecutive sentences is nine years.[56]

In VAWA 2013, Congress used similar constitutional equivalence language in requiring that all SDVCJ defendants must receive "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 criminal jurisdiction over the defendant."[57] Although there is some debate about the constitutionality of VAWA 2013 because the Act creates statutory rather than Constitutional rights, the Indian Civil Rights Act (ICRA) guarantees similar substantive rights as those guaranteed in the Bill of Rights.[58] This includes "the right to a trial by an impartial jury that is drawn from sources that – (A) reflect a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-Indians."[59] The "fair cross section" language tracks the "constitutional imperative of race neutrality in jury selection"[60] that "juries as instruments of public justice…be a body truly representative of the community."[61] In *Glasser v. U.S.*, the Court grounded this fair "cross section" requirement in the Sixth Amendment,[62] which may be applicable to tribal convictions with enhanced sentences under TLOA.[63]

The VAWA 2013 amendments depart significantly from the analogous state habeas statutes, which focus on respecting the sovereignty of states and their judicial processes.[64] Instead of

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[55] *Id.* at §1302(b)(2).
[56] *Id.* at §1302(a)(7)(d).
[57] 25 U.S.C. § 1304(d)(4) (2013).
[58] *See generally* JANE M. SMITH & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42488, TRIBAL CRIMINAL JURISDICTION OVER NON-INDIANS IN THE VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION AND SAVE NATIVE WOMEN ACT (2012); Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument For A Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553 (2009).
[59] 25 U.S.C. § 1304(d)(3)(A-B) (2013).
[60] *See* Powers v. Ohio, 499 U.S. 400, 402 (1991).
[61] Smith v. Texas, 311 U.S. 128, 130 (1940).
[62] Glasser v. U.S., 315 U.S. 60, 86 (1942).
[63] *See* Sanjay K. Chhablani, *Re-Framing The 'Fair Cross-Section' Requirement*, 13 J. OF CONST. L. 932-33 (2011) (Tribes may apply different standards, as critics have lamented the fair cross section standard as "stagnant" and insufficient constitutional protections).
[64] 18 U.S.C. § 2241 (2012); 18 U.S.C. § 2254 (2012); 18 U.S.C. § 2255 (2011).

commanding exhaustion of tribal remedies just as state court remedies must be exhausted, VAWA 2013 mandates that federal courts "*shall* grant a stay [of detention]" to SDVCJ §1303 habeas petitioners "if the court finds that there is a *substantial likelihood* that the habeas corpus petition will be granted."[65] To grant the stay, the reviewing court must also find "by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released."[66] The Act also gives "each alleged victim in the matter an opportunity to be heard" before the court rules on the petitioner's stay of detention.[67] This language is similar to the federal criminal direct appeal procedural rules for post-conviction challenges. [68] Adopting this language would have provided defendants with federal criminal procedure remedies like removal and direct appeals rather than habeas review. Ultimately, Congress reaffirmed inherent tribal jurisdiction rather than delegating constitutional authority from the federal government to tribes for SDVCJ prosecutions.

VAWA 2013 contains a catchall provision including "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 SDVCJ over the defendant." [69] This language gives way to two possible interpretations. [70] First, if Congress intends for "recognize and affirm" to mean that only the requirements already outlined in ICRA[71] are required for affirmation of SDVCJ convictions, then some constitutional protections incorporated against the states would be excluded. This interpretation would "exclude several protections accorded under the United States Constitution as applied against the states, including a jury of one's peers and the right to counsel in misdemeanor cases where the defendant faces actual punishment."[72]

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[65] 25 U.S.C. § 1304(e)(A) (2013) (emphasis added).
[66] *Id.* at § 1304(e)(2)(B).
[67] *Id.*
[68] 18 U.S.C. § 3245.
[69] 25 U.S.C. § 1304(d)(4) (2017).
[70] SMITH & THOMPSON, *supra* note 58.
[71] *See generally* 25 U.S.C. § 1301-1304.
[72] *See* SMITH & THOMPSON, *supra* note 58, at 4.

Alternatively, the Senate Committee on the Judiciary applied a different interpretation and viewed the provision as "protect[ing] effectively the same constitutional rights as guaranteed in State court criminal proceedings."[73] The United States' Constitution did not originally apply to the states,[74] and the Supreme Court eventually applied the Bill of Rights by selective incorporation through the Fourteenth Amendment.[75] Rights that are "implicit in the concept of ordered liberty"[76] or necessary for the "fundamental fairness essential to the very concept of justice"[77] have been incorporated against the states. However, under *Talton v. Mayes* these constitutional rights do not apply to tribes, and ICRA provides the only federal individual rights which constrain tribal governments.[78] Ultimately, ICRA's provisions guarantee both the right to an impartial jury under Section 1304(d)(3) and the right to counsel under Section 1302(c) in SDVCJ prosecutions.[79]Although this language ensures that SDVCJ defendants will be afforded those constitutional equivalent rights, the language does not resolve the ambiguity of the phrase "recognize and affirm."[80]

Courts can resolve this ambiguity by developing the individual rights requirements of ICRA Section 1304(d) as a statutory vehicle for selective incorporation of tribal criminal law into the federal constitutional system.[81] Although some scholars have argued "only

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[73] S. REP. 112-153, at 10 (2012).
[74] Barron v. Baltimore, 32 U.S. 243, 247 (1833).
[75] *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment prohibition on admitting evidence obtained through unlawful searches and seizures applies to state as well as federal governments); Gideon v. Wainwright, 372 U.S. 335 (1963) (state courts are required to provide counsel in criminal cases under the Sixth Amendment); Miranda v. Arizona, 384 U.S. 436 (1966).
[76] Palko v. Connecticut, 302 U.S. 319, 325 (1937).
[77] Lisenba v. California, 314 U.S. 219, 235 (1941).
[78] *Talton*, 163 U.S. 376.
[79] 25 U.S.C. § 1304(d) (2013).
[80] 25 U.S.C. § 1304(d)(4) ("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 [SDVCJ].").
[81] Some scholars argue that tribes have been incorporated into the federal system already. *See* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOLEDO L. REV. 617, 631 (1994); Carol Tebben, *An American Trifederalism Based Upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2003). However, other scholars argue tribes remain unincorporated. *See generally* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RESEARCH J. 1, 21-46 (1987); Alex T. Skibine, *United States v. Lara, Indian Tribes, and the Dialectic of*

a constitutional amendment can truly guarantee…tribal sovereignty," [82] Congress's plenary authority in Indian affairs means that legislation is sufficient to protect tribal sovereignty and avoid the complexities of the constitutional amendment process.[83] The VAWA 2013 framework preserves inherent tribal sovereignty by creating exceptions to the *Oliphant* rule, rather than converting inherent tribal sovereignty into constitutional authority and necessarily making tribal sovereignty a power delegated from the Constitution. In this way, Congress has struck a delicate balance between protecting tribal legal and cultural norms[84] and ensuring constitutionally sufficient tribal prosecutions through federal habeas review.[85]

### *B. Legislative History of VAWA 2013*

President Obama signed VAWA 2013 into law because "tribal governments have an inherent right to protect their people, and all women … including Native American women left vulnerable by gaps in the law … deserve the right to live free from fear."[86] Many years of tribal activists' efforts culminated in Title IX of the VAWA 2005 reauthorization, which was passed for the purposes of decreasing violence against Indian women, holding offenders

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*Incorporation*, 40 TULSA L. REV. 47, 49 (2004) ("No single act of Congress that can be said to have officially 'incorporated' tribes within the political system of the United States…If [incorporation] did occur, it can only have been done incrementally as a result of a series of congressional legislation and court decisions.").

[82] *See* Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 285 (2003).

[83] *Cf*., *id*., at fn. 21.

[84] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-9 (1978) (holding that ICRA provides no federal court review for individual rights violations in the civil context).

[85] An amendment introduced by Republican Representative Darrell Issa, would have created a right for "a defendant charged with a crime under this section [to] petition the appropriate Federal district for removal pursuant to [18 U.S.C. § 3245]." *See* Violence Against Indian Women Act, H.R.6625, 112th Cong. § 2 Removal of Criminal Prosecutions (2012) (This amendment did not pass the house, and S. 47 retained ICRA's only federal relief through writ of habeas corpus).

[86] President Barack Obama, *President Signs 2013 VAWA – Empowering Tribes to Protect Native Women* (March 7, 2013), available at https://obamawhitehouse.archives.gov/blog/2013/03/07/president-signs-2013-vawa-empowering-tribes-protect-native-women.

accountable, and "strengthen[ing] the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women."[87] Congress acknowledged that "1 out of every 3 Indian women are raped in their lifetime" and explicitly stated that the "United States … [has] a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women," and authorized funds for studies and grants for tribal programs.[88]

In 2006, Amnesty International shined a spotlight on the staggering disparity between rates of domestic and sexual violence against Native American women when compared to the population generally. [89] Amnesty focused on the jurisdictional and governmental structure issues that exacerbated the rates of sexual violence and predation experience in Indian country.[90] In 2009, reported instances of rape nationwide were down 60%[91] and murders of women by their abusive partners were down 72% since the passage of VAWA in 1994.[92] Nation-wide, the incidence of intimate partner violence fell by 67%, individuals killed by an intimate partner declined by 35%, and non-fatal intimate partner violence decreased by 53%.[93] State reforms since 1994 resulted in 660 state laws to protect against domestic and sexual violence by criminalizing stalking, date rape, and spousal rape.[94] As the stigma of domestic violence receded in the wake of VAWA, reporting of domestic violence increased 51% nationwide since VAWA was first passed in 1994.[95]

The benefits of VAWA did not occur in Indian country, where the "jurisdictional gap created by *Oliphant* has had grave

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[87] Violence Against Women Reauthorization Act of 2005, Pub. L. 109-162, § 902, 119 Stat. 2960 (codified with some differences in language at 42 U.S.C. 3796gg).
[88] *Id.* at § 904, § 906.
[89] *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA*, AMNESTY INTERNATIONAL PUBLICATIONS (2007), https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf (last visited Mar. 15, 2017).
[90] *Id.* at 27-49, 61-71.
[91] S. REP. NO. 112-265, at 2 (2012).
[92] *The Continued Importance of the Violence Against Women Act Before the Subcomm. on the Judiciary*, 111th Cong. 3 (2009) (remarks by Senator Kaufman).
[93] S. REP. NO. 112-265, 3 (2012).
[94] *Id.*
[95] *Id.*

consequences for Indian women… [who] are left without any recourse when the perpetrator is non-Indian." [96] Although nationwide there were improvements in reporting, only "49 percent of Native women victimization is reported to the police, [and] only 17 percent is reported directly by the victim." [97] Congress ostensibly recognized the need for the jurisdictional authority of tribes to protect their communities as the only solution to address violence on reservations. [98] The Senate Committee on Indian Affairs (SCIA) ordered the SAVE Act to be reported to the Senate, with the recommendation that it be passed, on December 27, 2012, after which the Senate Judiciary Committee incorporated its core provisions into the 2013 VAWA Reauthorization.[99]

Without criminal jurisdiction over non-Indians, tribes had not seen similar successes in decreasing rates of domestic violence in their communities. Given that 80% of Native American victims of rape or sexual assault describe their attackers as white,[100] tribes were unable to prosecute most sexual and domestic abuse offenders. Moreover, in 2010, federal prosecutors declined 67% of sexual abuse cases in Indian country. [101] Because the federal government had exclusive jurisdiction over all major crimes and crimes committed by non-Indians in Indian country, tribes were often unable to punish non-Indian criminals in their own

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[96] S. REP. NO. 112-265, at 5 (2012).
[97] *Id.* at 5, 39 & Table 10; *See also* RONET BACHMAN, ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN, (2008) https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.
[98] *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Before the S. Comm. on Indian Affairs*, 112th Cong. 9-10 (2011) (Prepared remarks from Thomas J. Perrelli, Associate Attorney General, U.S. Department of Justice). ("The first area for potential Federal legislation involves recognizing certain tribes' concurrent criminal jurisdiction to investigate, prosecute, convict and sentence Indians and non-Indians who assault Indian spouses, intimate partners, or dating partners, or who violate protection orders, in Indian country.").
[99] *Id.*
[100] *See* STEVEN W. PERRY, AMERICAN INDIANS AND CRIME, A BJS STATISTICAL PROFILE, 1992-2002, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 9 (2004) (noting that nearly 4 in 5 American Indian victims of rape/sexual assault described the offender as white).
[101] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–11–167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 3–9 (2010).

communities.[102] This gave non-Indian perpetrators free reign on many reservations, and incentivized non-Indian people to target Indian women.[103] With jurisdiction over 20% of domestic violence and/or sexual violence perpetrators, tribal governments were unable to protect their communities.

On the Senate floor, critics emphasized that Congress voted unanimously "on the two previous occasions the Senate has voted to reauthorize the VAWA." [104] However, in 2013 "the key stumbling block [was] the [Indian] provision."[105] Disregarding the serious epidemic of violence experienced by Native women, VAWA 2013 opponents labeled the Title IX amendment as "just another vehicle for scoring political points or bowing to special interests." [106] Senator Cornyn explained that the reason for Republican opposition was the "blatantly unconstitutional" SDVCJ that would "deny U.S. citizens their full constitutional protections under the Bill of Rights in tribal courts," and offered an amendment allowing SDVCJ "as long as those tribes followed the Constitution and allowed all convictions to be appealed in the Federal court system."[107]

Proponents of the bill responded on the senate floor. Senator Cantwell emphasized that habeas corpus remained available to test constitutionally-deficient tribal convictions under ICRA in the federal courts.[108] She also criticized the competing amendment's use of exclusive federal jurisdiction, asking "who will prosecute these crimes?" if tribes were prevented from conducting their own prosecutions. [109] Given that "four out of five perpetrators of domestic or sexual violence on tribal lands are non-Indian and

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[102] Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (1885) (codified at 18 U.S.C. § 1153 (2008)).
[103] *Hearing on S. 1763, S. 872, & S. 1192, Before the S. Comm. on Indian Affairs*, 112th Cong. 9 (2011) (statement of Thomas J. Perrelli, Assoc. Att'y General, U.S. Dep't of Justice, ''[T]he current jurisdictional framework has left many serious acts of domestic and dating violence unprosecuted and unpunished'').
[104] 159 CONG. REC. S497–99 (daily ed. Feb. 7, 2013) (statement of Sen. Cornyn).
[105] *Id.*
[106] *Id.*
[107] *Id.* This view of tribal criminal jurisdiction structure would have federalized SDVCJ, making convictions in tribal courts challengeable on direct appeal rather than through writ of habeas corpus.
[108] 159 CONG. REC. S506 (daily ed. Feb. 7, 2013) (statement of Sen. Cantwell).
[109] *Id.*

currently cannot be prosecuted by tribal governments," the amendment allowed tribes to participate in the "locally based solutions to domestic violence that VAWA has so successfully promoted."[110] These protections would build on the TLOA, so that "no one [w]ould get away with domestic violence and rape" in Indian country.[111] Proponents of VAWA 2013 "work[ed] with the Indian Affairs Committee … to fill a loophole in jurisdiction over perpetrators who have significant ties to the tribe in a very limited set of domestic violence cases involving an Indian victim on Indian land." [112] Senator Leahy ensured VAWA 2013 "would … guarantee[] defendants comprehensive rights."[113]

Although agreeing with the majority that SDVCJ requires tribes prosecuting non-Indian defendants all the rights guaranteed by the United States Constitution, the minority questioned the "resources" and "expertise" of tribes to do so.[114] The minority senators asked, "on what basis does [the majority] think that the relatively small amount of money to provide grants to tribes will be sufficient to ensure that these defendants will be provided with all rights in all prosecutions authorized under [SDVCJ]?"[115] The minority then also questioned "the estimate on caseload, cost, and other effects on the docket of federal district courts that would have to consider habeas corpus proceedings brought after tribal courts exercised their inherent powers under [VAWA 2013]."[116]

The minority concluded that Senator Grassley's substitute amendment would "best… improve the enforcement of laws against domestic violence in Indian territory" by providing appropriate resources for the federal government to fulfill those important responsibilities.[117] The majority pointed out that tribal investigation and prosecution of crimes committed by non-Indians on reservation lands "will be more efficient and more effective than creating a massive new infrastructure, moving law

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[110] 159 CONG. REC. S480 (daily ed. Feb. 7, 2013) (statement of Sen. Klobuchar).
[111] 159 CONG. REC. S499 (daily ed. Feb. 7, 2013) (statement of Sen. Leahy).
[112] 158 CONG. REC. S1991 (daily ed. Mar. 22, 2012) (statement of Sen. Leahy).
[113] *Id.*
[114] S. REP NO. 112-153, at 38 (2012) (minority views from Senators Grassley, Hatch, Kyl, and Cornyn).
[115] *Id.*
[116] *Id.*
[117] *Id.*

enforcement and prosecutors often hours away from their current locations."[118]

### *C. Potential Future Expansion of Tribal Criminal Jurisdiction*

Within current Indian law jurisprudence, there is already a rationale for further expansion of tribal criminal jurisdiction. In *Montana v. U.S.*, the Court extended its *Oliphant* rule to tribal civil jurisdiction by announcing that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe."[119] The Court created two exceptions to the *Montana* rule because "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[120] First, "a tribe may regulate …activities of non-members who enter consensual relationships with the tribe or its members."[121] Second, "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[122] The *Montana* exceptions preserve a tribe's regulatory authority over non-members "connected to that 'right of the Indians to make their own laws and be governed by them.'"[123]

VAWA 2013 clearly, statutorily affirms inherent tribal jurisdiction under similar rationales to the two *Montana* exceptions. By limiting jurisdiction over non-Indian defendants to those with sufficient ties to the Indian tribe, Congress emulated the *Montana* "consensual relationship" exception.[124] A consensual relationship means SDVCJ defendants must "reside in the Indian country of the participating tribe,"[125] be "employed in the Indian

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[118] S. REP NO. 112-153, at 11, n.26 (2012).
[119] Montana v. U.S., 450 U.S. 544, 565 (1981).
[120] *Id.* at 565.
[121] *Id.*
[122] *Id.* at 566.
[123] Nevada v. Hicks, 533 U.S. 353, 361 (2001) (*citing* Williams v. Lee, 358 U.S. 217 (1959)).
[124] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904(b)(4)(B), 127 Stat. 121 (2013) (codified at 25 U.S.C. 1304; § 904(b)(4)(B), 127 Stat. at 122).
[125] *Id.* at § 904(b)(4)(B)(i), 127 Stat. at 122.

country of the participating tribe,"[126] or be a "spouse, intimate partner, or dating partner of a member of the participating tribe or an Indian who resides in the Indian country of the participating tribe."[127]

The concern for the safety of Native women outlined in the legislative history of VAWA 2013[128] falls within the second *Montana* exception providing that "tribe[s] may regulate nonmember conduct where that conduct 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"[129] Although the Supreme Court created an "elevated threshold … that tribal power must be necessary to avert catastrophic consequences" for meeting the second *Montana* exception, this rationale is especially pertinent to the rampant domestic violence that Native American women face in Indian country.[130] While the elevated "catastrophic consequences"[131] has made the second *Montana* exception little more than a "dead letter" in the civil context,[132] the passage of VAWA 2013 shows Congress may be willing to legislatively limit the restrictions of tribal jurisdiction under the second *Montana* exception rationale in the criminal context.

Although federal courts have already developed tribal exhaustion jurisprudence, most of the federal courts' forays into habeas review of tribal criminal prosecutions occurred before Congress established SDVCJ, and cases involving non-Indian defendants only reached the jurisdictional issues.[133] Thus, current

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[126] *Id.* at § 904(b)(4)(B)(ii), 127 Stat. at 122.

[127] *Id.* at § 904(b)(4)(B)(iii)(I, II), 127 Stat. at 122.

[128] *See supra* Section I.B, Legislative History of VAWA 2013.

[129] Nevada v. Hicks, 533 U.S. 353, 394 (2001) (*citing* Montana v. U.S. 450 U.S. 544, 566 (1981).

[130] Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008).

[131] *Id.*

[132] Philip H. Tinker, *In Search of a Civil Solution: Tribal Authority to Regulate NonMember Conduct in Indian Country*, 50 TULSA L. REV. 193, 205 (2014) (Noting tribe met the high bar of jurisdiction in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, where tribe has *Montana II* jurisdiction over a holdover tenant on tribal land, 642 F.3d 802, 819 (9th Cir. 2011), and *Montana II* jurisdiction established over non-Indian private security guards who conducted armed raid on the tribe's government intending to take it over in *Attorney's Process and Investigation Servs., Inc., v. Sac and Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 939 (8th Cir. 2010)).

[133] *See* Garrow study, *infra* note 209.

law regarding tribal exhaustion for criminal convictions was created with the backdrop of *Oliphant's* complete exemption of non-Indians from tribal criminal jurisdiction. Absent a judicial overruling of *Oliphant*, tribes should continue to look to Congress to reinforce tribal sovereignty by adopting *Montana*-style legislative exceptions for tribal criminal jurisdiction. Senator Tester already introduced such legislation to expand tribal jurisdiction over child violence and drug offenses in the *Tribal Youth and Community Protection Act of 2016* and other criminal areas dealing with the "health or welfare of the tribe."[134]

## II. FEDERAL HABEAS CORPUS

Federal habeas corpus relief provides "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action" and "insure[s] that miscarriages of justice within its reach are surfaced and corrected."[135] The doctrine of federal habeas corpus enables federal courts to "release or retry prisoners held in violation of the Federal Constitution."[136] Originally established in the Judiciary Act of 1789, the habeas corpus review of the federal courts only reached jurisdictional errors of federal convictions. However, in 1867, Congress expanded federal habeas corpus review to cover unconstitutional state convictions to protect civil rights after the Civil War.[137] When federal courts decide habeas petitions from state prisoners, the state appellate courts are given deference to interpret state and federal law in the first instance and have the ability to avoid federal reversal of convictions through interpretation of state law.[138] Only

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[134] Tribal Youth and Community Protection Act of 2016, S. 2785, 114th Cong., § 4.

[135] Harris v. Nelson, 394 U.S. 286, 290-91 (1969).

[136] Timothy Finley, Habeas Corpus--Retroactivity of Post-Conviction Rulings: Finality at the Expense of Justice, 84 J. of Crim. L. and Criminology, 976 (1994).

[137] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241-54 (2016)).

[138] 28 U.S.C. § 2254 (a-c) (2000) (Congress establishes statutory exhaustion requirement); Ex parte Royall, 117 U.S. 241 (1886) (Supreme Court first adopts the Exhaustion Doctrine); Fay v. Noia, 372 U.S. 391 434-35 (1963) (defining a test for the exhaustion requirement); Rose v. Lundy, 455 U.S. 509, 510 (1982) (all claims in a multipart habeas petition may be dismissed if the petitioner fails to exhaust any of the claims); Coleman v. Thompson, 501 U.S. 722, 750 (1991) (overruling *Fay*, in favor of upholding the finality of state court determinations).

after petitioners exhaust all of their state remedies are they able to petition the federal courts for habeas review. Overarching all of federal habeas corpus jurisprudence are the principles of comity, finality, fairness and judicial economy of the federal courts.[139]

Supreme Court decisions and prior amendments of the Habeas Corpus Act of 1867 controlled federal habeas review.[140] In passing AEDPA, Congress made it more difficult for state habeas petitioners to obtain federal review, much less receive relief in federal court.[141] The expansions of civil rights and constitutional protections of the Bill of Rights against the states created minimum federal standards of due process throughout the country.[142]

In recent years, both the Supreme Court and Congress have severely restricted the availability of habeas review for petitioners.[143] In 1989, the Supreme Court limited application of the Retroactivity Doctrine, wherein a new criminal procedure rule cannot be applied to habeas petitioner's whose conviction has already become final.[144] Congress limited habeas relief in the federal courts for state and federal petitioners by passing the *Anti-Terrorism and Effective Death Penalty Act* (AEDPA) in 1996.[145]

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[139] Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 489 (1995); Karen M. Marshall, *Finding Time for Federal Habeas Corpus: Carey v. Saffold*, 33 AKRON L. REV. 549, 574 (2004).

[140] Pre-AEDPA habeas review included procedural defaults of claims by petitioners under Wainright v. Sykes, 433 U.S. 72 (1977) (no constitutional right to counsel for collateral attacks on state convictions under Strickland v. Washington, 466 U.S. 668 (1984)), non-retroactive application of Supreme Court precedent on constitutional criminal procedure to finalized cases under Teague v. Lane, 489 U.S. 288 (1989), and harmless error review, which requires that trial errors have a "substantial and injurious effect or influence in determining the jury's verdict," under Brecht v. Abrahamson, 507 U.S. 619, 623 (1992).

[141] 28 U.S.C. § 2244(d)(1) (1996) (AEDPA added a one-year filing deadline for state habeas petitioners); U.S.C. § 2264(a) (limited cognizable substantive claims reviewable on habeas); 28 U.S.C. § 2254(d) (mandated federal courts to generally defer to state court conclusions of federal law); 28 U.S.C. § 2253(c)(1), (c)(3) (required circuit court judges to grant permission to appeal lower court denials of habeas petitions, limited to the issues specified); 28 U.S.C. § 2244(b)(1-2).

[142] Timothy Finley, Habeas Corpus--Retroactivity of Post-Conviction Rulings: Finality at the Expense of Justice, 84 J. of Crim. L. and Criminology, 977 (1994).

[143] Joseph L. Hoffman & Nancy J. King, *Rethinking The Federal Role In State Criminal Justice*, 84. N.Y.U. L. REV. 791, 792-94 (2009).

[144] Teague v. Lane, 489 U.S. 288 (1989).

[145] Antiterrorism and Effective Death Penalty Act of 1996 Pub. L. No. 104-132, 110 Stat. 1214 (1996).

AEDPA imposed a one-year statute of limitations on individual habeas claims[146] and codified the Supreme Court's state court remedy exhaustion rule.[147] Most detrimental to habeas petitioners is AEDPA's requirement that "any claim that was adjudicated on the merits" is barred from federal habeas review "unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[148]

In contrast, federal habeas review of tribal SDVCJ convictions is much more expansive. Unlike state court petitioners who wait years for federal habeas review, SDVCJ defendants have immediate federal habeas review, a right to petition for a stay of tribal detention, and the option to forego tribal appellate procedures and apply directly to the federal courts.[149] In 1968, Congress provided by statute "the privilege of the writ of habeas corpus … to any person … to test the legality of his detention by order of an Indian tribe in a court of the United States."[150] ICRA provided individual rights, similar to the Bill of Rights, to Indians to protect them from their tribal governments.[151] Although ICRA provided tribal citizens pseudo-constitutional individual rights, the Supreme Court held in *Santa Clara Pueblo v. Martinez* that ICRA did not create a civil cause of action to sue tribes in federal court to enforce those rights.[152] In holding that ICRA only provided habeas corpus relief to tribal convictions and not any form of federal civil action, the Court explained that:

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[146] 28 U.S.C. § 2244 (2012).
[147] 28 U.S.C. § 2254(b) (2010).
[148] *Id.* at § 2254(d).
[149] 25 U.S.C. § 1304(e)(2) (2013).
[150] 25 U.S.C. § 1303.
[151] 25 U.S.C. §§ 1301-02.
[152] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70 (1978) ("ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303. … Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, [and] intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303.").

> In settling on habeas corpus as the exclusive means for federal court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed. Originally, the legislation would have authorized de novo review in federal court of all convictions obtained in tribal courts. At hearings held on the proposed legislation in 1965, however, it became clear that even those in agreement with the general thrust of the review provision–to provide some form of judicial review of criminal proceedings in tribal courts–believed that de novo review would impose unmanageable financial burdens on tribal governments and needlessly displace tribal courts. Moreover, tribal representatives argued that de novo review would "deprive the tribal court of all jurisdiction in the event of an appeal, thus having a harmful effect upon law enforcement within the reservation," and urged instead that "decisions of tribal courts . . . be reviewed in the U.S. district courts upon petition for a writ of habeas corpus.[153]

Because *Santa Clara* prevents tribal civil litigants from seeking federal review, many Indian litigants have attempted to disguise their civil claims as habeas petitions to gain a federal forum for intra-tribal disputes. This has resulted in few ICRA habeas cases reaching the merits of the §1303 habeas petitions, and thus a dearth of substantive habeas jurisprudence that controls collateral attacks

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[153] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 67 (1978) ("After considering numerous alternatives for review of tribal convictions, Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments"); *see also id.* at 70.

of tribal convictions.[154] *Poodry v. Tonawanda Band of Seneca Indians* provides an extensive analysis of an ICRA habeas petition.[155] In *Poodry*, the Seneca government banished a member after a contentious election. The Second Circuit held that, while banishment was not a criminal punishment, it was a sufficient restraint on liberty to qualify as "detention" under ICRA, thereby establishing federal court §1303 habeas jurisdiction.[156] The *Poodry* court reasoned that banishment is essentially the same as being "in custody" in the rest of the world outside of the reservation.[157] Neither federal common law nor 18 U.S.C. § 2254 federal habeas jurisprudence has interpreted the "in custody" requirement this broadly.

This expansive reading of "detention" in ICRA Section 1303 habeas has had limited effect. The federal courts have generally interpreted "detention" as similar to AEDPA's "in custody" requirement and have prevented civil litigants from disguising civil issues as habeas corpus issues.[158] Some federal circuits have explicitly contradicted *Poodry* by holding that banishment from a reservation does not amount to detention under ICRA.[159]

VAWA 2013 opponents harbored great concerns over the protection of defendants' constitutional rights in SDVCJ prosecutions[160] because tribal governments are not restrained by

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[154] *See generally*, Garrow study *infra* note 203.
[155] 85 F.3d 874 (2d Cir. 1996).
[156] Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 877 (2d Cir. 1996).
[157] *Id.* at 895. ("We believe that Congress could not have intended to permit a tribe to circumvent the ICRA's habeas provision by permanently banishing, rather than imprisoning, [convicted] members [ ]. The severity of banishment as a restraint on liberty is well demonstrated by the Supreme Court's treatment of [ ] "denaturalization" proceedings").
[158] *See* Shenandoah v. U.S. Dep't of Interior, 159 F.3d 708 (2d Cir. 1998) (Tribal member's disenrollment, tribal employment termination, prohibition from tribal businesses and speaking to some tribal members did not constitute "detention."); *see also* Jeffredo v. Macarro, 599 F.Sup.2d 279 (N.D.N.Y. 2003) (Tribal member and family excluded from tribal services did not amount to detention.); *see also* Shenandoah v. Halbritter, 275 F.Supp.2d 279 (N.D.N.Y. 2003)(Zealous tribal enforcement of tribal housing code did not constitute detention).
[159] Alire v. Jackson, 65 F.Supp.2d 1124, 1129 (D. Or. 1999) (despite exclusion, "Plaintiff has failed to demonstrate a severe actual or potential restraint on her liberty sufficient to give rise to habeas relief").
[160] *See supra* Section I.B, Legislative History of VAWA 2013

the United States Constitution.[161] However, habeas corpus challenges gain even more importance in the tribal (rather than state or federal) court context because the writ is the only vehicle for developing the law applicable to federal habeas challenges of tribal convictions. Additionally, there are no federal forums available for civil claims[162] against tribal officers that would otherwise be actionable against state and federal actors under 42 U.S.C. § 1983[163] or *Bivens* actions,[164] respectively. Because the Court foreclosed tribal review of § 1983 claims in *Nevada v. Hicks*, complainants are limited to tribal laws enforced through tribal court decisions.[165] Although § 1983 claims are not enforceable against tribes in federal court, and tribal courts do not have subject matter jurisdiction for such claims,[166] tribes may develop their own equivalent laws or even waive immunity for these suits.

Ultimately, ICRA § 1303 habeas review provides the only federal forum for tribal court defendants to challenge unconstitutional convictions. Although the United States Constitution does not directly apply to tribes, ICRA and TLOA provide constitutionally equivalent protections that ensure tribal court defendants receive similar individual rights as state court. If federal courts apply Indian law precedent, the ICRA statutory framework will still correspond with state habeas review standards in preventing the most egregious constitutional harms against defendants,[167] while protecting tribal sovereignty and promoting tribal governance.

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[161] *Talton*, 163 U.S. at 385 (conviction was "solely a matter within the jurisdiction of the courts of that Nation, and the decision of such a question, in itself, necessarily involves no infraction of the Constitution of the United States.").

[162] *Santa Clara Pueblo*, 436 U.S. at 59-72.

[163] 42 U.S.C. § 1983 provides a federal cause of action for a "person who, under the color of any statute, ordinance, regulation, custom, or usage, … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution." Such person "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[164] Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

[165] Nevada v. Hicks, 533 U.S. 353, 366 (2001) (holding that tribal courts are not courts of general jurisdiction and thus cannot adjudicate federal claims in the same manner as their state court counterparts).

[166] *Santa Clara Pueblo*, 436 U.S. 49 (upholding sovereign immunity).

[167] Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1, 11 (2010).

### *A. ICRA § 1303 Habeas*

Indian tribes are "distinct, independent political communities, retaining their original natural rights."[168] "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[169] Even after all Indians were granted American citizenship in 1924, and the Bill of Rights was applied to the states through selective incorporation, tribal courts remained unconstrained by the individual rights protections in the United States Constitution. This changed in 1968, when Senator Sam Ervin shepherded ICRA through Congress to expand civil rights to Native Americans.[170] Although framed as an expansion of civil rights to Native Americans, ICRA had a more nefarious purpose. Senator Ervin "tried to duplicate the North Carolina assimilation experience on a national level"[171] by "subject[ing tribes] to the same limitations and restraints as those which are imposed on the [U.S.] Government."[172]

The ICRA established statutory protections of individual liberties for Native Americans in tribal courts. Concern in Congress over the lack of constitutional constraints on tribal governments led to its passage. However, it provided no federal cause of action for civil cases or criminal cases not resulting in detention for federal habeas corpus purposes.[173] Because the ICRA habeas provision applies to "all persons" and not just tribal members or Indians,[174] ICRA provides the only federal guarantees of due process and equal protection in tribal courts.[175]

The VAWA 2013 amendments build on the *Santa Clara* rule precluding federal civil review while allowing habeas relief for criminal convictions regardless of Indian status.[176] By restricting

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[168] Worcester v. Georgia, 31 U.S. 515, 559 (1832).
[169] *Santa Clara Pueblo*, 436 U.S. at 56.
[170] Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty after the Indian Civil Rights Act of 1968*, 1 J.L. & POL'Y 1 (1993).
[171] Donald Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 575 (1972).
[172] 111 CONG. REC. S1799 (daily ed. Feb. 2, 1965) (statement of Sen. Ervin).
[173] *Santa Clara Pueblo*, 436 U.S. at 49.
[174] 25 U.S.C. § 1303 (2011).
[175] *Id.*
[176] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

federal review under ICRA to the criminal context, the *Santa Clara* doctrine protects tribal sovereignty. Further expanding ICRA review would violate the "right of the reservation Indians to make their own laws and be ruled by them."[177]

ICRA's § 1303 habeas corpus provision is subject to the same test for jurisdiction as "other statutory provisions governing habeas relief."[178] To "invoke jurisdiction of a federal court under § 1303 [one] must demonstrate, under *Jones v. Cunningham* and its progeny, a severe actual or potential restraint on liberty."[179] In *Jones*, the Court interpreted the "in custody" requirement of 28 U.S.C. § 2241, which provided a federal forum for collateral appellate review of state convictions.[180] The *Jones* court held that state parole entailed sufficient "restraints" on liberty to warrant habeas relief.[181] These restraints on liberty included directing petitioner to live with his aunt in Georgia, requiring permission to leave the community, change residence, or own or operate a car, reporting to his parole officer every month, and allowing home searches at will.[182] This federal habeas corpus jurisdiction was originally established in the aftermath of the Civil War when Congress passed the Habeas Act of 1867 to extend the writ to state custody for "cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States."[183]

Though many areas of Indian law are unique, by adopting § 1303, "Congress did not…intend to create jurisdictional requirements different from those associated with traditional habeas remedies."[184] This holding relates not only to § 1303 language, but also to the treatment of petitioners. The fact that §1303 refers to "detention" by a tribe rather than being held "in

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[177] Williams v. Lee, 358 U.S. 217 (1959).
[178] *Poodry*, 85 F.3d at 880.
[179] *Id.* (*citing* Jones v. Cunningham, 371 U.S. 236 (1963)) (holding that "besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally," including parole).
[180] 28 U.S.C. § 2241(c) ("The Writ of habeas shall not extend to a person unless he is in custody").
[181] *Id.*
[182] *Id.*
[183] YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1462 (14th ed. 2015) (*citing* Ex Parte McCardle, 73 U.S. 318, 318 (1867) (describing the Habeas Act of 1867)).
[184] *Poodry*, 85 F.3d at 893 n. 21.

custody" by a state for federal collateral review under § 2254[185] is "unremarkable," given that "Congress… use[s] the terms 'detention' and 'custody' interchangeably in the habeas context."[186] The *Poodry* court held that § 1303 federal habeas review is no "more expansive…than analogous statutes authorizing collateral review of state and federal action."[187] The *Poodry* Court explicitly reserved the question of "whether the substantive provisions of § 1302 must also be treated as coextensive with analogous constitutional provisions."[188]

Although the *Poodry* Court did not define the scope of § 1303 habeas review, other federal circuits began a limited incorporation of a constitutional approach of rights through their ICRA counterparts. In *U.S. v. Schmidt*, the Eighth Circuit held that ICRA was not violated by the exigency doctrine to justify tribal police actions.[189] In dictum, the Ninth Circuit has found that the ICRA and 4th Amendment standards are equivalent, in any event.[190]

Although limited in number, these cases foreshadow a judicial process similar to the selective incorporation of the Bill of Rights through ICRA's §1303 habeas review onto ICRA's statutory procedural rights. This fragile statutory patchwork of ICRA's *pseudo*-constitutional rights, and the court's constitutional jurisprudence, will allow tribes to exercise their inherent sovereignty so long as they assert their jurisdiction in ways that coincide with United States constitutional standards. Otherwise, federal courts will overturn their convictions on habeas review.[191] This jerry-rigged statutory scheme protecting federal individual rights will constrain tribal courts through federal review, but preserve the core of tribal sovereignty as conceived under *Worcester v. Georgia* and *Talton v. Mayes* in the tribes' internal affairs.

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[185] *Id.* at 891.
[186] *Id.*
[187] *Id.* at 901.
[188] *Id.* at 893 n. 21.
[189] United States v. Schmidt, 403 F.3d 1009 (8th Cir. 2005).
[190] United States v. Becerra-Garcia, 397 F.3d 1167 (9th Cir. 2005); *see also* United States v. Fuentes, 800 F.Supp.2d 1144 (D. Or. 2011).
[191] For example, intra-tribal criminal misdemeanors and civil issues will remain completely within tribal judicial control.

### *B. The Tribal Exhaustion Doctrine*

The doctrine of exhaustion is a fundamental aspect of habeas corpus across various legal contexts. The basis for the federal exhaustion requirement is to preserve the resources of the federal judiciary and to respect the sovereignty of the states and tribes in the federal system. Besides limiting federal jurisdictional reach over tribal proceedings, the doctrine of tribal exhaustion also limits federal review of tribal courts. The tribal exhaustion requirement is a judicial rule based in comity between the federal and tribal sovereigns where both sovereigns have concurrent jurisdiction over a claim.[192] The doctrine is supported by the following three policy concerns: (1) "Congress['s] commit[ment] to…supporting tribal self-government and self-determination"; (2) the "orderly administration of justice in the federal court[s]" through the development of a full record in tribal court; and (3) the provision of the tribal courts' "expertise…in the precise basis for accepting jurisdiction" to federal courts in appellate review.[193] Requiring a party to exhaust tribal remedies allows the tribal court a "full opportunity … to rectify any errors it may have made."[194] This means that, "at a minimum … tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts" before parties can seek federal jurisdiction.[195]

However, *National Farmers* created several exceptions to the requirement of tribal exhaustion.[196] First, exhaustion is not required if the tribal court intended to harass the party or claimed jurisdiction in bad faith.[197] Second, if the tribal court's assertion of jurisdiction violates an express jurisdictional prohibition, then the defendant is not subject to the exhaustion doctrine.[198] Third, tribal exhaustion does not apply if a tribal appellate review would be

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[192] Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 847 (1985); Deborah F. Buckman, *Annotation, Construction and Application of Federal Tribal Exhaustion Doctrine*, 186 A.L.R. FED. 71 (2003).
[193] *Nat'l Farmers*, 471 U.S. at 856; Texaco, Inc. v. Zah, 5 F.3d 1374, 1375 (10th Cir. 1993).
[194] Valenzuela v. Silversmith, 699 F.3d 1199, 1206 (10th Cir. 2012) (*quoting Nat'l Farmers*, 471 U.S. at 856).
[195] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987).
[196] *Nat'l Farmers*, 471 U.S. at 856, n. 21.
[197] *Id.*
[198] *Id.*

futile because there is no tribal forum, there is no relief available, or tribal review is biased.[199] The Court subsequently emphasized in *Strate v. A-1 Contractors* that *National Farmers* and *Iowa Mutual*, "enunciate only an exhaustion requirement, a 'prudential rule,' based on comity" and that regarding nonmembers, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[200] *Strate* also added one more exception to tribal exhaustion: "'[w]hen...it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule,' the exhaustion requirement 'would serve no purpose other than delay.'"[201]

Although federal Indian law jurisprudence has created many exceptions to the tribal exhaustion rule, courts have generally enforced the rule. After the Supreme Court's 1978 *Oliphant* decision to exempt non-Indians from tribal criminal jurisdiction, the only ICRA habeas questions to arise in federal court essentially have been jurisdictional challenges to tribal authority. Because of the Supreme Court's *Oliphant* exemption for non-Indians, "the development of principles governing civil jurisdiction in Indian Country has been markedly different from the development of rules dealing with criminal jurisdiction."[202] Although few cases have reached federal review on the merits, the federal courts have developed a tribal exhaustion rule doctrine for habeas challenges to tribal convictions.[203] In the post-VAWA world, however, with explicit tribal jurisdiction for domestic violence crimes, these original principles of tribal exhaustion developed in the civil context have become applicable to Indian and non-Indian habeas challenges. Whereas some circuits have perceived an exception for non-Indian defendants, this was simply the application of the *National Farmers'* lack of tribal jurisdiction exception and *Strate*'s delay exception in the criminal context.

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[199] *Id.*
[200] Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).
[201] Nevada v. Hicks, 533 U.S. 353, 369 (2001) (*quoting Strate*, 520 U.S. at 459, n.14).
[202] *Nat'l Farmers,* 471 U.S. at 854 (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 253 (1982)).
[203] *See generally* Carrie E. Garrow, *Habeas Corpus Petitions In Federal And Tribal Courts: A Search For Individualized Justice*, 24 WM. & MARY BILL OF RTS. J. 137 (2015).

In reviewing ICRA § 1304(e)(2) challenges requesting immediate stays of detention, a federal court must base the "substantial likelihood" standard in existing Indian law jurisprudence. While habeas petitions have an underlying criminal conviction, these challenges are in fact civil in nature, and thus without more specific language in ICRA stating otherwise, *National Farmers* and its progeny provide existing precedent for federal courts to apply towards their analysis of immediate stays of detention. If petitioners do not meet these *National Farmers*' exceptions, then a federal court may not grant relief under § 1303 and § 1304.

As different tribes exercise their inherent jurisdiction through prosecution of domestic and dating violence crimes involving both Indian and non-Indian defendants, the need for tribal appellate courts to review errors will necessarily grow. While TLOA and ICRA require public notice of tribal laws, judicial interpretation will still allow tribes to decide, in the first instance how to interpret their laws and whether certain ICRA rights are understood, similar to United States constitutional law. Until the tribal courts decide a SDVCJ appellate case, a federal court cannot interpret tribal laws in habeas review and thus usurp the jurisdiction granted to it under ICRA. Furthermore, the complexities of SDVCJ may raise jurisdictional and procedural errors that should be reviewed by the tribal appellate courts. Respecting tribal sovereignty with exhaustion requirements in these cases not only helps develop tribal law and keep tribal governments accountable but also promotes judicial economy and efficiency when considering § 1303 petitions.

Because of the barrier to federal court review established by *Santa Clara*, tribal petitioners have often attempted to expand the meaning of "detention" in the ICRA context[204] beyond the "in custody" requirement of AEDPA.[205] However, "the term 'detention' in the [ICRA] statute must be interpreted similarly to the 'in custody' requirement in other habeas contexts."[206] Thus, "a

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[204] *See e.g.*, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880 (2d Cir. 1996). (arguing that banishment was detention); Lewis v. White Mountain Apache Tribe, No. CV-12-8073-PCT-SRB (DKD), 2013 WL 510111 (D. Ariz. Jan. 24, 2013) (petitioner's liberty not restrained where tribe denied his bid to run for political office).

[205] 28 U.S.C. § 2254 (2011); 28 U.S.C. § 2255 (2011).

[206] Moore v. Nelson, 270 F.3d 789, 791 (9th Cir.2001).

federal court has no jurisdiction to hear a petitioner's claim for habeas corpus under § 1303 unless the petitioner is (1) in custody and (2) has exhausted all tribal remedies."[207] The federal courts explicitly defer to Congress's exclusive authority over "any expansion[s] of [§ 1303 habeas] jurisdiction."[208] In ICRA, Congress has given unprecedented relief to tribal court petitioners through immediate habeas review and interim relief through immediate stays of detention. In contrast, the federal habeas review to collaterally attack state convictions explicitly requires exhaustion of state remedies by statute.[209] Given the incredible difference in remedy a tribal court defendant has under § 1303 versus the remedy a state court defendant has under § 2254, federal courts must interpret the "substantial likelihood" standard with great care and deference to Congress while maintaining current federal Indian law jurisprudence.

Federal courts have followed the *National Farmers* tribal exhaustion rule in the habeas context, "recogniz[ing] that a petitioner must fully exhaust tribal-court remedies before a federal court can review challenges to his detention."[210] The *National Farmers'* exceptions allow petitioners to seek immediate federal review in the criminal habeas context.[211] Thus, while tribal civil and criminal jurisdictions have developed in significantly different ways,[212] several federal circuits require "that § 1303 petitioners must exhaust tribal court remedies … despite § 1303's lack of an express exhaustion requirement."[213] Despite being "a prudential

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[207] *Lewis*, 2013 WL 510111, at 12 (*citing* Jeffredo v. Macarro, 599 F.3d 913, 918 (2010)).
[208] *Jeffredo*, 599 F.3d at 918.
[209] 28 U.S.C. § 2254 (b)(1)(A) (2012).
[210] Acosta-Vigil v. Delorme-Gaines, 672 F. Supp. 2d 1194, 1196 (2009) (*citing* Boozer v. Wilder, 381 F.3d 931, 935 (2004)); *see also* Azure–Lone Fight v. Cain, 317 F. Supp. 2d 1148, 1150 (2004); Quair v. Sisco, 359 F. Supp. 2d 948, 971–72 (2004); Lyda v. Tah-Bone, 962 F.Supp. 1434, 1436 (1997).
[211] Garrow, *supra* note 203, at 149-50.
[212] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (2009).
[213] Valenzuela v. Silversmith, 699 F.3d 1199, 1206 (2012); *see also Jeffredo*, 590 F.3d at 756 ("[A] litigant must first exhaust tribal remedies before properly bringing a petition for writ of habeas corpus [pursuant to § 1303]"); Necklace v. Tribal Court of Three Affiliated Tribes, 554 F.2d 845, 846 (1977) ("[T]ribal remedies must ordinarily be exhausted before a claim is asserted in federal court under [§ 1303]"); *see also* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 4.01 (Supp.2009) ("All federal courts addressing the issue mandate that two prerequisites be satisfied before they will hear a habeas petition filed under

rule based on comity,"[214] federal courts have consistently upheld the exhaustion doctrine in § 1303 petitions. Under VAWA 2013, the federal courts must apply federal law to the § 1303 petitions, which directly incorporate the *National Farmers'* exceptions into the "substantial likelihood" standard for reviewing requests for immediate stays under § 1304(e). Thus, if a petitioner does not meet one of these exceptions, then the petitioner has not shown "a substantial likelihood that the habeas corpus petition will be granted"[215] under § 1303.

A recent survey of the federal courts' treatment of tribal court convictions during federal habeas review found only thirty cases of substantive federal habeas court decisions on ICRA habeas petitions.[216] Out of the thirty cases, fifteen were "dismissed for failure to exhaust tribal court remedies," five involved non-Indian defendants not subjected to the exhaustion rule,[217] and ten received a federal review after exhaustion of tribal court remedies. Out of the ten ICRA habeas petitions achieving federal habeas review on the merits of the petitions, six were granted habeas relief and four were denied.[218]

The survey concluded that the "federal courts' deferral to tribal courts is citizenship based"[219] because the "non-Indian status of the petitioner" is the "most common exception … to the exhaustion requirement."[220] She points to *Oliphant* and *Duro*, where the Court "proceed[ed] directly to the question of the tribal court's jurisdiction." [221] However, the *Duro* Court reviewed a tribal member's § 1303 petition before the legislative *Duro*-fix, rather than a non-Indian's habeas petition as in *Oliphant*.[222]

Several cases weigh against this non-Indian exemption of the tribal exhaustion rule. In *Greywater v. Joshua*[223] the Court held

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ICRA: The petitioner must be in custody, and the petitioner must first exhaust tribal remedies").

[214] *Valenzuela*,699 F.3d at 1206-07.

[215] 25 U.S.C. § 1304(e)(2)(A) (2013).

[216] Garrow, *supra* note 203, at 148.

[217] *Id.*

[218] *Id.*

[219] *I*d. at 150.

[220] *Id.* at 148.

[221] Garrow, *supra* note 203, at 151.

[222] Duro v. Reina, 495 U.S. 676, 684-85 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195-96 (1978).

[223] Greywater v. Joshua, 846 F.2d 486, 493 (1988).

that a non-member Indian petitioner was not required to exhaust his tribal court remedies in a case that pre-dated the *Duro*-fix. In *Connor v. Conklin*,[224] the North Dakota District Court did not require a tribal member petitioner to exhaust tribal remedies; however, the tribe "did not raise the exhaustion requirement, and the court failed to address it."[225] Although this may demonstrate that § 1303 does not require express waiver of the exhaustion requirement as AEDPA does,[226] *Connor* does not support a tribal exhaustion exception for non-Indian § .1303 petitioners.

The Ninth Circuit has noted that despite "the federal district court entertain[ing *Duro's*] habeas petition immediately after the tribal court had denied [his] motion to dismiss" the tribe made "no objection to the petition on the ground that the petitioner had not exhausted his tribal remedies."[227] From this, the *Wetsit* court "infer[red] 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."[228] Although scholars have previously cited this non-Indian tribal appeals exemption rule as good law,[229] no court has established such a rule. However, the *Wetsit* court mentioned this rule in dicta, comparing tribal exhaustion of "a person not a member of a tribe," where "no requirement of exhaustion need be enforced" to "when the petitioner is a member of the tribe."[230] The fact that the *Wetsit* Court did not "note or observe that Congress had subsequently changed the *Duro* ruling by [] amendment," nor did the Court's "dicta statement [] refer to the amendment to 25 U.S.C. § 1301 which confers criminal jurisdiction over 'all Indians,'" nor "even mention 25 U.S.C. § 1301" shows "the dicta in *Wetsit* is without merit and incorrect."[231] Even if the *Duro*-fix had not taken effect already, the non-member remedy requirement was not properly before the Court, since both Wetsit and her victim were tribal members.

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[224] Connor v. Conklin, No. A4-04-50, 2004 WL 1242513 (D.N.D. June 2, 2004).
[225] Garrow, *supra* note 203, at 152; *Connor*, No. A4-04-50, at *1-5.
[226] 28 U.S.C. § 2254(b)(3) (2011).
[227] Wetsit v. Stafne, 44 F.3d 823, 826 (9th Cir. 1995).
[228] *Id.*
[229] Garrow, *supra* note 203, at 150-51.
[230] *Westsit*, 44 F.3d at 826.
[231] Lyda v. Tah-Bone, 962 F.Supp. 1434, 1435 (D. Utah, 1997).

In *Wetsit*, the Ninth Circuit affirmed the district court's dismissal of an Indian's § 1303 habeas petition, where Wetsit challenged her tribal detention for manslaughter charges after Wetsit stabbed her husband, also a Fort Peck tribal member, to death.[232] The Fort Peck Tribal Court sentenced her to one year after a jury acquitted her in federal court under the Major Crimes Act.[233] The district court dismissed her petition because she failed to exhaust her tribal remedies.[234] On appeal, the Ninth Circuit ruled that a tribe has "jurisdiction over major crimes committed by a tribal member," despite Wetsit's "acquittal under the Major Crimes Act" by federal court.[235] Lastly, the *Wetsit* Court agreed that tribal members must exhaust all tribal remedies.

Petitioner's counsel did brief the court on tribal exhaustion, "respectfully submit[ting] that… the exhaustion requirement should not be imposed in criminal cases,"[236] as petitioner had to, in order to argue the Major Crimes Act jurisdictional matter. Petitioner argued that had "Congress intended an exhaustion requirement for tribal prisoners, it would have expressly provided for one as it did in § 2254" since it was "codified long prior" to §1303 habeas in 1968.[237]

The Ninth Circuit repeated its original misinterpretation of the *Duro*-fix in *In re Garvais*, holding that §1303 "does not require Garvais [a non-Indian BIA officer] to first exhaust his challenges in tribal court before seeking habeas relief in this court."[238] Much of the issue reviewed by the court was Garvais's status as a non-Indian because he "had been improperly granted [his Indian] preference" for his employment as a BIA officer.[239] The Court incorrectly based this rule on *Wetsit* and on *Means v. Northern Cheyenne Tribal Court*,[240] which the Ninth Circuit later clarified

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[232] *Wetsit*, 44 F.3d at 824.
[233] *Id.*
[234] *Id.*
[235] *Id.* at 826.
[236] Brief for Petitioner-Appellant at 4, Westsit v. Stafne, 44 F.3d 823, (9th Cir. 1995) 1994 WL 16048224, at *6-7.
[237] *Id.* at 8.
[238] In re Garvais, 402 F.Supp.2d 1219, 1220 (2004) (*citing Wetsit*, 44 F.3d at 826); *see also* Means v. Northern Cheyenne Tribal Court, 154 F.3d 941, 942 (9th Cir. 1998) (rev'd on other grounds, U.S. v. Enas, 255 F.3d 662 (9th Cir. 2001)).
[239] *In re Garvais*, 402 F.Supp.2d at 1222.
[240] *Means*, 154 F.3d at 942.

held that the "1990 ICRA amendments do not apply retroactively and that, under *Duro*, Means was not subject to the criminal jurisdiction of another tribe."[241] The *In re Garvais* Court claimed that *Means* was reversed on other grounds in *U.S. v. Enas*, where the court attempted to reconcile its previous decisions' improper readings of the *Duro*-fix.[242] However, while *Enas* did not rule on § 1303 exhaustion requirements directly, it clearly contradicted the foundational *Duro*-related principles that *Wetsit* and its misguided progeny were based upon.

Even including the *Oliphant* decision, no federal court has held the non-Indian status of a § 1303 habeas petitioner to be an exception to the *National Farmers* tribal exhaustion requirement. Nor should the courts create one based on the same policy issues of comity and federal court administrative concerns. Doing so goes against Congress's policy of "tribal support"[243] and would open up further litigation stagnating federal dockets with further ICRA-specific habeas jurisprudence. Because the § 1303 habeas jurisprudence is so undeveloped, many issues that have been resolved in the § 2254 context must be extended by analogy or fully litigated through collateral attacks on tribal convictions.

## III. A NEW HABEAS CORPUS JURISPRUDENCE?

Although seemingly innocuous, the immediate stay of detention petition provision raises several potential problems to the federal courts' judicial jurisprudence of § 1303 habeas relief. If federal courts treat § 1303 habeas petitions differently from § 2254 relief, then a new § 1303-specific habeas corpus jurisprudence must be developed. Developing a new § 1303 habeas jurisprudence will come at great cost to tribal governments that must defend convictions in federal court. Both tribal court defendants, who essentially must re-litigate habeas issues already settled in the state

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[241] *U.S. v. Enas*, 255 F.3d 662, 664 (9th Cir. 2001).

[242] *Enas*, 255 F.3d at 675 ("We conclude that Congress had the power to determine that tribal jurisdiction over nonmember Indians was inherent. Therefore, acting under the 1990 amendments to the ICRA, the White Mountain Apache Tribe prosecuted Enas pursuant to its own inherent power, and a federal prosecution would proceed pursuant to a separate source of power."). *See also*, U.S. v. Lara, 541 U.S. 193 (2004) (affirming this same principle three years after *Enas*).

[243] *Nat'l Farmers*, 471 U.S. at 845.

habeas review context, and Indian victims will relive the traumatic experiences simply because the jurisprudence is unclear.

The legislative history of VAWA 2013 does focus on habeas corpus under section 1303 of ICRA. The SCIA acknowledged that "defendants typically would have a direct right to appeal to a tribal appellate court," and could file the writ of habeas in federal court under ICRA, but "there would [] be no direct right of appeal to a Federal court."[244] Despite this claim, the report then discusses that the "purpose of the subsection on 'Petitions to Stay Detention' … would clarify the current legal standards for determining whether a person can be released from tribal detention prior to final resolution of his habeas petition."[245] The ability of a federal court to grant habeas relief to a petitioner without resolving their habeas petition is essentially a direct appeal right, since it provides a collateral attack on the tribal conviction without exhaustion of tribal remedies. Congress explicitly debated the consequences of creating a delegated authority with a direct appeal, or loosening restrictions on inherent tribal authority and providing federal habeas corpus review to tribal convictions. This clear legislative history must be kept in mind when federal courts adjudicate ICRA habeas petitions.

Alternatively, federal courts may apply already existing habeas corpus jurisprudence to the §1303 habeas petitions, considering *National Farmers* and its progeny. However, the legal mechanics of applying existing federal habeas law to ICRA habeas review is unclear. Federal courts could translate the constitutional rights-based habeas corpus precedents to ICRA statutory habeas claims, analogize any § 1303 habeas issues to relevant § 2254 sections, or create an entirely new §1303 habeas jurisprudence that respects the unique aspects of "domestic dependent nations."[246]

Regardless of the approach the federal courts take, VAWA's stay of detention relief raises several important issues for the collateral attack of tribal convictions. Judicially-created exceptions to the tribal exhaustion rule in federal habeas relief offend tribal

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[244] SCIA, Stand Against Violence and Empower (SAVE) Native Women Act, Senate Report 112-265 (December 27, 2012). The SAVE Act was the predecessor legislative effort, eventually passing as part of the VAWA amendments.

[245] *Id.*

[246] Cherokee Nation v. State of Georgia, 30 U.S. 1, 15 (1831).

sovereignty and weaken tribal judicial institutions by eliminating their appellate jurisdiction. Ultimately, this will deter tribal efforts to implement VAWA, thereby to protect Native American women and ultimately tribal communities.

### *A. Tribal Exhaustion Under VAWA 2013*

Because petitions must demonstrate a "substantial likelihood" that they would be granted in order to receive immediate remedies, to be excepted from the tribal exhaustion requirements a petitioner must meet that standard. Under current Indian case law, a petitioner would meet that standard by proving that any of the *National Farmers'* exceptions apply to his or her case. In defining the "substantial likelihood" standard, the habeas court may apply federal habeas corpus based on constitutional rights by analogy to federal court decisions interpreting statutory §1303 habeas relief. Alternatively, courts find that the quasi-constitutional rules established by TLOA and VAWA require an entirely new federal §1303 habeas jurisprudence. Either way, the federal courts must establish guidelines for tribes in the federal habeas context. Absent clear direction from the Supreme Court on applicable habeas jurisprudence, tribal habeas relief will become an even more confused morass of constitutional law, federal Indian law, and federal court processes.

Left unresolved, §1303 relief will cause three main problems for tribal courts. First, without specific guidance on ICRA habeas jurisprudence, federal courts may offend and diminish tribal sovereignty through misapplication of §1303 habeas jurisprudence. Second, federal courts will create further confusion over the tribal exhaustion requirement for *all* §1303 habeas petitioners—whether Indian or non-Indian—regardless of the length of sentencing. Third, absent guidance on the "substantial likelihood" standard for immediate release, VAWA will have a chilling effect on the tribal exercise of SDVCJ.

Without clear guidance from Congress and the federal courts, the SDVCJ may create another layer of confusion in Indian law jurisprudence, negating the real impact VAWA could have in Indian country. First, disregard of the tribal exhaustion rule on habeas review would create a lesser standard for collateral attacks on tribal convictions than state court convictions. Although the

*Oliphant* Court noted that state sovereigns are not equivalent to tribes, which it called "quasi-sovereign entities,"[247] this principle has limited inherent tribal jurisdiction, not federal court jurisdiction of review where tribes have personal and subject matter jurisdiction. By providing a cause of action to stay tribal detention even before the federal court has reached a final decision on the habeas case, Congress gives much more deference to state courts than tribal courts. By giving immediate habeas corpus review to tribal petitioners and not state petitioners, Congress has significantly weakened tribal courts. Congress is demanding that tribes raise the level of legal practice in tribal courts through the requirements of TLOA and VAWA, yet through §1303(e) it simultaneously weakens the purview of tribal courts.

Second, §1303(e) contradicts the well-established *National Farmers* doctrine of tribal exhaustion, which applies even in the criminal conviction context.[248] By providing an immediate stay of detention provision, SDVCJ defendants may gain immediate access to federal habeas review. This distinction between §1303 and §2254 habeas relief throws into doubt federal court §1303 habeas jurisprudence. The Second Circuit previously held §1303 habeas review to be equivalent in scope to its analogous state court habeas corpus review statutes.[249] This framework would make federal habeas jurisprudence applicable to §1303 petitions.

By explicitly including some constitutional protections into the VAWA and TLOA statutes but not others, Congress has created ambiguity in the applicable habeas corpus jurisprudence that federal courts should use to review §1303 petitions. The rule against surplusage[250] could make the inclusion of the Sixth Amendment fair cross-section jury requirement and indigent defense counsel in Section 1304(d) redundant. Alternatively, the ICRA can be read as highlighting these specific rights without excluding "all other rights…necessary…for Congress to recognize

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[247] *Oliphant*, 435 U.S. at 196 (*citing* Morton v. Mancari, 417 U.S. 535, 554 (1974)).
[248] *See infra*, Section II.
[249] *Poodry*, 85 F.3d at 880.
[250] *See* WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (West Group, 3d. ed. 2001).

and affirm"[251] the tribe's SDVCJ. Section 1303(e)'s exception to the *National Farmers*, and habeas corpus exhaustion rule for SDVCJ defendants, creates different avenues for collateral attacks on tribal convictions depending on the subject matter of the underlying charges involved. This is a fundamental difference from §2254 collateral review, which requires exhaustion of state appellate remedies and treats all petitions equally, regardless of the underlying offense. The more differences between §1303 and other statutory habeas review procedures there are, the more need for federal courts to create new habeas jurisprudence and the less certainty there is for participating tribes, as well as federal courts.

Rather than implementing a non-Indian exception similar to the Ninth Circuit's misguided *Westsit* progeny, the federal courts should only create exceptions based upon similar principles found in constitutional habeas corpus jurisprudence or analogous §2254 habeas decisions. For example, federal courts have permitted habeas review where the tribe lacked explicit habeas corpus provisions and only had informal procedures for seeking relief through the tribal court. [252] For obvious violations of the defendants' rights such as this, the *National Farmers* exceptions allow federal courts to provide a remedy without a harsh rule exempting non-Indians from tribal appellate jurisdiction.

In *Necklace v. Three Affiliated of Fort Berthold Reservation*, the Eighth Circuit reviewed an Indian petitioner's writ of habeas corpus, which challenged a tribal involuntary commitment order to a state hospital where she had been committed five years earlier. The Eighth Circuit found that "because [tribal laws] contain no formal habeas corpus procedure," petitioner was not "required to exhaust her tribal remedies." Therefore, the court reversed the lower court's requirement for trial exhaustion.[253] Given the lack of any formal habeas corpus review process by the tribal court, this decision both respects the *National Farmers* exhaustion rule and conforms to similar treatment of state proceedings under §2254.[254]

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[251] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 121 (2013); Stand Against Violence and Empower Native Women Act, S. 1763, 112th Cong. § 201 (2012).
[252] Necklace v. Tribal Court of Three Affiliated Tribes, 554 F.2d 845, 846 (8th Cir. 1977).
[253] *Id.*
[254] 25 U.S.C. § 2254(d) (2011).

Until Congress further develops ICRA habeas corpus procedures, federal courts "should not address a petitioner's unexhausted claims, unless the petitioner shows that one of the doctrine's narrow exceptions applies."[255] Federal courts must look to *National Farmers* and its progeny to permit §1303 petitioners avoiding the tribal exhaustion requirements. While criminal jurisdiction may be based on the Indian or non-Indian political status of a defendant under *Oliphant*, federal courts should not draw similar distinctions for habeas review.

Although federal courts may view *Oliphant* as establishing a tribal exhaustion exception,[256] the Court decided *Oliphant* before announcing the *National Farmers* tribal exhaustion requirement in 1985. [257] Furthermore, the court strengthened the exhaustion requirement in *Iowa Mutual Ins. Co. v. LaPlante* in 1987, holding that "issue[s] of jurisdiction be resolved by the Tribal Courts in the first instance" and that "local bias and incompetence" in tribal courts don't merit exceptions."[258]

To fulfill Congress's own policy of supporting tribal sovereignty, courts should "preserve the 'authority of the tribal courts.'" [259] As Congress, guided by the *Montana* exceptions, continues to dismantle further restraints on inherent tribal criminal jurisdiction,[260] federal courts must exercise restraint and deference similar to that required under §2254 review. Until §1303 is further developed by explicit legislation, federal courts should base §1303 decisions on the Indian canons of construction and habeas corpus jurisprudence that is still applicable after the passage of the AEDPA in 1996.

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[255] Jeffredo v. Macarro, 599 F.3d 913, 918 (9th Cir. 2010); *see also* Selam v. Warm Springs Tribal Corr. Facility, 134 F.3d 948, 954 (9th Cir. 1988).
[256] At most, *Oliphant* could be read to establish an immediate jurisdictional challenge in federal court, rather than a distinct federal habeas corpus right based upon Indian or non-Indian status.
[257] *Nat'l Farmers*, 471 U.S. at 845.
[258] Iowa Mut. Ins. Co. v. Laplante, 480 U.S. 9, 18-19 (1987).
[259] O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1146 (1973) (quoting Williams v. Lee, 358 U.S. 217, 223 (1959).
[260] Tribal Youth and Protection Act of 2016, S. 2785, 114th Cong. (2016) (On April 12, 2016, Sen. Tester introduced S.2785 "Tribal Youth and Community Protection Act of 2016," which will expand tribal criminal subject matter jurisdiction over child and drug violence crimes. This bill functions by amending Section 204 of Public Law 90–284 (25 U.S.C. 1304), thus tribes would be able to prosecute Indian non-Indian defendants alike for these categories of crimes).

Before judicially creating any further exceptions to *National Farmers* exhaustive list, federal courts must "weigh[] the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights." [261] In particular, federal habeas courts adopting the *O'Neal* balancing test should update the factors in light of the purposes of VAWA's Title IX amendment. In addition to cultural needs, federal courts should weigh the safety of the tribal community, federal inaction to maintain a safe environment and the efforts of the tribe to ensure the public safety of Indian country.

Third, the ICRA's §1304(e) "substantial likelihood" standard for §1303 SDVCJ habeas petitions is undefined in the statute.[262]Because the stay of detention upon petition is a unique remedy in federal habeas corpus law, a reviewing court will have to interpret the standard based on other federal law. In state collateral proceedings, §2254 requires "the applicant [to] exhaust[] the remedies available in the courts of the State,"[263] unless no "state corrective process is … available" or such process is ineffective to protect the applicant.[264] Although §1303 does not provide the same explicit comprehensive statutory framework for collateral attacks on tribal convictions as §2254, the legislative history of both statutes, congressional policy considerations in Indian affairs and the Indian canons of construction[265] result in at least equivalent protections of sovereignty afforded to tribes as states during federal habeas review.

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[261] *O'Neal*, 482 F.2d at 1146.
[262] 25 U.S.C. § 1303(e) (2013).
[263] 28 U.S.C. § 2254(b)(1)(A) (2011).
[264] *Id.* at § 2254(b)(1)(B)(i-ii).
[265] Conference of Western Attorneys General, American Indian Law Deskbook § 1:6. Federal common law application of Marshall trilogy principles—Indian canons of construction (May 2016 update), ("The practical effect of the canons is to resolve ambiguities or "doubtful expressions" in the affected Indians' favor."); *see also* Phillip P. Frickey, *Marshalling Past and Present Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) (Justice Marshall's creation of the Indian canons protected tribal sovereignty).

### *B. The Substantial Likelihood Standard*

To define the "substantial likelihood" standard, a federal court could look to several areas of law. Similar language is found in the civil context of preliminary injunctions, which require "substantial likelihood of success on the merits."[266] This gives no guidance or controlling language to the ICRA habeas proceedings. A plain language reading of §1304(e) may also lead the courts to the United States Code Title 18's release pending sentencing provision. Although not mentioned in the legislative history, the language and structure of Section 1304(e)(2)(A-B) tracks closely the language of 18 U.S.C. §3143 "[r]elease or detention of a defendant pending sentence or appeal." That provision requires that "a person who has been found guilty of an offense" be detained prior to sentencing or upon appeal unless "there is a substantial likelihood that a motion for acquittal or new trial will be granted."[267] In addition, the "judicial officer [must] find[] by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community."[268]

Congress's conception of ICRA habeas relief in terms of a pre-sentencing or post-conviction release of federal defendants is both problematic and emblematic of the long history of efforts to federalize tribal laws. [269] However, by using language from statutory provisions controlling post-conviction release for federal defendants at the trial and direct appeal levels, Congress gives no guidance to tribes and SDVCJ defendants seeking habeas review. Because SDVCJ is inherent in tribal nations, judicial analysis of the 18 U.S.C. §3143 post-conviction release language is only relevant by analogy to ICRA habeas relief where the federal government does not have jurisdiction over the defendant.

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[266] Fed. R. Civ. P. 65.
[267] 18 U.S.C. § 3143(a)(2)(A)(i) (2011).
[268] *Id.* at § 3143(a)(2)(B).
[269] *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY (1994) (The BIA originally pushed for the Major Crimes Act in the wake of *Ex part Crow Dog*, 109 U.S. 556 (1883) (commanding the release of Crow Dog – who was found guilty of murdering Spotted Tail in federal court – because the federal courts had no jurisdiction over Indian crimes in Indian country, to gain more authority to carry out its goal of forcibly assimilating Indian tribes).

Courts could also resolve the "substantial likelihood" standard by looking empirically at the circumstances where federal courts granted federal habeas corpus relief previously to §1303 petitioners. As the Garrow survey found, only four out of thirty §1303 petitions resulted in habeas relief after exhaustion of tribal remedies.[270] However, as the survey notes, *Spears v. Red Lake Band of Chippewa Indians*[271] has since been discredited.[272] Moreover, new case law has affirmed that tribal courts have jurisdiction over an elected official who sexually assaults a tribal employee at the off-reservation tribal headquarters.[273] Thus, basing the likelihood on past ICRA habeas cases does not necessarily incorporate the new expanses of tribal court jurisdiction.

In only one of the cases Professor Garrow surveyed was there a true due process violation. In *Wounded Knee v. Andera*, the federal habeas court granted relief for a defendant convicted at a "considerably less than desirable" trial where the tribal judge's "dual role" as judge and prosecutor "necessarily violate[d] due process."[274] Though the tribe was "financially unable to hire a prosecutor…financial obstacles" do not permit the tribe "to deny persons liberties and rights secured by…ICRA."[275] Despite this basic violation of the fundamental impartiality of the judge, the federal court still required exhaustion of tribal process.

In two of the cases, the tribal court misapplied fundamental criminal procedure concepts. *Johnson v. Tracy* concerned a basic misapplication of federal statutory law to a post-TLOA prosecution of a crime occurring before TLOA's passage.[276] The Arizona District Court found that TLOA's passage did not create

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[270] Garrow, *supra* note 203, at 153-55; Additionally, both *Oliphant, Duro* and the Duro-related cases should be discounted as they were based on jurisdictional issues.

[271] Spears v. Red Lake Band of Chippewa Indians, 363 F.Supp.2d 1176, 1176 (D. Minn., 2005).

[272] Miranda v. Anchondo, 684 F.3d 844, 848 (9th Cir., 2011) ("The statutory language 'any one offense' [in § 1302(7)] has a plain meaning, and that the district court erred in relying on the statute's legislative history to manufacture ambiguity in this otherwise clear language. As it is undisputed that Petitioner committed multiple criminal violations, the district court erred in concluding that her 910–day sentence violated § 1302(7)").

[273] Kelsey v. Pope, 809 F.3d 849 (6th Cir. 2016).

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

[275] *Id.* at 1240-41.

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

retroactivity or *ex post facto* concerns because "as a general matter, 'a court is to apply the law in effect at the time it renders its decision.'" [277] Because the tribe convicted petitioner after the passage of the TLOA on July 29, 2010, he "should have been accorded the procedural protections of 25 U.S.C. § 1302(c) that were then in effect as a result of the TLOA amendments." [278] However, while the court vacated the verdict and unlawful sentence, it emphasized that petitioner's "new trial may again result in petitioner's sentence for consecutive one-year sentences as was permitted before the TLOA."[279]

Although the Constitution does not apply to tribal governments, the Garrow survey shows that only *Wounded Knee* involved a true civil rights violation warranting the grant of a writ of habeas corpus. In six other instances "petitioners raised various challenges: equal protection and due process, that the trial judge was improperly in office, the failure to prove Indian status, right to counsel, the right to confrontation, right to compulsory process, and right to a jury trial," and all were denied habeas relief in federal court.[280] The Garrow survey shows that when correcting for changes in the law and jurisdictional issues, the federal courts rarely overturn tribal criminal convictions.

## IV. CONCLUSION

Tribes are just beginning to convict defendants under VAWA and TLOA in Indian country. The VAWA pilot program has been very successful, with tribal SDVCJ charges resulting in eleven being dismissed for jurisdictional or investigative reasons, ten guilty pleas, five referrals for federal prosecution, and one acquittal by a jury.[281] The participating tribes exercising SDVCJ after the pilot program have had similar results. [282] So far, no ICRA

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[277] *Id.* at *7 (citing Bradley v. School Bd. of City of Richmond, 416 U.S. 696, 711 (1974)).
[278] *Id.* at *5.
[279] *Id.*
[280] Garrow, *supra* note 203, at 157.
[281] *Special Domestic Violence Criminal Jurisdiction Pilot Project Report,* NATIONAL CONGRESS OF AMERICAN INDIANS (NCAI), (Oct. 29, 2015), http://www.ncai.org/attachments/NewsArticle_VutTUSYSfGPRpZQRYzWcuLekuVNeeTAOBBwGyvkWYwPRUJOioqI_SDVCJ%20Pilot%20Project%20Report_6-7-16_Final.pdf.
[282] *Id.*

defendants have sought collateral review of SDVCJ convictions in federal court.[283] However, as tribal participation grows and more charges are brought against non-Indians, and tribal courts implement enhanced TLOA sentencing, more habeas challenges will be brought before the federal courts.

The discussion for tribes is already shifting to concerns over §1303 habeas relief,[284] which will affect not only SDVCJ but any further sentencing or legislative *Oliphant* exceptions in the future. Congress and individual tribes have invested great amounts of resources into these Indian country safety efforts. Federal courts should weigh §1303 petitions with that consideration in mind as they resolve the many issues left unresolved by the court's habeas jurisprudence.

Congress has breathed new life into tribal sovereignty and self-determination in the criminal context through its first partial *Oliphant*-fix. However, tribes must bear in mind that ICRA's habeas relief gives federal courts access to their legislative and cultural purview in ways they have not experienced since *Santa Clara*. Tribes must be ready and able to defend their convictions on federal collateral review, while also maintaining the cultural integrity of their tribal courts. Otherwise, VAWA's SDVCJ will eventually create the system that Senator Sam Ervin originally conceived of, where ICRA would provide a vehicle for further assimilation of tribes.[285]

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[283] *Donald Trump's Justice choice leaves door open to fight tribal jurisdiction*, INDIANZ.COM (January 11, 2017), http://www.indianz.com/News/2017/01/11/trumps-justice-choice-leaves-door-open-t.asp.

[284] *Legislative Hearing on S. 2785, A Bill to Protect Native Children and Promote Public Safety in Indian Country; S. 2916 A Bill to Provide that the Pueblo of Santa Clara May Lease for 99 Years Certain Restricted Land and for Other Purposes; and S. 2920, The Tribal Law and Order Reauthorization Act of 2016 Before the S. Comm. on Indian Affairs*, 114th Cong. (2016) (Written Testimony of Alfred L. Urbina, Attorney General of Pascua Yaqui); *see also ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1709 (2016).

[285] Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty after the Indian Civil Rights Act of 1968*, 1 J.L. & POL'Y 1, 6 (1993).