NATIVE AMERICAN LAW AND THE CRIMINAL JUSTICE SYSTEM

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Native Americans and the Criminal Justice System

1. **TRIBAL COURT CONVICTIONS AND THE FEDERAL SENTENCING GUIDELINES: RESPECT FOR TRIBAL COURTS AND TRIBAL PEOPLE IN FEDERAL SENTENCING** 46 University of San Francisco Law Review 37 (Summer 2011) *Excerpt.*

2. **THE RIGHT TO COUNSEL FOR INDIANS ACCUSED OF CRIME: A TRIBAL AND CONGRESSIONAL** IMPERATIVE 18 Michigan Journal of Race and Law 317 (Spring 2013*) Excerpt*

3. **Indian Civil Rights Act as Amended by Tribal Law and Order Act and Violence Against Women Act 2013**

4. **United States v. Bryant,** 136 Sup. Ct. 1954 (2016) *Synopsis*

EXCERPT

Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing

By BARBARA CREEL*

Introduction

THIS ARTICLE CRITIQUES A PROPOSAL to include tribal court criminal convictions and sentences in the federal sentencing scheme. The proposal, as articulated by Kevin Washburn, calls for an amendment to the Federal Sentencing Guidelines[1] to count tribal court convictions in calculating an Indian defendant's criminal history score to determine a federal prison sentence.[2] Currently, tribal court convictions are not directly counted in criminal history, but may be used to support an "upward departure" to increase the Native defendant's overall federal sentence.[3]

Washburn's proposal seeks to gain "respect" for tribal courts, based upon a premise that tribal convictions must be afforded the same weight and treatment as federal and state criminal convictions under the Federal Sentencing Guidelines.[4] This Article explores the idea of respect for tribal courts and convictions in the context of their history and connection to tribal peoples and communities. Ultimately, this Article concludes that respectful treatment would not tolerate placing a tribal defendant in such a powerless position within the federal sentencing hierarchy.

A proposal that would negatively impact only Native American defendants in a foreign justice system in the name of respect warrants critical review. As an Assistant Federal Public Defender, I had the opportunity to view the application of federal criminal laws from the front and the back end of the criminal justice system, from trial to post-conviction. As a Native woman, I have seen the impact of crime, justice, and federal sentencing on tribal people, families, and whole communities.

It is from this perspective that I focus the lens of respect on the work of tribal courts and criminal justice in

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1. U.S. SENTENCING GUIDELINES MANUAL (2009) [hereinafter USSG]. Promulgated in 1987, with the express goals of uniformity in sentencing, and just punishment, the USSG were passed as part of the Sentencing Reform Act of 1984 and replaced judicial discretion in federal sentencing with a set of guidelines, outlining the six-month sentencing range for the defendant based upon his criminal history and the seriousness of the offense. The Guidelines are advisory only after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *See infra* Part II.

2. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 426 (2004) [hereinafter Washburn, *Tribal Courts*]; Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263, 288–89 (2004) [hereinafter Washburn, *Different Kind*]; Kevin K. Washburn, *Reconsidering the Commission's Treatment*, 17 FED. SENT'G REP. 209, 213 (2005) [hereinafter Washburn, *Reconsidering the Commission's Treatment*]; Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 840 (2006) [hereinafter Washburn, *Criminal Law and Tribal Self-Determination*].

3. USSG § 4A1.2(i) ("Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category)."). This means that if a sentencing judge considers an Indian defendant's criminal history score to be inadequate to reflect the seriousness of his past criminal history, the judge may use tribal court records to increase the defendant's sentence above and beyond the applicable federal sentencing range. *See* United States v. Drapeau, 110 F.3d 618, 620 (8th Cir. 1997) (concluding that the district court appropriately applied an upward departure to reflect the defendant's tribal offenses); United States v. Cavanaugh, 68 F. Supp. 2d 1062, 1074 (D.N.D. 2009) ("Today, the Sentencing Guidelines allow for consideration of tribal court convictions when determining the adequacy of criminal history and courts have the discretion to consider uncounseled tribal convictions when sentencing a defendant in federal court."). Washburn puts it this way, "Under the guidelines as enacted, tribal and foreign court sentences are not routinely counted in criminal history computations, but constitute a "favored" basis for upward departure." Washburn, *Tribal Courts*, *supra* note 2, at 416.

4. Washburn, *Tribal Courts*, *supra* note 2, at 405, 418, 444, 450 ("The Commission should change its tribal courts policy and recognize that the sentences of tribal courts are entitled to the same respect as state courts sentences in the federal sentencing regime."); Washburn, *Different Kind*, *supra* note 2, at 288–89; Washburn, *Reconsidering the Commission's Treatment*, *supra* note 2, at 213; Washburn, *Criminal Law and Tribal Self-Determination*, *supra* note 2, at 780.

Indian Country,[5] and ultimately oppose any amendment in federal sentencing to count tribal court convictions to increase federal sentences for Native criminal defendants. A review of the historical diminishment of tribal authority over crime and punishment on the reservation, as well as the disparate impact of crime and punishment on Native peoples, leads to a rejection of counting tribal court convictions in federal sentencing. This Article proposes an alternative view that both respects Native American individuals caught in the criminal justice system and elevates tribal sovereignty.

5. The term "Indian Country" is a term of art, defined in 18 U.S.C. § 1151 (2006), for the purposes of criminal jurisdiction and interpreted in case law to apply in civil cases. *See* United States v. John, 437 U.S. 634, 648–49 (1978) (federal trust land was Indian Country); Alaska v. Native Village of Venetie, 422 U.S. 520, 527 (1998); United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999) (stating that an assault occurring in a tribal building held in trust for Indian tribe was defined as Indian Country for the purposes of federal prosecution even though not formally declared a reservation).

The proper recognition and respect owed to tribal court decisions in the criminal context cannot be understood without a review of historical underpinnings and a brief history of crime and jurisdiction to punish. In addition, a review of the federal framework for sentencing Native Americans in federal court is necessary to understand the negative disparate impact. This history and the concomitant disparity refute the argument that respect for tribes comes from recognizing tribal court sentences. Each is thoroughly discussed below.

A. A Brief History of Criminal Law in Indian Country

Criminal jurisdiction in Indian Country has been aptly called a complex "jurisdictional maze."[6] Dual federal and tribal sovereignty to prosecute Indians within Indian Country requires Indian law practitioners to refer to a familiar, but nevertheless complex and confusing, chart or matrix to sort out: (1) which sovereign may prosecute in a particular case given the identity variables of the site, the perpetrator, and the victim; (2) whether that prosecutorial power is partial or complete; (3) whether the prosecutorial power is exclusive or concurrent; and (4) whether that power is inherent or conferred by the other sovereign.[7]

Tribal power to govern the people within the territory predates the U.S. Constitution.[8] Prior to the United States' assertion of jurisdiction over Indians, tribal power to govern within its recognized boundaries was established.[9] Although there could be physical struggles related to the power externally, the terms were determined within and among the tribes.[10] Tribes followed indigenous ways of knowing, including their own legal traditions and "systems" reflecting tribal values and norms.[11] In his book, *Crow Dog's Case*, Sidney L. Harring describes the federal treatment of indigenous legal tradition:

> The Indian tribes had their own laws, evolved through generations of living together, to solve the ordinary problems of social conflict. This legal tradition is very rich, reflecting the great diversity of Indian peoples in North America. Yet this law was seldom analyzed in U.S. [federal] Indian law, even when it was recognized. When it was discussed, as in Crow Dog, i[t] was often treated contemptuously, dismissed there as "a case of Red man's revenge," a racist and false description of Sioux law.[12]

Although acknowledged explicitly in treaties and implicitly in concepts of tribal self-governance, self-

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6. *See* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) (credited with coining the term in his "second in a series of three articles surveying the jurisdictional maze surrounding the problems of law enforcement on Indian lands" to describe the rules of tribal criminal jurisdiction developed piecemeal over a span of 200 years); *see also* Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975). The promised and much-anticipated third article suggesting reform in this area has not yet emerged.

7. Such a chart is reprinted in WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 199–200 (5th ed. 2009). *See also* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, TITLE 9: CRIMINAL RESOURCE MANUAL § 689, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm; Timothy J. Droske, *Correcting Native American Sentencing Disparity Post*-Booker, 91 MARQ. L. REV. 723, 737–39 (2008).

8. Talton v. Mayes, 163 U.S. 376, 383 (1896) ("It cannot be doubted . . . that prior to the formation of the Constitution treaties were made with the Cherokee tribes by which their autonomous existence was recognized.").

9. Tribal law and power constitutes the internal law of a tribe as distinguished from federal Indian law, which consists of treaties, statutes, and common law governing the federal government's relationship with tribes and the states. *See* Treaty of Hopewell with the Choctaw Nation art. IV, Jan. 3, 1786, 7 Stat. 21; *see also* Treaty of Hopewell with the Chickasaw Nation art. IV-V, Jan. 10, 1786, 7 Stat. 24; Treaty on the Great Miami with the Shawnee art. VII, Jan. 31, 1786, 7 Stat. 26; Treaty of Fort Harmar with the Wyandot Nation and Other Tribes art. IX, Jan. 9, 1789, 7 Stat. 28; Treaty of New York with the Creek Nation art. VI, Aug. 7, 1790, 7 Stat. 35; Treaty of Holston with the Cherokee Nation art. VIII, July 2, 1791, 7 Stat. 39; Treaty of Greenville with the Wyandots and Other Tribes art. VII, Aug. 3, 1795, 7 Stat. 49 .

10. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 10 (1994) (citing works of traditional law of Indian people).

11. For explications on tradition law in legal scholarship, see Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2008) (Hopi customary law); Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law*, TRIBAL L.J. (2000) [hereinafter Zuni Cruz, *Customs and Traditions*], *available at* http://tlj.unm.edu/tribal-law-journal/articles/volume_1/zuni_cruz/content.php (exploring adoption of tribal law that reflects indigenous traditional law and values); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997) (describing traditional Seneca dispute resolution and other traditional Native dispute resolution mechanisms); Yazzie, *supra* note 7 ("Navajo justice is unique, because it is the product of experience of Navajo people."); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995); Philmer Bluehouse & James W. Zion, *The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993).

12. HARRING, *supra* note 117, at 10 (citing works of traditional law of Indian people).

determination, and sovereignty, tribal legal tradition was not incorporated into the federal laws governing relations with Indian tribes.[13]

1. Beyond the Marshall Trilogy: The Courts and Congress on Crime in Indian Country

In any overview of Indian law, federal Indian law scholars typically skip indigenous legal tradition or internal tribal "law" and begin with the Marshall Trilogy[14]—three cases decided by the Supreme Court in the early years of the 19th century. These cases provide an introduction to the federal view of criminal jurisdiction in Indian Country, and without exception, they are touted as the foundational precedent in a chain of case law describing and developing federal power over Indian tribes.

Before the Supreme Court decided those cases in the 1830s, the delegation of authority to prosecute criminal offenses in certain territories was governed by treaty,[15] or trade and intercourse acts designed to allow for lawful trade with tribal nations.[16] The General Crimes Act,[17] enacted in 1817, provided for federal court jurisdiction over interracial crimes committed in Indian Country, but protected the tribe's' exclusive jurisdiction over Indian offenses in Indian Country "under the local law of the tribes" or by treaty stipulation.[18] Over time, Congress and the Supreme Court's concerted efforts limited inherent tribal sovereignty in legitimate tribal internal criminal matters on the reservation.[19] The pressure to assimilate and the pressure to produce traditional justice systems that reflected external federal and state court norms is apparent in the history of crime and punishment, and that legacy is evident today.

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13. *See, e.g.*, *id.* at 292 ("[T]his rich legal tradition does not exist because it was recognized by the courts, . . . but rather because the tribes never ceased to act as sovereign peoples and never gave up their 'old law'").

14. The Marshall Trilogy refers to "the three famous opinions of Chief Justice John Marshall that expounded for the first time in the halls of the United States Supreme Court the bases for federal Indian common law." Matthew L. M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 627 (2006). The cases are: *Johnson v. M'Intosh*, 21 US (8 Wheat) 543 (1823) (introducing the Doctrine of Discovery into federal Indian law, and finding that Indians retained rights in the lands they occupied, but limiting those rights by prohibiting alienation of such land to non-Indians); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (finding Indian tribes not a "foreign state" as that term is defined by Article III, section 2, paragraph 1 of the Constitution for jurisdictional purposes, and instead characterizing tribes as "domestic, dependent nations," and comparing the tribes' relationships to the United States as that of a "ward to his guardian"); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557, 561 (1832) (describing the "Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive," and within those boundaries, the laws of the state can have no force). Fletcher credits Charles Wilkinson with first describing these seminal cases as a trilogy in CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW, NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 24 (1987); *see* Fletcher, *supra*, at 627 n.2.

15. Treaties between the United States and the tribal nations were nation-to-nation documents and some included recognition of tribal power within the confines of the reservation to govern the community through tribal values, norms, and forms of justice. This recognition was based on the tribes themselves living, working, and warring and resolving issues within the tribe, and with other tribes. The treaty era of federal Indian policy formally ended in 1871. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2006)).

16. The Indian Trade and Intercourse Act of 1790 was one of the first Acts of Congress. Ch. 33, 1 Stat. 137 (1790). Replaced and amended over time, it is now codified at 25 U.S.C. § 177.

17. 18 U.S.C. § 1152. The General Crimes Act is also referred to as the "Indian Country Crimes Act." *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.02[1] (Nell Jessup Newton et al. eds., 2005).

18. The General Crimes Act provides:

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

19 U.S.C. § 1152.

19. *See, e.g.*, *id.* § 1153 (congressional diminishment of tribal criminal jurisdiction by removing jurisdiction over serious crimes to federal court.); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Tit. II–VII, §§ 201–701, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301–1341) (imposing a version of the Bill of Rights on Tribal governments); Oliphant v. Suquamish, 435 U.S. 191 (1978) (divesting tribes of tribal court jurisdiction over non-Indians in criminal cases); Nevada v. Hicks, 533 U.S. 353 (2001) (diminishing tribal court jurisdiction over non-members in civil tort actions); *see also* Angela Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 827 (2007) ("Although the treaty relationship, the federal Constitution, Supreme Court precedent, and congressional action have worked together to repeatedly reaffirm the inherent sovereignty of Indian nations, in many important respects, they have also limited it.").

2. *Ex parte Kan-gi-shun-ka* and the Major Crimes Act

The much-examined case of *Ex parte Crow Dog* (otherwise known as *Ex parte Kan-gi-shun-ka*)[20] illustrates a tribal restorative justice remedy in the criminal context. During the 1880s and the period preceding the Crow Dog prosecution, the murder of an Indian by an Indian in the Dakota Territory of Indian Country was treated exclusively under tribal traditional law.[21] *Ex parte Kan-gi-shun-ka*, decided in 1881, involved a murder on the Great Sioux Reservation in Dakota Territory in which Kan-gi-shun-ka, or Crow Dog in English, a Brule Sioux Indian, shot and killed Sin-ta-ga-le-Skca, or Spotted Tail in English, a Brule Sioux chief.[22] Crow Dog was brought to justice under Sioux tradition. Under the Brule tradition, the tribal council met to resolve the murder, order an end to the disturbance, and arrange a peaceful reconciliation of the families involved through offered or ordered gifts.[23] For the murder, Crow Dog's family was ordered to compensate Spotted Tail's family by offering $600, eight horses, and one blanket under tribal traditional "law."[24]

After the Brule settled the matter under local tribal authority, Crow Dog was arrested two days after the murder to be tried in the federal territorial court.[25] The United States then convicted Crow Dog of murder under federal law and condemned him to death, the applicable federal punishment in the territories for murder.[26] In an 1883 decision, the Supreme Court issued the writ of habeas corpus, reversed the Dakota Territorial court's conviction, and ordered Crow Dog's release from prison, finding that the federal district court did not have jurisdiction over the crime.[27] The U.S. federal courts had no jurisdiction to prosecute because the crime occurred within the exclusive jurisdiction of the Sioux Tribe, based on the existing federal statutes and the Treaty of 1868 between the United States and the Sioux.[28] Under these laws, Indians were not subject to federal prosecution for Indian against Indian offenses and could only be punished by the law of their tribe.[29]

The use of tradition and custom in handling such a case was seen as "primitive" by those outside the local law of the tribes.[30] The Supreme Court decision removed Crow Dog from the federal death penalty and was perceived as an acquittal for the murder of Spotted Tail, a Brule Sioux chief (and federal agent).[31] Federal outrage prompted a swift congressional response. In 1885, Congress passed the Major Crimes Act, mandating prosecution in federal court of enumerated "major" crimes committed by Indians within Indian Country.[32] Tribes retained concurrent jurisdiction, but tribal powers to impose sentences were limited under the Indian Civil Rights Act.[33]

Ex parte Kan-gi-shun-ka represented an important recognition by the Supreme Court of the existence and the efficacy of traditional tribal justice to address a serious offense. The Court, however, was less interested in upholding traditional justice than it was in providing a strict interpretation of the jurisdictional lines, and signaling to Congress that a legislative enactment was necessary to complete the subjugation of tribal Indians via federal punishment.[34] Congress received the message and quickly enacted the Major Crimes Act within the next

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20. 109 U.S. 556 (1883).

21. HARRING, *supra* note 117, at 1.

22. *Id.*

23. *Id.* at 104–05 (The process utilized in the case was "one of a number of conflict resolution mechanisms available to the Sioux," and "used only after the most serious of tribal disturbances.").

24. *Id.* at 1.

25. *Id.* at 110.

26. *Ex parte* Crow Dog (*Ex parte Kan-gi-shun-ka*), 109 U.S. 556, 558 (1883).

27. *Id.* at 572.

28. *Id.*

29. *Id.*

30. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 11 (1983).

31. *See* HARRING, supra note 117, at 1.5, 132.

32. Major Crimes Act, 18 U.S.C. § 1153 (2006). Currently, tribes retain concurrent jurisdiction, but tribal process and sentencing authority are limited under the Indian Civil Rights Act.

33. Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303 (2006).

34. *Ex parte Kan-gi-shun-ka*, 109 U.S. at 558–67, 572 ("To give to the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. To justify such a

two years. A later Supreme Court decision described the hasty nature of the Major Crimes Act and its obvious purpose:

> This is the last section of the Indian appropriation bill for that year, and is very clearly a continuation of the policy upon which Congress entered several years previously, of attempting, so far as possible and consistent with justice and existing obligations, to reduce the Indians to individual subjection to the laws of the country and dispense with their tribal relations.[35]

The murder of the Indian federal agent Spotted Tail by Crow Dog perpetuated an idea of lawlessness on the reservation that pervades criminal law in Indian Country to this day.[36] The undeniable premise of the reactive Major Crimes Act legislation was that a serious crime had to be dealt with in a serious federal court in order to mete out a legitimate punishment.[37]

The assumption that Crow Dog was not sufficiently punished in accordance with tribal understandings of justice, however, is flawed. The death of one Brule Sioux at the hands of another would have been significant—the loss of life given to the whole would have been something akin to a spiritual matter, not taken lightly. The direct and collateral effects of the loss of leadership, companionship, support, community—even the sheer loss of numbers, even if only one—would have been felt by some, if not all. The statuses of the victim and perpetrator, in addition to the political implications and the threat to the balance of federal and tribal authority, played an important role in the internal struggle, as it did in the Congressional response.

The fact that families settled the matter internally with money, horses, food, and tangible goods as reparations for the physical and intangible loss may have been seen by outsiders as denigrating the major importance of a human life. Perhaps Congress, as an outsider from the Indian justice perspective, misinterpreted the offer and acceptance of material goods as repayment for the loss of life. The offer of goods under local tradition and reconciliation would have been essential to survival in the plains, though, from the lens of an outsider looking to punish the untimely death of a federal agent, the traditional reparations could have been seen as a token amount.

Congressional desire to punish the Indian was exceeded only by the need to extinguish a direct threat to federal authority. The fact that the victim was a federal agent threatened federal power and authority in Indian Country. It is not an overstatement to say that the congressional reaction to Crow Dog was fueled by the federal government's desire to bring Indians into the federal arena to make sure that Indians were punishable by the death penalty. From the tribal point of view, the Major Crimes Act was not a "partnership" between the Sioux, tribal family, and the federal government. Rather, the Major Crimes Act constituted a sea change for tribal federal relations: a stripping away of tradition, and a shift in power from that of tribal community to self-govern under "local law of the tribe" to the federal government. This was a direct displacement of tribal right to govern crime and punishment and a denouncement of tribal traditional justice.

3. Courts of Indian Offenses and Public Law 280

Courts of Indian Offenses, created and administered by the Bureau of Indian Affairs, imposed a western-style court to administer justice where the non-Indian outsiders believed none existed.[38] After the *Ex parte Kan-gi-shun-ka* decision and the enactment of the Major Crimes Act, the Bureau of Indian Affairs continued in this vein to assimilate tribes and direct them away from their native practices.

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departure, in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find. It results that the First District Court of Dakota was without jurisdiction to find or try the indictment against the prisoner, that the conviction and sentence are void, and that his imprisonment is illegal.").

35. *Ex parte* Gon-shay-ee, 130 U.S. 343, 350 (1889).

36. The Major Crimes Act in effect today continues to give effect to this idea of lawlessness, by uniquely subjecting Native American adults and children to far graver consequences than others sentenced under state court systems.

37. Otherwise, the tribal restorative punishment imposed would have served as a model for federal justice, instead of the imposition of federal court jurisdiction.

38. *See* Valencia-Weber, *Innovative Law*, *supra* note 7, at 232–37 (providing an overview of Courts of Indian Offenses, also known as BIA courts or CFR courts).

In 1892, Congress outlawed the practice of Indian traditional ceremony[39] and imposed tribal administrative court systems to punish the newly outlawed civil "crimes" of being a practicing Indian, among other things.[40] These administrative courts introduced and imposed western justice and civil laws to address and control unwanted behaviors by Indians within their own lands.[41] In this way, the federal government criminalized facets of Indian life. Tribal sovereign "law" and mechanisms of dispute resolution withered and died in some communities. Courts of Indian Offenses continue to operate today as the sole justice system on some reservations.[42]

Later, during the Termination era of the 1950s, Congress enacted Public Law 280,[43] which "withdrew federal criminal jurisdiction on reservations in six designated states . . . and authorized those same states to assume criminal jurisdiction and to hear civil cases against Indians arising in Indian country."[44] The statute transferred jurisdiction over criminal matters from the federal government to certain states.[45] Historically, from the Commerce Clause and treaty provisions, the power to deal with Indian affairs rested with Congress, and states had no power over the affairs of Indians. Public Law 280 took civil and criminal jurisdiction from the tribes and from the auspices of federal control and authority.

4. Indian Civil Rights and the *Oliphant* Decision

During the era of civil rights legislation, Congress set out to investigate the civil rights of Native Americans, on and off reservation lands.[46] In 1961, Senator Sam Ervin of North Carolina initiated a series of hearings and field investigations in response to an independent report[47] and a Department of Interior report[48] examining civil rights problems of individual Indians and the question of how Indian tribal governments relate to the federal Constitution and its protections.[49] Senator Ervin sought to investigate and address the civil rights gap existing for tribal people due to the inapplicability of the Bill of Rights to tribal governments.[50] The investigation reflected the widespread concern that "the preservation of tribal rights and customs has seemed in some areas to come in conflict with the constitutional rights of individual Indians as American citizens."[51] At issue was the fact that "Indian tribes are not subject to Federal constitutional limitations in the Bill of Rights."[52]

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39. *See, e.g.*, Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (10th Cir. 1999) ("By the late 19th Century federal attempts to replace traditional Indian religions with Christianity grew violent. In 1890 for example, the United States Calvary shot and killed 300 unarmed Sioux men, women and children en route to an Indian religious ceremony called the Ghost Dance . . . . In 1892, Congress outlawed the practice of traditional Indian religious rituals on reservation land. Engaging in the Sun Dance . . . was punishable by withholding 10 days' rations or 10 days' imprisonment.").

40. *Id.*; *see also* United States v. Clapox, 35 F. 575, 576 (D. Or. 1888) (involving an underlying prosecution for adultery and referred to statutes prescribing "the punishment for certain acts called therein 'Indian offenses,' such as the 'sun,' the 'scalp,' and the 'war-dance,' polygamy, 'the usual practices of so-called "medicine men,"' the destruction or theft of Indian property, and buying or selling Indian women for the purpose of cohabitation").

41. *See Clapox*, 35 F. at 576–78 (Clapox involved an underlying prosecution of a tribal member for adultery, even though adultery was not a crime under the federal regulations or tribal rules or law. Instead, adultery was a moral transgression based upon imposed values, which was prosecuted as a crime in the Umatilla Court of Indian Offenses).

42. *See* 25 C.F.R. § 11.100 (2010).

43. 18 U.S.C. § 1163 (2006). For an in depth discussion on Public Law 280 and its impacts, see generally Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997).

44. Goldberg-Ambrose, *supra* note 150, at 1406.

45. 18 U.S.C. § 1163.

46. *The Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. pt. 1, 1–2 [hereinafter *1961 Hearings*—Part 1].

47. COMM'N ON THE RIGHTS, LIBERTIES & RESPONSIBILITIES OF THE AM. INDIAN, A PROGRAM FOR INDIAN CITIZENS (1961).

48. TASK FORCE ON INDIAN AFFAIRS, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1961), *as reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY (Francis Paul Prucha ed., 1975).

49. *1961 Hearings*—Part 1, *supra* note 153.

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

51. *1961 Hearings*—Part 1, *supra* note 153, at 5 (remarks of Sen. Kenneth Keating).

52. *1961 Hearings*—Part 1, *supra* note 153, at 8 (remarks of Sen. Frank Church). The United States Constitution does not apply to Tribal governments. Talton v. Mayes, 163 U.S. 376 (1896).

The resulting legislation, the Indian Civil Rights Act ("ICRA"),[53] applied a modified version of the Bill of Rights to tribal governments, imposed a limitation on the sentencing authority of tribes, and explicitly allowed federal habeas review for tribal court orders.[54] The final version of the ICRA reflected a compromise between the original intention to bring tribes fully under the umbrella of the federal Constitution and the recognition of tribal sovereignty.[55]

The ICRA has been interpreted as a deliberate intrusion on tribal sovereignty but with a decidedly limited right of federal court review.[56] With the exception of habeas corpus, the ICRA did not authorize suits against tribes or tribal officials without congressional consent.[57] In *Santa Clara v. Martinez*, the Supreme Court held that, as a matter of statutory construction, the ICRA did not abrogate the sovereign immunity of the tribe to allow an individual to sue the tribe in federal court for an alleged civil rights violation.[58] The ICRA has been both criticized as an imposition of foreign notions of rights and justice on Indian tribes[59] and hailed as a recognition of the tribe's ability to protect its own citizenry.[60]

Subsequently, the Supreme Court unambiguously eroded tribal jurisdiction with its decision in *Oliphant*. In 1978, the Court held that tribes had no jurisdiction to prosecute non-Indians in criminal matters, despite the fact that the crimes occurred on tribal lands.[61] The Court reasoned that although Indian tribes retained certain "quasi-sovereign" authority, tribes were prohibited from exercising sovereign powers "inconsistent with their status" as domestic-dependent nations.[62] A decade later, in *Duro v. Reina*,[63] the Court further eroded tribal sovereign powers in criminal matters. In *Duro*, the Supreme Court held that Indian courts had no jurisdiction over non-member Indians who committed an offense within the reservation boundaries.[64] The *Duro* decision added to the complex jurisdictional quagmire and created a jurisdictional gap for certain crimes. Six months after the Court's decision in *Duro*, Congress amended the ICRA to recognize and affirm "the inherent power of Indian tribes" in order "to exercise criminal jurisdiction over *all* Indians."[65]

Other amendments to the ICRA limited tribal court jurisdiction to prosecute and punish even the tribe's own membership.[66] Tribal power to sentence was limited to imposition of sentences up to one year and a fine of $5000, or both.[67] Congress recently expanded the sphere of tribal power to sentence to a maximum of three

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53. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Tit. II–VII, §§ 201–701, 82 Stat. 77, 77–81 (codified in part as amended at 25 U.S.C. §§ 1301–1303 (2006)). Signed into law as Titles II through VII of the Civil Rights Act of 1968, the act provided sweeping change addressing aspects of the underlying extensive investigation. Title II, 25 U.S.C. §§ 1301–1303, included the "Indian Bill of Rights"; Title III, *id.* §§ 1311–1312, directed the Secretary of the Interior to publish a model code for Courts of Indian Offenses and to provide training for the judges of these courts; Title IV, *id.* §§ 1321–1326, provided that states may not assume civil or criminal jurisdiction over Indian Country without the prior consent of the tribe; Title V, 18 U.S.C. § 1153, made a minor amendment to federal criminal law applicable to Indian Country; Title VI, 25 U.S.C. § 1331, lessens Bureau of Indian Affairs ("BIA") control over tribal employment of legal counsel; Title VII, *id.* § 1341, authorized the Secretary of the Interior to revise and republish Felix Cohen's Handbook of Federal Indian Law, the landmark treatise on Federal Indian law.

54. *See* 25 U.S.C. § 1302(7) (originally limiting sentencing authority to six months and a fine of $500, later expanded to one year); *id.* § 1303 (the writ of habeas corpus for federal review of tribal court orders of detention); *infra* note 172.

55. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

56. See *id.* at 51 n.1 for an overview of the legislative history of the ICRA.

57. 25 U.S.C. § 1303.

58. *Santa Clara Pueblo*, 436 U.S. at 71–72.

59. Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495 (1994) (questioning whether there is an unspoken assumption that tribal jurisdiction is inherently violative of individual rights and whether that is justified or racist).

60. *Santa Clara Pueblo*, 436 U.S. at 71–72 (holding that federal courts have no jurisdiction over internal tribal matters).

61. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978) (finding Indian tribal courts lacked criminal jurisdiction over non-Indians, absent congressional authorization).

62. *Id.* at 212.

63. Duro v. Reina, 495 U.S. 676, 692 (1990).

64. *Id.* at 693–96.

65. *See* 25 U.S.C. § 1301(2) (2006) (emphasis added).

66. *Id.* § 1302(7).

67. *Id.* § 1302(7)–(8). Originally limiting tribal courts to sentences of six months or fines of $500, or both, the ICRA was amended to allow harsher penalties in 1986 by the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, Tit. IV, § 4217,

years, a fine of $15,000, or both, providing substantial conditions are met.[68] The erosion of tribal criminal authority and autonomy and the encroachment of federal and state power has led to outcomes that include an over-representation of Natives in the federal criminal justice system.[69] To understand the effects, a review of the federal sentencing scheme is necessary.

100 Stat. 3207-137, 3207-146 (codified at 25 U.S.C. § 1302 (2006)).

68. Tribal Law and Order Act of 2010, Pub. L. No. 111-211 § 234 (2010).

69. *See generally* LAWRENCE A. GREENFELD & STEPHEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME (1999).

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

Barbara L. Creel★

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

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

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

…[L]awyers in criminal courts are necessities, not luxuries.

– Justice Hugo Black[2]

Introduction

The full panoply of rights and due process protections afforded to criminal defendants in this country do not apply to Native American Indian defendants prosecuted in tribal court.[3] Indians routinely face

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

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

3. U.S. Const. amends. IV-VI, VIII and XIV. As explained below in Part II-III, inherent tribal sovereignty predates the Constitution and the existence of the United States itself. Thus, the Constitution and Bill of Rights do

criminal prosecution, incarceration, and receive prison terms—— sometimes lengthy—all without the benefit of defense counsel.[4]

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

Under ICRA, an Indian has the right to counsel in a criminal proceeding in tribal court, but only "at his own expense."[8] The reality is that most American Indians cannot afford or find competent retained counsel to appear in tribal court.[9] This fact is often met with surprise by non-Indian lawyers and the general public.[10]

Few federal Indian law scholars have recognized the important differences of federal power over crime and punishment of Indians. Instead, they have collapsed the analysis of purported federal plenary power of Indian affairs in civil and criminal matters, without regard to the individual Indian.[11] They have failed to adequately decipher criminal law and the distinct impact

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not apply to federally recognized tribes. *See* Talton v. Mayes, 163 U.S. 376, 383-84 (1896) (holding that the Fifth Amendment grand jury requirement did not apply to tribes, as the U.S. constitution had no application to Indian tribes).

4. See, e.g., Romero v. Goodrich, No. 11-2159, 2012 WL 1632498 (10th Cir. May 10, 2012) (challenging a tribal court order of imprisonment for eight years without counsel. See also Bustamante v. Valenzuela, 715 F. Supp. 2d 960 (D. Ariz. 2010) (upholding an eighteen month prison term based upon a guilty plea without counsel).

5. Santa Clara v. Martinez, 436 U.S. 49, 56 (1978) ("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."); Talton, 163 U.S. at 384.

6. The Indian Civil Rights Act, 25 U.S.C. §§ 1301- 1303 (2011).

7. The ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall. . ." abridge a number of enumerated rights aimed at protecting individuals facing criminal prosecution in tribal court. 25 U.S.C. § 1302 (2011).

8. Prior to the Tribal Law and Order Act amendments, the statute read: "No Indian tribe exercising powers of self-government shall - . . . (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense." 25 U.S.C. § 1302 (2009). As shown below this provision was enacted prior to Gideon and Argersinger.

9. *See infra* Part III.

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

11. Some Indian law scholars object to the discussion of Indian civil rights as misplaced and separate the positions into two groups: tribal rights and individual rights. See, e.g., Carole Goldberg, Individual Rights and Tribal Revitalization, 35 **Ariz. St. L. J.** 889, 937 (2003) (viewing "the injection of Anglo-American [individual] rights as a threat to tribal revitalization"); **Frank Pommersheim, Braid of Feathers: American Indian Law and Contemporary Tribal Life** 73 (1995) (noting that tribal leaders must balance respect for individual rights with the possibility of civil rights suits "grind[ing] tribal activity to a halt"). A number of Indian law scholars addressed civil rights issues after the passage of the Indian Civil Rights Act, including one article on the right to counsel. See Robert T. Coulter, Federal Law and Indian Tribal Law: The Right to Counsel and the 1968 Indian Bill of Rights, 3 **Colum. Surv. Hum. Rts. L.** 49 (1971). There is, however, little else written on the subject of the right to counsel. *See* Vincent Milani, The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control, 31 **Am. Crim. L. Rev.** 1279 (1994); Alex M. Hagen, From Formal Separation to Functional Equivalence: Tribal-Federal Dual Sovereignty and the Sixth Amendment Right to Counsel, 54 **S.D. L. Rev.** 129 (2009). Other scholars discuss tribal sovereignty and injustice, but decline to discuss individual Indians seeking redress of internal tribal injustice. See, e.g., Nell Jessup Newton, Federal Power Over Indians: It's Sources, Powers, and Scope Over Indians, 132 **U. Pa. L. Rev.**

that federal power has over the defenseless Indian.[12] Indian scholars and practitioners have also overlooked the fact that, whether absolute or qualified, a "right to counsel" arises from a foreign adversarial model based upon the retributive justice system.[13] The United States imposed this adversary system on tribes to displace tribal traditional justice based upon restorative principles.[14] The displacement occurred without concern for rights of the accused.[15]

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

195, 241-48 (1984) (claiming that tribal sovereignty should be treated as a protected right, and recognizing Indian personhood, in terms of due process and protected rights of the collective Indian group). Some scholars claim that tribal courts operate the same as state and federal courts. Some scholars defend the legitimacy of tribal courts without a discussion of criminal cases and incarceration without defense counsel. See, e.g., Nell Jessup Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 **Am. Indian L. Rev.** 285 (1998). Some scholars fear that discussing individual rights with outsiders allows opponents of tribal sovereignty attack tribal justice systems. See, e.g., Mathew Fletcher, Indian Courts and Fundamental Fairness, 84 **U. Colo. L. Rev.** 59 (2003) (citing to attacks on tribal ability to administer justice in the Violence Against Women Act Reauthorization hearings, S. Rep. No. 112-153, at 40-41, 51-55 (2012) (reporting minority views of Senators arguing against expansion of tribal court jurisdiction); H.R. Rep. No. 112-480, at 58-59 (2012) (reporting House majority views that tribal courts will not provide adequate due process to nonmembers).

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

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

[14] The displacement included the imposition of the CIO courts, and the Major crimes Act after Ex Parte Kan gi-shun-ka, 109 U.S. 556, as explained in Part II B, infra.

[15]. . The evolution of the right to counsel in American courts described in Part I did not include the Indian country as shown in Part II describing the historical underpinnings of the prohibition against counsel.

16. See infra Parts III and IV.

Indian Civil Rights Act as Amended by the Tribal Law and Order Act
July 29, 2010

The Tribal Law and Order Act of 2010 makes several amendments to the Indian Civil Rights Act of 1968 to enhance tribal sentencing authority. In order to assist tribes in understanding these important changes to federal law, NCAI provides the following demonstration of how the Tribal Law and Order Act amends the Indian Civil Rights Act. The amendments to ICRA marked in **bold**.

This document is intended only as a guide for tribal leaders on the passage of the Tribal Law and Order Act. It is not an official version of either the Indian Civil Rights Act or the Tribal Law and Order Act. Tribal leaders should consult federal legal sources once the Act has been codified to see where and how the provisions of the Tribal Law and Order Act are incorporated into existing federal law.

25 U.S.C. § 1301 - Definitions

For purposes of this subchapter, the term--

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

25 U.S.C. § 1302 – Constitutional Rights

(a) IN GENERAL.--No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense **(except as provided in subsection (b)**;

DELETED: ~~(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both~~;

INSERTED:

(7)

(A) require excessive bail, impose excessive fines, or inflect cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) OFFENSES SUBJECT TO GREATER THAN 1-YEAR IMPRISONMENT OR A FINE GREATER THAN $5,000.—A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1

offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) RIGHTS OF DEFENDANTS.—In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) SENTENCES.—In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correction center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian

tribes) not later than 180 days after the date of enactment of the Tribal Law and Order Act of 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) DEFINITION OF OFFENSE.—In this section, the term 'offense' means a violation of a criminal law.

(f) EFFECT OF SECTION.—Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

25 U.S.C. § 1303 – Habeas Corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

The Indian Civil Rights Act, as Amended by the Violence Against Women Reauthorization Act of 2013

The Violence Against Women Reauthorization Act of 2013 makes several amendments to the Indian Civil Rights Act of 1968 authorizing tribes to exercise special domestic-violence criminal jurisdiction. To assist tribes in understanding these important changes to federal law, NCAI provides the following demonstration of how the new law will amend the Indian Civil Rights Act.

This document is intended only as a guide for tribal leaders on the reauthorization of the Violence Against Women Act. It is not an official version of either the Indian Civil Rights Act or the Tribal Law and Order Act. You should consult federal legal sources once the Act has been codified to see where and how the provisions of the Violence Against Women Reauthorization Act of 2013 are incorporated.

Immediately below this paragraph is the section of VAWA which specifies the effective date that tribes will be eligible to exercise special domestic-violence criminal jurisdiction, which will be two years after the VAWA reauthorization's enactment. There will also be a pilot project that will allow tribes to ask the U.S. Attorney General to exercise this special jurisdiction on an accelerated basis.

SEC. 908. EFFECTIVE DATES; PILOT PROJECT.

(a) GENERAL EFFECTIVE DATE.—Except as provided in section 4 and subsection (b) of this section, the amendments made by this title shall take effect on the date of enactment of the Violence Against Women Reauthorization Act of 2013.

(b) EFFECTIVE DATE FOR SPECIAL DOMESTIC-VIOLENCE CRIMINAL JURISDICTION.—

(1) IN GENERAL.—Except as provided in paragraph (2), subsections (b) through (d) of section 1304 of title 25, United States Code, shall take effect on the date that is 2 years after the date of enactment of the Violence Against Women Reauthorization Act of 2013.

(2) PILOT PROJECT.—

(A) IN GENERAL.—At any time during the 2-year period beginning on the date of enactment of the Violence Against Women Reauthorization Act of 2013, an Indian tribe may ask the Attorney General to designate the tribe as a participating tribe under subsection (a) of section 1304 of title 25, United States Code, on an accelerated basis.

(B) PROCEDURE.—The Attorney General may grant a request under subparagraph (A) after coordinating with the Secretary of the Interior, consulting with affected Indian tribes, and concluding that the criminal justice system of the requesting tribe has

adequate safeguards in place to protect defendants' rights, consistent with section 1304 of title 25, United States Code.

(C) EFFECTIVE DATES FOR PILOT PROJECTS.—An Indian tribe designated as a participating tribe under this paragraph may commence exercising special domestic violence criminal jurisdiction pursuant to subsections (b) through (d) of section 1304 of title 25, United States Code, on a date established by the Attorney General, after consultation with that Indian tribe, but in no event later than the date that is 2 years after the date of enactment of the Violence Against Women Reauthorization Act of 2013.

The Indian Civil Rights Act, as Codified

Title 25, U.S.C.

§ 1301. Definitions

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

§ 1302. Constitutional rights

(a) In general — No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7) (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000 — A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants — In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences — In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense — In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section — Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

§ 1304. Tribal Jurisdiction Over Crimes of Domestic Violence

(a) Definitions — In this section:

(1) DATING VIOLENCE.—The term 'dating violence' means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(2) DOMESTIC VIOLENCE.—The term 'domestic violence' means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

(3) INDIAN COUNTRY.—The term 'Indian country' has the meaning given the term in section 1151 of title 18, United States Code.

(4) PARTICIPATING TRIBE.—The term 'participating tribe' means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.

(5) PROTECTION ORDER.—The term 'protection order'—

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(6) SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION.—The term 'special domestic violence criminal jurisdiction' means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(7) SPOUSE OR INTIMATE PARTNER.—The term 'spouse or intimate partner' has the meaning given the term in section 2266 of title 18, United States Code.

(b) Nature of the Criminal Jurisdiction —

(1) IN GENERAL.—Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

(2) CONCURRENT JURISDICTION.—The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) APPLICABILITY.—Nothing in this section—

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) EXCEPTIONS.—

(A) VICTIM AND DEFENDANT ARE BOTH NON-INDIANS.—

(i) IN GENERAL.—A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) DEFINITION OF VICTIM.—In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term 'victim' means a person specifically protected by a protection order that the defendant allegedly violated.

(B) DEFENDANT LACKS TIES TO THE INDIAN TRIBE.—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—

(i) resides in the Indian country of the participating tribe;

(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of—

(I) a member of the participating tribe; or

(II) an Indian who resides in the Indian country of the participating tribe.

(c) Criminal Conduct — A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

(1) DOMESTIC VIOLENCE AND DATING VIOLENCE.—An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.

(2) VIOLATIONS OF PROTECTION ORDERS.—An act that—

(A) occurs in the Indian country of the participating tribe; and

(B) violates the portion of a protection order that—

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of title 18, United States Code.

(d) Rights of Defendants — In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—

(1) all applicable rights under this Act;

(2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c);

(3) 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; and

(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 special domestic violence criminal jurisdiction over the defendant.

(e) Petitions to Stay Detention —

(1) IN GENERAL.—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 may petition that court to stay further detention of that person by the participating tribe.

(2) GRANT OF STAY.—A court shall grant a stay described in paragraph (1) if the court—

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds 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.

(3) NOTICE.—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303

(f) Grants to Tribal Governments — The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)—

(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including—

(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);

(B) prosecution;

(C) trial and appellate courts;

(D) probation systems;

(E) detention and correctional facilities;

(F) alternative rehabilitation centers;

(G) culturally appropriate services and assistance for victims and their families; and

(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a

participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;

(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of title 18, United States Code, consistent with tribal law and custom.

(g) Supplement, Not Supplant — Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.

(h) Authorization of Appropriations — There are authorized to be appropriated $5,000,000 for each of fiscal years 2014 through 2018 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.

Professor Barbara L. Creel
UNM School of Law

U.S. v. Bryant

136 S.Ct. 1954

Supreme Court of the United States
UNITED STATES, Petitioner
v.
Michael **BRYANT**, Jr.

No. **15–420**.
Argued April 19, 2016, Decided June 13, 2016

Background:

Michael Bryant, Jr., a Native American Indian, faced a federal indictment charging two counts of domestic assault as a habitual offender, in violation of 18 U.S.C. § 117(a). That statute, passed in 2006 to combat domestic violence against Native American women, created a federal domestic violence charge. Section 117(a) criminalizes the commission of "domestic assault within …Indian Country" by any person "who has a final conviction on at least 2 separate prior occasions in Federal, State or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction… assault … or serious violent felony against a spouse or intimate partner."

The United States relied on two prior tribal court convictions for domestic abuse as elements of the offense. These tribal court convictions were uncounseled and at least one resulted in a term of imprisonment. Mr. Bryant moved to dismiss the indictment. Following a denial of the motion to dismiss, he entered a conditional guilty plea in the district court. The district court sentenced Mr. Bryant to 46 months of imprisonment, to be followed by three years of supervised release.

On appeal, the United States Court of Appeals for the Ninth Circuit, reversed the convictions and directed that the charges be dismissed, holding that the Mr. Bryant's prior uncounseled convictions from Northern Cheyenne Tribal Court could not be used as predicate offenses. 769 F.3d 671. The United States petitioned for a writ of certiorari, and the Supreme Court granted review.

Circuit Split: The Ninth Circuit's holding that Section 117(a) was unconstitutional when applied habitual offenders with uncounseled tribal-court convictions resulting in imprisonment conflicted with the published decisions of two other courts of appeals. The Eighth and Tenth Circuits held that it does not violate the Constitution to rely on uncounseled tribal-court misdemeanor convictions to satisfy the predicate-offense element of Section 117(a).

In *United States v. Cavanaugh,* 643 F.3d 592 (2011), cert. denied, 132 S. Ct. 1542 (2012), the Eighth Circuit held that the Constitution did not "preclude use of" an uncounseled tribal-court conviction in a Section 117(a) prosecution "merely because [the conviction] *would have been* invalid had it arisen from a state or federal court." *Id.* at 604.

In *United States v. Shavanaux,* 647 F.3d 993 (2011), cert. denied, 132 S. Ct. 1742 (2012), the Tenth Circuit reached the same conclusion. The court observed that the defendant's uncounseled tribal-court domestic-violence convictions did not violate the Sixth Amendment "[b]ecause the Bill of Rights does not constrain Indian tribes." *Id.* at 997.

The United States opposed certiorari in *Cavanaugh* and *Shavanaux.*

Question Presented: The question presented is whether reliance on valid, uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element violates the Constitution.

Holding:

The Supreme Court held in favor of the government's argument. The U.S. admitted that Mr. Bryant "was indigent and was not appointed counsel" at the time of conviction. And that "[f] or most of his convictions, he was sentenced to terms of imprisonment not exceeding one year's duration." They argued, however, that "[b]ecause of his short prison terms, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered." Thus, the valid conviction did not offend the U.S. Constitution under the *Nichols* precedent.

Opinion:

Justice GINSBURG delivered the opinion of the Court. Justice THOMAS filed a Concurrence.

What Happened:

- Defense conceded that the uncounseled convictions were valid.
- The Government argued that the U.S. Constitution did not apply and argued that uncounseled convictions were valid under ICRA pursuant to federal constitutional law in *Nichols* and *Scott*
- *Scott v. Illinois*, 440 U.S. 367 (1979) held that the Sixth and Fourteenth Amendments to the United States Constitution require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel
- *Nichols, 511 U.S. 738 (1994)* "[C]onsistent with the Sixth and Fourteenth Amendments of the Constitution…an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.*"*
- *Nichols* is *NOT* an Indian Country Case; NOT a predicate offense case where the prior convictions are uncounseled - but a Habitual DUI Sentencing Case
- *Argersinger v.Hamlin*, 407 U.S. 25 (1972) requires appointment of counsel for indigent defendants whenever a sentence of imprisonment is imposed in state and federal court.
- *Burgett v. Texas,* 389 U.S. (1967) prohibits the government from using prior convictions obtained in violation of the right to counsel in subsequent proceedings.

What We know:

- Native Americans live in a Betts v. Brady world without Equal Protection
- Natives have no right to indigent defense counsel in tribal court, in general
- Indians have the unqualified right of an indigent defendant to appointed counsel under 25 U.S.C. § 1302(b),(c)1,2
- Non-Indians have Constitutional right to appointed counsel and U.S. Constitutional laws and protections as defined by Supreme Court precedent in Tribal Court under Special DV Criminal Jurisdiction
- Non-Indians have Sixth Amendment right to counsel in federal court under Sixth Amendment

Questions for Further Analysis:

Racial Equity and the role of tribal sovereignty and individual rights in criminal law in **federal** courts (CREEL)

Creel Synopsis of Bryant

Congress' purported plenary power over Indian tribes rests on even shakier foundations (THOMAS, J.)

18 U.S.C.A. § 117

§ 117. Domestic assault by an habitual offender

(a) In general.--Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction--

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; or

(2) an offense under chapter 110A,

shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

(b) Domestic assault defined.--In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

CREDIT(S)

(Added Pub.L. 109-162, Title IX, § 909, Jan. 5, 2006, 119 Stat. 3084; amended Pub.L. 113-104, § 3, May 20, 2014, 128 Stat. 1156.)

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by People v. Fields, Ill.App. 1 Dist., March 31, 2017

136 S.Ct. 1954
Supreme Court of the United States

UNITED STATES, Petitioner
v.
Michael BRYANT, Jr.

No. 15–420.
|
Argued April 19, 2016.
|
Decided June 13, 2016.
|
As Revised July 7, 2016.

Synopsis

Background: Following denial of his motion to dismiss, defendant was convicted, pursuant to guilty plea, in the United States District Court for the District of Montana, Jack D. Shanstrom, Senior Judge, of domestic assault within Indian country by an habitual offender. He appealed. The United States Court of Appeals for the Ninth Circuit, Paez, Circuit Judge, 769 F.3d 671, reversed, and certiorari was granted.

Holdings: The Supreme Court, Justice Ginsburg, held that:

[1] use of defendant's uncounseled tribal-court convictions to establish prior-crimes predicate of the statute making it a felony for an habitual offender to commit domestic assault in Indian country did not violate Sixth Amendment, and

[2] use of the tribal-court convictions as predicate offenses did not violate due process.

Reversed and remanded.

Justice Thomas filed concurring opinion.

West Headnotes (17)

[1] Criminal Law
Indigence

The Sixth Amendment guarantees indigent defendants, in state and federal criminal proceedings, appointed counsel in any case in which a term of imprisonment is imposed. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[2] Indians
Tribal or Indian Courts

The Sixth Amendment does not apply to tribal-court criminal proceedings. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[3] Indians
Crime committed in Indian country or on reservation

Tribal governments generally lack criminal jurisdiction over non-Indians who commit crimes in Indian country.

1 Cases that cite this headnote

[4] Indians
State court or authorities

Indians
Crime committed in Indian country or on reservation

Most States lack jurisdiction over crimes committed in Indian country against Indian victims.

3 Cases that cite this headnote

[5] Indians
State court or authorities

Indians

Crime committed in Indian country or on reservation

States empowered by Congress to exercise jurisdiction in Indian country may apply their own criminal laws to offenses committed by or against Indians within all Indian country within the State. 18 U.S.C.A. § 1162; Indian Civil Rights Act of 1968, §§ 405, 406, 25 U.S.C.A. §§ 1325, 1326; 25 U.S.C.A. §§ 1328, 1360.

1 Cases that cite this headnote

[6] **Indians**

Government of Indian Country, Reservations, and Tribes in General

Federal law generally governs in Indian country.

Cases that cite this headnote

[7] **Criminal Law**

Penalty, potential or actual

The Sixth Amendment right to counsel requires appointment of counsel for indigent defendants whenever a sentence of imprisonment is imposed. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[8] **Criminal Law**

Penalty, potential or actual

An indigent defendant has no constitutional right to appointed counsel if his conviction results in a fine or other noncustodial punishment. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[9] **Indians**

Status of Indian Nations or Tribes

Indians

Authority over and regulation of tribes in general

Indians

Tribal or Indian Courts

Indians

Counsel

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; the Bill of Rights, including the Sixth Amendment right to counsel, therefore, does not apply in tribal-court proceedings. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[10] **Indians**

Indian civil rights laws

The Indian Civil Rights Act (ICRA) accorded a range of procedural safeguards to tribal-court defendants similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment. U.S.C.A. Const.Amend. 14; 25 U.S.C.A. § 1301et seq.

3 Cases that cite this headnote

[11] **Indians**

Indian civil rights laws

The right to counsel under the Indian Civil Rights Act (ICRA) is not coextensive with the Sixth Amendment right. U.S.C.A. Const.Amend. 6; Indian Civil Rights Act of 1968, § 202(a)(6), (c)(1, 2), 25 U.S.C.A. § 1302(a)(6), (c)(1, 2).

1 Cases that cite this headnote

[12] **Indians**

Counsel

In tribal court, unlike in federal or state court, a sentence of imprisonment up to

one year may be imposed without according indigent defendants the right to appointed counsel. U.S.C.A. Const.Amend. 6; Indian Civil Rights Act of 1968, § 202(a)(6), 25 U.S.C.A. § 1302(a)(6).

2 Cases that cite this headnote

[13] Sentencing and Punishment
Convictions or adjudications in other jurisdictions

Sentencing and Punishment
Absence or denial of counsel

Use of defendant's uncounseled tribal-court convictions resulting in imprisonment for less than one year, obtained in full compliance with the Indian Civil Rights Act (ICRA), to establish prior-crimes predicate of the statute making it a felony for an habitual offender to commit domestic assault in Indian country, did not violate defendant's Sixth Amendment right to counsel. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 117(a); Indian Civil Rights Act of 1968, § 202(a)(6), 25 U.S.C.A. § 1302(a)(6).

Cases that cite this headnote

[14] Criminal Law
In general;necessity

Sentencing and Punishment
Counsel in Prior Proceeding

A conviction obtained in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent proceeding either to support guilt or enhance punishment for another offense. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[15] Sentencing and Punishment
Convictions or adjudications in other jurisdictions

Sentencing and Punishment
Counsel in Prior Proceeding

Because a defendant convicted in tribal court suffers no Sixth Amendment violation of the right to counsel in the first instance, use of tribal convictions in a subsequent prosecution cannot violate the Sixth Amendment anew. U.S.C.A. Const.Amend. 6.

6 Cases that cite this headnote

[16] Constitutional Law
Criminal Law

Indians
Trial

Proceedings in compliance with Indian Civil Rights Act (ICRA) sufficiently ensure the reliability of tribal-court convictions; therefore, the use of those convictions in a federal prosecution does not violate a defendant's Fifth Amendment right to due process. U.S.C.A. Const.Amend. 5; Indian Civil Rights Act of 1968, § 202(a)(8), 25 U.S.C.A. § 1302(a)(8).

4 Cases that cite this headnote

[17] Constitutional Law
Habitual and career offenders

Sentencing and Punishment
Convictions or adjudications in other jurisdictions

Use of defendant's tribal-court convictions as predicate offenses for the crime of domestic assault in Indian country by an habitual offender did not violate due process, where the tribal court proceedings complied with the Indian Civil Rights Act (ICRA). U.S.C.A. Const.Amend. 5; Indian Civil Rights Act of 1968, § 202(a)(8), 25 U.S.C.A. § 1302(a)(8).

4 Cases that cite this headnote

***1956** *Syllabus* [*]

In response to the high incidence of domestic violence against Native American women, Congress enacted a felony offense of domestic assault in Indian country by a habitual offender. 18 U.S.C. § 117(a). Section 117(a)(1) provides that any person who "commits a domestic assault within ... Indian country" and who has at least two prior final convictions for domestic violence rendered "in Federal, State, or Indian tribal court proceedings ... shall be fined ..., imprisoned for a term of not more than 5 years, or both...." Having two prior tribal-court convictions for domestic violence crimes is thus a predicate of the new offense.

This case raises the question whether § 117(a)'s inclusion of tribal-court convictions as predicate offenses is compatible with the Sixth Amendment's right to counsel. The Sixth Amendment guarantees indigent defendants appointed counsel in any state or federal criminal proceeding in which a term of imprisonment is imposed, *Scott v. Illinois,* 440 U.S. 367, 373–374, 99 S.Ct. 1158, 59 L.Ed.2d 383, but it does not apply in tribal-court proceedings, see *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 337, 128 S.Ct. 2709, 171 L.Ed.2d 457. The Indian Civil Rights Act of 1968 (ICRA), which governs tribal-court proceedings, accords a range of procedural safeguards to tribal-court defendants "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment," *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 57, 98 S.Ct. 1670, 56 L.Ed.2d 106. In particular, ICRA provides indigent defendants with a right to appointed counsel only for sentences exceeding one year. 25 U.S.C. § 1302(c)(2). ICRA's right to counsel therefore is not coextensive with the Sixth Amendment right.

This Court has held that a conviction obtained in state or federal court in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent ***1957** proceeding "to support guilt or enhance punishment for another offense." *Burgett v. Texas,* 389 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319. Use of a constitutionally infirm conviction would cause "the accused in effect [to] suffe[r] anew from the [prior] deprivation of [his] Sixth Amendment right." *Ibid.* *Burgett* 's principle was limited by the Court's holding in *Nichols v. United States,* 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745, that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction," *id.,* at 748–749, 114 S.Ct. 1921.

Respondent Michael Bryant, Jr., has multiple tribal-court convictions for domestic assault. When convicted, Bryant was indigent and was not appointed counsel. For most of his convictions, he was sentenced to terms of imprisonment not exceeding one year's duration. Because of his short prison terms, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered. Based on domestic assaults he committed in 2011, Bryant was indicted on two counts of domestic assault by a habitual offender, in violation of § 117(a). Represented in federal court by appointed counsel, he contended that the Sixth Amendment precluded use of his prior, uncounseled, tribal-court misdemeanor convictions to satisfy § 117(a)'s predicate-offense element and moved to dismiss the indictment. The District Court denied the motion; Bryant pleaded guilty, reserving the right to appeal. The Ninth Circuit reversed the conviction and directed dismissal of the indictment. It comprehended that Bryant's uncounseled tribal-court convictions were valid when entered because the Sixth Amendment right to counsel does not apply in tribal-court proceedings. It held, however, that Bryant's tribal-court convictions could not be used as predicate convictions within § 117(a)'s compass because they would have violated the Sixth Amendment had they been rendered in state or federal court.

Held : Because Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as

predicate offenses in a § 117(a) prosecution does not violate the Constitution.

Nichols instructs that convictions valid when entered retain that status when invoked in a subsequent proceeding. *Nichols* reasoned that "[e]nhancement statutes ... do not change the penalty imposed for the earlier conviction"; rather, repeat-offender laws "penaliz[e] only the last offense committed by the defendant." 511 U.S., at 747, 114 S.Ct. 1921. Bryant's sentence for violating § 117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court. He was denied no right to counsel in tribal court, and his Sixth Amendment right was honored in federal court. Bryant acknowledges that *Nichols* would have allowed reliance on uncounseled tribal-court convictions resulting in fines to satisfy § 117(a)'s prior-crimes predicate. But there is no cause to distinguish for § 117(a) purposes between fine-only tribal-court convictions and valid but uncounseled tribal-court convictions resulting in imprisonment for a term not exceeding one year. Neither violates the Sixth Amendment. Bryant is not aided by *Burgett.* A defendant convicted in tribal court suffered no Sixth Amendment violation in the first instance, so he cannot "suffe[r] anew" from a prior deprivation in his federal prosecution.

Bryant also invokes the Due Process Clause of the Fifth Amendment to support his assertion that tribal-court judgments ***1958** should not be used as predicate offenses under § 117(a). ICRA, however, guarantees "due process of law," accords other procedural safeguards, and permits a prisoner to challenge the fundamental fairness of tribal court proceedings in federal habeas corpus proceedings. Because proceedings in compliance with ICRA sufficiently ensure the reliability of tribal-court convictions, the use of those convictions in a federal prosecution does not violate a defendant's due process right. Pp. 1964 – 1966.

769 F.3d 671, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion.

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Opinion

Justice GINSBURG delivered the opinion of the Court.

In response to the high incidence of domestic violence against Native American women, Congress, in 2005, enacted 18 U.S.C. § 117(a), which targets serial offenders. Section 117(a) makes it a federal crime for any person to "commi [t] a domestic assault within ... Indian country" if the person has at least two prior final convictions for domestic violence rendered "in Federal, State, or Indian tribal court proceedings." See Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA Reauthorization Act), Pub. L. 109–162, §§ 901, 909, 119 Stat. 3077, 3084. [1] Respondent Michael Bryant, Jr., has multiple tribal-court convictions for domestic assault. For most of those convictions, he was sentenced to terms of imprisonment, none of them exceeding one year's duration. His tribal-court convictions do not count for § 117(a) purposes, Bryant maintains, because he was uncounseled in those proceedings.

[1] **[2]** The Sixth Amendment guarantees indigent defendants, in state and federal criminal proceedings, appointed counsel in any case in which a term of imprisonment is imposed. *Scott v. Illinois,* 440 U.S. 367, 373–374, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). But the Sixth Amendment does not apply to tribal-court proceedings. See *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 337, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008). The Indian Civil Rights Act of 1968 (ICRA), Pub.L. 90–284, 82 Stat. 77, 25 U.S.C. § 1301 *et seq.,* which governs criminal ***1959** proceedings in tribal courts, requires appointed counsel only when a sentence of more than one year's imprisonment is imposed. § 1302(c)(2). Bryant's tribal-court convictions, it is undisputed, were valid when entered. This case presents the question whether those convictions, though uncounseled, rank as predicate offenses within the compass of § 117(a). Our answer is yes. Bryant's tribal-court convictions did not violate the Sixth Amendment when obtained, and they retain their validity when invoked in a § 117(a) prosecution. That proceeding generates no Sixth Amendment defect where none previously existed.

I

A

"[C]ompared to all other groups in the United States," Native American women "experience the highest rates of domestic violence." 151 Cong. Rec. 9061 (2005) (remarks of Sen. McCain). According to the Centers for Disease Control and Prevention, as many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, M. Black et al., National Intimate Partner and Sexual Violence Survey 2010 Summary Report 40 (2011) (Table 4.3), online at http://www.cdc.gov/ViolencePrevention/pdf/NISVS_report2010-a.pdf (all Internet materials as last visited June 9, 2016). American Indian and Alaska Native women "are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general." Dept. of Justice, Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, Ending Violence So Children Can Thrive 38 (Nov. 2014), online at https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf. American Indian women experience battery "at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women," and they "experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women." VAWA Reauthorization Act, § 901, 119 Stat. 3077.

As this Court has noted, domestic abusers exhibit high rates of recidivism, and their violence "often escalates in severity over time." *United States v. Castleman,* 572 U.S. ——, ——, 134 S.Ct. 1405, 1408, 188 L.Ed.2d 426 (2014). Nationwide, over 75% of female victims of intimate partner violence have been previously victimized by the same offender, Dept. of Justice, Bureau of Justice Statistics, S. Catalano, Intimate Partner Violence 1993–2010, p. 4 (rev. 2015) (Figure 4), online at http://www.bjs.gov/content/pub/pdf/ipv9310.pdf, often multiple times, Dept. of Justice, National Institute of Justice, P. Tjaden & N. Thoennes, Extent, Nature, and Consequences of Intimate Partner Violence, p. iv (2000), online at https://www.ncjrs.gov/pdffiles1/nij/181867.pdf ("[W]omen who were physically assaulted by an intimate partner averaged 6.9 physical assaults by the same partner."). Incidents of repeating, escalating abuse more than occasionally culminate in a fatal attack. See VAWA Reauthorization Act, § 901, 119 Stat. 3077–3078 ("[D]uring the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances.").

[3] The "complex patchwork of federal, state, and tribal law" governing Indian country, ***1960** *Duro v. Reina,* 495 U.S. 676, 680, n. 1, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), has made it difficult to stem the tide of domestic violence experienced by Native American women. Although tribal courts may enforce the tribe's criminal laws against Indian defendants, Congress has curbed tribal courts' sentencing authority. At the time of § 117(a)'s passage, ICRA limited sentences in tribal court to a maximum of one year's imprisonment. 25 U.S.C. § 1302(a)(7) (2006 ed.).[2] Congress has since expanded tribal courts' sentencing authority, allowing them to impose up to three years' imprisonment, contingent on adoption of additional procedural safeguards. 124 Stat. 2279–2280 (codified at 25 U.S.C. § 1302(a)(7)(C), (c)).[3] To date, however, few tribes have employed this enhanced sentencing authority. See Tribal Law and Policy Inst., Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing, online at http://www.tribal-institute.org/download/VAWA/VAWAImplementationChart.pdf.[4]

[4] **[5]** States are unable or unwilling to fill the enforcement gap. Most States lack jurisdiction over crimes committed in Indian country against Indian victims. See *United States v. John,* 437 U.S. 634, 651, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978). In 1953, Congress increased the potential for state action by giving six States "jurisdiction over specified areas of Indian country within the States and provid[ing] for the [voluntary] assumption of jurisdiction by other States." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) (footnote omitted). See Act of Aug. 15, 1953, Pub. L. 280, 67 Stat. 588 (codified, as amended, at 18 U.S.C. § 1162 and 25 U.S.C. §§ 1321–1328, 1360). States so empowered may apply their own criminal laws to "offenses committed by or against Indians within all Indian country within the State." *Cabazon Band of Mission Indians,* 480 U.S., at 207, 107 S.Ct. 1083; see 18 U.S.C. § 1162(a). Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country. Jimenez & Song, Concurrent Tribal and State Jurisdiction Under Public Law 280, 47 Am. U. L. Rev. 1627, 1636–1637 (1998); Tribal Law and Policy Inst., S. Deer, C. Goldberg, H. Valdez Singleton, & M. White Eagle, Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women 7–8 (2007), online at http://www.tribal-institute.org/download/Final% 20280% 20FG% 20Report.pdf.

[6] That leaves the Federal Government. Although federal law generally governs in Indian country, Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian. 18 U.S.C. § 1152; see *Ex* ***1961** *parte Crow Dog,* 109 U.S. 556, 572, 3 S.Ct. 396, 27 L.Ed. 1030 (1883) (requiring "a clear expression of the intention of Congress" to confer federal jurisdiction over crimes committed by an Indian against another Indian). In the Major Crimes Act, Congress authorized federal jurisdiction over enumerated grave criminal offenses when the perpetrator is an Indian and the victim is "another Indian or other person," including murder, manslaughter, and felony assault. § 1153. At the time of § 117(a)'s enactment, felony assault subject to federal prosecution required "serious bodily injury," § 113(a)(6) (2006 ed.), meaning "a substantial risk of death," "extreme physical pain," "protracted and obvious disfigurement," or "protracted loss or impairment of the function of a bodily member, organ, or mental faculty." § 1365(h)(3) (incorporated through § 113(b)(2)).[5] In short, when § 117(a) was before Congress, Indian perpetrators of domestic violence "escape[d] felony charges until they seriously injure[d] or kill[ed] someone." 151 Cong. Rec. 9062 (2005) (remarks of Sen. McCain).

As a result of the limitations on tribal, state, and federal jurisdiction in Indian country, serial domestic violence offenders, prior to the enactment of § 117(a), faced at most a year's imprisonment per offense—a sentence insufficient to deter repeated and escalating abuse. To ratchet up the punishment of serial offenders, Congress created the federal felony offense of domestic assault in Indian country by a habitual offender. § 117(a) (2012 ed.); see No. 12–30177 (CA9, July 6, 2015), App. to Pet. for Cert. 41a (Owens, J., dissenting from denial of

rehearing en banc) ("Tailored to the unique problems ... that American Indian and Alaska Native Tribes face, § 117(a) provides felony-level punishment for serial domestic violence offenders, and it represents the first true effort to remove these recidivists from the communities that they repeatedly terrorize."). The section provides in pertinent part:

> "Any person who commits a domestic assault within ... Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction any assault, sexual abuse, or serious violent felony against a spouse or intimate partner ... shall be fined ..., imprisoned for a term of not more than 5 years, or both...." § 117(a)(1).[6]

Having two prior convictions for domestic violence crimes —including tribal-court convictions—is thus a predicate of the new offense.

B

[7] **[8]** This case requires us to determine whether § 117(a)'s inclusion of tribal-court convictions is compatible with the Sixth Amendment's right to counsel. The ***1962** Sixth Amendment to the U.S. Constitution guarantees a criminal defendant in state or federal court "the Assistance of Counsel for his defence." See *Gideon v. Wainwright,* 372 U.S. 335, 339, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). This right, we have held, requires appointment of counsel for indigent defendants whenever a sentence of imprisonment is imposed. *Argersinger v. Hamlin,* 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). But an indigent defendant has no constitutional right to appointed counsel if his conviction results in a fine or other noncustodial punishment. *Scott,* 440 U.S., at 373–374, 99 S.Ct. 1158.

[9] "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." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). The Bill of Rights, including the Sixth Amendment right to counsel, therefore, does not apply in tribal-court proceedings. See *Plains Commerce Bank,* 554 U.S., at 337, 128 S.Ct. 2709.

[10] In ICRA, however, Congress accorded a range of procedural safeguards to tribal-court defendants "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Martinez,* 436 U.S., at 57, 98 S.Ct. 1670; see *id.,* at 62–63, 98 S.Ct. 1670 (ICRA "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments"). In addition to other enumerated protections, ICRA guarantees "due process of law," 25 U.S.C. § 1302(a)(8), and allows tribal-court defendants to seek habeas corpus review in federal court to test the legality of their imprisonment, § 1303.

[11] **[12]** The right to counsel under ICRA is not coextensive with the Sixth Amendment right. If a tribal court imposes a sentence in excess of one year, ICRA requires the court to accord the defendant "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," including appointment of counsel for an indigent defendant at the tribe's expense. § 1302(c)(1), (2). If the sentence imposed is no greater than one year, however, the tribal court must allow a defendant only the opportunity to obtain counsel "at his own expense." § 1302(a)(6). In tribal court, therefore, unlike in federal or state court, a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel.

[13] **[14]** The question here presented: Is it permissible to use uncounseled tribal-court convictions—obtained in full compliance with ICRA—to establish the prior-crimes predicate of § 117(a)? It is undisputed that a conviction obtained in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent proceeding "either to support guilt or enhance punishment for

another offense." *Burgett v. Texas,* 389 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). In *Burgett,* we held that an uncounseled felony conviction obtained in state court in violation of the right to counsel could not be used in a subsequent proceeding to prove the prior-felony element of a recidivist statute. To permit such use of a constitutionally infirm conviction, we explained, would cause "the accused in effect [to] suffe[r] anew from the [prior] deprivation of [his] Sixth Amendment right." *Ibid.*; see *United States v. Tucker,* 404 U.S. 443, 448, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) (invalid, uncounseled prior convictions could not be relied upon at sentencing to impose a longer term of imprisonment for a subsequent conviction); cf. ***1963** *Loper v. Beto,* 405 U.S. 473, 483–484, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972) (plurality opinion) ("use of convictions constitutionally invalid under *Gideon v. Wainwright* to impeach a defendant's credibility deprives him of due process of law" because the prior convictions "lac[k] reliability").

In *Nichols v. United States,* 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), we stated an important limitation on the principle recognized in *Burgett*. In the case under review, Nichols pleaded guilty to a federal felony drug offense. 511 U.S., at 740, 114 S.Ct. 1921. Several years earlier, unrepresented by counsel, he had been convicted of driving under the influence (DUI), a state-law misdemeanor, and fined $250 but not imprisoned. *Ibid.* Nichols' DUI conviction, under the then-mandatory Sentencing Guidelines, effectively elevated by about two years the sentencing range for Nichols' federal drug offense. *Ibid.* We rejected Nichols' contention that, as his later sentence for the federal drug offense involved imprisonment, use of his uncounseled DUI conviction to elevate that sentence violated the Sixth Amendment. *Id.,* at 746–747, 114 S.Ct. 1921. "[C]onsistent with the Sixth and Fourteenth Amendments of the Constitution," we held, "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.,* at 748–749, 114 S.Ct. 1921.

C

Respondent Bryant's conduct is illustrative of the domestic violence problem existing in Indian country. During the period relevant to this case, Bryant, an enrolled member of the Northern Cheyenne Tribe, lived on that Tribe's reservation in Montana. He has a record of over 100 tribal-court convictions, including several misdemeanor convictions for domestic assault. Specifically, between 1997 and 2007, Bryant pleaded guilty on at least five occasions in Northern Cheyenne Tribal Court to committing domestic abuse in violation of the Northern Cheyenne Tribal Code. On one occasion, Bryant hit his live-in girlfriend on the head with a beer bottle and attempted to strangle her. On another, Bryant beat a different girlfriend, kneeing her in the face, breaking her nose, and leaving her bruised and bloodied.

For most of Bryant's repeated brutal acts of domestic violence, the Tribal Court sentenced him to terms of imprisonment, never exceeding one year. When convicted of these offenses, Bryant was indigent and was not appointed counsel. Because of his short prison terms, Bryant acknowledges, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered. Bryant has never challenged his tribal-court convictions in federal court under ICRA's habeas corpus provision.

In 2011, Bryant was arrested yet again for assaulting women. In February of that year, Bryant attacked his then girlfriend, dragging her off the bed, pulling her hair, and repeatedly punching and kicking her. During an interview with law enforcement officers, Bryant admitted that he had physically assaulted this woman five or six times. Three months later, he assaulted another woman with whom he was then living, waking her by yelling that he could not find his truck keys and then choking her until she almost lost consciousness. Bryant later stated that he had assaulted this victim on three separate occasions during the two months they dated.

Based on the 2011 assaults, a federal grand jury in Montana indicted Bryant on two counts of domestic assault by a habitual offender, in violation of §

117(a). Bryant was represented in federal court ***1964** by appointed counsel. Contending that the Sixth Amendment precluded use of his prior, uncounseled, tribal-court misdemeanor convictions to satisfy § 117(a)'s predicate-offense element, Bryant moved to dismiss the indictment. The District Court denied the motion, App. to Pet. for Cert. 32a, and Bryant entered a conditional guilty plea, reserving the right to appeal that decision. Bryant was sentenced to concurrent terms of 46 months' imprisonment on each count, to be followed by three years of supervised release.

The Court of Appeals for the Ninth Circuit reversed the conviction and directed dismissal of the indictment. 769 F.3d 671 (2014). Bryant's tribal-court convictions were not themselves constitutionally infirm, the Ninth Circuit comprehended, because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." *Id.*, at 675. But, the court continued, had the convictions been obtained in state or federal court, they would have violated the Sixth Amendment because Bryant had received sentences of imprisonment although he lacked the aid of appointed counsel. Adhering to its prior decision in *United States v. Ant,* 882 F.2d 1389 (C.A.9 1989),[7] the Court of Appeals held that, subject to narrow exceptions not relevant here, "tribal court convictions may be used in subsequent [federal] prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right." 769 F.3d, at 677. Rejecting the Government's argument that our decision in *Nichols* required the opposite result, the Ninth Circuit concluded that *Nichols* applies only when the prior conviction *did* comport with the Sixth Amendment, *i.e.,* when no sentence of imprisonment was imposed for the prior conviction. 769 F.3d, at 677–678.

Judge Watford concurred, agreeing that *Ant* controlled the outcome of this case, but urging reexamination of *Ant* in light of *Nichols*. 769 F.3d, at 679. This Court's decision in *Nichols,* Judge Watford wrote, "undermines the notion that uncounseled convictions are, as a categorical matter, too unreliable to be used as a basis for imposing a prison sentence in a subsequent case." 769 F.3d, at 679. The Court of Appeals declined to rehear the case en banc over vigorous dissents by Judges Owens and O'Scannlain.

In disallowing the use of an uncounseled tribal-court conviction to establish a prior domestic violence conviction within § 117(a)'s compass, the Ninth Circuit created a Circuit split. The Eighth and Tenth Circuits have both held that tribal-court "convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of § 117." *United States v. Cavanaugh,* 643 F.3d 592, 594 (C.A.8 2011); see *United States v. Shavanaux,* 647 F.3d 993, 1000 (C.A.10 2011). To resolve this disagreement, we granted certiorari, 577 U.S. ——, 136 S.Ct. 690, 193 L.Ed.2d 518 (2015), and now reverse.

II

Bryant's tribal-court convictions, he recognizes, infringed no constitutional right because the Sixth Amendment does not apply to tribal-court proceedings. Brief ***1965** for Respondent 5. Those prior convictions complied with ICRA, he concedes, and therefore were valid when entered. But, had his convictions occurred in state or federal court, Bryant observes, *Argersinger* and *Scott* would have rendered them invalid because he was sentenced to incarceration without representation by court-appointed counsel. Essentially, Bryant urges us to treat tribal-court convictions, for § 117(a) purposes, as though they had been entered by a federal or state court. We next explain why we decline to do so.

As earlier recounted, we held in *Nichols* that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." 511 U.S., at 748–749, 114 S.Ct. 1921. "Enhancement statutes," we reasoned, "do not change the penalty imposed for the earlier conviction"; rather, repeat-offender laws "penaliz[e] only the last offense committed by the defendant." *Id.,* at 747, 114 S.Ct. 1921; see

United States v. Rodriquez, 553 U.S. 377, 386, 128 S.Ct. 1783, 170 L.Ed.2d 719 (2008) ("When a defendant is given a higher sentence under a recidivism statute ... 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.' "). *Nichols* thus instructs that convictions valid when entered—that is, those that, when rendered, did not violate the Constitution—retain that status when invoked in a subsequent proceeding.

Nichols ' reasoning steers the result here. Bryant's 46–month sentence for violating § 117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court. Bryant was denied no right to counsel in tribal court, and his Sixth Amendment right was honored in federal court, when he was "adjudicated guilty of the felony offense for which he was imprisoned." *Alabama v. Shelton,* 535 U.S. 654, 664, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002). It would be "odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected." 769 F.3d, at 679 (Watford, J., concurring). [8]

Bryant acknowledges that had he been punished only by fines in his tribal-court proceedings, *Nichols* would have allowed reliance on his uncounseled convictions to satisfy § 117(a)'s prior-crimes predicate. Brief for Respondent 50. We see no cause to distinguish for § 117(a) purposes between valid but uncounseled convictions resulting in a fine and valid but uncounseled convictions resulting in imprisonment not exceeding one year. "Both Nichols's and Bryant's uncounseled convictions 'comport' with the Sixth Amendment, and for *the same reason* : the Sixth Amendment right to appointed counsel did not apply to either conviction." App. to Pet. ***1966** for Cert. 50a (O'Scannlain, J., dissenting from denial of rehearing en banc).

In keeping with *Nichols,* we resist creating a "hybrid" category of tribal-court convictions, "good for the punishment actually imposed but not available for sentence enhancement in a later prosecution." 511 U.S., at 744, 114 S.Ct. 1921. *Nichols* indicates that use of Bryant's uncounseled tribal-court convictions in his § 117(a) prosecution did not "transform his prior, valid, tribal court convictions into new, invalid, federal ones." App. to Pet. for Cert. 50a (opinion of O'Scannlain, J.).

[15] Our decision in *Burgett,* which prohibited the subsequent use of a conviction obtained in violation of the right to counsel, does not aid Bryant. Reliance on an invalid conviction, *Burgett* reasoned, would cause the accused to "suffe[r] anew from the deprivation of [his] Sixth Amendment right." 389 U.S., at 115, 88 S.Ct. 258. Because a defendant convicted in tribal court suffers no Sixth Amendment violation in the first instance, "[u]se of tribal convictions in a subsequent prosecution cannot violate [the Sixth Amendment] 'anew.' " *Shavanaux,* 647 F.3d, at 998.

Bryant observes that reliability concerns underlie our right-to-counsel decisions and urges that those concerns remain even if the Sixth Amendment itself does not shelter him. *Scott* and *Nichols,* however, counter the argument that uncounseled misdemeanor convictions are categorically unreliable, either in their own right or for use in a subsequent proceeding. Bryant's recognition that a tribal-court conviction resulting in a fine would qualify as a § 117(a) predicate offense, we further note, diminishes the force of his reliability-based argument. There is no reason to suppose that tribal-court proceedings are less reliable when a sentence of a year's imprisonment is imposed than when the punishment is merely a fine. No evidentiary or procedural variation turns on the sanction —fine only or a year in prison—ultimately imposed.

[16] **[17]** Bryant also invokes the Due Process Clause of the Fifth Amendment in support of his assertion that tribal-court judgments should not be used as predicate offenses. But, as earlier observed, ICRA itself requires tribes to ensure "due process of law," § 1302(a)(8), and it accords defendants specific procedural safeguards resembling those contained in the Bill of Rights and the Fourteenth Amendment. See *supra,* at 1962. Further, ICRA makes habeas review in federal court available to persons incarcerated pursuant to a tribal-court judgment. § 1303. By that means, a prisoner may

challenge the fundamental fairness of the proceedings in tribal court. Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions. Therefore, the use of those convictions in a federal prosecution does not violate a defendant's right to due process. See *Shavanaux,* 647 F.3d, at 1000; cf. *State v. Spotted Eagle,* 316 Mont. 370, 378–379, 71 P.3d 1239, 1245–1246 (2003) (principles of comity support recognizing uncounseled tribal-court convictions that complied with ICRA).

* * *

Because Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution. We accordingly reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

***1967** Justice THOMAS, concurring.

The Court holds that neither the Sixth Amendment nor the Fifth Amendment's Due Process Clause prohibits the Government from using Michael Bryant's uncounseled tribal-court convictions as predicates for the federal crime of committing a domestic assault within Indian country. *Ante,* at 1966; see 18 U.S.C. § 117(a) (making it a federal crime to "commi[t] a domestic assault within ... Indian country" if the person "has a final conviction on at least 2 separate prior occasions in ... Indian tribal court proceedings" for domestic assault and similar crimes). Because our precedents dictate that holding, I join the Court's opinion.

The fact that this case arose at all, however, illustrates how far afield our Sixth Amendment and Indian-law precedents have gone. Three basic assumptions underlie this case: that the Sixth Amendment ordinarily bars the Government from introducing, in a later proceeding, convictions obtained in violation of the right to counsel, *ante,* at 1962 – 1963; that tribes' retained sovereignty entitles them to prosecute tribal members in proceedings that are not subject to the Constitution, *ante,* at 1961 – 1962; and that Congress can punish assaults that tribal members commit against each other on Indian land, *ante,* at 1960 – 1962. Although our precedents have endorsed these assumptions for decades, the Court has never identified a sound constitutional basis for any of them, and I see none.

Start with the notion that the Sixth Amendment generally prohibits the government from using a prior, uncounseled conviction obtained in violation of the right to counsel as a predicate for a new offense in a new proceeding. *Ante,* at 1962. All that the text of the Sixth Amendment requires in a criminal prosecution is that the accused enjoy the "[a]ssistance of [c]ounsel" in *that* proceeding. The Court was likely wrong in *Burgett v. Texas,* 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), when it created a Sixth Amendment "exclusionary rule" that prohibits the government from using prior convictions obtained in violation of the right to counsel in subsequent proceedings to avoid "erod[ing] the principle" of the right to counsel. *Id.,* at 115, 88 S.Ct. 258. I would be open to reconsidering *Burgett* in a future case.

The remaining two assumptions underpinning this case exemplify a central tension within our Indian-law jurisprudence. On the one hand, the only reason why tribal courts had the power to convict Bryant in proceedings where he had no right to counsel is that such prosecutions are a function of a tribe's core sovereignty. See *United States v. Lara,* 541 U.S. 193, 197, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004); *United States v. Wheeler,* 435 U.S. 313, 318, 322–323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). By virtue of tribes' status as " 'separate sovereigns pre-existing the Constitution,' " tribal prosecutions need not, under our precedents, comply with " 'those constitutional provisions framed specifically as limitations on federal or state authority.' " *Ante,* at 1962 (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)).

On the other hand, the validity of Bryant's ensuing federal conviction rests upon a contrary view of tribal sovereignty. Congress ordinarily lacks authority to enact

a general federal criminal law proscribing domestic abuse. See *United States v. Morrison,* 529 U.S. 598, 610–613, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). But, the Court suggests, Congress must intervene on reservations to ensure that prolific domestic abusers receive sufficient punishment. See *ante,* at 1960 – 1961. The Court does not explain where Congress' ***1968** power to act comes from, but our precedents leave no doubt on this score. Congress could make Bryant's domestic assaults a federal crime subject to federal prosecution only because our precedents have endowed Congress with an "all-encompassing" power over all aspects of tribal sovereignty. *Wheeler, supra,* at 319, 98 S.Ct. 1079. Thus, even though tribal prosecutions of tribal members are purportedly the apex of tribal sovereignty, Congress can second-guess how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land by virtue of its "plenary power" over Indian tribes. See *United States v. Kagama,* 118 U.S. 375, 382–384, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); accord, *Lara,* 541 U.S., at 200, 124 S.Ct. 1628.

I continue to doubt whether either view of tribal sovereignty is correct. See *id.,* at 215, 124 S.Ct. 1628 (THOMAS, J., concurring in judgment). Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest. In light of the tribes' distinct histories, it strains credulity to assume that all tribes necessarily retained the sovereign prerogative of prosecuting their own members. And by treating all tribes as possessing an identical quantum of sovereignty, the Court's precedents have made it all but impossible to understand the ultimate source of each tribe's sovereignty and whether it endures. See Prakash, Against Tribal Fungibility, 89 Cornell L. Rev. 1069, 1070–1074, 1107–1110 (2004).

Congress' purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power —not Congress' power to "regulate Commerce ... with Indian Tribes," not the Senate's role in approving treaties, nor anything else—gives Congress such sweeping authority. See *Lara, supra,* at 224–225, 124 S.Ct. 1628 (THOMAS, J., concurring in judgment); *Adoptive Couple v. Baby Girl,* 570 U.S. ——, —— – ——, 133 S.Ct. 2552, 2566–2568, 186 L.Ed.2d 729 (2013) (THOMAS, J., concurring). Indeed, the Court created this new power because it was unable to find an enumerated power justifying the federal Major Crimes Act, which for the first time punished crimes committed by Indians against Indians on Indian land. See *Kagama, supra,* at 377–380, 6 S.Ct. 1109; cf. *ante,* at 1960. The Court asserted: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection.... It must exist in that government, because it has never existed anywhere else." *Kagama, supra,* at 384, 6 S.Ct. 1109. Over a century later, *Kagama* endures as the foundation of this doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power. See, *e.g., Lone Wolf v. Hitchcock,* 187 U.S. 553, 566–567, 23 S.Ct. 216, 47 L.Ed. 299 (1903) (relying on *Kagama's* race-based plenary power theory); *Winton v. Amos,* 255 U.S. 373, 391–392, 56 Ct.Cl. 472, 41 S.Ct. 342, 65 L.Ed. 684 (1921) (Congress' "plenary authority" is based on Indians' "condition of tutelage or dependency"); *Wheeler, supra,* at 319, 98 S.Ct. 1079 (*Winton* and *Lone Wolf* illustrate the "undisputed fact that Congress has plenary authority" over tribes); *Lara, supra,* at 224, 124 S.Ct. 1628 (THOMAS, J., concurring in judgment) ("The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty").

It is time that the Court reconsider these precedents. Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty. And, until the Court rejects ***1969** the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the "remnants of a race" for its own good. *Kagama, supra,* at 384, 6 S.Ct. 1109.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 "Indian country" is defined in 18 U.S.C. § 1151 to encompass all land within any Indian reservation under federal jurisdiction, all dependent Indian communities, and all Indian allotments, the Indian titles to which have not been extinguished.

2 Until 1986, ICRA permitted sentences of imprisonment up to only six months. See 100 Stat. 3207–146.

3 Among the additional safeguards attending longer sentences is the unqualified right of an indigent defendant to appointed counsel. 25 U.S.C. § 1302(c)(1), (2).

4 Tribal governments generally lack criminal jurisdiction over non-Indians who commit crimes in Indian country. See *Oliphant v. Suquamish Tribe,* 435 U.S. 191, 195, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). In the Violence Against Women Reauthorization Act of 2013, Congress amended ICRA to authorize tribal courts to "exercise special domestic violence criminal jurisdiction" over certain domestic violence offenses committed by a non-Indian against an Indian. Pub. L. 113–4, § 904, 127 Stat. 120–122 (codified at 25 U.S.C. § 1304). Tribal courts' exercise of this jurisdiction requires procedural safeguards similar to those required for imposing on Indian defendants sentences in excess of one year, including the unqualified right of an indigent defendant to appointed counsel. See § 1304(d). We express no view on the validity of those provisions.

5 Congress has since expanded the definition of felony assault to include "[a]ssault resulting in substantial bodily injury to a spouse [,] ... intimate partner, [or] dating partner" and "[a]ssault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate." Violence Against Women Reauthorization Act of 2013, § 906, 127 Stat. 124 (codified at 18 U.S.C. § 113(a)(7), (8)). The "substantial bodily injury" requirement remains difficult to satisfy, as it requires "a temporary but substantial disfigurement" or "a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." § 113(b)(1).

6 Section 117(a) has since been amended to include as qualifying predicate offenses, in addition to intimate-partner crimes, "assault, sexual abuse, [and] serious violent felony" offenses committed "against a child of or in the care of the person committing the domestic assault." 18 U.S.C. § 117(a) (Supp. II 2014).

7 In *United States v. Ant,* 882 F.2d 1389 (1989), the Ninth Circuit proscribed the use of an uncounseled tribal-court guilty plea as evidence of guilt in a subsequent federal prosecution arising out of the same incident. Use of the plea was impermissible, the Court of Appeals reasoned, "because the tribal court guilty plea was made under circumstances which would have violated the United States Constitution were it applicable to tribal proceedings." *Id.,* at 1390.

8 True, as Bryant points out, we based our decision in *Nichols v. United States,* 511 U.S. 738, 747, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), in part on the "less exacting" nature of sentencing, compared with the heightened burden of proof required for determining guilt. But, in describing the rule we adopted, we said that it encompasses both "criminal history provisions," applicable at sentencing, and "recidivist statutes," of which § 117(a) is one. *Ibid.* Moreover, *Nichols* ' two primary rationales—the validity of the prior conviction and the sentence's punishment of "only the last offense"—do not rely on a distinction between guilt adjudication and sentencing. Indeed, it is the validity of the prior conviction that

distinguishes *Nichols* from *United States v. Tucker,* 404 U.S. 443, 448, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), in which we found impermissible the use at sentencing of an *invalid,* uncounseled prior conviction.

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