

The Rights of Criminal Defendants, and the Rights of Prisoners, in Tribal Prosecutions Under TLOA

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Talton v. Mayes, 163 U.S. 376 (1896)

“It cannot be doubted, as said in *Worcester*, that . . .
‘The Indian nations had always been considered as
distinct, independent political communities, retaining
their original natural rights.’ . . . [Because] the
powers of local self-government enjoyed by the
Cherokee Nation existed prior to the constitution,
they are not operated upon by the fifth amendment.”

Indian Civil Rights Act of 1968

(25 U.S.C. § § 1301 *et seq.*)

In 1968, in reaction to allegations of arbitrary abuse of tribal authority, Congress required Indian tribes to afford nearly all the protections in the Bill of Rights, such as:

- Freedom of speech, press, assembly, and petition;
- Protection against unlawful search and seizure;
- Protection against double jeopardy and self-incrim.;
- Right to a speedy trial, and to call witnesses;
- Right to *hire* counsel;
- Right to a criminal jury trial of at least six jurors;
- Protection against cruel and unusual punishment and the imposition of excessive fines;
- Right to due process and equal protection.

ICRA: A Compromise

Some people argued for the total adoption of the Bill of Rights into the ICRA. Congress compromised. The ICRA omits 6 civil liberties contained in the Constitution:

1. Establishment Clause (1st Amendment)
2. Discrimination in voting (15th Amendment)
3. Jury trials in civil cases (7th Amendment)
4. Grand Jury indictments (5th Amendment)
5. Counsel in criminal cases (6th Amendment)
6. Right to bear arms (2^d Amendment)

§ 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.

If Your ICRA Rights Are Violated, What is Your Remedy?

The ICRA expressly provides only one remedy: habeas corpus. But many of the rights guaranteed by the ICRA cannot be protected that way.

From 1968-1978, federal courts granted remedies in a wide range of “non-custodial” cases.

If Your ICRA Rights Are Violated, What is Your Remedy? (cont.)

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978):

1. ICRA does not waive tribal sovereign immunity from suit in *federal* court. (A writ of habeas corpus is a suit against a tribal official, not the tribe.) Nothing in the ICRA authorizes suit against Indian tribes.
2. “Tribal forums are available to vindicate rights created by the ICRA, and Section 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply.”

Is There A Remedy in Tribal Court?

The Court in *Santa Clara Pueblo* assumed that Indian tribes must provide a remedy for all violations of ICRA. But that part of the decision was not binding on tribes (“dicta”).

On many reservations, there’s no remedy in tribal court for non-custodial violations of ICRA because the tribe has not passed a law allowing the tribal courts to hear suits against the tribe.

Other Tribes: There Is A Remedy

On many other reservations, a remedy *does* exist for non-custodial violations of ICRA because:

1. A growing number of tribes are amending their Constitutions or passing statutes to expressly waive tribal sovereign immunity in such cases.
2. On those reservations where such consent has not been given, some tribal courts have ruled that they have the inherent right to decide such issues.

Express Authorizations

The Constitution of the Three Affiliated Tribes of the Ft. Berthold Reservation confers on its tribal courts “the authority to enforce the provisions of the Indian Civil Rights Act.”

Express Authorizations

The Constitution of the Confederated Tribes of the Grand Ronde Community grants its courts the power “to review and overturn Tribal legislative and executive actions for violation of this Constitution or the Indian Civil Rights Act.”

Express Authorizations

The Constitution of the Rosebud Sioux Tribe confers on its tribal courts “the power to review and overturn tribal legislative and executive actions for violations of the Constitution or of the Federal Indian Civil Rights Act of 1968.”

Tribal Law and Order Act of 2010 (TLOA)

Under the ICRA, the maximum punishment that tribes can impose for one offense is 1 year of imprisonment or a fine of \$5,000, or both.

On the urging of many tribes, Congress passed TLOA in 2010 to help fight crime. Under TLOA, tribes can impose for any one offense 3 years of imprisonment or a fine of \$15,000, or both, with a maximum of 9 years for three or more offenses.

TLOA (cont.)

However, to impose an “enhanced” sentence, the defendant must:

1. have 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.

TLOA (cont.)

In addition, the tribe must do five things:

1. “provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;”
2. if the defendant is indigent, provide free assistance of an attorney licensed “by any jurisdiction in the United States” that ensures the competence of its licensed attorneys;

TLOA (cont.)

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 tribe’s criminal laws, rules of evidence, and rules of criminal procedure; and
5. “maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.”

TLOA (cont.)

Sentencing:

Defendants sentenced under TLOA may be required to serve their sentence in (1) a tribal jail approved by the BIA for long-term incarceration, (2) a federal facility, (3) a state or local correctional center, or (4) an alternative rehabilitation center.

Today, more than thirty tribes exercise authority under TLOA.

Enforcing the Rights of Criminal Defendants in ICRA/TLOA Cases

A review of tribal court decisions shows that tribal courts have been extremely sensitive to protecting the rights of criminal defendants in ICRA/TLOA cases. As one tribal court stated: “Tribal courts have consistently demonstrated they are up to the challenge of interpreting federal law and balancing the rights of tribal criminal defendants properly.”

Picard v. Colville Confed. Tribes, 2020 WL 858212 (Coville Ct. App. 2020).

Enforcing ICRA/TLOA in Tribal Court (cont.)

Overarching principle:

In implementing the rights listed in ICRA, tribal courts will look to see how those analogous rights are implemented by federal courts. However, tribal courts are not bound by a federal court's interpretation. As one tribal court of appeals stated: "A different interpretation may be appropriate if it is shown the Tribe's customs and traditions require it."

Charles v. Swinomish Tribal Community, 22 NICS App. 1 (Swinomish Ct. App. 2024).

Enforcing ICRA/TLOA in Tribal Court (cont.)

Due Process

Charles v. Swinomish Tribal Community, 22 NICS App. 1 (Swinomish Ct. App. 2024) (overturning conviction due to the tribe presenting inadequate evidence of the crime).

Big Eagle v. Andera, 508 F.2d 1293 (8th Cir. 1975) (overturning tribal court conviction of disorderly conduct because tribal ordinance was vague in violation of the Due Process Clause).

Enforcing ICRA/TLOA in Tribal Court (cont.)

Double Jeopardy

Tohono O'odham Nation v. Miles, No. AP2023-0005 (Tohono O'odham Ct. App. 2024) (finding that although tribal law does not protect against double jeopardy, ICRA does, but finds here that defendant was properly convicted of violating two tribal laws).

Enforcing ICRA/TLOA in Tribal Court (cont.)

Excessive Fines

Swinomish Tribal Community v. 2002 BMW, 2022 WL 3723225 (Swinomish Tribal Ct. 2022)

(overturning the forfeiture of an automobile owned by a third party because the tribe hadn't shown that the loss was proportional to the owner's culpability or necessary for deterrence).

Enforcing ICRA/TLOA in Tribal Court (cont.)

Equal Protection

Priest v. Colville Confed. Tribes, 2023 WL 8452393 (Colville Ct. App. 2023) (holding that denying credit for time served merely because the defendant was convicted of a drug offense violates the ICRA's Equal Protection Clause and is inconsistent with tribal law and custom).

Enforcing ICRA/TLOA in Tribal Court (cont.)

Failure to publish the Tribe's rules of evidence

Desautel/Randall v. Colville Confed. Tribes, 13 Am. Tribal Law 347 (Colville Ct. App. 2016) (holding that the Tribe's failure to publish its rules of evidence violates TLOA and requires dismissal of the charges).

Enforcing ICRA/TLOA in Tribal Court

(cont.)

Right to Confront Witnesses

Lilley v. Fort Peck Tribes, 2023 WL 8099472 (Fort Peck Ct. App. 2023) (citing ICRA's confrontation clause, court orders new trial for defendant convicted on hearsay evidence).

Enforcing ICRA/TLOA in Tribal Court (cont.)

Search and Seizure

Lambert v. Fort Peck Tribes, 2024 WL 1557839
(Fort Peck Ct. App. 2024) (citing ICRA, court
overturns conviction and remands due to illegal
search and seizure).

Enforcing ICRA/TLOA in Tribal Court (cont.)

Speedy Trial

Vandecar v. Muscogee (Creek) Nation, No. SC-2022-01 (Muscogee Sup. Ct. 2022) (citing ICRA, court orders a hearing on whether defendant was denied a speedy trial).

Eagle v. Fort Peck Tribes, 2022 WL 614775 (Fort Peck Ct. App. 2022) (finding that ICRA's right to a speedy trial was violated and dismissing charges).

Summary: ICRA/TLOA

1. Nearly every constitutional right that a defendant has in federal is also guaranteed to a defendant in tribal court because of ICRA/TLOA. Tribal courts seek guidance from federal courts in interpreting those rights but often apply them in a manner consistent with that tribe's customs and traditions.
2. Few ICRA/TLOA cases reach federal courts because (a) federal courts require exhaustion of tribal remedies, *see Valenzuela v. Silversmith*, 699 F.3d 1199 (10th Cir. 2012), and (b) tribal courts are doing a good job applying ICRA/TLOA.

The Rights of Prisoners in ICRA/TLOA Prosecutions

The U.S. Supreme Court has recognized that prisoners retain some constitutional rights. The Court has found that prisoners have limited rights under the First, Fourth, Sixth, Eighth, and Fourteenth Amendments.

Given that those same rights are enumerated in the ICRA/TOLA, there is every reason to believe that tribal prisoners are entitled to those same rights.

Prisoners' Rights: Background

1. Fyodor Dostoevsky: "The degree of civilization in a society can be judged by entering its prisons." Civilized societies treat their prisoners humanely.

2. Even if we are motivated purely selfishly, we should treat prisoners humanely because 99% of them will return to society. If they're mistreated in prison and not rehabilitated, they'll be more apt to reoffend. We're not asking for a Hilton hotel but only a place that understands that good people often make bad decisions.

Background (cont.)

3. About 80 tribes operate a jail. Most are administered by the BIA or by the tribe through a “638” contract. Only a few are operated solely by the tribe.

As a 2011 joint report from the DOJ and DOI found, many tribal jails are in “egregious physical condition, plagued by overcrowding and serious disrepair.”

<https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/tloa-tsp-aug2011.pdf> at 22.

Background (cont.)

Ass't Sec'y Bryan Newland reported to Congress in May 2024 that “the total estimated unmet obligations identified in the 2021 TLOA report for Tribal law enforcement, detention, and courts funding are just over \$3 billion,” with \$284 million of that needed to upgrade *existing* detention centers, never mind the need to build new ones on other reservations.

<https://www.doi.gov/sites/default/files/documents/2024-05/52224-native-communities-safety-newland.pdf>

1. Cruel and Unusual Punishment

People are sent to jail *as* punishment, not *for* punishment. Thus, any significant injury they receive beyond the loss of liberty is “cruel and unusual.”

The Eighth Amendment obligates prison officials to “provide humane conditions of confinement; prisons officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’” --*Farmer v. Brennan*, 511 U.S. 835, 832 (1994), quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984).

Cruel and Unusual Punishment (cont.)

To obtain an injunction, the prisoner need not wait until the injury has actually occurred, provided that the condition “is sure or very likely to cause serious injury and needless suffering.” --*Helling v. McKinney*, 509 U.S. 25, 33 (1993).

The court should consider the length of time that the prisoner is subject to an unsafe or unhealthy condition. For instance, an overcrowded or filthy cell may be tolerable “for a few days but intolerably cruel for weeks or months.” --*Hutto v. Finney*, 437 U.S. 678, 686-87 (1978).

Cruel and Unusual Punishment (cont.)

The prisoner must prove that the defendant is “deliberately indifferent.” This requires proof that the defendant either knew about the condition or was reckless in the administration of the jail, ignoring obvious risks.

For example, a prisoner beaten in a jail could win a damages suit only by proving that the defendant knew the perpetrator was violent or failed to take reasonable steps to prevent violence in the jail.

Cruel and Unusual Punishment:

(a) Overcrowding

There is no fixed limit on the number of prisoners who can be confined to a cell. However, overcrowding becomes unconstitutional when it (1) increases the risk of violence, (2) prevents providing necessary services like food or recreation, or (3) creates unhealthy conditions like inadequate ventilation or plumbing.

Bell v. Wolfish, 441 U.S. 520 (1979)

Rhodes v. Chapman, 452 U.S. 337 (1981)

Cruel and Unusual Punishment:

(b) Inadequate Staffing

Adequate staffing is a necessity. Staff must be adequate in number and training. Maintaining adequate staff is one of the most important requirements of any jail.

Dangers of having inadequate staff:

- increase in prisoner violence
- unable to provide essential services (food, recreation, laundry, etc.)
- unable to timely respond to emergencies

Cruel and Unusual Punishment:

(c) Inadequate Medical Care

Prisoners have an Eighth Amendment right to adequate medical care. “An inmate must rely on prison authorities to treat his medical needs” because failing or delaying to do so may result in “torture or a lingering death” or “in pain and suffering which no one suggests would serve any penological purpose.”

--*Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

Jails violate the 8th Amendment when they:

- cause a prisoner to suffer unnecessary pain, or
- a worsening of the condition, or
- place the prisoner at serious risk of future harm

Cruel and Unusual Punishment: (d) Inadequate Ventilation

Adequate ventilation is necessary to ensure proper respiration, prevent the spread of communicable diseases, and prevent the spread of mold and other airborne contaminants.

“Inadequate ventilation and air flow violates the Eighth Amendment if it undermines the health of inmates and the sanitation of the penitentiary.”

Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996).

Cruel and Unusual Punishment: (e) Inadequate Sanitation

Sanitation is one of “the discrete basic human needs that prison officials must satisfy“ to ensure prisoner health. *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986).

Jails can require prisoners to clean their housing units but the Jail is ultimately responsible. *See Blake v. Hall*, 668 F.2d 52, 57-58 (1st Cir. 1981) (“the prison administration must bear the ultimate responsibility for cell block conditions.”)

Cruel and Unusual Punishment:

(f) Inadequate Plumbing

Plumbing violates the 8th Amendment when it is “in such disrepair as to deprive inmates of basic elements of hygiene and seriously threaten their physical and mental well-being.”

Jails must provide:

- adequate sinks, toilets, and showers
- adequate hot and cold water
- adequate plumbing for dishwashing, laundry
- timely and effective maintenance

Hoptowit v. Spellman, 753 F.2d 779, 783 (9th Cir. 1985).

Cruel and Unusual Punishment: (g) Indoor and Outdoor Recreation

“Exercise is one of the basic human necessities protected by the Eighth Amendment. . . . [Prisoners held] for more than a short period of time” must be offered a reasonable opportunity for both indoor *and* outdoor recreation. *Pierce v. County of Orange*, 526 F.3d 1190, 1211-12 (9th Cir. 2008).

Courts have required that rec be offered at least 3 times a week, that even segregated prisoners be offered rec unless it creates a security risk, and long-term prisoners especially be offered outdoor rec.

Other Eighth Amendment Rights

Other conditions that violate the Eighth Amendment include:

1. Inadequate protection from assault by other prisoners;
2. Inadequate temperature control (heating/cooling);
3. Inadequate lighting; and
4. Prolonged and/or inappropriate use of isolation.

Other Prisoners' Rights

1. Equal Protection: *e.g.*, female prisoners must have comparable opportunities as male prisoners.
2. Due Process: *e.g.*, prisoners may not be placed in long-term segregation without notice and a hearing before an impartial examiner.
3. Right to Counsel/Right to Petition for Redress of Grievances: *e.g.*, prisoners cannot be denied the right to correspond freely (without censorship) with their attorneys and with courts.