REMAINING SILENT IN INDIAN COUNTRY: SELF-INCRIMINATION AND GRANTS OF IMMUNITY FOR TRIBAL COURT DEFENDANTS

Philipp C. Kunze*

Abstract: A defendant in state and federal courts is entitled to a constitutional protection against self-incrimination. The Fifth Amendment establishes this privilege, which can only be overcome through a voluntary waiver or by the granting of an appropriate level of immunity. Those grants of immunity were made mutually binding on the state and federal governments in *Kastigar v. United States* and *Murphy v. Waterfront Commission of New York Harbor*. However, in *Talton v. Mayes*, the U.S. Supreme Court held that the Fifth and Fourteenth Amendments do not limit the conduct of the more than 560 federally recognized Indian tribes within the boundaries of the United States. In response, Congress exercised its plenary power and passed the Indian Civil Rights Act (ICRA). Under federal law, ICRA extended many, but not all, protections afforded under the Bill of Rights to tribal defendants without any required action from the tribes; many of the provisions are verbatim from the Constitution's amendments. However, the complicated distribution of jurisdiction amongst sovereigns, as well as the tribal authority to create and implement unique constitutions and systems of justice, calls into question the standard by which to evaluate violations of the privilege against self-incrimination in tribal court. Furthermore, rare examples exist in which a court of any jurisdiction has considered or extended the mutually binding nature of grants of immunity and the use of testimony compelled by a separate jurisdiction to include tribal courts. This Comment suggests that violations of ICRA's protections against self-incrimination be evaluated under a Fifth Amendment standard, utilizing U.S. Supreme Court precedent. This approach ensures a predictable analysis that is consistent with the legislative intent of ICRA and minimizes potential complications upon federal habeas review. This Comment further suggests that the universal application of Fifth Amendment precedent is a prerequisite for mutual and binding recognition of tribal, state, and federal grants of immunity. Mutual recognition places tribal courts on equal footing with state and federal courts. Further, a defendant facing prosecution in two or more courts exercising concurrent jurisdiction benefits when courts extend and recognize binding grants of immunity. Lastly, when grants of immunity apply in each jurisdiction, tribal courts and communities are empowered to pursue avenues of justice unique to tribal traditions and cultures.

INTRODUCTION

In 1883, the U.S. Supreme Court decided the seminal case of *Ex parte Crow Dog*.[1] The Court held the Dakota Territory federal court did not

* J.D. Candidate, University of Washington School of Law, Class of 2019. The author is an officer in the U.S. Coast Guard, as well as an admitted spokesperson before the Tulalip Tribal Bar. The opinions, conclusions, and views expressed herein are solely those of the author; they are not to be construed as official and do not reflect the official position of the U.S. Government, the U.S. Coast Guard, or the Tulalip Tribes and their agencies. The author gratefully thanks the staff of *Washington*

have jurisdiction to hear the case of an Indian defendant accused of the homicide of another Indian on the Great Sioux Reservation.[2] *Ex parte Crow Dog* triggered more than 140 years of extensive judicial history,[3] as the Court analyzed often contradictory, vacillating, and heavy-handed congressional action imposing laws on the Indian tribes.[4]

Greater awareness of the disparities of rights available to Indians was achieved contemporaneously to the broader civil rights movement sweeping the nation in the 1960s.[5] Congress responded to perceived shortcomings in the protections of Indian defendants in tribal courts and passed the Indian Civil Rights Act of 1968 (ICRA).[6] While ICRA afforded Indians in tribal court many of the privileges and protections of the Constitution's Bill of Rights[7] that are essential to the criminal process, Congress also made some notable exceptions.[8] For example, ICRA does not include an establishment clause, a right to bear arms, or legal representation for indigent defendants.[9]

Despite many of the differences between ICRA and the Bill of Rights, both documents utilize substantially similar, and sometimes verbatim, language to describe the enumerated rights. By their terms, ICRA and the Constitution impose nearly "identical limitation[s]"[10] on the federal and tribal governments, including a privilege against self-incrimination.[11] However, courts have applied various standards of analysis and

---

Law Review for their patience and tireless editing to make this Comment possible. Thank you also to Professor Robert Anderson for his insight and guidance, and to Professors Molly Cohan and Brenda Williams of the Tulalip Tribal Defense Clinic.

1. 109 U.S. 556 (1883).

2. *Id.* at 572.

3. *See generally* United States v. Lara, 541 U.S. 193 (2004); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

4. *See generally* Major Crimes Act, 18 U.S.C. § 1153 (2012); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1304 (2012 & Supp. III 2015); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118–26 (codified in scattered sections of 18, 25, and 42 U.S.C.); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261–301 (codified in scattered sections of 25 and 42 U.S.C.).

5. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 127–28 (1983).

6. Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303 (2012)).

7. U.S. CONST. amends. I–X.

8. *Compare* U.S. CONST. amends. VI–VII, *with* 25 U.S.C. § 1302 (discussing the right to a jury trial and representation by counsel).

9. 25 U.S.C. § 1302.

10. United States v. Becerra-Garcia, 397 F.3d 1167, 1171 (9th Cir. 2005).

11. *Compare* U.S. CONST. amend. V, *with* 25 U.S.C. § 1302(a)(4).

interpretation to assess compliance with ICRA's provisions—some have emphasized tribal sovereignty, while others have looked to the textual similarities and congressional intent.[12] The tribal defendant's exposure to prosecution in tribal, federal, and state courts further complicates the inconsistent standard of analysis.

In *United States v. Lara*,[13] the U.S. Supreme Court upheld a congressional statute which recognized the tribes' inherent sovereign power to prosecute non-member Indians and removed political restrictions on such prosecutions.[14] A tribal defendant is thus subject to prosecution in any tribal court within the United States and, therefore, the defendant is subject to each tribal court's unique constitution and interpretation of ICRA. The Court also held that prosecuting a tribal defendant under both tribal and federal law did not violate the Double Jeopardy Clause of the Constitution.[15]

According to both the Constitution and ICRA, the government may not compel a person "in any criminal case to be a witness against themselves."[16] Although federal and state defendants are entitled to the privilege against self-incrimination articulated by the Fifth Amendment, defendants may still be compelled to testify through the granting of *use and derivative use immunity* or *transactional immunity*.[17] Because a grant of immunity minimizes or eliminates the threat of prosecution based on the compelled testimony, the defendant receives "very substantial protection, commensurate with [the protection] resulting from invoking" the Fifth Amendment and must therefore testify.[18] However, once a federal or state entity makes such a grant of immunity, it is mutually binding on other jurisdictions to the extent that the compelled testimony or its derivative evidence is the basis for a subsequent prosecution of the defendant.[19] Only a few courts have considered whether federal and state

12. *Compare* United States v. Lara, 541 U.S. 193, 210 (2004) (tribal sovereignty), *with Becerra-Garcia*, 397 F.3d at 1171 (textual similarities).

13. 541 U.S. 193 (2004).

14. *Lara*, 541 U.S. at 210. The statute in question was called the "*Duro* fix," Pub. L. No. 102-137, 105 Stat. 646 (1991), and was passed in the wake of *Duro v. Reina*, 495 U.S. 676 (1990). As the *Lara* Court explained, *Duro* had held "that a tribe no longer possessed *inherent or sovereign authority* to prosecute a 'nonmember Indian.'" *Lara*, 541 U.S. at 197 (citing *Duro*, 495 U.S. at 682).

15. *Id.*

16. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); 25 U.S.C. § 1302 ("No Indian tribe . . . shall . . . compel any person in any criminal case to be a witness against himself . . . .").

17. 18 U.S.C. §§ 6001–6005 (2012).

18. Kastigar v. United States, 406 U.S. 441, 461 (1972).

19. *Id.*; Murphy v. Waterfront Comm'n, 378 U.S. 52, 80 (1964).

grants of immunity are binding on tribal courts,[20] and none have considered the binding effect of tribal grants of immunity.

This Comment analyzes the interaction between the Fifth Amendment and ICRA and the impact of applying federal and tribal standards of analysis to tribal defendants. Part I traces the protections provided by the Fifth Amendment and the development of mutually binding grants of immunity in federal and state courts. Part II provides a general overview of the complicated jurisdictional scheme and relationship between the tribes, the several states, and the federal government. Part III follows the passage of ICRA and the various standards of analysis applied to its provisions. Part IV argues that courts of all jurisdictions should analyze violations of ICRA's self-incrimination provision under a federal Fifth Amendment standard. This Part also argues that the threat of prosecution in a tribal court is sufficient to invoke Fifth Amendment protections in federal or state court. Lastly, Part V argues that, having adopted a uniform standard of analysis for self-incrimination violations, grants of immunity by tribal, state, or federal courts should be mutually binding.

I. FIFTH AMENDMENT PROTECTION IN THE UNITED STATES

Federal and state courts must comply with the constitutional mandates enumerated in the Bill of Rights. A defendant or witness is generally entitled to invoke a privilege against self-incrimination under the Fifth Amendment, and compelling testimony without the appropriate constitutional safeguards is typically prohibited. One permissible avenue of compelling testimony without violating the Fifth Amendment is through grants of immunity which prohibit the direct use or derivative use of such testimony against the defendant or witness in future prosecutions.

A. The Fifth Amendment Protects Against a Defendant's or Witness's Compelled Self-Incrimination

"I plead the Fifth!" is a common refrain found on the news, on television shows, and in movies.[21] Although the Bill of Rights protects

20. *In re* Long Visitor, 523 F.2d 443 (8th Cir. 1975); Navajo Nation v. MacDonald Jr., 19 Indian L. Rep. 6079 (Navajo Nation Sup. Ct. 1992); Tracy v. Superior Court of Maricopa Cty., 810 P.2d 1030 (Ariz. 1991).

21. *See, e.g.*, CNBC, *Martin Shkreli Testifies Before Congress: Full Testimony*, YOUTUBE (Feb. 4, 2016), https://www.youtube.com/watch?v=LPIQ_gyiHag (last visited Oct. 1, 2018); Comedy Central, *Chappelle's Show - Tron Carter's "Law & Order" – Uncensored*, YOUTUBE (Mar. 1, 2018), https://www.youtube.com/watch?v=HeOVbeh2yr0 (last visited Oct. 1, 2018); MISS SLOANE

one's right to silence, the right is not absolute; the defendant or witness must first be entitled to invoke those protections.[22]

The Fifth Amendment provides in relevant part that "no person . . . shall be compelled in any criminal case to be a witness against himself."[23] As a protection against "testimonial compulsion,"[24] this right is "accorded liberal construction in favor of the right it was intended to secure."[25] Further, despite the clear limiting language, the protections offered by the Fifth Amendment may be more broadly "asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory."[26] However, the Fifth Amendment's protections must still be "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer."[27]

When a witness or defendant invokes the protections of the Fifth Amendment, the judge must determine if the "silence is justified."[28] A court will consider the questions posed to the individual, the questions' implications, and the setting in which the questions were asked; then the court determines whether a responsive answer or explanatory demurral would threaten the invoked privilege.[29] Ultimately, the court must determine if the witness has a reasonable cause to apprehend danger of prosecution from a direct answer.[30] The court will decline the witness's invocation of the privilege only if it is clear under all the circumstances that the witness is mistaken and that the contested testimony cannot incriminate the witness.[31]

(FilmNation Entm't 2016); Theodore Schleifer & Laura Koran, *Judicial Watch: Clinton IT Staffer Pleads 5th 125 Consecutive Times*, CNN (June 22, 2016, 8:56 PM), https://www.cnn.com/2016/06/22/politics/bryan-pagliano-judicial-watch-deposition/index.html [https://perma.cc/3YG7-Q9TY].

22. Hoffman v. United States, 341 U.S. 479, 486 (1951).

23. U.S. CONST. amend. V.

24. *Hoffman*, 341 U.S. at 486.

25. *Id.*

26. Kastigar v. United States, 406 U.S. 441, 444 (1972) (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 93–94 (1964) (White, J., concurring)).

27. *Hoffman*, 341 U.S. at 486.

28. *Id.*

29. *Id.* at 486–87.

30. *Id.* at 486.

31. Counselman v. Hitchcock, 142 U.S. 547, 580 (1891) (citing Temple v. Commonwealth, 75 Va. 892 (1881)).

Invoking the Fifth Amendment also requires satisfying three concurrent criteria.[32] First, the demanded evidence must be testimonial.[33] Second, the evidence must be compelled.[34] Third, the evidence must be incriminating.[35]

1. Fifth Amendment Evidence Must Be Testimonial

The Fifth Amendment normally protects defendants and witnesses from incriminating themselves only through oral testimony.[36] The production of physical documents potentially implicates the Fifth Amendment in certain instances, even though physical evidence is generally not protected.[37] In *Fisher v. United States*,[38] the U.S. Supreme Court suggested that the act of production may be transformed into a testimonial act when a defendant is required to determine which documents to produce in response to a subpoena.[39] However, the Court identified another exception to the exception of transformed testimonial production.[40] If the records or documents whose existence, authenticity, and possession or control by the defendant are a "foregone conclusion,"[41] those documents are not entitled to testimonial status.[42] Because the documents do not have testimonial status, the defendant cannot invoke Fifth Amendment protections in that instance.

2. Fifth Amendment Evidence Must Be Compelled

Government agents may compel testimony at a court proceeding or through questioning. The *Miranda* doctrine[43] and associated extensive

---

32. *See* Brown v. United States, 356 U.S. 148, 155 (1958) ("A witness who is compelled to testify . . . has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate.").

33. *Id.*

34. *Id.*

35. *Id.*

36. Fisher v. United States, 425 U.S. 391, 408 (1976).

37. *Id.* at 409.

38. 425 U.S. 391 (1976).

39. *Id.* at 411.

40. *Id.* at 391.

41. *Id.*

42. *Id.* at 411. The government must demonstrate, however, that the existence, possession, and authenticity of the documents are all foregone conclusions. *Id.* at 411–13.

43. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (applying the right to silence to custodial interrogations and balancing the rights of Americans versus the efficiency and efficacy of police investigations to prevent crime). A person in custody "must be warned prior to any questioning that

judicial history explore the nuances of statements made during custodial interrogation and the application of the Fifth Amendment to those circumstances. Testimony outside of custodial interrogations is compelled if the witness faces the "cruel trilemma."[44] This trilemma occurs when a witness believes there are only three choices in response to a question at the time of questioning: (1) lie and be held liable for perjury; (2) refuse to answer and be liable for contempt; or (3) answer truthfully and furnish inculpatory evidence.[45] An additional corollary to the "cruel trilemma" is that the government may not use a defendant's right to silence (including a refusal to testify at trial) to assist in the prosecution.[46] The U.S. Supreme Court has also held that severe threats to an individual's livelihood are sufficiently compulsory to invoke the protections of the Fifth Amendment, especially when the government employs the defendant.[47]

3. Fifth Amendment Evidence Must Be Incriminating

In addition to being testimonial and compelled, Fifth Amendment protected testimony must also be incriminating. Testimonial evidence does not have to "support a conviction under a . . . criminal statute," but must only "furnish a link in the chain of evidence needed."[48] A court may also extend Fifth Amendment privileges to statutes superficially designated as civil sanctions if the statute's purpose or intent is sufficiently punitive.[49] The courts will look to seven factors[50] to determine if proof exists that the statutory scheme has "transformed what was clearly intended as a civil remedy into a criminal penalty."[51] Likewise, the person invoking the Fifth Amendment need not be on trial themselves, so long as

---

he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479.

44. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

45. *Id.*

46. Griffin v. California, 380 U.S. 609, 615 (1965).

47. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 76 (1973) (eligibility for government contract); Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (employment as a police officer); Spevack v. Klein, 385 U.S. 511, 514 (1966) (disbarment); *cf.* McKune v. Lile, 536 U.S. 24, 29 (2002) (incentivizing admission during voluntary sex offender treatment program); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 276 (1998) (declining to grant parole/clemency for death row inmate following silence in response to a question at voluntary interview).

48. Hoffman v. United States, 341 U.S. 479, 486 (1951) (citing Blau v. United States, 340 U.S. 159 (1950)).

49. Hudson v. United States, 522 U.S. 93, 99 (1997).

50. *Id.* at 99–100; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

51. Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956).

there exists a reasonable danger of future prosecution;[52] even a witness proclaiming innocence may assert Fifth Amendment rights and invoke its protections.[53] The risk of incrimination may not be "of an imaginary and unsubstantial character" or "some extraordinary and barely possible contingency."[54]

B. Fifth Amendment Protections Are Not Absolute and May Be Overcome

A witness's or defendant's testimony, even if compelled, testimonial, and incriminating, may still fall outside the scope of Fifth Amendment protection. First, a defendant may waive the protections of the Fifth Amendment by voluntarily taking the stand as a defense witness.[55] A defendant or witness may not then invoke the Fifth Amendment upon cross-examination "regarding matters made relevant by [their] direct examination."[56] Likewise, a witness or defendant who has previously failed to invoke Fifth Amendment rights and has given testimony may be compelled to repeat such testimony as there is no *new* risk of incrimination or prosecution.[57] Additionally, testimony that is compelled but never acted upon or offered as inculpatory evidence at trial does not violate a defendant's Fifth Amendment rights.[58]

More importantly for this Comment, even a well-founded and reasonable fear of prosecution by a foreign jurisdiction is typically disregarded, as the defendant generally cannot invoke the privileges of the Fifth Amendment.[59] In *United States v. Balsys*,[60] the Court held that a defendant may not invoke Fifth Amendment privileges if there is "no valid fear of criminal prosecution in *this* country."[61] In this case, the Court

---

52. *See Hoffman*, 341 U.S. at 486–87; *Blau*, 340 U.S. at 161; Counselman v. Hitchcock, 142 U.S. 547, 586 (1891).

53. Ohio v. Reiner, 532 U.S. 17, 21–22 (2001) (per curiam).

54. Brown v. Walker, 161 U.S. 591, 599 (1896) (citing Queen v. Boyes (1861) 121 Eng. Rep. 730; 1 B. & S. 311).

55. *Id.*

56. Brown v. United States, 356 U.S. 148, 154 (1958).

57. *See* United States v. Allmon, 594 F.3d 981, 985 (8th Cir. 2010).

58. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990); *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177, 199 (2d Cir. 2008).

59. United States v. Balsys, 524 U.S. 666 (1998), *rev'g* 119 F.3d 122 (2d Cir. 1997). Both parties agreed that the risk of deportation alone is insufficient for asserting Fifth Amendment protections. *Id.* at 671.

60. 524 U.S. 666 (1998), *rev'g* 119 F.3d 122 (2d Cir. 1997).

61. *Id.* at 671 (emphasis added) (citing United States v. Balsys, 119 F.3d 122 (2d Cir. 1997)).

held that a resident alien could not refuse to testify about his alleged Nazi activities during World War II, despite potentially subjecting him to prosecution by the governments of Lithuania, Israel, and Germany.[62] However, the Court suggested that coordinated prosecutorial efforts between the United States and foreign nations may develop to the point at which the Fifth Amendment becomes applicable.[63]

C. Grants of Immunity May Compel Testimony

The use of involuntary statements or testimony as evidence is strongly limited. However, it may be permissible if the defendant or witness is given a grant of immunity.

Courts have firmly maintained that confessions or other statements introduced as evidence against a defendant must be voluntary, based on both common law[64] and judicial precedent.[65] In *Bram v. United States*,[66] the U.S. Supreme Court held that compelled, involuntary confessions gathered by Canadian officials could not be used as evidence during a trial.[67] One hundred thirty years later, the Second Circuit affirmed the same principles considered in *Bram*, holding that compulsory interviews and statements provided to the Financial Conduct Authority of the United Kingdom,[68] and subsequently used by the U.S. Department of Justice during prosecution, violated the defendant's Fifth Amendment rights to not serve as a witness against himself.[69] As such, claims of voluntariness are viewed skeptically, and the issue is most easily circumvented through grants of immunity.

1. There Are Three Types of Immunity Available to Compel Testimony

If the government considers a witness's testimony especially relevant or necessary, it may compel such testimony by granting statutorily

62. *Id.* at 670.

63. *Id.*

64. Bram v. United States, 168 U.S. 532, 545 (1897).

65. United States v. Allen, 864 F.3d 63, 90 (2d Cir. 2017).

66. 168 U.S. 532 (1897).

67. *Bram*, 168 U.S. at 565.

68. *Allen*, 864 F.3d at 66–68. The defendant's refusal to testify would have resulted in imprisonment in the United Kingdom. Additionally, the defendants were provided direct use immunity. *Id.* at 67–68. However, the requisite derivative use immunity (discussed *infra* section I.C.1) was not provided prior to the compulsory statements. *Id.*

69. *Id.* at 66–68.

authorized immunity.[70] There exist three types of immunity: (1) *use immunity*; (2) *use and derivative use immunity*; and (3) *transactional immunity*.[71]

First, the government may grant a witness or defendant *use immunity*. *Use immunity* prohibits the introduction of the specific testimony the court or government compels; however, it does not prohibit the exploitation of such compelled testimony to seek out additional evidence against the witness.[72] The U.S. Supreme Court has held that such limited *use immunity* is not coextensive with the protections afforded by the Fifth Amendment, and therefore "cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege."[73]

A second option available is *use and derivative use*. Contrary to use immunity alone, *use and derivative use immunity* prohibits the introduction of any evidence gathered directly from the compelled testimony, or subsequently derived either directly or indirectly "from such testimony or other information."[74] Such grants of immunity are considered coextensive with the protections afforded by the Fifth Amendment and are therefore adequate to protect a witness's rights when testimony is compelled.[75] Title 18 of the United States Code provides the statutory means by which the federal government may grant immunity to a witness before either House of Congress, a congressional committee, a court, a grand jury, or an agency of the United States.[76] If the government pursues future prosecution following a grant of this type of immunity, the government then assumes a "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate *independent* sources."[77]

The third, and most extensive, grant of immunity is *transactional immunity*. Unlike the other two types of immunity, *transactional immunity* provides protections broader than those of the Fifth Amendment.[78] Compared to use and derivative use immunity, which only prohibits the direct or indirect use of the testimony provided, *transactional immunity* "accords full immunity from prosecution for the

70. Kastigar v. United States, 406 U.S. 441, 448 (1972).

71. *Id.* at 458.

72. *Id.* at 450.

73. *Id.* (discussing Counselman v. Hitchcock, 142 U.S. 547, 586 (1891)).

74. *Id.* at 449 (citing 18 U.S.C. § 6002 (2012)).

75. *Id.* at 453.

76. 18 U.S.C. § 6002 (immunity generally).

77. *Kastigar*, 406 U.S. at 461–62 (emphasis added).

78. *Id.* at 453.

offense to which the compelled testimony relates,"[79] regardless of the source of the evidence sought to be introduced against the defendant. Because *transactional immunity* provides greater protections than the Fifth Amendment, it is sufficient to compel the self-incriminating testimony of a witness.

2. Grants of Immunity Are Binding Across Jurisdictions

The Fourteenth Amendment applies a defendant's privilege against self-incrimination to state proceedings,[80] and state grants of immunity must still comply with the constitutional limitations articulated by the U.S. Supreme Court.[81] In *Murphy v. Waterfront Commission of New York Harbor*,[82] the Court held that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."[83] In other words, both federal and state prosecutors are bound when either grants immunity, and are limited to using evidence independent of compelled testimony. The Court considered the "witness and Federal Government [to be] in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity," without unnecessarily inhibiting the states' law enforcement or investigatory functions.[84]

Because of the mutually binding nature of grants of immunity, the Department of Justice has implemented an agency-wide policy directing U.S. Attorneys to consider potential adverse effects to concurrent prosecutions prior to requesting or granting immunity.[85]

II. THE COMPLICATED RELATIONSHIP BETWEEN THE UNITED STATES, THE SEVERAL STATES, INDIAN TRIBES, AND THE RESPECTIVE LEGAL SYSTEMS OF EACH

Indian tribes, as sovereign entities, preexisted the Constitution and the United States. Through treaty making, legislative action, and judicial decision, the scope of tribal sovereignty has fluctuated wildly from the

79. *Id.*

80. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

81. Counselman v. Hitchcock, 142 U.S. 547, 585–86 (1891).

82. 378 U.S. 52 (1964).

83. *Id.* at 77–78.

84. *Id.* at 79.

85. U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 720 (2018) [hereinafter CRIMINAL RESOURCE MANUAL], https://www.justice.gov/jm/criminal-resource-manual-720-authorization-procedure-immunity-requests [https://perma.cc/YAX8-LSUU].

earliest days of interaction to present; so too has congressional and federal authority to regulate tribal conduct. Indelibly connected with tribal sovereignty, tribal jurisdiction also experienced periods of restriction and restoration. Today's tribal defendants face prosecution in numerous tribunals, including tribal, federal, and state court, with no Double Jeopardy limits. A push is also underway to provide traditional resolutions or apply fundamental Indian law to tribal cases and continue jurisdictional reversion to tribal courts.

A. A Brief History of Indian Sovereignty and Intervention by the Federal Government

There are 567 federally recognized tribes within the national boundaries of the United States.[86] These tribes are located on and exercise jurisdiction over Indian country; Indian country includes reservations, allotments, and dependent Indian communities.[87] A federally recognized tribe is an entity that has "a government-to-government relationship with the United States . . . ."[88] Further, federally recognized tribes are understood to have "certain inherent rights of self-government (i.e., tribal sovereignty),"[89] each entitled to a "special brand of sovereignty."[90]

Early interactions between the government of the United States and Native American tribes demonstrated (at least superficial) respect for the sovereignty of the tribes and Indian nations.[91] In early decisions, the U.S. Supreme Court recognized "those semi-independent tribes whom our government has always recognized as exempt from our laws . . . and, in regard to their domestic government, left to their own rules and traditions."[92] Absent an explicit treaty provision or federal statute to the contrary, Indian crime committed against other Indians was beyond the jurisdiction of federal and state courts.[93]

Furthermore, in the absence of limited examples of delegation, Congress reserved jurisdiction over Indian affairs to the federal

86. Indian Entities Recognized and Eligible to Receive Services from the Unites States Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4235 (Jan. 30, 2018).

87. 18 U.S.C. § 1151 (2012) (defining Indian country).

88. *Frequently Asked Questions: What Is a Federally Recognized Tribe?*, U.S. DEP'T INTERIOR INDIAN AFFS., https://www.bia.gov/frequently-asked-questions [https://perma.cc/CFS6-AEZY].

89. *Id.*

90. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 800 (2014).

91. *See* Robert Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 920 (2012).

92. United States v. Joseph, 94 U.S. 614, 617 (1877).

93. *See generally Ex parte* Crow Dog, 109 U.S. 556 (1883).

government.[94] The Court explicitly rejected state attempts to exercise jurisdiction over the conduct of non-Indians in Indian country.[95] The foundational principles for these holdings were three-fold: (1) that Indian tribes "possess certain incidents of preexisting sovereignty"; (2) that this "sovereignty is subject to diminution or elimination" only by the federal government and not the states; and (3) that the "limited sovereignty and their corresponding dependency upon the United States for protection" imposed a responsibility on the federal government.[96]

Despite these claims and original principles, both legislative and judicial action further curtailed tribal sovereignty and jurisdiction. In 1871, the federal government stopped making treaties with the tribes, effectively ending tribal consent to the form of the tribes' relationship with the federal government.[97] In passing the General Allotment Act of 1887,[98] Congress assigned individual parcels to members of Indian tribes, abrogating the traditional model of community ownership and "returning" approximately 110 million acres of "surplus" territory to public (i.e., non-Indian) ownership.[99] Following the U.S. Supreme Court's ruling in *Ex parte Crow Dog*, and in response to the perceived inadequacy of the traditional tribal means of conflict resolution,[100] Congress passed the Major Crimes Act (MCA).[101] This statute granted to the federal courts jurisdiction over Indians who committed any of the enumerated crimes against other Indians in Indian Country.[102]

These legislative actions, specifically the MCA, were upheld as a proper exercise of Congress' plenary powers over the tribes.[103] Because of the tribes' apparent dependence on the government of the United States, the Court described the tribes as "wards of the nation."[104] The Court held that "[t]he power of the General Government over [the tribes] . . . is necessary to their protection, as well as to the safety of those among whom

94. *See* Anderson, *supra* note 91, at 929.

95. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 562 (1832) (invalidating a Georgia statute requiring non-Indians to have a state license to live on Indian land).

96. CONFERENCE OF WASH. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK § 1:1, at 7–8 (2017); DELORIA & LYTLE, *supra* note 5, at 39.

97. Anderson, *supra* note 91, at 921.

98. Ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

99. Anderson, *supra* note 91, at 921.

100. *Id.* at 925–26.

101. Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (2012)).

102. *Id.* (listing seven crimes; later amended to enumerate thirteen separate crimes).

103. United States v. Kagama, 118 U.S. 375, 384–85 (1886).

104. *Id.* at 382, 383.

they dwell."[105] This plenary power is recognized and upheld as a "broad congressional authority to impose federal policy directly on tribes without their consent,"[106] especially with regards to "health, safety, and morals within Indian country."[107] Congress also limited the sentencing authority of the tribal courts, statutorily capping any sentence to one-year imprisonment and a five thousand dollar fine.[108]

B. The Shifting Scope of Tribal Jurisdiction

From the 1970s to early 2000s, the existing understanding of the Indian tribes' exclusive jurisdiction was limited by a series of court decisions, while legislative efforts to circumscribe tribal authority were judicially upheld. In *Oliphant v. Suquamish Tribe*,[109] the U.S. Supreme Court held that Indian tribes do not have jurisdiction over non-tribal defendants for crimes committed in Indian country.[110] The Court also held in a separate case that the tribes also could not regulate hunting and fishing activities by non-tribal members on land owned in fee simple by non-Indians, even if such land fell within the boundaries of the tribal reservation.[111] In *Strate v. A-1 Contractors*,[112] the Court denied tribal jurisdiction over the civil claims of two non-tribal parties, arising out of conduct occurring on a state highway, on land transferred through a federal lease which crossed through an Indian reservation.[113] The Court also rejected a claim of civil jurisdiction over state officials who entered onto reservation land to execute a state search warrant.[114]

Despite these reductions in jurisdiction, recent legislative efforts and judicial decisions are again extending the scope of tribal courts. First, in *Lara*, the Court upheld a federal statute permitting tribal jurisdiction over *any* member of *any* federally recognized tribe, even if the defendant is not a member of the tribe hearing the case.[115] Additionally, the Court reaffirmed that the Double Jeopardy Clause posed no obstacle to

105. *Id.* at 384.

106. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5-02, at 391 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK].

107. *Id.*

108. 25 U.S.C. § 1302 (2012).

109. 435 U.S. 191 (1978).

110. *Id.* at 195.

111. Montana v. United States, 450 U.S. 544, 566–67 (1981).

112. 520 U.S. 438 (1997).

113. *Id.* at 442.

114. Nevada v. Hicks, 533 U.S. 353, 374 (2001).

115. United States v. Lara, 541 U.S. 193, 210 (2004).

prosecutions under both tribal and federal law.[116] Recent legislation, such as the Violence Against Women Reauthorization Act (VAWA 2013)[117] and the Tribal Law and Order Act (TLOA),[118] have also increased tribal authority. For example, VAWA 2013 includes provisions extending the jurisdiction of tribal courts to non-Indians, specifically in the context of domestic violence prosecutions.[119] Further, TLOA extended tribal sentencing authority by permitting the "stacking" of numerous charges, resulting in an effective sentence of nine years imprisonment and a fifteen thousand dollar fine.[120]

C. Concurrent Jurisdiction and the Intervention of Federal and State Courts in Tribal Matters

When tribal members are not physically located in Indian country, they are subject to the jurisdiction of both the state and federal governments. However, even within the boundaries of Indian country, tribal members may be subject to the jurisdiction of the tribes, the federal government, and the state.[121] For example, although "tribal powers may not be limited by implication"[122] and "concurrent tribal jurisdiction over matters covered by federal criminal statutes is not preempted,"[123] tribal members still remain subject to federal jurisdiction under the MCA[124] and the Indian Country Crimes Act (ICCA).[125] Additionally, some lower courts have held that "the United States has jurisdiction over some general federal criminal laws within Indian country"[126] and that such "general crimes have a nationwide scope and therefore should reach into Indian country."[127]

---

116. *Id.* at 210.

117. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118–26 (codified in scattered sections of 18, 25, and 42 U.S.C.).

118. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261–301 (codified in scattered sections of 25 and 42 U.S.C.).

119. Violence Against Women Reauthorization Act of 2013 § 904 (codified as 25 U.S.C. § 1304 (Supp. III 2015)).

120. Tribal Law and Order Act of 2010 § 234 (codified as 25 U.S.C. § 1302 (2012)).

121. *See generally* Anderson, *supra* note 91, at 924, 926, 930.

122. *Id.* at 927.

123. *Id.*

124. 18 U.S.C. § 1153 (2012). Indian defendants are therefore accountable for the fourteen enumerated crimes (murder, arson, etc.). *Id.*

125. *Id.* § 1152 (assimilating state law crimes through the Assimilative Crimes Act).

126. Anderson, *supra* note 91, at 926.

127. *Id.*

The line of reasoning employed by the U.S. Supreme Court in *United States v. Kagama*,[128] upholding Congress's plenary authority to pass the MCA,[129] has yet to be overruled. In fact, the Court recently affirmed Congress's "broad general powers to legislate in respect to Indian tribes."[130] The same general legislative attitude, as well as efforts to terminate the federal trust relationship,[131] brought about the passage of Public Law 83-280 (PL 280).[132] Congress exercised its plenary power, mandating that some states assume jurisdiction over certain crimes committed within Indian country; other states were presented the option to assume jurisdiction.[133] PL 280 requires six states to assert criminal, and some civil, jurisdiction over Indian country located within the respective state borders; other states could assert criminal and civil jurisdiction unilaterally.[134]

In *United States v. Wheeler*,[135] the Court held that prosecution under both tribal and federal statutes did not implicate Double Jeopardy.[136] First, the tribes retained inherent powers to prosecute tribal members despite the tribes' dependent status with the federal government.[137] Second, because a "separate sovereign" brought each prosecution, the prosecution is not "for the same offence."[138] The Ninth Circuit further refined this holding. Acquittal under the MCA, the court held, did not prevent subsequent prosecution by a tribal court for the same crime under a tribal statute.[139]

This application of the "separate sovereigns" doctrine to the tribes is consistent with the Court's application of the doctrine to the states. In

---

128. 118 U.S. 375 (1886).

129. *Id.* at 384–85; *supra* section II.A.

130. United States v. Lara, 541 U.S. 193, 200–06 (2004) (offering six distinct points of discussion for the basis of Congress's authority).

131. Anderson, *supra* note 91, at 922.

132. State Jurisdiction over Criminal Offenses (PL 280), Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1322, 28 U.S.C. § 1360 (2012)).

133. *Id.* Recall the Court's holding in *Worcester v. Georgia*, 31 U.S. 515 (1832), that the states had no jurisdiction within the boundaries of a reservation under the contemporaneous jurisprudence and law. *Id.* at 562; *supra* text accompanying note 95. PL 280 legislatively overruled this precedent.

134. 18 U.S.C. § 1162(a); Anderson, *supra* note 91, at 930. See WASH. REV. CODE § 37.12 (2018) as an example of Washington State's assertion of jurisdiction over tribal matters. Note also that the optional assumption of jurisdiction has been revoked, and states may request the United States accept a retrocession of previously assumed jurisdiction. 25 U.S.C. § 1323.

135. 435 U.S. 313 (1978).

136. *Id.* at 329–30.

137. *Id.* at 332.

138. *Id.* at 330.

139. Wetsit v. Stafne, 44 F.3d 823, 826 (9th Cir. 1995).

Abbate v. United States,[140] the Court held that a state conviction does not bar prosecution under a federal statute.[141] Further, states may prosecute individuals previously charged under federal law.[142] Successive prosecutions by tribal, state, or federal courts are not barred as each government is a separate sovereign, and the respective courts are not "emanating" from the same sovereign.[143]

It is important to note that the U.S. Supreme Court recently held oral arguments in the case of *Gamble v. United States*[144]; the sole question presented is whether the "separate sovereigns" exception to the Double Jeopardy Clause should be overruled.[145] The Native Indigenous Women's Resource Center (NIWRC) and National Congress of American Indians (NCAI) has strongly opposed such a holding.[146] The NIWRC and NCAI contend that eliminating the "separate sovereigns" exception would "only further perpetuate the crisis Native women and children now face,"[147] as meaningful and sufficient punishment of domestic violence offenders requires the availability of federal prosecution in addition to tribal sanctions.[148] Arguably, tribes would be left with two choices: (1) wait for a decision on federal prosecution, potentially exceeding the tribal statute of limitations, or (2) bring tribal charges (with limited sentencing) to the exclusion of federal prosecution.[149] Furthermore, NIWRC and NCAI argue that any disruption of the "separate sovereigns" exception should not extend to tribal prosecutions, as the Double Jeopardy Clause is a federal constitutional question and is therefore inapplicable.[150] Additionally, the incorporation of the Double Jeopardy Clause in ICRA is

140. 359 U.S. 187 (1959).

141. *Id.* at 196. However, see the Department of Justice's "Petite Policy," articulating several factors and considerations prior to commencing a prosecution of an individual who has proceeded through the criminal justice process in a state court. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-2.031 (2018) [hereinafter JUSTICE MANUAL], https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031 [https://perma.cc/2TQ7-26L8].

142. Bartkus v. Illinois, 359 U.S. 121, 139 (1959).

143. Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937) (permitting concurrent territorial and federal anti-trust law).

144. 694 F. App'x 750 (11th Cir. 2017) (per curiam), *cert. granted*, 138 S. Ct. 2707 (2018) (No. 17-646).

145. Brief for Petitioner at i, Gamble v. United States, No. 17-646 (U.S. Sept. 4, 2018).

146. Brief of Amicus Curiae National Indigenous Women's Resource Center & National Congress of American Indians in Support of Respondent at 10, Gamble v. United States, No. 17-646 (U.S. Nov. 1, 2018).

147. *Id.*

148. *Id.* at 16.

149. *Id.* at 17.

150. *Id.* at 27.

arguably limited only to duplicative *tribal* prosecutions, as it does not explicitly bar subsequent state or federal prosecution.[151]

Ultimately, while a positive result for the petitioner in *Gamble* may have momentous implications on tribal prosecutions, it does not resolve the question of what standard should be applied to ICRA provisions mirroring the Bill of Rights.

D. Contemporaneous Efforts to Apply Traditional Methods or Fundamental Indian Law to Tribal Jurisdictions and to Revert Control of Tribal Systems to Indian Tribes

Traditional tribal punishments, remedies, and purpose are significantly different from Anglo-Saxon criminal justice systems.[152] Tribal fundamental law is "something that existed before Western style courts and [is] something that still exists beyond the court setting."[153] Because tribes are sovereign, they are not only empowered and entitled to "[administer] justice for the community," but are also responsible for it.[154]

Before the imposition of European and American standards of justice on tribal courts, one of the most essential functions exercised by a tribal government "involved the resolution of disputes among tribal members."[155] Compared to a contemporary focus on guilt and punishment, the "primary goal was simply to mediate the case to everyone's satisfaction."[156] Although a chief, elder, or other leader was generally responsible for the proceeding, the parties had to "discuss the problem until a satisfactory compromise or solution could be agreed upon."[157] The peace and functioning of the tribe remained the overarching goal, even though the tribe might also punish an offender (up to and including banishment or death).[158]

---

151. *Id.* at 28 (discussing 25 U.S.C. § 1302(a)(3) (2012)); *see also* Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty After the Indian Civil Rights Act of 1968*, 1 J.L. & POL'Y 1, 26 (1993) ("Congress was deliberate in the silences it left in ICRA.").

152. CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 16 (Jerry Gardner ed., 2004).

153. April L. Wilkinson, *A Framework for Understanding Tribal Courts and the Application of Fundamental Law: Through the Voices of Scholars in the Field of Tribal Justice*, 15 TRIBAL L.J. 67, 69–70 (2015).

154. *Id.* at 71.

155. DELORIA & LYTLE, *supra* note 5, at 111.

156. *Id.*

157. *Id.* at 112.

158. GARROW & DEER, *supra* note 152, at 16–18.

Application of modern constitutional law, especially Fifth Amendment protections, is further complicated by a difference in cultural values between many Indian philosophies of justice and the Anglo-American judicial system.[159] For example, some cultures such as the Mohawk, banished members who were found guilty a third time of lying or minimizing their own culpable behavior.[160] The tribe imposed a "cultural requirement of full disclosure" entirely contrary to an Anglo-American right to remain silent in order to support rehabilitation and the integrity of the community as a whole.[161]

As tribal justice systems continue to develop, each has adopted a unique format.[162] Some courts implement Anglo-American formats, to include trained lawyers and judges practicing adversarial law in courtrooms, with an emphasis on, and incorporation of, fundamental law.[163] Tribal fundamental law is defined as the "tradition, customs, [and] tribal values" incorporated into a tribal court.[164] Others offer a mix of Western and traditional Indian forums, staffing both adversarial criminal courts and dispute resolution venues.[165] The third type of tribal system relies solely on traditional methods and fundamental laws, to the point a written code may not be available.[166]

Efforts are currently underway to facilitate a continued transfer of responsibility and authority to the tribal courts.[167] Government committees,[168] tribal organizations,[169] and academics[170] champion these efforts. Recommendations include the return of jurisdiction assumed as a product of PL 280,[171] substantial increases in funding for tribal justice

159. *Id.* at 243.

160. *Id.* at 244.

161. *Id.*

162. *See generally* Wilkinson, *supra* note 153, at 69–80.

163. *Id.* at 76.

164. *Id.* at 70.

165. *Id.* at 78.

166. *Id.*

167. *See generally* INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES (2013) [hereinafter INDIAN LAW & ORDER COMM'N].

168. *Id.*

169. INDIGENOUS PEACEMAKING INITIATIVE, https://peacemaking.narf.org/ [https://perma.cc/8RJV-GBVE].

170. INDIAN LAW & ORDER COMM'N, *supra* note 167; Anderson, *supra* note 91.

171. The optional and unilateral assumption of jurisdiction by states was repealed with the passage of ICRA. COHEN'S HANDBOOK, *supra* note 106, § 1-07.

systems,[172] and the creation of a separate U.S. Court of Indian Appeals.[173] Likewise, courts have adopted a policy to engage in statutory interpretation in favor of tribal sovereignty in the case of federal statutes with ambiguous congressional intent that impose upon tribal rights, systems, or laws.[174]

III. THE INDIAN CIVIL RIGHTS ACT AND JUDICIALLY IMPOSED FEDERAL UNDERSTANDING OF INDIAN RIGHTS

Congress passed ICRA in 1968, and statutorily mandated the application of certain fundamental rights to tribal defendants. Many of these rights are similar to or verbatim from the Bill of Rights, yet courts across tribal, federal, and state jurisdictions disagree as to the proper standard of analysis and the applicability of federal precedent in interpreting constitutional rights.

A. Judicial and Legislative History Leading to the Adoption of the ICRA

Assuming tribal members meet federal standards for citizenship,[175] as well as the membership requirements of a federally recognized tribe,[176] Indians are simultaneous citizens of three distinct and sovereign entities: the tribe, the state, and the United States.[177] However, within Indian country, the Fifth and Fourteenth Amendments do not apply to the actions of tribal governments.[178] In fact, because tribes pre-date the signing of the Constitution, it is not binding and tribes retain their "historic sovereign authority."[179] However, tribes that wish to implement similar rights may

172. INDIAN LAW & ORDER COMM'N, *supra* note 167, at xiv–xv, xvii–xix, xxiii–xxiv.

173. *Id.* at 23–24.

174. *See generally* Ramah Navajo School Bd. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973).

175. U.S. CONST. amend. XIV; Indian Citizenship Act of 1924, Pub. L. No. 68-175, § 233, 43 Stat. 253.

176. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52–55, 52 n.2 (1978) (affirming District Court's emphasis on the importance of tribal control over membership requirements); Roff v. Burney, 168 U.S. 218, 223 (1897).

177. DELORIA & LYTLE, *supra* note 5, at 217–18.

178. Talton v. Mayes, 163 U.S. 376, 384 (1896). The Fifth and Fourteenth Amendments do apply to the actions of state and federal government actors exercising lawful jurisdiction within Indian country. Nevada v. Hicks, 533 U.S. 353, 371 (2001).

179. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014).

do so in tribal constitutions, or Congress may exercise its plenary powers to impose such rights statutorily.[180]

In an effort described as a push to "grant the American Indians the rights which are secured to other Americans,"[181] Senator Sam Ervin became the chief sponsor of ICRA.[182] Over a seven-year period, Senator Ervin held hearings to address a long line of court cases affirming the inapplicability of the Constitution to the tribes.[183] In *Santa Clara Pueblo v. Martinez*,[184] the U.S. Supreme Court engaged in an extensive review of the legislative history of ICRA, finding Congressional intent to "promote the well-established federal policy of further Indian self-government" and protecting "tribal sovereignty from undue influence."[185] The Court also held that extending an unenumerated remedy beyond habeas corpus was "not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government."[186] In conducting its own review of the legislative history, the Ninth Circuit cited with approval the statements of Representative Benjamin Reifel,[187] that "habeas corpus under ICRA 'would assure effective enforcement of . . . fundamental trial rights' that arise in the criminal context, including the prohibition on double jeopardy, the privilege against self-incrimination, and the right to confront witnesses."[188]

B. Protections Afforded by ICRA, and the Judicial Review Available for Violations

Much of the language of the ICRA is similar, though not necessarily identical, to that of the Bill of Rights. In relevant part, ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall . . . compel any person in any criminal case to be a witness against

180. Tavares v. Whitehouse, 851 F.3d 863, 869–70 (9th Cir. 2017).

181. COHEN'S HANDBOOK, *supra* note 106, § 1-07.

182. *Id.*

183. *Id.*

184. 436 U.S. 49 (1978).

185. *Id.* at 62–63.

186. *Id.* at 65.

187. Representative Reifel was a Representative for the state of South Dakota from 1961 to 1971. Representative Reifel was born on the Rosebud Indian Reservation in South Dakota and was an area administrator with the Bureau of Indian Affairs prior to his political career. *Biographical Directory of the United States Congress, 1774–Present, Reifel, Benjamin, (1906 - 1990)*, U.S. CONG. http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000152 [https://perma.cc/ETQ4-XDWY].

188. Tavares v. Whitehouse, 851 F.3d 863, 873 (9th Cir. 2017) (citing 114 CONG. REC. 9611 (1968)).

himself."[189] Additional rights protected by ICRA include freedom of speech, protections against unreasonable searches and seizures, and protection against takings without compensation.[190]

However, unlike the federal judicial system, the only means of achieving a remedy for violations of ICRA rest within the tribal justice systems,[191] or upon a writ of habeas corpus.[192] In *Martinez*, the U.S. Supreme Court held that only habeas corpus suits permitted federal review of tribal court holdings.[193] According to the Court, tribal sovereign immunity barred an action against the tribe itself and was not limited by an exercise of Congress' plenary power.[194] Likewise, action against tribal officials is not coextensive with the remedies available against state or federal officers, such as an *Ex parte Young* claim, due to the unique relationship between the United States and tribes.[195] In the absence of express authorization, the Court declined to imply an additional federal cause of action beyond habeas review. The Ninth Circuit further narrowed the availability of review, holding that initiation of federal habeas corpus review required actual detention, rather than the broader understanding of custody used in federal courts.[196]

C. Imposed Federal Understandings of Indian Rights and the Application of Constitutional Precedent

The U.S. Supreme Court has not resolved the issue of what precedent to apply to (nearly) identical language between ICRA and the Constitution. As such, it has fallen to the lower federal courts to determine the constitutional boundaries of ICRA; in the process, these courts have imposed a federal perspective and precedent on laws and rights solely applicable to the Indian tribes.

Relying heavily on the nearly identical nature of the search and seizure language, both the Eighth and Ninth Circuits of Appeals have applied Fourth Amendment precedent to ICRA's protections against unreasonable

189. 25 U.S.C. § 1302(a)(4) (2012); *cf.* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").

190. 25 U.S.C. § 1302.

191. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978).

192. 25 U.S.C. § 1303.

193. *Martinez*, 436 U.S. at 67.

194. *Id.* at 58–59. For an extensive discussion on the scope and origins of tribal immunity, see Seth W.R. Brickey, Comment, *Rent a Tribe: Using Tribal Immunity to Shield Patents from Administrative Review*, 93 WASH. L. REV. 1449, 1455–74 (2018).

195. *Martinez*, 436 U.S. at 71.

196. Tavares v. Whitehouse, 851 F.3d 863, 872–73, 877 (9th Cir. 2017).

searches and seizures.[197] For example, in *United States v. Clifford*,[198] the Eighth Circuit applied a federal reasonableness standard to the search and seizure conducted by tribal police officers arresting a tribal member on a reservation, prior to the defendant's prosecution in federal court.[199] As in *Clifford*, the parties in *United States v. Becerra-Garcia*[200] briefed the case as a Fourth Amendment matter, although the violation was committed by tribal rangers on tribal land.[201] Nevertheless, the Ninth Circuit proceeded "under well developed Fourth Amendment precedent, which nets the same result as an analysis under ICRA."[202]

The courts of appeals have also applied federal constitutional standards to due process violation claims. The Ninth Circuit held in *Randall v. Yakima Nation Tribal Court*[203] that, so long as the criminal procedures of a tribe do not "differ significantly from those 'commonly employed in Anglo-Saxon society[,]' . . . federal constitutional standards are employed in determining whether the challenged procedure violates the Act."[204] Directly citing the Ninth Circuit opinion in *Randall*, the Sixth Circuit held in accord that ICRA's due process protections required application of U.S. Supreme Court precedent establishing the protection of fair notice.[205]

D. Various Tribal Courts Apply Federal Fifth Amendment Law to ICRA Self-Incrimination

In interpreting ICRA's self-incrimination protections, several tribal courts have looked to the tribal statutes requiring rights advisements and analyzed them under a Fifth Amendment lens.[206] For example, in *Quileute*

197. United States v. Becerra-Garcia, 397 F.3d 1167, 1171 (9th Cir. 2005); United States v. Clifford, 664 F.2d 1090, 1091 n.3 (8th Cir. 1981); United States v. Lester, 647 F.2d 869, 872 (8th Cir. 1981).

198. 664 F.2d 1090 (8th Cir. 1981).

199. *Id*. at 1092 (applying an "expectation of privacy" test to the case at hand). The court did note that while both parties' arguments addressed Fourth Amendment concerns, ICRA was the controlling law; the distinction was ultimately irrelevant, however, as the analysis was the same pursuant to *Lester*. *Id.* at 1091 n.3.

200. 397 F.3d 1167 (9th Cir. 2005).

201. *Id.* at 1171.

202. *Id.* ("[T]he Indian Civil Rights Act . . . imposes an 'identical limitation' on tribal government conduct as the Fourth Amendment." (citation omitted)).

203. 841 F.2d 897 (9th Cir. 1988).

204. *Id.* at 900.

205. Kelsey v. Pope, 809 F.3d 849, 864 (6th Cir. 2016).

206. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 499 (1998).

Tribe v. LeClair,[207] the tribal court held procedural due process required a defendant to not only have certain rights, but also "reasonably understand those rights and have reasonable opportunities to exercise those rights."[208] The same court also recognized in *Southern Ute v. Henry*[209] that the Fifth Amendment, while inapplicable to the tribes directly, did share language with the relevant tribal statute provision that "is almost identical."[210] Likewise, the court looked to the Fifth Amendment and *Miranda* when analyzing the "Tribe's code provisions that address the issue of proper warnings where a person is subjected to a custodial interrogation."[211] The Chippewa-Ottawa Conservation Court also looked to *Miranda* as a guide in interpreting ICRA and tribal statutes.[212] Ultimately, even assuming that *Miranda* and related precedent were binding, the court held rights advisements were not required for adjudication of major civil infractions.[213]

The Fort Peck Court of Appeals was much more explicit about the coextensive nature of the Fifth Amendment and ICRA's self-incrimination protections. In *Fort Peck Tribes v. Bighorn*,[214] the court held that both the Fifth Amendment and ICRA mandated that law enforcement, when taking tribal members into custody, advise those defendants of tribal rights.[215] The court also looked directly to the U.S. Supreme Court precedent to determine whether the defendant in the case was "'in custody' for purposes of receiving [*Miranda*] protection."[216] The Supreme Court of the Muskogee (Creek) Nation also held that, under the U.S. Constitution, ICRA, and the tribal code, asking a defendant under oath about Indian enrollment status violated the privilege against self-

207. 1 NICS App. 50 (Quileute Tribal Ct. App. 1989).

208. *Id.* at 54.

209. 15 NICS App. 35 (Southern Ute Tribal Ct. App. 2017) (per curiam).

210. *Id.* at 38.

211. *Id.*; *accord* Lower Elwha Klallam Indian Tribe v. Bolstrom, 19 Indian L. Rep. 6026, 6027 (Lower Elwha Klallam Ct. App. 1991) (describing the tribal statute as "essentially a statutory list of the decision of *Miranda v. Arizona*" and then applying U.S. Supreme Court and Ninth Circuit precedent as guidance to determine the proper remedy).

212. Chippewa-Ottawa Tribes v. Payment, Jr., 18 Indian L. Rep. 6141, 6141 (Chippewa-Ottawa Conservation Ct. 1991).

213. *Id.* at 6141–42.

214. No. 279, 1999 Mont. Fort Peck Tribe LEXIS 4 (Fort Peck Ct. App. Nov. 5, 1999).

215. *Id.* at *4.

216. *Id.*; *accord* Southern Ute Tribe v. Lansing, 19 Indian L. Rep. 6091, 6092 (Southern Ute Tribal Ct. 1992) (applying U.S. Supreme Court and Eighth Circuit precedent to the statutory language of "*in custody*").

incrimination.[217] This is because tribal enrollment is a necessary element for jurisdiction and prosecution.[218]

However, not all tribal courts agree that *Miranda* warnings are necessary under ICRA. For example, in *Chippewa-Ottawa v. Payment Jr.*,[219] the court left open the possibility that *Miranda* warnings are not required by ICRA, even while assuming *Miranda* applied to rule against the defendant.[220] Other tribal courts have taken a more middle of the road approach. The Crow Court of Appeals recognized that *Miranda* is not binding, but also noted that the Ninth Circuit precedent in *Randall* would suggest applying the federal constitutional law in analyzing ICRA's self-incrimination clause.[221] Instead, the court chose to forego applying ICRA to the case at hand and instead resolved the issue more narrowly by reviewing "the intent of the Tribal Council in enacting the requirement for *Miranda* warnings under Tribal law."[222]

E. Accepting the Binding Nature of Grants of Immunity Across Tribal, State and Federal Courts

Although rare, some courts have considered the effect of grants of immunity on cross-jurisdictional prosecutions involving tribal courts. In *In re Long Visitor*,[223] the Indian appellants were held in contempt by a district court for failing to testify before a federal grand jury investigating the shooting death of three people on the Pine Ridge Reservation, including two Federal Bureau of Investigation agents.[224] The appellants were twice granted use immunity in accordance with 18 U.S.C. § 6003, and twice refused to testify.[225] After being remanded to the custody of the U.S. Marshals, the appellants filed their appeal, arguing that the grant of immunity was inadequate to protect them from future use of their grand jury testimony in tribal court prosecutions.[226] The Eighth Circuit Court of Appeals dismissed the defendants' claim as premature and speculative;

---

217. Muscogee (Creek) Nation v. Johnson, SC 11-13, 2013 Muscogee Creek Nation Sup. LEXIS 2, at *32–33 (Muscogee (Creek) Nation Sup. Ct. Aug. 15, 2013).

218. *Id.* at *31–32.

219. 18 Indian L. Rep. 6141 (Chippewa-Ottawa Conservation Ct. 1991).

220. *Id.* at 6141.

221. Crow Tribe v. Big Man, No. 00-410, 2000 Mont. Crow Tribe LEXIS 5, at *19–26 (Crow Ct. App. Oct. 12, 2000).

222. *Id.* at *29.

223. 523 F.2d 443 (8th Cir. 1975).

224. *Id.* at 444.

225. *Id.* at 445.

226. *Id.* at 445–46.

however, the court also implied that the tribal courts would not be able to use compelled testimony because ICRA "expressly protects an Indian from self-incrimination."[227]

Likewise, the Supreme Court of Arizona suggested in dicta that, because the language of ICRA mirrors that of the Fifth Amendment, the non-Indian petitioner would be able to invoke a privilege coextensive with the Bill of Rights during testimony in a tribal court.[228] In *Tracy v. Superior Court of Maricopa County*,[229] although the Navajo court could not criminally try the non-Indian petitioner, the tribe nevertheless sought to compel his testimony in a different criminal case.[230] Upon request from the tribal court and pursuant to an applicable state statute, the state superior court ordered the petitioner to appear before the Navajo Nation court.[231] The petitioner claimed that his testimony as a witness in a Navajo court would provide incriminating evidence for a pending federal prosecution against him.[232] The petitioner also contended that the protections of ICRA against self-incrimination are inferior to state and federal safeguards.[233] The Supreme Court of Arizona emphasized that those "provisions of the ICRA that clearly mirror the federal provisions in language and intent . . . have been interpreted under the federal standard and are generally held to be identical to their federal counterparts"[234]; accordingly, the court held that ICRA "could not be interpreted to provide any lesser protection."[235] The court hypothesized that the petitioner would "enjoy a federally imposed privilege against self-incrimination that is substantially coextensive with the fifth amendment privilege" and the tribal court could not compel the petitioner's testimony "without a grant of use and derivative use immunity sufficient to meet the dictates of the fifth amendment."[236]

At least one tribal court has squarely addressed the issue of previous grants of immunity by non-tribal jurisdictions. In *Navajo Nation v. MacDonald Jr.*,[237] the Navajo Nation prosecuted the defendant following

227. *Id.* at 447.

228. Tracy v. Superior Court of Maricopa Cty., 810 P.2d 1030, 1048 (Ariz. 1991).

229. 810 P.2d 1030 (Ariz. 1991).

230. *Id.* at 1033.

231. *Id.* at 1033–34.

232. *Id.* at 1046.

233. *Id.* at 1047.

234. *Id.* at 1047–48.

235. *Id.* at 1048.

236. *Id.*

237. 19 Indian L. Rep. 6079 (Navajo Nation Sup. Ct. 1992).

televised and otherwise publicly broadcasted immunized testimony before a congressional committee.[238] First, the court held that the tribal prosecutor failed to prove to the court that evidence used in prosecuting the trial was not directly based on or derived from the defendant's immunized testimony.[239] Second, the court determined that this failure violated the defendant's due process rights articulated in the Navajo Nation Bill of Rights.[240] Relying on the concept that "[t]he right against self-incrimination is fundamental" and is a Navajo principle espoused in tribal law, the court affirmatively designated the safeguards articulated in *Kastigar v. United States*[241] as the appropriate standard by which to evaluate prosecutions following immunized testimony.[242]

F. Academic and Tribal Resistance to Adopting Federal Standards of Analysis for ICRA Violations.

As previously identified, the voluminous U.S. Supreme Court decisions interpreting the Bill of Rights are merely "a guide in Indian country, not the law," and may be followed or ignored at will by tribal courts.[243] The Court has recognized the "definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA's . . . clauses and need not follow the U.S. Supreme Court precedents jot-for-jot."[244] Likewise, tribal courts are free to apply ICRA to provide "essential fairness" consistent with tribal traditions and circumstances.[245]

Some commentators suggest that the ambiguous deference to tribal courts in interpreting the provisions of ICRA has both failed to protect the constitutional rights of Indians and failed to empower tribes to protect civil rights.[246] Professor Robert Porter posited that the provisions of ICRA

---

238. *MacDonald Jr.*, 19 Indian L. Rep. at 6083–84. Interestingly, this was the case for which the petitioner in *Tracy v. Superior Court of Maricopa County*, discussed *supra* notes 228–236, was compelled to testify.

239. *Id.* at 6084.

240. *Id.*

241. 406 U.S. 441, 461 (1972).

242. *MacDonald Jr.*, 19 Indian L. Rep. at 6084.

243. GARROW & DEER, *supra* note 152, at 248.

244. Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

245. COHEN'S HANDBOOK, *supra* note 106, § 14-04 n.63.

246. Note, *ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1720 (2016) ("[I]f Congress instead is trying to empower tribes to protect civil rights in their own way, the uncertainty surrounding ICRA is causing tribes to hesitate and some federal courts to return to federal jurisprudence as a guide to ICRA's provisions.").

were an intentional and not so subtle continuation of Congress's "100-year attack on traditional methods of governance and dispute resolution" by shifting a tribal court's focus to the individual and away from the community.[247] Application of U.S. Supreme Court precedent would only further impose "the strictures of Anglo-American law."[248] Additional suggestions include the idea that federal courts, despite the similarity in language to the Bill of Rights, decline to follow federal understandings of constitutional rights; rather, the court should ensure that tribal "practice accords with a permissible understanding" of that right.[249] This approach is arguably consistent with tribal culture and supports the idea of comity; the sovereign nature of the tribes also supports such latitude.[250] Further, as noted in Harvard Law Review, permitting federal interpretation of ICRA in federal court and tribal interpretation of ICRA in tribal court leaves tribes with three stark choices: impose shorter sentences "to maintain their tribal rights and distinctions, adapt to federal standards, or have their judgments vacated by the federal government."[251]

IV. THE SELF-INCRIMINATION PROTECTIONS OF ICRA SHOULD BE ANALYZED UNDER, AND HELD AS CO-EXTENSIVE WITH, FIFTH AMENDMENT PROTECTIONS

Application of federal Fifth Amendment precedent is necessary to ensure a degree of predictability and consistency between tribal, federal, and state courts in hearing the cases of tribal defendants. Further, tribal court decisions have demonstrated a willingness to adopt a uniform standard of analysis, as well as compatibility between federal precedent and tribes utilizing an Anglo-American trial system. The availability of habeas corpus review by a federal court also recommends applying a consistent federal standard to self-incrimination protections. Lastly, even without changes to the current analysis, tribal prosecution poses a

247. Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 272 (1997); *see also* Hayley Weedn, *Stay Out of the Cookie Jar: Revisiting* Martinez *to Explain Why the U.S. Should Keep Its Hands out of Tribal Constitutionalism and Internal Self-Governance*, 20 WILLAMETTE J. INT'L L. & DISP. RESOL. 18, 41–43 (2012).

248. Porter, *supra* note 247, at 272.

249. Note, *supra* note 246, at 1723.

250. *Id.* at 1724–28. *See also* Berry, *supra* note 151, at 31 (rejecting efforts at expanding the jurisdiction of federal courts to hear ICRA claims as "no clearer path lies to furthering [Congress's] dual interests in tribal sovereignty and civil liberties than in allowing the tribal courts to develop an autonomous body of civil liberties law that can synthesize tribal principles with the principles embodied in the Constitution").

251. Note, *supra* note 246, at 1724.

sufficient risk to a defendant's liberty to warrant self-incrimination protections in other courts.

A. Broad Tribal Jurisdiction Demonstrates the Need for a Uniform and Consistent Interpretation of ICRA's Protections

There are more than 560 tribal nations within the United States of America,[252] and each tribe is entitled (but not required) to create its own constitution and criminal justice system.[253] Each constitution is unique, varied, and does not necessarily extend the same explicit protections to tribal members.[254] As a remedy, ICRA purported to extend basic constitutional protections to tribal defendants. However, each tribal court remains free to interpret and apply ICRA's protections as it deems appropriate, resulting in a patchwork of "constitutional" protections. While this may have been an initially acceptable and workable state of affairs, the U.S. Supreme Court's decision in *Lara* and the passage by Congress of the VAWA 2013 demands the application of a singular standard.

In *Lara*, the Court upheld Congress's plenary power to extend tribal court jurisdiction to *any* enrolled member of *any* federally recognized tribe.[255] The Court also held that Double Jeopardy did not apply to prosecutions under both federal and tribal law.[256] While defendants across the nation must look to precedent for the respective charging jurisdiction, all can rely on the Court's decisions and interpretations of the Constitution; tribal defendants are not afforded such predictability. It is unnecessarily burdensome and counter to the express intent of Congress in passing ICRA for defendants to determine the extent of rights and privileges after crossing each jurisdictional boundary.[257]

---

252. *See supra* note 86.

253. Organization of Indian Tribes, 25 U.S.C. § 476 (2012).

254. *Compare* 1 N.N.C. §§ 1–9 (Navajo Nation Bill of Rights), *with* Tulalip Const. art. VII, https://www.codepublishing.com/WA/Tulalip/ [https://perma.cc/EA99-42H5] (Tulalip Bill of Rights).

255. United States v. Lara, 541 U.S. 193, 197–98 (2004) (emphasis added). The U.S. Supreme Court initially held that tribal courts did not have jurisdiction over nonmembers in *Duro v. Reina*, 495 U.S. 676 (1990). The Indian Civil Rights Act, 25 U.S.C. § 1301(4), legislatively remedied such lack of jurisdiction and was upheld as a proper relaxation by Congress of politically imposed restrictions upon the tribes. *Lara*, 541 U.S. at 196.

256. *Lara*, 541 U.S. at 210.

257. Take, for example, western Washington: there are twenty different recognized tribes within the Puget Sound watershed alone. *Native American Tribes of the Puget Sound Watershed*, ENCYCLOPEDIA PUGET SOUND (2018), https://www.eopugetsound.org/terms/212 [https://permacc/SP68-Q6B2]. An enrolled tribal member driving from Bellingham to Quinault

The passage of VAWA 2013 extended the jurisdiction of tribal courts to non-Indians who committed domestic violence on tribal reservations.[258] This was statutorily achieved by amending the language of ICRA.[259] To exercise VAWA 2013 jurisdiction, tribes are required to extend all constitutional protections necessary for "Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant."[260] However, VAWA 2013 speaks primarily to general due process requirements and not specifically to Fifth Amendment self-incrimination protections. The explicit recognition of the right to jury trials and the cross-reference to due process rights articulated under TLOA in the event of confinement supports this conclusion.[261] Further, a non-Indian defendant over whom tribes exercise extended jurisdiction under VAWA 2013 is still subject to the concurrent jurisdiction of state and federal courts.[262] Unlike tribal members in Indian country, to whom the Constitution does not apply,[263] non-Indian defendants subject to a tribal court's jurisdiction due to charges of domestic violence are still entitled to Constitutional protections. Although unclear, the language of VAWA suggests that a tribal court must extend standard constitutional protections to a tribal defendant charged under VAWA statutes, meaning those rights and privileges enumerated in the Bill of Rights as interpreted by the U.S. Supreme Court.

If a tribal court were to extend a federal understanding of self-incrimination protection to a non-Indian defendant, and yet hold ICRA to not be co-extensive, a tribal defendant charged with the same crime as a non-tribal defendant would be entitled to different protections. This dual-

---

around the Olympic Peninsula could be subject to seventeen different tribal jurisdictions along the route, each one with an independently achieved interpretation of ICRA and unique self-incrimination protections.

258. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, § 904, 127 Stat. 54, 122 (codified as amended at 25 U.S.C. § 1304 (Supp. III 2015) (effective Jan. 3, 2016)); *see also* TRIBAL LAW AND POLICY INST., TRIBAL LEGAL CODE RESOURCE: TRIBAL LAWS IMPLEMENTING TLOA ENHANCED SENTENCING AND VAWA ENHANCED JURISDICTION 40 (Mar. 2016) [hereineafter TRIBAL LEGAL CODE RESOURCE], http://www.tribal-institute.org/download/codes/TLOA_VAWA_3-9-15.pdf [https://perma.cc/8LZQ-PD8N].

259. *See* 25 U.S.C. § 1304; Violence Against Women Reauthorization Act of 2013 § 904.

260. 25 U.S.C. § 1304(d)(4).

261. TRIBAL LEGAL CODE RESOURCE, *supra* note 258, at 17–18. For example, in the event of incarceration, tribal courts are required to ensure effective assistance of counsel, provide counsel for indigent defendants, and publish tribal laws, rules of evidence and rules of criminal procedure, among others. *Id.*

262. 25 U.S.C. § 1304 (b)(2).

263. Talton v. Mayes, 163 U.S. 376, 384 (1896).

level of protection unnecessarily complicates proceedings for the courts, defendants, and attorneys; it is also blatantly contrary to the congressional intent underlying ICRA to extend the same rights to every tribal defendant. A tribe is also unlikely to make the policy decision to provide required protections to non-Indians yet deny them to tribal citizens charged with the same crime.[264]

B. Tribal Court Precedent Strongly Suggests Adopting a Uniform Interpretation of ICRA's Self-Incrimination Protections

Various tribal jurisdictions have held ICRA's protections against self-incrimination to be coextensive with the Fifth Amendment.[265] Persuasively, the Northwest Intertribal Court System Court of Appeals, which covers fifteen independent tribes and court systems, and one of the only intertribal court systems in the United States,[266] suggested that tribal statutes passed pursuant to ICRA and offering rights advisements are, without further legislative history, intended to abide by *Miranda* and the Fifth Amendment.[267] Likewise, the Fort Peck Tribe Court of Appeals considered ICRA and the Fifth Amendment concurrently and equally in articulating the applicable rule of law, and held that neither dictated a rights advisement for voluntary incriminating statements.[268] Most explicitly, the Navajo Nation Supreme Court held that ICRA's protections against self-incrimination required *Miranda*-like rights advisements as required by the Fifth Amendment. [269]

The Supreme Court of Arizona also concluded, because of the identical language of the Fifth Amendment and ICRA, that a defendant in tribal court is entitled to invoke a privilege against self-incrimination coextensive with the Bill of Rights.[270] Because Arizona is home to the majority of the Navajo reservation and its well-developed tribal court

---

264. *See* TRIBAL LEGAL CODE RESOURCE, *supra* note 258, at 40, 43–52 (offering various examples of tribal codes implementing the VAWA 2013 changes).

265. *Infra* Part III.

266. NORTHWEST INTERTRIBAL CT. SYS., https://www.nics.ws/about.html [https://perma.cc/6GYH-K9DP].

267. Southern Ute v. Henry, 15 NICS App. 35, 38 (Southern Ute Tribal Ct. App. 2017) (per curiam).

268. Fort Peck Tribes v. Bighorn, No. 279, 1999 Mont. Fort Peck Tribe LEXIS 4, at *3 (Fort Peck Ct. App. Nov. 5, 1999).

269. Navajo Nation v. Rodriguez, No. SC-CR-03-04, 2004 Navajo Sup. LEXIS 13, at *12 (Navajo Nation Sup. Ct. Dec. 16, 2004) (adopting "the minimum requirements from Miranda as consistent with [their] Navajo values").

270. Tracy v. Superior Court of Maricopa Cty., 810 P.2d 1030, 1047–48 (Ariz. 1991).

system, the decision is highly persuasive, even though not binding. Further, the Navajo tribal courts have also held that self-incrimination protections are "fundamental" and protected, including under the Navajo Bill of Rights.[271]

Tribal courts, notably the NICS judicial consortium, have found it proper to impose a single interpretation of self-incrimination protections in accordance with the precedent set by the U.S. Supreme Court. The Eighth Circuit highlighted the difficulty defendants and tribal courts would otherwise encounter, bluntly stating that the powers of the federal judicial process "cannot be circumscribed by the speculative uses to which such testimony may subsequently be put by another sovereignty *not subject to the commands of the Fifth Amendment*."[272]

C. *Decisions by Courts of Appeal Interpreting Analogous ICRA Protections Are Strongly Persuasive in the Event of Habeas Review and Should Be Adopted by District and Tribal Courts*

In consideration of tribal sovereignty, and a long history of interpreting statutes in favor of such sovereignty rather than federal precedent,[273] decisions by federal courts are not binding upon the tribal courts.[274] However, because tribal defendants may subsequently bring a writ of habeas corpus for violations of ICRA before a federal court,[275] federal precedent becomes applicable in those cases.

At least one Court of Appeals has implied, without deciding, that the protections afforded by ICRA are co-extensive with the Fifth Amendment and would prohibit compelled testimony.[276] Likewise, the Ninth and Eighth Circuits both held that tribal searches and seizures are evaluated under a Fourth Amendment standard.[277] Relying heavily on the identical language in both the Bill of Rights and ICRA, the Ninth Circuit determined that an analysis under the Fourth Amendment results in the same conclusion as an analysis under ICRA. Further, the court assumed

---

271. Navajo Nation v. MacDonald Jr., 19 Indian L. Rep. 6079, 6084 (Navajo Nation Sup. Ct. 1992).

272. *In re* Long Visitor, 523 F.2d 443, 447 (8th Cir. 1975) (emphasis added).

273. Tavares v. Whitehouse, 851 F.3d 863, 869 (9th Cir. 2017).

274. GARROW & DEER, *supra* note 152, at 248.

275. 25 U.S.C. § 1303 (2012).

276. *In re* Long Visitor, 523 F.2d at 447.

277. United States v. Becerra-Garcia, 397 F.3d 1167, 1171 (9th Cir. 2005); United States v. Lester, 647 F.2d 869, 872 (8th Cir. 1981); *see also* United States v. Clifford, 664 F.2d 1090, 1091 n.3 (8th Cir. 1981).

in *Becerra-Garcia*, as had others, that violations of ICRA would result in suppression of evidence during a federal proceeding.[278]

Like the search and seizure provisions of the Fourth Amendment and ICRA, the language of the self-incrimination provisions is identical. Because of the "identical limitation"[279] imposed on the federal and tribal governments by the respective language, courts are likely to apply Fifth Amendment analysis and precedent when hearing a motion to suppress in a federal proceeding or during a habeas hearing. It is counterproductive for tribal courts to apply an independent interpretation of the protections provided by ICRA, only to have a defendant released or a case remanded for rehearing by a federal court upon habeas review which applies Fifth Amendment standards.

D. Tribal Prosecution Is a Sufficient Risk to Personal Liberty and Warrants Self-Incrimination Protections

Unlike the truly foreign prosecutions addressed by the U.S. Supreme Court in *Balsys*,[280] the semi-sovereign tribal nations within the United States pose a sufficient risk of prosecution for a defendant to invoke the right and privilege against self-incrimination. In the case of a tribal defendant, up to three separate jurisdictions may exercise their authority, with Double Jeopardy affecting none of the prosecutions. A tribal court could prosecute a hypothetical defendant and compel that defendant to testify under the tribal court's standard. A state or federal court could then prosecute that same defendant using that compelled testimony as inculpatory evidence. Furthermore, a defendant may avoid a truly foreign threat of prosecution by avoiding the nation posing that threat (absent the risk of extradition). However, tribal defendants risk "foreign" prosecution every time they cross into a reservation—a reservation which may literally be across the street and be their childhood home.

V. CONSTITUTIONALLY SUFFICIENT GRANTS OF IMMUNITY BY FEDERAL, STATE OR TRIBAL COURTS SHOULD BE MUTUALLY BINDING

Legal precedent and ICRA's congressional intent call for a Fifth Amendment analysis of ICRA violations. Additionally, courts should consider the possibility of prosecution in either a tribal, state, or federal court a sufficient threat for the defendant to invoke the privilege against

278. *Becerra-Garcia*, 397 F.3d at 1171.

279. *Id.*

280. *See supra* text accompanying notes 59–63.

self-incrimination. Having adopted a singular self-incrimination analysis, grants of immunity satisfying the *Kastigar* standards warrant a mutually binding effect across tribal, state, and federal court.

A. The Policy and Constitutional Reasoning Making Federal and State Grants of Immunity Binding Applies Equally to Tribal Courts

Various theories underlie mutually binding grants of immunity and are directly applicable to tribal defendants. In *Murphy*, the Court held that mutually binding grants of immunity are permissible, as the other jurisdiction is left in the same situation as if the defendant invoked the privilege against self-incrimination.[281] This is especially relevant if a defendant subject to concurrent jurisdiction is entitled to invoke self-incrimination protections in federal or state court due to the possibility of prosecution in tribal court, or vice versa. However, the adoption of a singular Fifth Amendment standard is a prerequisite for mutually binding grants of immunity to ensure that all jurisdictions are operating under the same circumstance; otherwise, *Murphy* would ring hollow.

Even if a court found that prosecution in a tribal court is insufficient to invoke self-incrimination privileges elsewhere, the application of a Fifth Amendment standard would preclude the use of testimony in a tribal court compelled by another jurisdiction. As the Court held in *United States v. Allen*,[282] the use of compelled testimony is precluded, even if generated by a foreign jurisdiction, when the protections provided are constitutionally insufficient.[283] Therefore, mutually binding grants of immunity would result in an outcome similar to one in which a defendant exercises the full panoply of privileges and protections offered by ICRA and the Fifth Amendment.

Additionally, as the Supreme Court of Arizona identified in *Tracy*, the U.S. Supreme Court's language in *Murphy* pointed to a broader applicability than merely a state/federal relationship.[284] *Murphy* permits the use of compelled, immunized testimony in "one *jurisdiction within our federal structure*" even if such evidence would support a conviction in "another such jurisdiction."[285] Although tribal jurisdictions are quasi-sovereign entities, they remain within the "federal structure" of the United States, subject to the plenary powers of Congress; this unique relationship

281. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

282. 864 F.3d 63 (2d Cir. 2017).

283. *Id.* at 82.

284. Tracy v. Superior Court of Maricopa Cty., 810 P.2d 1030, 1049 (Ariz. 1991).

285. *Murphy*, 378 U.S. at 53 (emphasis added).

gives rise to "a distinct likelihood of dual prosecution by tribal and federal courts."[286] As such, *Murphy* could and should be extended to include tribal courts.

Arguably, both tribal and federal precedent have already established a legal construct in which prosecutors cannot use immunized and compelled testimony directly or as a derivative, and mutually binding grants of immunity are a mere formality. However, formal recognition of the mutually binding effects would simplify and streamline criminal prosecutions, as well as avoid the need to litigate the issue every time grants of immunity are present.

B. Grants of Immunity Empower Tribal Nations, Validate Tribal Justice System Procedures, and Facilitate Alternative Resolutions

In addition to serving as a formal recognition of grants of immunity, especially by tribal courts, mutually binding effects would have second level benefits as well. Extending recognition of tribal grants of immunity would place tribal courts on equal footing with federal and state counterparts. Granting immunity is almost exclusively a reflection of prosecutorial priorities and policies that, to date, have not included the priorities of tribal prosecutions.[287] By imposing *Kastigar* limitations on subsequent prosecutions following tribal grants of immunity, tribal courts (and, tangentially, tribal leadership) may give true effect to tribal priorities on courts with concurrent jurisdiction.

Further, recognition would likely impose a duty, especially on federal prosecutors, to include tribes with concurrent jurisdiction in discussions prior to pursuing consecutive prosecutions or offering grants of immunity. Because current policy requires cooperative efforts only between federal and state prosecutors,[288] the decision-making process fails to definitively include tribal prosecutors beyond professional courtesy. However, by making grants of immunity mutually binding across all three types of jurisdiction, all are impacted by the decision of one and will require the input of all jurisdictions involved.

Tribes will also be able to make decisions as to what they consider the proper course of action, without the fear of future state or federal prosecution utilizing tribally immunized testimony and undermining the tribal decision. This will also enhance the tribe's abilities to pursue more traditional remedies, such as Elder Panels, which focus heavily on

286. *Tracy*, 810 P.2d at 1049.

287. CRIMINAL RESOURCE MANUAL, *supra* note 85, § 720.

288. JUSTICE MANUAL, *supra* note 141, § 9-2.031.

truthfulness and reconciliation, by offering a defendant the proper level of immunity in exchange for full participation in such a remedy.

CONCLUSION

Tribal, state, and federal cases demonstrate a continuing reluctance to impose a constitutional gloss on the self-incrimination protections mandated by the Indian Civil Rights Act. Instead, courts interpret statutes in favor of tribal independence and sovereignty rather than constitutional compliance. In the absence of a repeal of ICRA, this Comment argues for the evaluation of ICRA's privilege against self-incrimination under a Fifth Amendment standard along with associated federal precedent. Some courts, including federal, state, and tribal courts, have reached a similar conclusion. Meanwhile, the Eighth and Ninth Circuits of Appeal have set an analogous and persuasive precedent, imposing a federal standard and analysis of tribal searches and seizures due to the almost identical language of the Bill of Rights and ICRA. This Comment also suggests that grants of immunity to compel testimony by a tribal, state, or federal court should be mutually binding and evaluated under the U.S. Supreme Court decision in *Kastigar v. United States*. Such mutual effect furthers the gravitas and authority of tribal decisions, provides clarity and consistent protections for a defendant, and empowers tribes to pursue appropriate sanctions, remedies, and reconciliation.