

Indian Civil Rights Act

 [tribal-institute.org/lists/icra.htm](https://www.tribal-institute.org/lists/icra.htm)

What is the Indian Civil Rights Act?

Native Nations, whose political systems and traditions predate the United States and the passage of the Constitution, never agreed to any of the terms in the Constitution, including the Bill of Rights. This idea that tribes were not subject to limitation by the Bill of Rights because of their established sovereignty was most clearly communicated in [Talton v. Mayes](#), 163 U.S. 376 (1896). In *Talton*, the Supreme Court held that Native Nations are “distinct, independent political communities” and found that tribal governments and their courts were not subject to Fifth Amendment limitations applicable to federal and state governments because of their distinctiveness that predates the Constitution.

During the Civil Rights era, members of Congress became concerned about American Indian civil rights in Indian country. However, American Indian individuals and groups like the American Indian Movement were concerned about American Indian rights violations by federal and state authorities. The concerns of Congress, violations by tribal authorities, are addressed in [Indian Civil Rights Act](#), which passed in 1968. (25 U.S.C. §§ 1301-1304)

For more on ICRA and other information on the relationship among tribal, state and federal governments, consider purchasing: Deer, Sarah. [Introduction to Tribal Legal Studies](#). Rowman & Littlefield, 2015.

“Indian Bill of Rights”

Though the Indian Civil Rights Act (ICRA) was passed in 1968, not all provisions of the Bill of Rights were mirrored in the [“Indian Bill of Rights”](#) contained in ICRA. The equivalent of the establishment clause, right to appointed counsel, grand jury indictment requirement, and civil jury trial were all excluded.

Amendments to ICRA

- 1986 – [Anti-Drug Abuse Act \(Pub. L. 99-570\)](#)
- 1991 - [“Duro-Fix”](#)
- 2010 - [Tribal Law and Order Act](#)
- 2013 - [Violence Against Women Act - 2013 Reauthorization](#)
- 2022 - [Violence Against Women Act - 2022 Reauthorization](#)

Since its enactment in 1968, the Indian Civil Rights Act (ICRA) has been amended five times. It was first amended in 1986 to increase the sentencing limitations in section 1302(7). This provision originally limited tribes to imposing sentences for a single offense to no greater than six months imprisonment or a

fine of \$500 or both. In 1986, this provision was amended ([as part of a federal drug and alcohol prevention act](#)) to "in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of \$5,000, or both."

1991 – [“Duro-Fix”](#)

The Indian Civil Rights Act (ICRA) was amended again in 1991 in order to overturn the U.S. Supreme Court decision in [Duro v. Reina](#), 495 U.S. 676 (1990). The *Duro* decision held that tribal courts lack criminal jurisdiction over non-member Indians. Congress overturned the *Duro* decision (the so-called Congressional "Duro-fix") by adding the language "...and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians" to the definition of "powers of self-government." This Congressional *Duro*-fix restored tribal court criminal jurisdiction over all Indians (members and non-members).

25 U.S.C. §1301 Definitions

For the purposes of this subchapter, the term –

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

2010 - [Tribal Law and Order Act \(TLOA\)](#)

The Indian Civil Rights Act (ICRA) was amended for the third time in 2010 by the Tribal Law and Order Act (TLOA). TLOA was passed with the goal to improve public safety and justice systems in Indian country in response to significant rates of violent crime. Most notably, TLOA amends ICRA by expanding the limitations on the term of imprisonment from one year to three years, and fines, from \$5,000 to \$15,000, that can be imposed on defendants convicted in tribal court. However, to impose these "enhanced sentencing" options, tribal courts must provide certain additional, enumerated due process protections. These include: effective assistance of counsel; free, appointed, licensed attorneys for indigent defendants; law-trained judges; and publicly available criminal laws.

[Indian Civil Rights Act as Amended by the Tribal Law and Order Act, July 2010](#)

2013 – [Violence Against Women Act \(VAWA\)](#)

The Indian Civil Rights Act (ICRA) was amended for the fourth time in 2013 in order to partially overturn the U.S. Supreme Court decision in [Oliphant v. Suquamish Indian Tribe](#), 435 U.S. 191 (1978). *Oliphant* held that tribal courts lack criminal jurisdiction over non-Indian defendants. Congress partially overturned the *Oliphant* decision in the re-authorization of the Violence Against Women Act

(VAWA) of 2013. Title IX of the VAWA Act, among other provisions, provided for "special domestic violence criminal jurisdiction" to tribal courts over non-Indian offenders who commit domestic violence, dating violence, or violate a protection order. However, to utilize this special domestic violence criminal jurisdiction, tribal courts will have to provide certain enumerated due process protections. These include all TLOA due process protections (even if tribes do not impose the enhanced sentencing options), as well as several additional due process protections including the right to an impartial jury.

[Indian Civil Rights Act as Amended by the Violence Against Women Reauthorization Act of 2013](#)

2022 - [Violence Against Women Act \(VAWA\)](#)

The Indian Civil Rights Act (ICRA) was amended for the fifth time in 2022 in order to partially overturn the U.S. Supreme Court decision in [Oliphant v. Suquamish Indian Tribe](#), 435 U.S. 191 (1978). Oliphant held that tribal courts lack criminal jurisdiction over non-Indian defendants. Congress partially overturned the Oliphant decision in the re-authorization of the Violence Against Women Act (VAWA) of 2013. VAWA 2022 builds on VAWA 2013's Tribal jurisdiction provision (covering [domestic violence](#), [dating violence](#), and [protection order violations](#)) by incorporating additional categories of criminal conduct that can be prosecuted by Tribes against non-Indians including [sexual violence](#), [stalking](#), [sex trafficking](#), [child violence](#), [obstruction of justice](#), and [assault against Tribal justice personnel](#). VAWA 2022 also creates a [pilot program for Indian Tribes in Alaska to exercise Special Tribal Criminal Jurisdiction](#) within Alaska Native villages; provides formal authorization for the [Tribal Access Program \(TAP\)](#); and reestablishes the [U.S. Bureau of Prisons \(BOP\) Tribal Prisoner Program](#) first authorized as a pilot in the 2010 Tribal Law and Order Act. However, to utilize this special tribal criminal jurisdiction, tribal courts will have to provide certain enumerated due process protections. These include all TLOA due process protections (even if tribes do not impose the enhanced sentencing options), as well as several additional due process protections including the right to an impartial jury.

The [Tribal provisions of VAWA 2022](#) are included in Title VIII of Division W of the overall bill. For more information, please check out the [Section by Section Summary of VAWA 2022 Tribal Provisions](#) by the Senate Committee on Indian Affairs and the [Inter-Tribal Working Group Summary of VAWA 2022 Tribal Provisions](#).

Enforcement of ICRA

For ten years after its passage in 1968, the general perception was that the Indian Civil Right Act (ICRA) gave the federal courts broad powers to hear and decide claims of civil rights violations by tribal governments. This changed dramatically, however, in 1978 with the U. S. Supreme Court decision in [Santa Clara Pueblo v. Martinez](#), 439 U.S. 49 (1978).

During the ten-year period from ICRA's passage to the *Martinez* decision, federal courts heard [Approximately Eighty Cases](#) involving the application of the ICRA. These cases covered many subjects: tribal election disputes; reapportionment of voting districts on Indian reservations ("one man, one vote"), tribal government employee rights; land use regulations and condemnation procedures; criminal and civil proceedings in tribal courts; tribal membership and voting; tribal police activities, conduct of tribal council members and council meetings, and standards for enforcing due process of law and equal protection of the laws in tribal settings.

Also, during this period, the federal courts devised rules of interpretation, including:

1. While the ICRA is generally patterned after the Bill of Rights, the same language does not necessarily have to be interpreted in the same way;
2. The ICRA does not require that Indians and non-Indians must be treated identically by tribal governments, that is, different treatment is permitted and justified in certain circumstances (for example, tribal membership requirements);
3. Tribal customs, traditions, and culture must be considered in interpreting and applying the ICRA; and
4. Tribal remedies must first be exhausted before a dispute can be heard in federal court.

[*Santa Clara Pueblo v. Martinez*](#), 439 U.S. 49 (1978)

Santa Clara Pueblo is in northern New Mexico. In 1939, the Tribal Council of the Pueblo adopted an ordinance that extended tribal membership to the children of male members who married non-members but denied membership to children of female members who married non-members. The tribe justified the ordinance because of its patriarchal traditions plus the economic need to restrict tribal enrollment.

The issue was whether the Indian Civil Rights Act (ICRA) prohibits an Indian tribe from setting membership criteria that discriminates against women. It is a difficult question: equal rights for women on one side; a tribe's rights to set membership criteria on the other side.

The Supreme Court in *Martinez* never actually decided the merits of the case. It disposed of the case on a jurisdictional basis; that is, that the ICRA does not give federal courts broad jurisdiction to review tribal government actions in Indian country. Thus, Ms. Martinez's challenge to the tribal ordinance could not go forward. In reaching this conclusion, the Court noted that there were two purposes that Congress had in mind in enacting the ICRA:

1. Protection of individual civil rights in Indian country. It did this by prohibiting tribal governments from taking actions that might interfere with individual freedoms.

2. Encouragement of tribal self-government. It did this by implicitly recognizing the importance of tribal governments on reservations, reaffirming the idea of sovereign immunity as applied to Indian tribes, and giving tribal institutions the principal responsibility for resolving disputes over civil rights.

In *Martinez*, the Supreme Court interpreted ICRA as not giving the federal court any power to review any complaints of ICRA violations by a tribal government except those arising as writ of habeas corpus actions—complaints of unlawful detention raised by individuals being held in tribal custody. The decision held that violations of all the other rights guaranteed under the ICRA, including equal protection rights, fell under tribal jurisdiction, and thus could only be brought in tribal court.

- Ruth Swentzell, [Testimony of a Santa Clara Woman](#), 14 Kansas Journal of Law and Public Policy 97 (2004): A mother from Santa Clara Pueblo responds to the 1978 decision.

Books & Articles

- Carpenter, Kristen A., Matthew L. M. Fletcher, and Angela R. Riley. 2012. [The Indian Civil Rights Act at Forty](#). Los Angeles, Calif: UCLA American Indian Studies Center.
- Pommersheim, Frank. [Broken Landscape: Indians, Indian Tribes, and the Constitution](#). Oxford University Press, 2009.
- Riley, Angela R. "[Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality"](#)" In *HARVARD LAW REVIEW FORUM*, vol. 130, p. 173. 2017.

Reports

U.S. Commission on Civil Rights (Commission)

[The Commission](#) was created by the Civil Rights Act of 1957. It is an independent, bipartisan, fact-finding federal agency with the mission to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws.

- In a 2003 study, [A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country](#), the Commission found significant disparities in federal funding exist between Native Americans and other groups in our nation, as well as the general population. Among immediate requirements for increased funding are: infrastructure development, without which tribal governments cannot properly deliver services; tribal courts, which preserve order in tribal communities, provide for restitution of wrongs, and lend strength and validity to other tribal institutions; and tribal priority allocations, which permit tribes to pursue their own priorities and allow tribal governments to respond to the needs of their citizens.
- In 1991, the Commission published a report, [The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights](#), on enforcement of ICRA. The report is based on a series of

hearings, field interviews, staff research, data submitted by tribes, and responses to Commission requires for information. The report found:

1. The U.S. has established a government-to-government relationship with tribal governments;
2. Congress did not fully consider the practical application of some of ICRA's provisions and failed to provide means and resources for their implementation;
3. Federal courts nor any Federal agency enforces or oversees enforcement, apart from habeas corpus actions;
4. Adjudication of civil ICRA suits in tribal forums are complicated by tribal governing structures imposed on tribes via the Indian Reorganization Act of 1934;
5. Lack of funding for tribal judicial systems has been a persistent issue for more than twenty years;
6. Tribal sovereign immunity frustrates plaintiffs' efforts to adjudicate their ICRA claims; and
7. Tribal courts' reputation is harmed by jurisdictional disputes and by litigants.

Blogs & Other Resources

- [Turtle Talk](#) – blog of the Indigenous Law and Policy Center Blog Michigan State University College of Law consistently posts updates on ICRA cases, papers, and conference talks. Search by using the tag “Indian Civil Rights Act.”
- [Native American Rights Fund](#) – Indian law research guides.
- [National Congress of the American Indian](#) – Tribal Implementation of VAWA page.