

## **Proactive Approaches to Avoiding Habeas Corpus Petitions**

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## **Habeas Corpus Petition**

Latin, meaning "you have the body." A writ of habeas corpus generally is a judicial order forcing law enforcement authorities to produce a prisoner they are holding, and to justify the prisoner's continued confinement.

See [www.USCourts.gov/glossary](http://www.USCourts.gov/glossary) for the full glossary.

	<p style="text-align: center;"><b>Indian Civil Rights Act of 1968 (ICRA)</b> <b>[Pre-Tribal Law and Order Act of 2010]</b></p>
	<p>The Federal Statute guarantees:</p> <ul style="list-style-type: none"> <li>■ The right to the equal protection of the tribe's laws.</li> <li>■ The right not to be deprived of liberty or property without due process of law.</li> <li>■ The right against unreasonable search and seizures.</li> <li>■ The right not to be twice put in jeopardy for the same tribal offense.</li> <li>■ The right not to be compelled to testify against oneself in a criminal case.</li> <li>■ The right to a speedy and public trial.</li> </ul>

	<p style="text-align: center;"><b>ICRA</b> <b>(Pre-Tribal Law and Order Act of 2010)</b> <b>Continued</b></p>
	<p>The Federal Statute guarantees:</p> <ul style="list-style-type: none"> <li>■ The right to a trial by jury of not less than six persons.</li> <li>■ The right to be informed of the nature and cause of the accusation in a criminal case.</li> <li>■ The right to be confronted with adverse witnesses.</li> <li>■ The right to compulsory process for obtaining witnesses in one's favor.</li> <li>■ The rights against excessive bail, excessive fines, and cruel and unusual punishments.</li> </ul>

	<p style="text-align: center;"><b>ICRA</b> <b>(Pre-Tribal Law and Order Act of 2010)</b> <b>Continued</b></p>
	<p style="text-align: center;">Sentencing Limit:</p> <p>The imposition for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both.</p>

	<p style="text-align: center;"><b>Tribal Law and Order Act of 2010</b> <b>(TLOA)</b> <b>[Amendments to ICRA]</b></p>
	<p>The same rights as ICRA are guaranteed.</p> <p style="text-align: center;">Enhanced Sentencing Limit:</p> <p>The imposition for conviction of any 1 offense any penalty or punishment for a term not to exceed 3 years, or a fine of \$15,000, or both, if the defendant (1) has been previously convicted of the same or comparable offense by any US jurisdiction, or (2) is being prosecuted for a comparable offense that would be punishable by more than 1 year , if prosecuted by the US or any state.</p>

**TLOA**  
**[Amendments to ICRA]**  
**Continued**

Further Enhanced Sentencing Limit:  
The imposition “in a criminal proceeding” a total penalty or punishment greater than imprisonment for a term of 9 years.  
However, if the Tribe chooses to impose these longer sentences, the Tribe must meet several due process requirements.

**TLOA**  
**[Amendments to ICRA]**  
**Continued**

Additional due process requirements:

- Provide the defendant the right to effective assistance of counsel at least equal to that guaranteed by the US Constitution.
- At the expense of the Tribe, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the US having professional licensing standards, competency and professional responsibility rules.

## TLOA [Amendments to ICRA] Continued

### Additional due process requirements:

- The judge presiding over the criminal proceeding must (1) have sufficient legal training to preside over criminal proceedings; and (2) be licensed to practice law by any jurisdiction in the US.
- Prior to charging the defendant, the Tribe must make publicly available the criminal laws, rules of evidence, and rules of criminal procedures, including rules governing recusal of judges.
- Must maintain a record of the criminal proceeding, including an audio or other recording of the trial.

## Violence Against Women Act (VAWA) 2013: What it does & how it works

If a Tribe complies with statutory requirements, VAWA 2013 **restores to the tribe the ability to prosecute** defendants, Indian or non-Indian...

- Who live or work in the tribe's Indian country OR who are a spouse/intimate partner of a tribal member or an Indian who lives in the tribe's Indian country; and
- Who commit dating violence or domestic violence or who violate the no contact/no harassment portion of a protection order
- Within the tribe's Indian country

## Violence Against Women Act (VAWA) 2013

Tribe must provide defendant with:

- All the rights guaranteed by the Indian Civil Rights Act
- Including (if defendant is sentenced to jail time) all rights listed in Section 1302(c) [TLOA]
- Right to trial by an impartial jury that is drawn from sources that
  - Reflect a fair cross-section of the community, and
  - Do not systematically exclude any distinctive group in the community, including non-Indians
- “all other rights necessary...” catch-all provision

## Important Considerations

Given the complexity of these laws, Tribes and Tribal Courts must understand:

1. Which federal statute is being enforced within the tribal jurisdiction (ICRA, TLOA, VAWA).
2. What rights are guaranteed within ICRA’s applicable provisions (being exercised by the tribal court).
3. What the sentencing limits are under ICRA, TLOA or VAWA being exercised by your respective tribal court.