Habeas in Indian Country

Sample Syllabus, with Annotations
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Mailyn Fidler, Yale Law School[1]

Habeas corpus is revered for its function as a guarantor of individual liberty against an overreaching sovereign. The Great Writ has served this function in Indian Country, but it is most often invoked in debates over the extent of tribal sovereignty and how much control the U.S. federal government has over tribes. To what sovereign a habeas petition should be submitted is a critical question, especially when two possible answers exist.

This class investigates questions that revolve around this central theme of how habeas has functioned as a tool of expanding and curtailing tribal sovereignty: how have tribal members used habeas corpus throughout history? How did changing views of Indian jurisdiction over criminal matters affect the use of habeas? Is it right to place so much emphasis on habeas corpus as the only available remedy under one of the most significant pieces of federal Indian legislation, the Indian Civil Rights Act? How are tribes currently using habeas to shape debates on pressing issues such as tribal banishment, child welfare and custody, and domestic violence? How do restrictions on non-tribal habeas affect Indians in the that justice system? How do tribal courts facilitate habeas corpus petitions within the tribal justice system?

This course is structured as a weekly seminar for a 13-week semester, with one class reserved for guest speakers and one reserved either for student presentations or a review session, depending on the assessment method chosen.

Syllabus Overview

Class 1: Introduction to Habeas Corpus

Cary Federman, "Chronology of Habeas Corpus," THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE (2006).
Eric Freedman, "Introduction," MAKING HABEAS WORK: A LEGAL HISTORY.
Marc Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1 (1995), pg. 33-58.
Amanda Tyler, "Introduction," HABEAS CORPUS IN WARTIME, FROM THE TOWER OF LONDON TO GUANTANAMO BAY (2017).

Class 2: Introduction to Indian Law

Judge Joseph J. Wiseman, *An Overview of Key Federal Indian Law Cases*, TRIBAL-COURT STATE-COURT FORUM, JUDICIAL BRANCH OF CALIFORNIA.
Matthew Fletcher, *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 J. OF L. & POL'Y 273 (2005).
Worcester v. Georgia, 31 U.S. 515 (1832).
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

Class 3: Indian Success Securing Habeas as Individual Right (1870s)

Cary Federman, "Habeas in the New American State, 1789-1915," THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE (2006), pg. 21-44.

[1] With thanks to Eugene Fidell and Stephen Pevar for their guidance in creating this syllabus.

Katrina Jagodinsky, "Lucia Martinez and the 'Putative Father,'" LEGAL CODES AND TALKING TREES: INDIGENOUS WOMEN'S SOVEREIGNTY IN THE SONORAN AND PUGET SOUND BORDERLANDS (2016), pg. 1854-1946.
In Re Petition of Can-ah-Couqua, 29 F. Reg. (D. Alaska 1887).
U.S. ex rel Standing Bear v. Crook, 25 F. Cas. 695 (D. Neb. 1879).
Walter Echo-Hawk, "United States ex rel. Standing Bear v. Crook (1879)," IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2013), pg. 159-160.

Class 4: Habeas at the Center of Debates over Indian Criminal Sovereignty (1880s-1890s)

Ex parte Crow Dog, 109 U.S. 556 (1883).
In re Sah Quah, 31 F. 327 (D. Alaska 1886).
Talton v. Mayes, 163 U.S. 376 (1896).

Class 5: A Sea Change—ICRA and Federal Habeas as a Check on Tribal Power (1965-1968)

Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965)
Note, *The Forgotten Indian*, HARV. L. REV. 1968
Stephen Pevar, "The Indian Civil Rights Act," THE RIGHTS OF INDIANS AND TRIBES (2012).

Class 6: Habeas as Only Federal ICRA Remedy (1978-1990)

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670 (1978)
Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995)
Part I of Carrie E. Garrow, *Habeas Corpus in Federal and Tribal Courts*, 24 WM. & MARY BILL OF RIGHTS J. 1 (2015)

Class 7: Restricting Habeas to Protect Sovereignty (Banishment) (1990-2010s)

Poodry v. Tonawanda Band of Seneca Indians (2nd Cir. 1996) [permanent banishment]
Shenandoah v. Dep't of Interior (2nd Cir. 1998) [benefit withholding]
Jeffredo v. Macarro (9th Cir. 2010) [disenrollment]
Tavares v. Whitehouse, 851 F.3d 863 (9th Cir. 2017) [differentiating ICRA "detention" standard from federal "custody" standard]
Chegup v. Ute Indian Tribe (D.Utah 2019) (on appeal) [temporary banishment]
Alternatively: *Oviatt v. Reynolds* (10th Cir. 2018) [temporary banishment]

Class 8: Expanding Habeas to Expand Tribal Jurisdiction (Domestic Violence) (2010-2020)

Angela Riley*, Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016).
Hunter Cox*, ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the Post-Oliphant World*? 5 AM. IN. L. J. 596 (2017).

Class 10: Habeas and Indian Child Welfare

Stephen Pevar, "The Indian Child Welfare Act," in THE RIGHTS OF INDIANS AND TRIBES (2012).
Walter Echo-Hawk, "In Re Adoption of John Doe v. Heim: Taking the Kids," IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (2010) (Chapter 9).
In re Larch, 872 F.2d 66 (4th Cir. 1989)
DeMent v. Ogalala Sioux Tribal Court, 874 F.2d 510 (8th Cir. 1989).
Arneach v. Reed, 3 Cher. Rep. 9 (Cher. Sup. Ct. N.C. 2000).

Class 9: AEDPA's Effects on Tribes

Barbara Creel and Veronica C. Gonzalez-Zamora, *State Habeas and Tribal Habeas: Identical or Fraternal Twins?* 36 AMERICAN BAR ASSOCIATION APPELLATE PRACTICE (2017).
Roxanne Daniel, *Since You Asked: What Data Exists About Native American People in the Criminal Justice System?* PRISON POLICY INITIATIVE, April 22, 2020.
Lincoln Caplan, *The Destruction of Defendants' Rights*, THE NEW YORKER, June 21, 2015.
Review: Hunter Cox, *ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the Post-Oliphant World?* 5 AM. IN. L. J. 596 (2017), pages 634-637.

Class 11: Habeas within Tribal Courts

Part II of Carrie E. Garrow, *Habeas Corpus in Federal and Tribal Courts*, 24 WM. & MARY BILL OF RIGHTS J. 1 (2015)
Thompson v. Greyeyes, Navajo Nation Supreme Court (2004)
Note, *The Forgotten Indian,* HARV. L. REV. 1968, p. 1828-29

Class 12: Guest Speaker Class

Class 13: Student Presentations or Review Session

Annotated Syllabus

Class 1: Introduction to Habeas Corpus

This introductory class addresses what habeas corpus is and how it has been used, expanded, and restricted throughout history. Before looking at habeas as a tool in debates over Indian sovereignty, its role as a tool in power struggles between colonial America and Britain, between states and the federal government during slavery, and between branches of the U.S. government, especially during wartime, should be understood. This class also provides a brief look at the writ's legal evolution in the U.S.

Read:

Cary Federman, "Chronology of Habeas Corpus," THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE (2006).
Eric Freedman, "Introduction," MAKING HABEAS WORK: A LEGAL HISTORY.
Marc Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1 (1995), pg. 33-58.
Amanda Tyler, "Introduction," HABEAS CORPUS IN WARTIME, FROM THE TOWER OF LONDON TO GUANTANAMO BAY (2017).

Class 2: Introduction to Indian Law

This introductory class lays out key characteristics of American Indian law that permeate most areas of Indian law. As you will read, Fletcher notes that "Americans have alternated between extreme imposition on Indian tribal affairs and tortious neglect." This overview focuses on Indian criminal law, since habeas most often arises in that context. Focus especially on the jurisdictional issues as signs of struggles over sovereignty—which courts can adjudicate which questions over which peoples.

Read:

Judge Joseph J. Wiseman, *An Overview of Key Federal Indian Law Cases*, TRIBAL-COURT STATE-COURT FORUM, JUDICIAL BRANCH OF CALIFORNIA.
Matthew Fletcher, *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 J. OF L. & POL'Y 273 (2005).
Worcester v. Georgia, 31 U.S. 515 (1832).
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

Class 3: Indian Success Securing Habeas as Individual Right (1870s)

When did habeas become accessible to and used by Indian tribal members? How did they use it? Why did it become available at this time? What were its limits? Changing federal-state relations in the post-Civil War period opened up new legal possibilities for Indian use of habeas. In the 1870s, American Indians successfully used the Great Writ of white man's law to assert modicums of control against white incursion. In the early 1870s, Lucia Martinez, a Yaqui native taken captive by territorial King S. Woolsey in Arizona, used habeas to regain custody of the children she bore by him. However, a similar petition by a Tlingit mother against a government school in Alaska to regain custody of her child was not successful.

Habeas also played a key role in the late 1870s legal victory of Standing Bear. Standing Bear, a Ponca native, was removed to Indian Territory from Nebraska. Finding terrible conditions, Standing Bear and a few others attempted to return to their former Nebraska reservation and were arrested. A judge hearing the habeas suit found that habeas protections applied to Standing Bear, despite his effectively stateless status; he was not a citizen and had renounced Ponca membership. This was considered a remarkable legal victory.

Read:
Cary Federman, "Habeas in the New American State, 1789-1915," THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE (2006), pg. 21-44.
Katrina Jagodinsky, "Lucia Martinez and the 'Putative Father,'" LEGAL CODES AND TALKING TREES: INDIGENOUS WOMEN'S SOVEREIGNTY IN THE SONORAN AND PUGET SOUND BORDERLANDS (2016), pg. 1854-1946.
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Walter Echo-Hawk, "United States ex rel. Standing Bear v. Crook (1879)," IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2013), pg. 159-160.

Class 4: Habeas at the Center of Debates over Indian Criminal Sovereignty (1880s-1890s)

Judicial and congressional attitudes towards Indian sovereignty, especially over criminal matters have gone through periods of lassitude and strictness. How did these change the availability and use of the writ by Indian populations? In the 1881 case *Ex Parte Crow Dog*, the Supreme Court granted a writ of habeas corpus to an Indian on the basis that the federal courts did not have jurisdiction to try him; he had already been tried by his own tribe for murder. This reaffirmation of Indian sovereignty did not sit well with Congress, who subsequently passed the 1885 Major Crimes Act, extending federal jurisdiction over Indians who committed certain crimes.

Potentially following this wave of anti-Indian sentiment, an Alaska federal court decided *In re Sah Quah* in 1886. Here, the court granted a habeas petition brought by slaves held by Alaskan Indians, as was customary, on Thirteenth Amendment grounds. Taken all the way, the logical consequence of this case was that constraints that applied to state and federal governments with respect to individual rights also applied to Indian tribes.

The 1898 case *Talton v. Mayes* took the law in a different direction, however. At issue in this habeas petition was whether the Fifth Amendment grand jury requirements applied to tribes. The Supreme Court held that this Amendment, like other constitutional provisions, does not bind tribes. This decision was a reaffirmation of tribal sovereignty, a conception which governed, at least in the criminal realm, largely undisturbed for the next sixty years.

Read:

Ex parte Crow Dog, 109 U.S. 556 (1883).
In re Sah Quah, 31 F. 327 (D. Alaska 1886).
Talton v. Mayes, 163 U.S. 376 (1896).

Class 5: A Sea Change—ICRA and Federal Habeas as a Check on Tribal Power (1965-1968)

One of the most prominent pieces of Indian legislation is the 1965 Indian Civil Rights Act (ICRA)—and it directly addressed habeas petitions. This era of habeas jurisdiction provides a contradiction that many civil libertarians struggle with: it extended the availability of habeas remedies for Indians in federal court, but curtailed tribal sovereignty in doing so. Was this increased accessibility a good thing?

In the 1965 case *Colliflower v. Garland*, a ninth circuit court found jurisdiction to issue a writ of habeas corpus to an individual convicted in a tribal court. The court called into question the validity of *Talton* principle, that the Constitution only applies to Indian tribes when explicitly applied by Congress. The Ninth Circuit did not explicitly overrule *Ex Parte Crow Dog*, but made an exception for habeas jurisdiction. The court found, "no case has been cited to us that holds that the courts of the United States do not have jurisdiction to issue writs of habeas corpus to inquire into the legality of the imprisonment of an Indian pursuant to an order or judgment of an Indian court." Indeed, in doing so, the court cited *In re Sah Quah* for this habeas-specific jurisdiction.

This decision may have been informed by an ongoing change in perception about how the constitution should apply to Indian tribes. Starting in 1962, Congress held a series of hearings about tribal administration of justice. Many Senators were shocked that Indians did not have recourse to the Bill of Rights and by the allegations of misconduct by some who testified. These discussions eventually led to the 1965 passage of ICRA, which applied most of the Bill of Rights to Indian tribes. Notably, §1303 provided habeas corpus as a remedy for violations of ICRA, essentially formalizing the holding of *Colliflower*: "the privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

Read:

Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965)
Note, *The Forgotten Indian*, HARV. L. REV. 1968
Stephen Pevar, "The Indian Civil Rights Act," THE RIGHTS OF INDIANS AND TRIBES (2012).

Class 6: Habeas as Only Federal ICRA Remedy (1978-1990)

What happened to habeas in the aftermath of ICRA? It became the only legally available remedy for Indians under ICRA, bearing a huge amount of weight. In a sovereignty-enhancing decision, the landmark 1978 case *Santa Clara Pueblo v. Martinez* clarified that the only remedy that ICRA provided for any violation was habeas corpus. ICRA rights were not enforceable in federal court through other means, so if a right was not enforceable via habeas, it was not enforceable in federal court. The court so ruled because it found that Congress had intentionally limited available remedies to one to "protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments." This decision is one of the key turning points in how habeas is an arbiter of sovereignty rather than solely of individual rights.

In the 1995 Ninth Circuit case *Wetsit v. Stafne*, the court found an exhaustion requirement in ICRA. A tribal member must first exhaust tribal remedies before filing a habeas petition in federal court. This again strengthened tribal sovereignty and limited individual access to habeas. Although not all circuits have decided equivalents to this case, most follow its exhaustion principles as a matter of comity.

A study of habeas petitions to federal courts from tribal courts from 1968 to 2013 found only thirty complete petitions. This low number suggests that overall violations of ICRA are low. Further examination shows that 14 of these were dismissed for lack of exhaustion of tribal remedies, none of which were refiled. 10 were filed after proper exhaustion, of which 6 were dismissed and 4 granted.

Read:

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670 (1978)
Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995)
Part I of Carrie E. Garrow, *Habeas Corpus in Federal and Tribal Courts*, 24 WM. & MARY BILL OF RIGHTS J. 1 (2015)

Class 7: Restricting Habeas to Protect Sovereignty (Banishment) (1990-2010s)

How have Indian peoples continued to innovate around habeas corpus on the issues that matter to them in the modern age? ICRA places limits on the extensiveness of detention/fine sentences tribal courts can impose, increasing the chances that prisoner habeas suits will be moot before they can be heard. Because of this restriction and for cultural reasons, tribal courts impose punishments other than imprisonment, including temporary or permanent banishment, as well as withholding of a range of tribal benefits including employment, housing, healthcare, and annuity payments. Courts have repeatedly held that all of these other judicial consequences fail to qualify as "detention" under ICRA, the standard a punishment must meet to merit a habeas petition in

federal court. Courts generally do so using the rhetoric of sovereignty and self-determination: Congress only meant for one remedy to be available, and that is habeas in cases of detention. Note that some tribes have waived sovereign immunity to allow for ICRA suits to be heard in their own tribal courts.

Read:

Poodry v. Tonawanda Band of Seneca Indians (2nd Cir. 1996) [permanent banishment]
Shenandoah v. Dep't of Interior (2nd Cir. 1998) [benefit withholding]
Jeffredo v. Macarro (9th Cir. 2010) [disenrollment]
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Chegup v. Ute Indian Tribe (D.Utah 2019) (on appeal) [temporary banishment]
Alternatively: *Oviatt v. Reynolds* (10th Cir. 2018) [temporary banishment]

Class 8: Expanding Habeas to Expand Tribal Jurisdiction (Domestic Violence) (2010-2020)

This class session continues the inquiry into how habeas has evolved as a tool to respond to modern tribal concerns. In 2013, Congress reauthorized the Violence Against Women Act with a special title that provided Indian tribes with criminal jurisdiction over domestic violence crimes—including jurisdiction over non-Indians. The compromise that enabled this expansion of jurisdiction was to allow any convicted person to petition directly to federal court on a habeas writ to challenge a conviction *and* detention, pending review. No exhaustion of tribal procedure is required—a first for statutorily granted jurisdiction to tribes. This compromise has been heavily debated: some see it as a necessary cost of achieving greater tribal jurisdiction and have advocated for using the same tactic in other areas of law, while others see it as an unnecessary sacrifice of tribal sovereignty. As of March 2018, 128 non-Indian abusers had been arrested under VAWA jurisdiction and none have filed a habeas petition in federal court.

Read:

Angela Riley*, Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016).
Hunter Cox*, ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the Post-Oliphant World*? 5 AM. IN. L. J. 596 (2017).

Class 10: Habeas and Indian Child Welfare

The first instance of Indian habeas usage we examined in this class involved Lucia Martinez's suit for return of custody of her children. Habeas has been used throughout its history in child custody suits. How does habeas feature into the modern statutory landscape of Indian child custody? Namely, how does it interact with the Indian Child Welfare Act (ICWA)? Courts have determined that ICWA only applies when a child is placed in the custody of a third party and does not apply to custody disputes between two parents. Does that mean habeas actions still have a role to play? What happens to the strong presumption ICWA established for keeping children of Indians within the community when a custody dispute occurs between an Indian parent and a non-Indian parent? Which court has jurisdiction, an Indian court or a non-Indian court?

Read:

Stephen Pevar, "The Indian Child Welfare Act," in THE RIGHTS OF INDIANS AND TRIBES (2012).
Walter Echo-Hawk, "In Re Adoption of John Doe v. Heim: Taking the Kids," IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (2010) (Chapter 9).
In re Larch, 872 F.2d 66 (4th Cir. 1989)
DeMent v. Ogalala Sioux Tribal Court, 874 F.2d 510 (8th Cir. 1989).
Arneach v. Reed, 3 Cher. Rep. 9 (Cher. Sup. Ct. N.C. 2000).

Class 9: AEDPA's Effects on Tribes

Indians are overrepresented in the American criminal justice system. This means that many Indians are exposed not to tribal procedures under ICRA, but to the modern state of the writ in America, which was sharply curtailed in the criminal context by the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA). Many regard AEDPA as a death knoll for habeas in this context. What implications does AEDPA have for equitable treatment of Indians in the criminal justice system? What implications does AEDPA have on administration of ICRA, which is often performed by the same federal judges?

Read:
Barbara Creel and Veronica C. Gonzalez-Zamora, *State Habeas and Tribal Habeas: Identical or Fraternal Twins?* 36 AMERICAN BAR ASSOCIATION APPELLATE PRACTICE (2017).
Roxanne Daniel, *Since You Asked: What Data Exists About Native American People in the Criminal Justice System?* PRISON POLICY INITIATIVE, April 22, 2020.
Lincoln Caplan, *The Destruction of Defendants' Rights*, THE NEW YORKER, June 21, 2015.
Review: Hunter Cox, *ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the Post-Oliphant World?* 5 AM. IN. L. J. 596 (2017), pages 634-637.

Class 11: Habeas within Tribal Courts

Habeas within tribal courts functions much as it does in the state and federal system. Tribal courts have been fairly willing to rule against tribal governments in granting habeas motions. Habeas has also been used as a political tool in adjudicating inter-branch disagreements within tribes.

Read:
Part II of Carrie E. Garrow, *Habeas Corpus in Federal and Tribal Courts*, 24 WM. & MARY BILL OF RIGHTS J. 1 (2015)
Thompson v. Greyeyes, Navajo Nation Supreme Court (2004)
Note, *The Forgotten Indian,* HARV. L. REV. 1968, p. 1828-29

Class 12: Guest Speaker Class

Suggested speakers include:

- Professor Angela Riley, Potawatomi Nation, UCLA Law School
- Professor Barbara Creel, Pueblo of Jemez, University of New Mexico Law School
- Mary Kathryn Nagle, Esquire, Cherokee Nation, Pipestem Law
- Judge Carrie E. Garrow, Mohawk Nation, St. Regis Mohawk Tribal Court and Visiting Assistant Professor at Syracuse University College of Law.
- Judge Kristen Carpenter, Shawnee Supreme Court, and Professor at University of Colorado School of Law.
- Professor Matthew Fletcher, Grand Traverse Band of Ottawa and Chippewa Indians, Michigan State University Law School.
- Professor Katrina Jagodinsky, University of Nebraska (History).
- Stephen Pevar, Esquire, American Civil Liberties Union.

Class 13: Student Presentations or Review Session

Structure according to chosen assessment for class.