Due Process in Indian Country

What is due process?
It is a constitutionally guaranteed right. It provides these protections:

- It requires certain procedural safeguards be in place when your fundamental rights (the right to life, liberty or property) are threatened. Legal proceedings must be carried out fairly.
- In some situations, the government cannot interfere with certain fundamental rights regardless of the process used.

The due process requirements in the Bill of Rights and the Fourteenth Amendment of the U.S. Constitution apply to federal and state governments. They do not apply to federally recognized Indian Tribes. They are sovereign (independent) governments.

In Indian Country, your due process rights come from:

- The Indian Civil Rights Act (ICRA) (http://tinyurl.com/nr8zzg3)
- Tribal constitutions and/or codes
- A tribe’s tradition and custom

There are two types of due process:

- Procedural
- Substantive

What is procedural due process?
It refers to the procedure (such as a hearing or trial) a government agency uses to limit or deprive you of a protected interest. The government agency must conduct the process at least according to certain laws and rules. You must have

- notice of the government’s intended action
- a chance to be heard before a neutral decision maker

What is substantive due process?
It protects you from government actions that would unreasonably deprive you of a fundamental right, including:

- Life
- Liberty
- Property interests

Substantive due process says the government cannot deprive you of certain fundamental aspects of individual liberty, no matter what process it provides. The government cannot infringe on these rights unless necessary to accomplish a compelling government objective, such as:

- Protecting children
- Preventing discrimination
- Ensuring public safety
What is the Indian Civil Rights Act (ICRA)?

It is a federal law that:

- strengthens the rights of tribal members facing adverse action of tribal governments
- promotes the federal policy of furthering Indian self-government

ICRA provides protections against tribal governmental actions like those in the Bill of Rights, including

- due process restraints
- protection of your liberty interests and property rights\footnote{25 USC §1302(a)(8) states that no Indian tribe, in exercising their powers of self-government, shall deny anyone within its jurisdiction the equal protection of its laws or deprive anyone of liberty or property without due process of law.}

How does the ICRA work in Indian Country?\footnote{The U.S. Bill of Rights does apply in Indian Country when a state or the federal government (not a tribal government) violates individual rights protected under the Bill of Rights.}

- The ICRA applies only to federally recognized tribes.

If a tribe violates the ICRA, your options depend on:

- Whether the tribe decided to incorporate the ICRA into its own laws AND
- How its tribal court has interpreted the ICRA

Tribal courts usually hear ICRA cases. They can implement the ICRA consistent with the tribe’s values, culture, and traditions.

At this time, you can only go to federal court about one type of ICRA violation. A person incarcerated (arrested, jailed or imprisoned) or detained by an Indian tribe may petition federal court for a \textit{writ of habeas corpus}. The arrested person is brought before a federal court, which decides whether the detention is lawful. “Detainment” might include tribal banishment or exclusions.

- Before you bring a habeas corpus action in federal court, you must first exhaust (use and finish) all tribal court or tribal forum remedies.

My tribe has not incorporated the ICRA. Do I have due process protections?

It depends.
A tribe can expressly consent to the ICRA by incorporating it into their tribal codes or constitutions. **Example 1:** The Confederated Tribes of the Colville Reservation enacted a tribal civil rights law like ICRA in its Tribal Code at Chapter 1-5. **Example 2:** The Sauk-Suiattle Tribe’s Constitution has language adopting the protections of both the ICRA and the U.S. Constitution.

Some tribes have incorporated some but not all of the ICRA.

**Example 1:** Article VII of the Tulalip Tribes’ Constitution is a Bill of Rights protecting suffrage, economic rights, civil liberties, and the rights of defendants in criminal proceedings. It does **not** grant due process rights in civil cases.

**Example 2:** Title 15 of the Jamestown S’Klallam Tribe’s Tribal Code provides rights to defendants in criminal proceedings. However, the Tribal Code does not have any provisions protecting civil liberties.

Even if a tribe has not expressly incorporated the ICRA into its Constitution or code, ICRA still applies to judicial review of tribal government actions in tribal court.

Even when a tribe has not expressly incorporated the ICRA, it may still use federal law as a guide when there is no tribal law on the subject. A tribe’s code might call this a “choice of law” provision. This may allow you to use the federal Bill of Rights to secure your due process rights.

A tribe may also provide due process rights in its tribal codes, or in accordance with its traditions and customs. We explain more in the section called “What about due process rights based on tribal law?”

**What is sovereign immunity?**

It protects governments, including tribal governments, from lawsuits. If you bring a court case claiming ICRA violations against a tribe, you may need to overcome its sovereign immunity defense. You may not sue the government unless it has waived (given up) its immunity or consented to being sued.

Tribes may waive their sovereign immunity in these situations:

- The tribal court has interpreted the ICRA to waive tribal sovereign immunity from suit in tribal court.
- The tribe has expressly consented to the ICRA.
- The Tribe has voluntarily given up sovereign immunity regarding a particular type of legal claim (called a limited waiver).

Even when sovereign immunity protects a tribe from lawsuits, ICRA still has some force. Tribal courts often reverse convictions and

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3 Generally, tribal sovereign immunity covers its governmental agencies, officials and commercial enterprises.

4 Even when a tribal code or constitution incorporates the ICRA, the tribal government or agency may argue that sovereign immunity still applies. The tribal court would then analyze whether the tribe has waived its sovereign immunity by incorporating the ICRA into its tribal laws.
grant remedies because of ICRA violations. Also, a tribe’s sovereign immunity may not protect individual tribal officials acting outside their authority by violating your tribal constitutional or civil rights.

**What about due process rights based on tribal law?**

Sometimes a tribe has established due process rights, not based on ICRA, but derived from the tribe’s own laws or its tradition and custom. **Example:** a tribal code may provide a right to notice and a hearing if the tribal government revokes a permit or license.

Tribes exercising criminal jurisdiction have criminal codes with the basic due process protections for criminal defendants.⁵ Tribal courts may also rely upon the tribe’s traditions and customs as a source of due process rights. **Example:** Many tribes have a traditional practice of allowing tribal members a chance to tell their side of the story. This is a due process right established by a tribe’s traditions and customs. The tribal court may require a fair hearing before depriving you of a fundamental right.

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⁵ ICRA provides basic due process protections for criminal defendants. It does not require tribes to provide jury trials or fund criminal defense lawyers. Many tribal criminal codes provide these protections anyway.

**What are some examples of due process protections?**

**Employment:** An employee entitled to continued employment has a property right protected by due process. The source of this right may be a tribal law or an employment contract.

There are two ways you may have a right to continued employment by contract:

1. **Express right to employment:**

If an employment contract states you will be employed for one year and can only be fired “for cause,” you have a right to the job for one year. If the contract says you are “terminable at will,” there is usually not an express right to keep the job.

2. **Implied right to employment:**

This exists when an employer’s action creates an expectation of continued employment. It may be the employer’s verbal statement, such as, “you’ll be here as long as your sales are above a certain minimum.” Verbal statements must be specific. An employer’s assurance, “you’ll have a job as long as you like,” is too general.

“Course of dealing” can also create an implied right. This means an employer has a practice of keeping employees on as long as they keep up certain standards of performance. You may then claim they cannot fire you as long as you meet these standards. The ways an implied right may be created depends on a tribe’s policies and practices.

A personnel handbook or employee policy may create specific procedural due process rights, such as the right to a hearing to
challenge your firing or discipline. These due process rights may apply in some cases even if the job is terminable at will.\textsuperscript{6}

**Example:** You work for a casino. Its employee handbook outlines termination procedures, such as disciplinary warnings and a chance for a hearing before a review board. This creates an express procedural due process right for you. The casino must conduct the stated procedures before it fires you. A disciplinary warning is notice. A hearing before a board of review is a chance to be heard. If the casino does not provide you these procedures, it may have violated your due process rights.

Exclusion, Banishment and Disenrollment:\textsuperscript{7} Most tribes have laws and procedures for excluding people from tribal lands (banning them). These typically require notice of the intended exclusion explaining:

- The reason the tribe wants to exclude you
- A process for challenging the exclusion in tribal court

If a person or tribal government does not follow tribal code provisions or provide due process, they may have violated tribal law or the ICRA.\textsuperscript{8}

Most ICRA claims must be heard in tribal courts. There is an exception if you are in custody and seek a “writ of habeas corpus” to test whether your detention is legal. You might file in federal court after challenging your detention through all levels of the tribal judicial system.\textsuperscript{9}

“Detention” generally means imprisonment. Some courts have held that a tribal member's permanent exclusion (banning) from his/her Indian reservation may be “detention” within the meaning of habeas corpus and subject to federal court review. This area of law is unsettled. A remedy in federal court may only be available if you are facing a criminal sanction.

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\textsuperscript{6} Most employment is "at will." Your employer can fire you for any or no reason.

\textsuperscript{7} Most tribes call the act of barring someone from the reservation "banishment" or "exclusion." "Disenrollment" is when the tribe revokes (takes back) your tribal membership. Check the tribe’s Constitution or code for its laws on these procedures.

\textsuperscript{8} There may be an exception if the governing body excludes someone by tribal resolution that includes a form of due process.

\textsuperscript{9} Generally, you must “exhaust” all tribal court remedies before a federal court will hear a petition for a writ of habeas corpus. There may be an exception if you can show that exhaustion is futile or that the tribal court of appeals offers no adequate remedy.
Example: A tribe’s exclusion code says it must give written notice of the intended exclusion and the reason for it. It also says you can have a trial before an impartial tribal judge. The code creates a procedural due process right before the tribe may exclude you from the reservation. If the tribe does not provide you these procedures, you may have a claim for due process violations under ICRA and/or tribal law.