

Due Process in Indian Country

What is due process?

It is a constitutionally guaranteed right. It protects you:

- It requires the government to carry out legal proceedings fairly when the proceedings threaten your rights to life, liberty, or property.
- The government cannot interfere with some rights no matter the process.

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.¹

Where do my due process rights in Indian Country come from?

- The [Indian Civil Rights Act \(ICRA\)](http://tinyurl.com/nr8zzg3) (<http://tinyurl.com/nr8zzg3>)
- Tribal constitutions and/or codes
- A tribe's tradition and custom

What types of due process are there?

There are two:

1. Procedural
2. Substantive

What is procedural due process?

A government agency conducting a hearing, trial, or other procedure to limit or deprive you of a protected interest must give you

- notice of what it intends to do
- 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

- Life
- Liberty
- Property interests

The government cannot deprive you of these rights, no matter what process it provides. It can only infringe on them if necessary to accomplish a compelling objective, such as:

¹ The U.S. Bill of Rights *does* apply in Indian Country when the government, except for tribal government, violates rights protected by the Bill of Rights.

- Protecting children
- Preventing discrimination
- Ensuring public safety

What is the Indian Civil Rights Act (ICRA)²?

This federal law

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

It 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

When does the ICRA apply?

It applies only to federally recognized tribes.

How does the ICRA work?

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

- If the tribe decided to incorporate the ICRA into its own laws

- How the tribal court has interpreted the ICRA

Where do I file an ICRA case?

Tribal courts usually hear ICRA cases. They can carry out the ICRA consistent with the tribe's values, culture, and traditions.

Can I file an ICRA case in federal court?

Only about one type of ICRA violation. If an Indian tribe **arrests, jails, imprisons, or detains you**, you can petition federal court for a **writ of habeas corpus**. You are then brought before a federal court. That court decides if the detainment is lawful. "Detainment" can include tribal banishment or exclusions.

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- ❖ Before bringing a habeas corpus action in federal court, you must first exhaust (use and finish) all tribal court or forum remedies.
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Has my tribe incorporated the ICRA?

A tribe expressly consents to the ICRA by incorporating it into their tribal code or constitution.

² No Indian tribe shall deny anyone within its jurisdiction the equal protection of its laws or deprive anyone of liberty or property without due process of law. [25 USC §1302\(a\)\(8\)](#).

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 the ICRA and the U.S. Constitution.

Can a tribe incorporate some but not all of the ICRA?

Yes.

Example 1: Article VII of the Tulalip Tribes’ Constitution is a Bill of Rights protecting women’s rights, economic rights, civil liberties, and defendants’ rights 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. It does not have any provisions protecting civil liberties.

My tribe has not expressly incorporated the ICRA. Do I still have due process rights?

Maybe.

- ICRA still applies when a tribal court reviews tribal government actions.

- A tribe can still use federal law as a guide when there is no tribal law on the subject. Tribal code might call this a “choice of law” provision. This may let you use the federal Bill of Rights to secure your due process rights.
- A tribe may provide due process rights in its tribal code, or in accordance with traditions and customs. Read “Could I have due process rights based on tribal law,” below.

What is sovereign immunity?

It protects governments from lawsuits.³ If you bring a court case against a tribe over ICRA violations, the tribe has a sovereign immunity defense. You can only sue it if it has waived (given up) its immunity or consented to being sued.

When does a tribe waive its sovereign immunity?

In these situations:

- The tribal court interprets the ICRA to waive tribal sovereign immunity from suit in tribal court.

³ Generally, it covers a tribe’s governmental agencies, officials and commercial enterprises.

- The tribe has expressly consented to the ICRA.⁴
- The Tribe has given up sovereign immunity against a type of legal claim. This is a **limited waiver**.

Even when sovereign immunity protects a tribe from lawsuits, ICRA has some force. Tribal courts often reverse convictions and grant remedies because of ICRA violations.

Does sovereign immunity protect an individual tribal official?

Maybe not, if they were acting outside their authority by violating your tribal constitutional or civil rights.

Could tribal law give me due process protections?

Yes.

- A tribe may have established due process rights in its own laws. **Example:** Tribal code can provide a right to notice and a hearing if the tribal government revokes a permit or license.
- A tribe may have established due process rights derived from its traditions and customs. **Example:** a

traditional practice of allowing tribal members a chance to tell their side of the story.

- Tribes exercising criminal jurisdiction have criminal codes with basic due process protections for criminal defendants.⁵

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 the right may be 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:

An employment contract states you will be employed for one year and the employer can only fire you “for cause.” You have a right to the job for one year.

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- ❖ A contract saying you are “terminable at will” usually means you do not have an express right to keep the job.
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⁴ Even a tribal government or agency whose tribal code or constitution incorporates the ICRA may say it still has sovereign immunity. The tribal court would then decide if the tribe has waived sovereign immunity by incorporating the ICRA into its tribal laws.

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 anyway.

2. Implied right to employment:

An employer's action creates an expectation of continued employment. **Example:** the employer states, "You'll be here as long as your sales are above a certain minimum." Verbal statements must be specific. "You'll have a job as long as you like," is too general.

Course of dealing can create a right. 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.

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- ❖ Whether you have an implied right depends on a tribe's policies and practices.
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A **personnel handbook or employee policy** can create due process rights, such as the right to a hearing to challenge your firing or discipline. These rights may apply even to "at will" work.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 a procedural due process right. The casino must conduct the stated procedures before it fires you. A warning is notice. A hearing before

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

⁷ Most tribes call barring someone from the reservation **banishment** or **exclusion**. **Disenrollment** is when the tribe revokes (takes back) your tribal membership.

a review board is a chance to be heard. If the casino does not provide these procedures, it may have violated your due process rights.

Do I have due process rights when it comes to exclusion, banishment and disenrollment?⁷

Most tribes have laws and procedures for excluding (banning) people from tribal lands. Usually you must get notice of the intended exclusion explaining:

- Why they want to exclude you
- The process for fighting the exclusion in tribal court

A person or tribal government who does not follow tribal code provisions or provide due process in this type of case may have violated tribal law or the ICRA.⁸

The tribe excluded me. I believe they violated my due process rights. Where do I file an ICRA claim?

Some courts have held that your permanent exclusion from your Indian reservation may be "detention" within the meaning of habeas corpus. That would mean federal court review. **This area of law is unclear.** Federal

Check the tribe's Constitution or code for its laws on these procedures.

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

court may only be available if you are facing a criminal sanction.

Example: A tribe's exclusion code says it must give written notice of the intended exclusion and reason for it. It says you can have a trial

before a tribal judge. The code creates a procedural due process right before the tribe can 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.

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