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Indians—Criminal Procedure: Habeas Corpus as an Enforcement Procedure Under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1302-1303

anon

RECENT DEVELOPMENTS

INDIANS—CRIMINAL PROCEDURE: HABEAS CORPUS AS AN ENFORCEMENT PROCEDURE UNDER THE INDIAN CIVIL RIGHTS ACT OF 1968, 25 U.S.C. §§ 1302-1303.

The Indian Civil Rights Act, Title II of the Civil Rights Act of 1968, extended portions of the Bill of Rights to individual Indians as against their tribal governments and provided federal habeas corpus relief to review alleged violations of these rights.[1] The Indian Bill of Rights marked the culmination of a complete reversal in federal recognition of Indian constitutional rights. Until 1965 federal courts had recognized Indian tribes as quasi-sovereign entities.[2] Individual Indians were guaranteed their constitutional rights in relations with federal and state governments, but not with their tribal governments.[3] The only rights

1. The text of the Indian Bill of Rights, 25 U.S.C. §§ 1302-03 (Supp. V, 1970) reads:
§ 1302. Constitutional Rights
No Indian tribe in exercising powers of self-government shall—
(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
(3) subject any person for the same offense to be twice put in jeopardy;
(4) compel any person in any criminal case to be a witness against himself;
(5) take any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
§ 1303. Habeas Corpus
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.

2. Talton v. Mayes, 163 U.S. 376 (1896), first enunciated the doctrine of the limited sovereignty of Indian tribes.

3. Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959), for example, held that the first amendment prohibition against governmental interference

Indian governments recognized when dealing with Indians were those guaranteed by tribal custom and tradition. In 1965 the Ninth Circuit Court of Appeals, in *Colliflower v. Garland*,[4] held that federal courts may issue a writ of habeas corpus to determine the legality of detention of an Indian jailed by a tribal court without benefit of constitutional due process. *Colliflower* was reaffirmed and expanded in 1969 by *Settler v. Yakima Tribal Court*.[5]

The wisdom of Congress in adopting habeas corpus as a means of review must be examined. Habeas was the only means available to the courts, but not the only means available to Congress. This note will examine: (1) the inconsistency of Congress's adoption of habeas corpus relief; (2) the Indian tribal justice system; (3) the impact of traditional habeas corpus review on that system; (4) alternatives to habeas corpus review.

I. CONGRESSIONAL INCONSISTENCY

Congress enacted the Indian Bill of Rights "to protect individual Indians from arbitrary and unjust actions of tribal governments."[6] Section 1302 guarantees the individual Indian basically the same constitutional rights enjoyed by all Americans.[7] To enforce those rights, Congress enacted Section 1303, providing the writ of habeas corpus to test, in federal court, "the legality of his [any person's] detention by order of an Indian tribe."[8] This means of enforcing the provisions of section 1302 is arguably the most important part of the Indian Bill of Rights. Without adequate enforcement, the rights conferred by the Act are illusory. However, by the same token, the damage to the Indian tribe resulting from an excessive power of enforcement by habeas corpus

with religious freedom did not apply to Indian tribal governments in the absence of an act of Congress.

4. 342 F.2d 369 (9th Cir. 1965).

5. 419 F.2d 486 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970). *Settler* was decided prior to the effective date of the Indian Civil Rights Act.

Settler expanded the rule of *Colliflower* in two ways: (1) habeas corpus relief was extended to a petitioner free on bail, not jailed as was the petitioner in *Colliflower*; (2) in *Colliflower*, federal relief was granted because the tribal court was a Court of Indian Offenses, partially federally funded and controlled. In *Settler* relief was granted even though the court was funded and run by the tribe itself.

6. S. REP. No. 841, 90th Cong., 1st Sess. 6 (1968).

7. *See* note 1, *supra*.

8. 25 U.S.C. § 1303 (Supp. V, 1970).

may outweigh the benefits conferred on the individual Indian. The enforcement procedure must be tailored to the society in which it is to operate.

In testimony before the Senate Subcommittee on Constitutional Rights, the Solicitor of the Department of the Interior stated:[9]

> [T]he Constitution of the United States was adopted by a people whose philosophical and political roots were deeply imbedded in the history of England and of Western Europe. Many of the restraints and limitations on the United States contained in the U.S. Constitution were an outgrowth of that history. On the other hand, the people of the Indian tribes have their roots in an entirely different culture and it may be that the devices which appropriately protected the interests of the Anglo-American of the late 18th century may not be appropriate to protect the Indian tribal member of the middle-20th century.

With this cultural disparity in mind, Congress took great pains to accommodate the ten provisions of the Indian Bill of Rights to Indian life and custom. Two examples are Sections 1302(1) and 1302(6). Section 1302(1) recites the provisions of the first amendment, but omits the prohibition against establishment of religion in recognition of the theocratic nature of tribal governments. Section 1302(6) is similar to the sixth amendment, but adds the provision that the cost of counsel at trial is to be borne by the client. Section 1302(6) recognized (1) the traditional nature of tribal court proceedings, often making an attorney unnecessary,[10] and (2) the burden which tribes without means or a local associated bar would have to bear should they be required to appoint counsel upon demand.[11]

In light of the Solicitor's statement and Congress' precautionary efforts in Section 1302, it is at best inconsistent that no such accomodations were made in enacting the enforcement section of the Indian Bill of Rights. Habeas corpus is a traditional remedy of the Anglo-American judicial system, truly an "18th century device." As demonstrated later in this note, its use reflects a disregard for the uniqueness of the Indian

9. *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 17 (1965) [hereinafter cited as *1965 Senate Hearings*].

10. Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 No. DAK. L. REV. 337, 339 (1969).

11. *1965 Senate Hearings, supra* note 9, at 341.

judicial system and a failure to consider the cultural values faithfully recognized in Section 1302. A possible explanation is that habeas corpus was adopted when defects in the original enforcement proposal were discovered. The original proposal, Senate Bill 962, would have allowed appeal to the federal court for a trial de novo where a constitutional violation in the tribal trial was alleged.[12] The trial de novo concept was rejected, however, apparently for fear that a small number of district courts would be overcome by a great flood of de novo appeals.[13] The Department of the Interior's recommended substitute, habeas corpus,[14] was adopted, though apparently no testimony concerning the choice of habeas corpus was given. The choice of habeas relief was not carefully considered, as were the Section 1302 provisions, and certainly was not tailored to the situation in Indian courts.

II. THE INDIAN TRIBAL JUSTICE SYSTEM

There are eighty-four Indian courts, divided into three categories: nineteen traditional courts; fifty-three tribal courts; and twelve Courts of Indian Offenses.[15] The jurisdiction of those eighty-four courts is similar to that of a justice court.[16] Congress has, through the so-called Major Crimes Act, removed jurisdiction over thirteen major crimes from the Indian courts.[17] The Indian Bill of Rights, Section 1302(7)

12. SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS ON THE CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN, 89th Cong., 2d Sess. 11 (Comm. Print 1966) [hereinafter cited as 1966 Senate Print].

13. *1965 Senate Hearings*, *supra* note 9, at 22.

14. *Id.* at 318.

15. SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS ON CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN, 88th Cong., 2d Sess. 15 (Comm. Print 1964) [hereinafter cited as 1964 Senate Print].

16. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1356 (1969) [hereinafter cited as 82 HARV. L. REV.].

17. 18 U.S.C. § 1153 (Supp. V, 1970) states in part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

forbids imposition of a sentence of imprisonment greater than six months by the seventy-two traditional and tribal courts.[18]

The traditional courts operate without written codes for either law or procedure.[19] Trial is by the same group which governs the tribe, with the governor of the tribe presiding.[20] There is no provision for juries and infrequent provision for counsel.[21] The Pueblos, who operate traditional courts, believe that their judicial system already guaranteed the rights enumerated in the Indian Bill of Rights.[22]

Tribal courts enforce written criminal codes covering some forty offenses;[23] promulgated by the tribe itself, the codes must be approved by the Secretary of the Interior.[24] The judges in such courts are normally laymen; in 1968, of the sixty-five formal (tribal and Indian Offenses) courts, only five had judges who were licensed attorneys.[25] This lack of legal training is not a substantial handicap, however, since most of the tribal cases deal with traditional and customary law, where legal expertise is not required.[26] Court sessions are informal and rarely are records of the proceedings kept.[27] Trial by jury, where available, is most often waived.[28]

The Courts of Indian Offenses were created by federal regulation to replace those tribal court systems which have failed.[29] Courts of Indian Offenses administer a criminal code promulgated by the federal government: the courts have jurisdiction over approximately fifty criminal offenses; the maximum length of imprisonment the courts may impose is nine months.[30] Judges are appointed and paid by the federal govern-

18. *See* note 1, *supra.*
19. Benge, *Law and Order on Indian Reservations*, 20 FED. B.J. 223, 225-26 (1960).
20. *Hearing on Rights of Members of Indian Tribes Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 51 (1968) [hereinafter cited as *1968 House Hearing*].
21. 82 HARV. L. REV., *supra* note 16, at 1357.
22. *1968 House Hearing, supra* note 20, at 50.
23. 1964 Senate Print, *supra* note 15, at 15.
24. Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. PUB. L. 311, 320 (1969).
25. *1968 House Hearing supra* note 20, at 29.
26. *Id.* at 27.
27. *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 103, 135 (1961) [hereinafter cited as *1961 Senate Hearings*].
28. Of 44,557 civil and criminal cases in all three courts in 1961, there were 58 jury trials. *1961 Senate Hearings, supra* note 27, at 250.
29. 25 C.F.R. § 11.1(b) (1970), promulgated under the authority of 25 U.S.C. § 2 (1964).
30. *Id.* §§ 11.38-11.87 NH.

ment; the number of judges per court and procedures for administering criminal and civil justice are set forth in 25 C.F.R. Part 11 (1970).

The Indian judicial system is lacking in adequate appeal procedure. While the Courts of Indian Offenses have an appeal procedure provided,[31] appeals from the seventy-two traditional and tribal courts are haphazard at best. Appeals from the tribal courts are heard by a three man appellate tribunal, consisting of the trial judge and two members of the tribe.[32] In the traditional court, appeals are heard by the tribal council.[33] The appellate structure of the tribal system is rarely used, however: there were only thirty-three appeals in 44,557 cases from all three courts in 1961.[34]

Despite the shortcomings of the Indian judicial systems from the white man's viewpoint, the systems engender a great amount of respect among the Indians. The Indian philosophy of law is concerned with restitution and rehabilitation, rather than retribution and incarceration. There is less concern with the intricacies of bail procedure and booking, and more concern with "making the injured party whole."[35] The result is more releases on personal recognizance with judge-made schemes of restitution, especially among the traditional courts. The Indian judge has specialized knowledge of both Indian law and custom which a federal judge cannot match. The Indian procedure assures the individual Indian freedom from the discrimination he faces or believes he may face in the white court.[36]

Moreover, the Indian system does provide constitutional safeguards on an informal basis. An expert on Indian law testified that after speak-

31. *Id.* § 11.6.
32. 1964 Senate Print, *supra* note 15, at 16.
33. *1965 Senate Hearings, supra* note 9, at 263.
34. *1961 Senate Hearings, supra* note 27, at 250-52.
35. Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1836 n.155 (1968) [hereinafter cited as 81 HARV. L. REV.]; *1968 House Hearing, supra* note 20, at 52. An example of the restitutive philosophy is the testimony of the Chairman of the All Indian Pueblo Council of New Mexico (*1968 House Hearing* at 37-38):

> We hope to incorporate [in our model code] the principles that our courts have traditionally employed—that is, seeking to make the injured party, or the one against whom the offense is committed, whole. For example, if one of our members should injure another to the extent that the injured party for a period of time could not work his fields or provide for his family, our system traditionally required the aggressor to substitute his services in providing for the injured and his family. Since such an offense is against the tribe as well, we sometimes exact an additional penalty for the tribe in the form of community work. Is not this better than merely exacting a fine or imposing a jail sentence?

36. 81 HARV. L. REV., *supra* note 35, at 1836.

ing at a conference of Indian judges and remarking that the constitutional protections did not extend to Indians on reservations, the response of the judges was surprise:[37]

> The first point that came out from the audience was surprise that the Constitution did not apply on the reservation, because these judges had been applying it. . . . [T]hey . . . did not feel their major problem stemmed from any deprivation of constitutional rights. . . . [T]hey did not have on the reservation instances of illegal searches and seizures or police brutality or detention before arraignment . . . .

This point goes in part to the wisdom of extending Section 1302 protection to the Indians, which is not examined here. The testimony does underline the very different situation which prevails on Indian reservations, and the need for tailoring enforcement remedies to the nature of the problem. Constitutional guarantees exist on the reservations, but in forms which the federal courts may not recognize.

III. THE IMPACT OF TRADITIONAL HABEAS CORPUS ON THE INDIAN TRIBAL JUSTICE SYSTEM

The threat habeas corpus review poses to the Indian courts is the removal of effective adjudication from the tribal courts. The tribal court, though its jurisdiction is limited, still remains a viable and visible exercise of tribal government. To hamper such an exercise is contrary to the recently expressed and growing desire of Indians to run their own lives.[38]

The federal court in a habeas proceeding ordinarily is limited to application of the correct constitutional standard to the facts underlying the constitutional claim.[39] The record from the lower court must be adequate to weigh the sufficiency of the allegations and evidence and must be free of "unusual circumstances," or a repetition of the trial will be necessary.[40] Since the traditional and tribal courts generally have no

37. *1961 Senate Hearings*, *supra* note 27, at 213.
38. *1968 House Hearing*, *supra* note 20, at 57. The difficulty of collecting representative data indicative of *all* Indian's feelings should be noted, however. *See* 81 HARV. L. REV., *supra* note 35, at 1818.
39. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1113 (1970) [hereinafter cited as 83 HARV. L. REV.].
40. Brown v. Allen, 344 U.S. 443, 463 (1953).

record to supply the federal court for its review of the trial the federal court would obviously have to conduct a complete evidentiary hearing. The tribal court proceeding would thus be of no effect whatsoever.

Even in the unlikely event that records of the proceedings of the tribal courts are kept, a complete evidentiary review would still be required, so much does the tribal system differ from the Anglo-American. *Townsend v. Sain*[41] established five circumstances in which the federal court, in habeas review, must hold an evidentiary hearing: inadequate factfinding procedure; inadequate development of facts; determination not fairly supported by the facts; failure to resolve the relevant factual issues; and the prisoner's allegation of newly discovered evidence.[42] The first four circumstances may readily apply to review of tribal and traditional court decisions. Tribal court decisions are not reasoned and decided as are state and federal decisions. The body of traditional law underlying such decisions is not cognizable in federal courts. The tribal court is not analogous in either procedure or legal principles to the state and lower federal courts to which *Townsend* was to apply.

Were the traditional standards of habeas corpus applied strictly to the tribal court, fact relitigation would thus be necessary in the great majority of habeas proceedings. Tribal court decisions in such cases would be of no effect, because the net result of the habeas hearing will be essentially a new trial to decide what the tribal court has passed upon. In theory the relitigation would be confined to constitutional issues, but the effect will be to subordinate the tribal courts to the federal courts. One of the complaints voiced against the rejected trial

41. 372 U.S. 293 (1963).

42. *See* 83 HARV. L. REV., *supra* note 39, at 1122. The court added a sixth discretionary category for situations in which the state fails to provide a full and fair evidentiary hearing. 28 U.S.C. § 2254 (Supp. V, 1970), essentially embodying *Townsend*, states eight circumstances requiring evidentiary hearing in the federal court:

(1) inadequate factual resolution;
(2) inadequate factfinding procedure;
(3) inadequate development of material facts;
(4) the State court's lack of jurisdiction over the subject matter or the person of the applicant;
(5) failure of the State court to appoint counsel for an indigent;
(6) applicant's hearing was not full, fair or adequate;
(7) denial of process of law;
(8) failure of the record as a whole to support the State court's factual determination.

de novo was the subordinating effect such review would have on tribal courts.[43] The same criticism validly applies to habeas corpus review:[44]

> To force a revolutionary change upon the tribal court systems, and the tribal governments, would cause a complete failure of the existing system. Certainly the committee must be aware that no tribal court could retain the respect of the Indian peoples it serves if its decisions were consistently criticized and overturned by the Federal courts.

Certain testimony indicated that the impact of habeas corpus should be mitigated to preserve the Indian court system.[45] One suggested mitigating change was the use of the doctrine of "fundamental fairness" in determining the due process standard of tribal justice.[46] There are two problems with the application of such a doctrine. First, "fundamental fairness," stated generally, considers the "totality of the circumstances" in determining whether the questioned procedure "shocks the conscience of the court."[47] The standard of judgment is that of the "conscience" of a federal judge. Such a standard is arguably unsuited to a determination of the conscionability of tribal justice proceedings. The tribal justice system is foreign, both procedurally and substantively, to the federal judge, and his judgment, however well reasoned, may not comprehend the traditional and customary underpinning of a particular case in a particular Indian court.

The second and more obvious problem is that such a modification would not change the necessity for evidentiary hearings in the federal court. The subordinating effect of habeas review, referred to earlier,

43. *1965 Senate Hearings, supra* note 9, at 66.

44. *Id.* 341 (statement of the Mescalero Apache Tribe). With that statement compare the statement of the Pueblos (*1968 House Hearing, supra* note 20, at 37):

> Section [1303], habeas corpus, opens an avenue through which Federal courts, lacking knowledge of our traditional values, customs, and laws, could review and offset the decisions of our councils sitting as courts and acting on the basis of our own laws and customs as tribal courts.

45. *1961 Senate Hearings, supra* note 27, at 29 (statement of Assistant Secretary of the Interior John A. Carver):

> [I]nsistence upon strict application in the Indian courts as they are now constituted . . . of the same procedural safeguards that apply in the non-Indian judicial system would result in the destruction of the Indian court system and would leave the Indian people, in a great many instances, without any protection.

Carver's views were not accepted by all, however. See 1964 Senate Print, *supra* note 15, at 16.

46. 82 HARV. L. REV., *supra* note 16, at 1353.

47. Rochin v. California, 342 U.S. 165, 172 (1952); Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934).

would not be substantially lessened. The "fundamental fairness" modification goes only to the standard to be applied by the federal court once evidentiary findings are made.

In addition to the incalculable dimunition to Indian self-government, the subordination of the tribal justice system will impose very real costs on the tribes. The petitioner must pay for the services of his attorney; the tribe as well will have to be represented in federal court. More important to the tribes is the cost and inconvenience of traveling to the district court for the trial, costs which many tribes and their members cannot bear.[48] It may be that the total costs of habeas corpus review may be greater than the benefit of the rights habeas is to protect.

IV. THE ALTERNATIVES TO HABEAS REVIEW

Habeas corpus is an improper tool to enforce the provisions of the Indian Bill of Rights. While the provisions of Section 1302 were well-tailored to meet the unique Indian situation, the enforcement tool was not. There is a definite need for some system of appeal, but lifting cases from the tribal courts and relitigating them in the federal courts is inappropriate and unnecessary.

There are two possible alternatives to habeas review. One, federal appeal, is a compromise which accomodates both federal review and a viable tribal court system. The other alternative is review by the Indians themselves.

A. Federal Appeal

The compromise solution provides review by means of appeal to federal district courts. The court would not be bound by the *Townsend* criteria for evidentiary hearings, but could hold hearings only to the extent the record was inadequate. Should there be no violation of constitutional rights, the tribal court's judgment would stand. Should a violation be discovered, the court could vacate and remand either for (1) dismissal of the complaint or (2) a new trial in Indian court free of the defects.[49] The latter provision should be followed wherever possible. Constitutional rights will be guaranteed the individual Indian

48. *1965 Senate Hearings, supra* note 9, at 341-42.
49. *1965 Senate Hearings, supra* note 9, at 341.

while tribal courts are educated in the rights to be accorded criminal defendants.

Modifications of both tribal procedure and federal substantive law are necessary to this scheme. First, there must be an adequate record at the trial level; a tape recording may suffice.[50] Second, the federal court in determining the sufficiency of tribal judicial procedure from the record should apply the harmless error rule broadly. Rule 52(a) of the Federal Rules of Criminal Procedure states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."[51] Harmless error applies, however, only when the error committed is not so great as to taint the entire trial. Where the confession has been coerced, the right to counsel denied, or a judge has been biased, such errors infect the entire trial, and the decision must be automatically reversed.[52] To best preserve the dignity of the Indian courts the application of automatic reversal should be limited in Indian court appeals. Automatic reversal of a decision will educate the Indian court in nothing more than the invalidity of its decision. The opportunity to infuse constitutional law with customary law will be lost, which is the purpose of the review and remand system.

It is clear that automatic reversal does not follow all constitutional errors.[53] Disagreement arises, however, in deciding when automatic reversal must be granted. Mr. Justice Stewart expressed one view in *Chapman v. California*:[54]

> [C]onstitutional rights are not fungible goods. The differing values which they represent and protect may make a harmless-error rule appropriate for one type of constitutional error and not for another.

The reviewing district court, in sum, should apply the automatic reversal rule only to those errors which the Supreme Court has deemed so great as to require automatic reversal. Even then the differing values of the Indian system should be considered. In determining the bias of

50. Fretz, *The Bill of Rights and American Indian Tribal Governments*, 6 NAT. RES. J. 581, 601 n.76 (1966).
51. FED. R. CRIM. P. 52(a).
52. *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967). Mr. Justice Stewart in his concurring opinion summarized other cases requiring automatic reversal. 386 U.S. at 42-44.
53. *Id.* at 23.
54. *Id.* at 44.

an Indian judge, for example, the court must consider the relative closeness of the Indian judge or judicial council to the people, as compared to the white judge. The Indian judge may well know the parties involved, the relevant evidence, and community sentiment. The principles of law he will apply may be as much traditional as statutory, therefore the degree of subjectivity in his decision may be great. The bias present in such a proceeding is obvious, but its extent is unascertainable. In such cases the reviewing court should not automatically reverse but should determine the harmfulness of the error in the overall proceeding.

Where harmless error *is* applicable, the test for determining the harmfulness of the error is uncertain. In *Chapman*, the Supreme Court stated one test for harmfulness: unless the error was "harmless beyond a reasonable doubt,"[55] it was harmful and grounds for reversal. In *Harrington v. California*,[56] however, the Supreme Court's test was whether the error when separated from the trial was so insignificant as to be inconsequential. Thus in *Harrington* the overwhelming evidence against the accused was so great as to render harmless the failure of the court to allow the accused to cross-examine hostile witnesses.

Determination of an error's harmfulness in the tribal court setting should be in accord with the "overwhelming" standard adopted in *Harrington*. The "overwhelming" standard avoids the subjectivity of the *Chapman* test, which necessarily must consider the effect of the tainted evidence on the average jury. The *Harrington* test compares the tainted evidence with the untainted in determining its harmfulness. While the Supreme Court has left unclear which is *the* test, the overwhelming evidence test is more appropriate to review of the Indian system. Rather than burdening the white court with the difficult task of dividing the impact of certain evidence on the Indian judge, council, or jury, the federal court's test should be the more objective balancing of evidence.

While problems of travel to the higher court and financing of appeals remain, the review and remand system mitigates the effect of federal review on the Indian court system itself. The need for a full eviden-

55. *Id.* at 24.
56. 395 U.S. 250 (1969).

tiary hearing is reduced by (1) establishment of a record; and (2) freeing the federal courts from the statutory criteria for evidentiary hearings in habeas review cases. The remand requirement should enable Indian courts to correct deficiencies while retaining primary control over Indian defendants. Yet, one principal problem remains: federal courts, in determining whether to affirm, remand, or vacate Indian court decisions, will be judging the Indian system by non-Indian standards.

B. Indian Appeals

The second alternative, establishment of an Indian court of appeals, would insure Indian control of the judicial process as it affects Indians. The circuit courts would be composed of members from each tribe within designated jurisdictions. The courts could hear appeals which under the current system would be heard by the federal courts on habeas corpus review. By requiring written records of the decisions of the circuit court, a substantial and much-needed body of Indian law could be developed.[57] The circuit courts proposal assumes that the judges of the courts will be afforded opportunities for study of and training in the application of constitutional rights to Indian defendants. As suggested by one tribe, a study of the nature and application of constitutional rights would require tribal judges to study at least one month every year for at least three years, in an academic setting. The formal study would be supplemented by continuing home study of constitutional problems.[58] A program to adequately train circuit judges could be carried out at a regional law school under the auspices of the federal government. Arizona State University and the Universities of New Mexico and South Dakota now provide Indians with some legal training.[59] The implementation of this program would insure the application of constitutional rights to Indian defendants while preserving Indian self-government and the Indian judicial system.[60]

57. 81 HARV. L. REV., *supra* note 35, at 1836.
58. *1965 Senate Hearings*, *supra* note 9, at 342.
59. 81 HARV. L. REV., *supra* note 35, at 1833.
60. It is arguable, however, that an Indian judge from one tribe would be no more familiar with the law of another tribe than would a federal judge. This criticism is misplaced to the extent that there are common threads running through Indian law, such as the emphasis on restitution and rehabilitation. *See* Part II, *supra*.

CONCLUSION

The perceived efficacy of the use of the writ of habeas corpus ultimately depends on the observer's prejudice toward the Indian and Indian self-government. The view here is premised on the continued existence of a viable Indian court, as a part of Indian self-government. Indians recently have expressed a growing desire to run their own lives and not be assimilated into the mainstream of American life.[61] So long as the Indian seeks to remain a separate subculture, "it seems both appropriate and essential that Indian governments control those internal affairs . . . deeply interwoven with tribal culture and tradition."[62] Tribal courts, as a part of that culture and tradition, should not be subject to complete federal intervention in the form of a habeas corpus review. That intervention, while necessary to some extent, should have as little impact as possible on tribal life.

61. *But see* note 38, *supra.*
62. Comment, *The "Right of Tribal Self-Government" and Jurisdiction of Indian Affairs*, 1970 UTAH L. REV. 291, 294 (1970).